IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CASE NO. 04/09**

In the matter between

MASTER GARMENTS **APPELLANT**

AND

SWAZILAND MANUFACTURING & ALLIED WORKERS UNION **RESPONDENT**

CORAM : RAMODIBEDIJP
M.C.B. MAPHALALA AJA
HLOPHE AJA

HEARD : 7 SEPTEMBER 2010

DELIVERED: 17 SEPTEMBER 2010

SUMMARY

Labour law - Industrial relations - Notice of redundancy - Whether one month or two weeks - Interpretation of Sections 33 (1) (c), 33 (2) and 40 of the Employment Act No. 5 of 1980 as amended.

JUDGMENT

RAMODIBEDI, JP

[1] This appeal is a sequel to a notice of redundancy which the appellant issued to the respondent union, the Labour Department and the appellant's employees, effective from 26 February 2009. The notice was expressly made under s 40 of the Employment Act No. 5 of 1980 as amended ("the Act"). It was stated therein that the notice would expire on 26 March 2009. In the notice in question, the appellant cited two reasons for the proposed redundancy, namely, (1) the decline in market demand and (2) global economic effects affecting overseas markets and resulting in financial difficulties.

[2] Acting on behalf of its members, namely, the appellant's employees, the respondent objected to the notice of redundancy on the ground that it was irregular for a number of reasons. Insofar as this appeal is concerned, the respondent took the view that the notice contravened the provisions of s 40 (2) (b) and (e) of the Act.

[3] Thereafter, the parties engaged in consultative meetings in an attempt to negotiate a common ground for themselves. They, however, reached a stalemate on the duration of the notice which the appellant's employees were entitled to. The appellant insisted on two weeks' notice in terms of s 33 (2) of the Act. The respondent, on the other hand, insisted that s 33 (1) (c) was applicable, and indeed mandatory.

[4] Against this background, the appellant ultimately launched a notice of motion in the court *a quo.* It sought relief, inter alia, declaring that its two weeks' notice of redundancy was in terms of s 33 (2) of the Act. It also sought a declaratory order that it could issue a notice in lieu of additional notice to be served on the job other than by way of payment.

[5] It is no doubt convenient at this stage to point out that in its answering affidavit the respondent made a counter application in these terms:-

> "*Wherefore the respondent prays that it may please the Honourable Court to decide on (sic) its favour and find that the notices from applicant to applicant's employees and respondent are irregular and order that applicant pays applicant's employees in lieu of notice in terms of s 33 (1) (c) of the Employment Act 1980 as amended or fresh and proper notices be served on individual employees in terms of the Act.*"

[6] After hearing the respective submissions of the parties, the court *a quo* made the following order in paragraph 12 of its judgment:-

> *"12.1 The Applicant is directed to pay notice pay due to its employees in terms of s 33 (1) of the Employment Act.*
>
> *12.2 The respondent [is] granted leave to file a counter application regarding the question whether the notices of redundancy issued by the applicant are lawful within fourteen days of this order.*"

[7] In view of what is recorded in paragraph [5] above, I am satisfied that the court *a quo*'*s* order in paragraph 12.2 of its judgment cannot be allowed to stand. The counter application referred to in paragraph [5] above is sufficient in the circumstances to dispose of the matter without putting the parties to unnecessary costs of further litigation.

[8] As can be seen from the above background facts, the real bone of contention between the parties is whether the notice in question should have been two weeks, on appellant's version, or one month, on respondent's version. It will thus be seen that the point is short and can quickly be disposed of.

