IN THE INDUSTRIAL COURT OF APPEAL

HELD AT MBABANE **CIVIL CASE NO. 08/08**

In the matter between:

Arthur Mndawe and 74 Others **Appellants**

And

Central Bank of Swaziland **Respondent**

CORAM	**MM RAMODIBEDI, JP** **MCB MAPHALALA, AJA** **JN HLOPHE, AJA**
For Appellants	**In person**
For Respondent	**Attorney Z.D. Jele**
Heard:	30th August 2010
Delivered:	17th September 2010

Summary

Labour Law - Application for re-instatement and/or maximum compensation for unfair dismissal - Court a quo held that the termination was lawful in compliance with Section 40 (2) of the Employment Act - Aggrieved by the decision Appellants file Notice of Appeal and application for condondation for late filing of Appeal - Appeal dismissed - Court does not have power to grant condonation in terms of Section 19 of Industrial Relations (Amendment Act) 2000 - No reasonable prospects of success on Appeal.

JUDGMENT

MCB MAPHALALA AJA

[1] In 2001 the Appellants instituted legal proceedings in the court a quo in terms of Section 41 of the Employment Act for re-instatement and / or maximum compensation for unfair dismissal.

Section 41 provides:

> **"(1) Where an employee alleges that his services have been unfairly terminated, or that the conduct of his employer towards him has been such that he can no longer be expected to continue in his employment, the employee may file a complaint with the Labour Commissioner, whereupon the Labour Commissioner, using the powers accorded to him in Part II shall seek to settle the complaint by such means as may appear to be suitable to the circumstances of the case.**
>
> **(2) Where the Labour Commissioner succeeds in achieving a settlement of the complaint, the terms of the settlement shall be recorded in writing, signed by the employer and by the employee and witnessed by the Labour Commissioner: one copy of the settlement shall be given to the employer, one copy shall be given to the employee and the original shall be retained by the Labour Commissioner.**
>
> **(3) If the Labour Commissioner is unable to achieve a settlement of the complaint within**

> **twenty-one days of it being filed with him, the complaint shall be treated as an unresolved dispute and the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act."**

1.1. The basis of the application was that the Appellants were, as they claimed, compelled to take a Voluntary Exit Scheme by being made to sign acceptance forms. Furthermore, the Respondent is alleged to have fraudulently promised them additional incentives if they accepted the scheme. However, such representation turned out to be false since they were not given the additional incentives.

[2] It is common cause that in 1993 the Respondent embarked on a Restructuring Exercise; consultants were engaged for this purpose. The Report was discussed and accepted by the Respondent as well as the Union representing the Appellants; accordingly, One hundred and thirteen posts were declared to be surplus to the needs of the Respondent due to a duplication of functions. Twenty three new posts were created. The affected departments were identified. In order to avoid a retrenchment, the Respondent and the Union agreed on a Voluntary Retirement Exit Package to willing employees; this offer was directed to all employees of the Respondent including the appellants. The Appellants opted to take for the Voluntary Exit Package because it had additional incentives.

[3] An employee who accepted the Voluntary Exit Package had to sign and submit a form provided by the Respondent within a

period of seven working days from 31st March 1994 to 14th April 1994; this period was extended for a further fourteen working days at the instance of the Union representing the Appellants. This was to allow the Union to consult with the employees on the Exit Package.

[4] In addition to the negotiations between the Respondent and the Union, the Management of the Respondent led by the Governor held a meeting of all employees where the Restructuring Report was discussed in detail. Subsequently, the Respondent issued a formal notice to the Labour Commissioner and to the Union in terms of Section 40 (2) of the Employment Act No. 5 of 1980.

[5] Section 40 (2) of the Employment Act provides:

> **"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 organization (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 reasons 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."

[6] The Respondent and the Union further agreed on measures intended to minimize the number of persons who would lose their employment. Firstly, a transfer of suitably qualified staff from those positions identified in the restructuring report as being surplus to the requirements of the Respondent to other positions within the institution; that is, positions that were vacant and / or positions that were created by virtue of the Restructuring Exercise. Secondly, an introduction of a Voluntary Exit Scheme in terms of which employees who wanted to leave the Respondent's employ voluntarily could proceed and do so; in this regard, vacancies would be created which could be filled by the employees whose positions were identified as being surplus to the requirement of the Respondent.

