IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 311/2018

In the matter between:

SIFISO FAKUDZE AND THIRTY SIX OTHERS Applicants

And

SWAZI PLASTIC INDUSTRIES LTD Respondent

Neutral citation: Sifiso Fakudze and Thirty-Six Others v Swazi Plastic Industries LTD [2020] SZIC 46 (30 April 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 12 December 2019

Date Delivered: 30 April 2020

JUDGMENT

[1] The Applicants are thirty-seven in number and are former employees of the Respondent. They applied to the Industrial Court on 24th October 2018 for determination of an unresolved dispute arising from the termination of their services on 31st August 2017. They allege that their dismissal was both procedurally and substantially unfair because, whilst they were dismissed on alleged grounds of redundancy, there was no consultation between them and the Respondent and their trade union; the Labour Commissioner was not notified of the redundancies nor was he furnished with Respondent's audited financial statements; there was no fair and objective criteria used to select Applicants for the redundancy and no alternatives were explored in order to avert the redundancy. They each, individually, claim notice pay and 12 months wages as compensation for unfair dismissal.

[2] The Respondent, filed a Reply on 6th August 2019 in which it denied the Applicants were unfairly dismissed. It avers that the termination of Applicants' services were substantively and procedurally fair as it complied with **Section 40, Section 36(l) and Section 42(2) of the Employment Act as amended**.

[3] This dispute now awaits the allocation of a trial date by the Registrar following the filing of a Replication by the Applicants.

[4] The Applicants have now applied to the President of the Court for an order referring the unresolved dispute to the Conciliation Mediation and Arbitration Commission (CMAC) for arbitration in terms of **Section 85(2) of the Industrial Relations Act No.1 of 2000 (as amended)**. The Respondent is opposing this application, and objects to the matter being determined by arbitration.

[5] The Applicant advances the following reasons for the referral of the dispute to arbitration:

5.1 that the issues for determination are not complex and can be dealt with by an arbitrator appointed by CMAC whose arbitrators have vast experience in labour matters;

5.2 that CMAC was established to provide a mechanism for speedy resolution of Labour matters and the Applicant stands to benefit from such mechanism if the matter is referred for arbitration;

5.3 that the Respondent stands to suffer no prejudice if the matter is referred.

[6] In its opposition of this application the Respondent has set out the following factors which militate against referring the matter to arbitration:

6.1 There are numerous disputes of fact for determination, such as whether the Applicants were in fact unfairly dismissed; whether the termination of the Applicants' employment complied with **Sections 40, 36(1) and 42(2) of the Employment Act 1980**;

6.2 The claim is for a substantial amount in excess of E1 million.

6.3 The Respondent has no say in the selection of the arbitrator and thus stands to suffer prejudice if the matter is referred to CMAC for arbitration;

6.4 The Applicants have not acted with any haste in having their case prosecuted. The Respondent submitted that the Applicants' conduct has in fact resulted in the delay in having the case trial ready. In this regard it was submitted that the Applicants first brought the matter to Court on 24th October 2018 but failed to appear either in person or by representation. Respondents' reply was eventually filed almost a year later on 6th August 2019 because of the constant non-appearance of the Applicant's representatives.

[7] I have considered the submissions of the parties in this matter, together with the pleadings and the heads of argument. The dispute involves issues of redundancy as set out in **Section 40 of the Employment Act**. It does not raise a novel question of law and the outcome will depend mostly on whether or not the Respondent followed the procedures laid out in **Section 40** and confirmed in the numerous cases dealing with issues of redundancy that this Court has decided. The questions of fact that arise are unlikely to depend only on the word of one party or the other. The Respondent is enjoined by **Section 40(2)** to give notice, <u>in writing</u> to the Labour Commissioner where it contemplates terminating 5 or more employees on the basis of redundancy. It is expected to give certain information in that notice. Disputes of fact that may arise in this matter revolve around the information that the **Section 40(2)** notice required the Respondent to provide in

writing - the number, occupation and remuneration of employees to be affected by the contemplated redundancy; the reasons therefore etc. Thus it appears to me that such disputes will not be complex in view of the paper trial provided by the requirement of the said section.

[8] I have also considered the submission that the claim is substantial and the prejudice likely to be suffered by the Respondent by being forced to arbitration while facing a substantial claim. While it is true that the claim is substantial, I am of the view that whatever prejudice the Respondent stands to suffer will be off-set by the improvement in the legal training and experience of the arbitrators at CMAC. According to **Nathi Gumede** in his article **– "The Attitude of the Industrial Court on Labour Arbitration Referrals," (4th July 2012)** states that *"all CMAC arbitrators now have LLB Degrees and are practising Attorneys"*. Secondly, the amount of the claim is a consequence of the number of Applicants herein. Further having found that there are no complex legal issues or disputes of fact for determination, the total amount of the claim becomes less of a factor in persuading the President not to refer a dispute to arbitration (See **Lucky Zwane and 6 Others v Smith and Glendinning IC Case No. 119/2017)**.

[9] I have considered all the principles established in the cases cited by the Respondent's representative – **(Sydney Mkhabela v Maxi Prest Tyres IC Case No. 29/2005; Zodwa Gamedze v Swaziland Hospice at Home IC Case No. 252/2005; OK Bazaars Swaziland v Acting President of the Industrial Court**

and Others High Court Case No. 1181/2015) and in my view in the particular circumstances of this case, there are no factors that militate against this matter being referred to arbitration.

[10] The Applicants may have, through their representatives been slow in prosecuting their claim as pointed out by the Respondents, nothing in my view prejudices the Respondent if the matter is referred to arbitration. Consequently I make the following order:

(a) the application for referral is granted;

(b) there is no order as to costs.

The Members agree.

For Applicants: Mr. E.B. Dlamini (Labour Law Consultant)

For Respondent: Ms. Q. Dlamini (Musa M. Sibandze Attorneys)