[9] At the outset, it will be remembered that the notice in question was expressly made in terms of s 40 of the Act. Once that is so, it stands to reason, in my view, that the appellant is bound by the provisions of this section. In relevant parts, the section reads as follows:-

> *"40 (2) Where an employer contemplates terminating the contracts of employment of five or more of his employees for reasons of redundancy, he shall give not less than one month's notice thereof in writing to the Labour Commissioner and to the organisation (if any) with which he is a party to a collective agreement and such notice shall include the following information -*
>
> *(a) the number of employees likely to become redundant;*
>
> *(b) the occupations and remuneration of the employees affected;*

> *(c) The reason for the redundancies; and*
> *(d) The date when the redundancies are likely to take effect.*
> *(e) The latest financial statements and audited accounts of the undertaking;*
> *(f) What other opinions have been looked into to avert or minimize the redundancy".*

It means, therefore, that the appellant was obliged to give the parties involved not less than one month's notice of redundancy, which is mainly for consultation purposes, apart from the notice of termination contemplated by s 33 of the Act. The appellant's reliance on s 33 (2) of the Act is on this ground alone misplaced.

[10] It is instructive to point out that in several of its judgments the Industrial Court has, in my view, correctly interpreted s 40 in a manner that recognises that redundancy and retrenchment are separate concepts requiring separate and distinct notices. See for example such cases as **The Swaziland National Association of Civil Servants (S.N.A.C.S.) v Swaziland Government Case No. 83/2007; Swaziland Agricultural and Plantations Workers Union v Royal Swaziland Sugar Corporation Limited Case No. 60/05.** It is indeed the nature and scheme of the Act that s 40 has to precede s 33 at all times. S 40 leads to s 33 and not the other way round. It is thus plainly wrong to lump the two together as the appellant purported to do in its notice of redundancy. In this regard it will be seen that although the notice in question is headed "Re:

Notice of Redundancy", paragraph 1 thereof doubles up as a notice of retrenchment in the following terms:-

> "*1. Notice* is *hereby given that the company shall embark on a retrenchment exercise in April 2009.*"

It follows, in my view, that the notice in question is fatally defective. It is a non-starter.

[11] In relevant parts, s 33 reads as follows:-

> "*33. (1) Subject to s 32, the minimum notice of termination of employment an employer may give an employee who has completed his probationary period of employment, and who has been continuously employed by that employer for more than one month shall be —*
>
> *(a) if the period of continuous employment is less than three months, one week;*
>
> *(b) if the period of continuous employment is between three months and twelve months, two days for each completed month of continuous employment up to and including the twelfth month;*
>
> *(c) if the period of continuous employment is more than twelve months, one month and an additional four days for each completed year of continuous employment after the first year of such employment.*
>
> *(2) Notwithstanding any other provision of this section, where an employee has completed his probationary period of employment and* is *employed on a contract of employment which provides for him to be paid his wages at monthly or fortnightly intervals, the minimum period of notice of termination of employment to be given to that employee shall not be less than one month or a*

fortnight as the case may be.".

[12] The main distinction to be drawn between subsections 33 (1) and 33 (2), as I see it, is that the former concerns a situation where there is no formal contract of employment or where no reliance is made upon such a contract. On the contrary, the latter subsection applies in a situation where there is a contract of employment providing for payment of wages at monthly or fortnightly intervals, whatever the case may be. The notice corresponds with the intervals of payment of wages in each case.

[13] In paragraph 30.2 of the answering affidavit of Sipho Manana the respondent made the point that most of the appellant's employees had been in continuous employment for five (5) years and some for six (6) years, thus entitling them to additional notice of 20 days and 24 days respectively on top of one month in each case. This allegation was met by no more than a bare denial in paragraph 28 of the replying affidavit of Brazil Mfumo, namely:-

> "*28. <u>Ad paragraph 30.2 and 30</u>*
>
> *The contents therein are disputed. These employees who have been with applicant for more years their days would be calculated accordingly if the days served on the job would not be sufficient and no prejudice is to be suffered.*"

[14] It follows from the foregoing considerations that the appeal

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cannot succeed. Accordingly, the following order is made:

(1) The appeal is dismissed with costs.

(2) The order of the court *a quo* reflected in paragraph 12 (2) of its judgment is set aside.

M. M RAMODIBEDI
JUDGE PRESIDENT

I agree

M.C.B. MAPHALALA
ACTING JUSTICE OF APPEAL

I agree

N.J. HLOPHE
ACTING JUSTICE OF APPEAL

For Appellant : Mr. M.H. Mdluli

For Respondent: Mr. N.G. Dlamini