[7] The Union and the Respondent further agreed that those employees who wanted to proceed on a Voluntary Exit Scheme would be paid a Notice pay, additional Notice pay, additional incentive equivalent to one month's salary, leave pay, full pension pay into which the Respondent had to make good a shortfall of E2,606,000.00 (Two million six hundred and six thousand Emalangeni) to the pension fund as well as severance pay in terms of Article 4 of the Collective Agreement concluded between the parties. However, they did not agree on the payment of Statutory Severance in terms of Section 34 of the Employment Act; the Union felt that they were entitled to receive it whereas the Respondent felt otherwise. A dispute arose which was reported to the Labour Commissioner in terms of Section 41

of the Employment Act. The parties agreed that the other benefits which were not in dispute should be paid to the employees.

[8] The offer of the Voluntary Exit Scheme was issued on the 31st March 1994; it was open to all employees of the Respondent, but specific letters were sent to those whose departments had been identified with a surplus.

[9] The parties could not reach an agreement during the conciliation process with regard to the Statutory Severance Allowance; hence, they agreed to refer that dispute to an arbitrator. The Union was not successful, and, the decision of the arbitrator was final.

> 9.1. On the application for re-instatement and/or maximum compensation for unfair dismissal the *Court a quo* came to the conclusion that the Retrenchment was valid and complied with Section 40 of the Employment Act; the application was dismissed. Judgment was delivered on the 26th March 2003. The Court ruled that the termination of services of the Appellants was fair and reasonable in that the Respondent had followed the required procedure in terms of Section 40 of the Employment Act of 1980.

[10] On the 24th September 2008, the appellants filed a Notice of Appeal against the judgment of the *Court a quo,* five years after judgment was granted. A quick glance at the Notice of Appeal shows that the grounds of appeal are based on findings of fact. Section 19 (1) of the Industrial Relations (Amendment) Act No. 1 of 2000 provides that "there shall be a right of appeal against a decision of the Industrial Court on a question of law to the Industrial Court of Appeal". Ordinarily this should render the

appeal incompetent at law. However, for the sake of fairness and justice as well as the fact that the Appellants are not legally represented, I will proceed and deal with the Appeal as it stands.

[11] The grounds of appeal are quoted verbatim as follows:

> **1. That the learned Judge misconducted himself in law and in fact by taking into account irrelevant evidence, in reaching his decision in which evidence was not clear to the legal issues before him.**
>
> **2. That the additional incentives which the Respondent failed to identify before Court, the nature and size of it was vague and scanty but surprisingly the learned Judge failed to find proof of payment as to what it was and how much was it if it was in monetary form. The additional incentive does not appear anywhere in the Employment Act of 1980 even in the Industrial Relations Act of 1980 in spite of the above the learned Judge delivered his judgment. Even the deduction of Statutory Severance Pay out, this also meant nothing to the learned Judge. Finally the additional incentive was only an inducement to the first group of ex-employees (the Applicants) to entice the applicants to accept the offer. See annexures 1, 2 and 3 all referred to as Voluntary Exit Scheme.**

2.1 THE ESSENCE OF "EX-GRATIA" PAYMENT

The essence of *Ex-Gratia* payment that was effected on us was Statutory, the employer (Central Bank) was obliged to pay it by law. The exit employees were, for this reason entitled to it. It was by law not a mere free gift but it was from Government coffers. Hence it had nothing to do with Severance Pay.

2.2. <u>DISCREPANCY OCCASIONED BY DEDUCTION OF SEVERANCE PAY FROM VOLUNTARY EXIT EMPLOYEES PENSION PAY-OUT</u>

The bank deducted Severance Pay from individual Exit Employees Pension Pay Out instead of the Pension Fund. This act by Central Bank was a gross anomaly and grossly illegal. This is so because the law states clearly that the employer may recoup the Severance amount from the Pension Fund. Surprisingly in our case the right to recoupment was misdirected because Severance was recouped from individual's Pension Pay Out. Therefore the applicants pray that it may please the Honourable Court:

2.1.1. To find, that the respondent would be obliged to pay to the applicants the amount equivalent to Severance Allowance due to applicants as at April 1994 which was deducted from applicants pension benefits plus interest calculated as required by law with effect from September 1994 to date of payment.

2.1.2. The Severance Allowance due to applicants

as a result of the termination of service in April 1994 plus
interest as required by law from May 1994 to date of payment.

2.1.3 An increment as a result of the 12.85 per cent increment accruing to the applicants in terms of the Collective Agreement concluded in September 1994 plus interest with effect from October to date of payment.

2.1.4. Six months salary pay plus interest as required by law, from May 1994 to date of payment.

3. It is to be noted that, the applicants are not against the respondent's exercise, but against the way it was conducted the Voluntary Exit Scheme offers or terminal benefits offers/Pay Out.

The first group of employees, who accepted the Voluntary Exit Scheme were dismissed without their terminal benefits as required by law or by the Employment Act of 1980. except that they were offered one month's Notice Pay, plus one month's Additional Notice Pay, and Leave Pay. According to the letter addressed to Arthur Mndawe there was this additional incentives of which its nature and size was not identified to the ex-employees (see letter addressed to (Arthur Mndawe) Annexure (1) Then there was the second group of employees who also accepted the Voluntary Exit offer, their offer was different from the other offers. Theirs was in accordance with the

Employment Act 1980 see copy of the letter of offer Annexure (2). Then there was the third and the last group who also accepted the Voluntary Exit Scheme which is completely different from the First and Second Group (see copy of the draft application form) which has better offers. The second letter and draft application form they are both silent about the additional incentives why? If the additional incentives (story) was the policy of the Central Bank it was to affect every individual and it was supposed to have been identified and clearly explained as to nature and size but this was not the case. Even the Governor of the Central Bank failed to tell the court as to what this additional incentive was all about and why was it effected to one group of ex-employees not the rest?

4. It is submitted therefore in light of this, that the Honourable Court should find nothing strange or peculiar in interpreting the additional incentive which according to the respondent this was one month Additional Notice Pay as a terminal Benefit. Moreover there is vagueness and obscurity in identifying the additional incentives one month Additional Notice Pay as part of the terminal benefit is too little when the Employment Act was not followed as required by law.

The applicants' additional incentives was only an inducement to make the applicants to agree to sign the document to accept the dismissal which was invalid. That is why it was effected only to the applicants and not to the rest of ex-employees who accepted the Exit Schemes (see copies of the letters of offer and the Draft

Application Form). It is surprising that there is a vast difference in computation of Voluntary Exit Packages by the same respondent.

No wonder the respondent failed to expressly specify the nature and size of the additional incentives. The identity of it was vague, and contradictory and very scanty. In this regard the Human Resources Manager of the respondent testified that he does not know which if any of the applicants did approach him to seek explanation of what the additional incentives were.

Therefore the applicants herein pray that the appeal be allowed.

[12] On the 26th March 2009, the Appellants lodged an application for condonation for the late filing of the Appeal. During the hearing, the appellants urged the Court to grant them condonation; the Court allowed them to make submissions on the reasons for the delay as well as the existence of reasonable prospects of success on appeal.

It is implicit in an application for condonation that the Appellant not only satisfies the Court of the reasonableness of his non-compliance but that he has good prospects of success on appeal:

- **UNITRANS Swaziland Limited v. Inyatsi Construction Limited Appeal Case No. 9** of **1996** (unreported) at **page 9,** quoting the South African judgment of **Bezuidenhout v. Dippenaar 1943 A.D. 190.**

The **Buzuidenhout** case dealt with an application for the late filing of an application for leave to appeal at a time when the

appeal had already lapsed. **Centlives JA** said:

> "Whatever the position might have been, if the applicant had applied for leave to this Court before the prescribed period of three months has elapsed... in view of the fact that the appeal has already lapsed the Court should not grant the applicant any form of relief if it is satisfied that there is no reasonable prospect of the appeal succeeding."

14.1 This case was approved and followed by the Supreme Court of Swaziland in the case of **Sibusiso Boy Boy Nyembe v. Pinky Lindiwe Nyembe (nee Mango) Appeal Case No. 62/2008.**

14.2 It is against this background that the Appellants were invited by the Court to address the issue of reasonable prospects of success on appeal during their application for condonation.

[15] The Respondent opposed the application for condonation on the basis that this Court does not have the power to grant condonation for the late filing of an appeal. It is common cause that judgment was issued on the 26th March 2003 and the Appeal was lodged five years later on the 24th September 2008; clearly, the time for lodging the appeal had lapsed. **Section 19 (3) of the Industrial Relations Act No. 1 of 2000** provides that:

> "An appeal against the decision of the Court to the Industrial Court of Appeal shall be lodged within three months of the date of the decision."

[16] The Respondent argues that the legislature in enacting Section 19 (3) of the Industrial Relations Act did not grant the Court the power to condone an appeal that has been filed outside

the three months period; and that this Section is peremptory.

[17] In Contrast, the Industrial Court of Appeal Rules 1997 made in terms of Section 20 of the Industrial Relations Act of 1996 give this Court jurisdiction to condone the late filing of an appeal. The Rules are made by the Judge President of the Industrial Court of Appeal in consultation with the Chief Justice and the Attorney General by Notice in the Government Gazette. Under the Industrial Relations (Amendment) Act No. 1 of 2000, the power to make the Rules are contained in Section 22; the wording is the same as in the 1996 Act.

[18] Rule 8 provides that:

> **"(1) The Notice of Appeal shall be filed within seven days of the date of the judgment appealed against: provided that there is a written judgment such period shall run from the date of delivery of such written judgment.**
>
> **(2) The Registrar shall not accept any notice of appeal for filling which is presented after the expiry of the period referred to in subrule (1) unless leave to appeal out of time has on application to the Industrial Court of Appeal previously been obtained."**

[19] Rule 9 provides that:

> **(1) An application for leave to appeal out of time**
> **shall be filed within six weeks of the date of the judgment which it is sought to appeal**

> **against and shall be made on notice of motion to the Industrial Court of Appeal stating shortly the reasons upon which the application is based, and where facts are alleged they shall be verified by affidavit.**
>
> **(2) The appellant shall deliver such notice of motion and its supporting documents to the Registrar, and serve a copy on the Respondent forthwith.**
>
> **(3) Such Notice of Motion accompanied by supporting documents shall be delivered to the Industrial Court of Appeal.**
>
> **(4) The Respondent may file an affidavit in reply to the notice of motion within seven days from the date of service or within such longer period as the Registrar may allow.**

[20] Rule 17 provides that:

> **"The Industrial Court of Appeal or any Judge thereof may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and may give such directions in matters of practice and procedure as it considers just and expedient."**

[21] It is apparent that these Rules are in conflict with Section 19 of the Industrial Relations (Amendment) Act of 2000 in the following respects: First, the period within which the appeal should be lodged; secondly, they grant the appellant six weeks of

the date of judgment to apply for leave to appeal out of time; thirdly, they give this Court power to condone non-compliance with the Rules including failure to file an appeal on time.

[22] Rule 10 further provides that:

> **"If the Industrial Court of Appeal on a petition or motion for leave has given an appellant leave to appeal it shall not be necessary for him to file or serve a notice of appeal, the petition or motion constituting sufficient notice."**

[23] Rules 8, 9, 10 and 17 are inconsistent with Section 19 of the Industrial Relations (Amendment) Act of 2000 notwithstanding that the power to make these Rules is derived from the Act.

[24] From a reading of Section 19 of the Industrial Relations (Amendment) Act of 2000, it is apparent that this Court does not have jurisdiction to condone the late filing of an appeal; in addition, nowhere in the Act is this Court granted such jurisdiction either expressly or by necessary implication. It is only the legislature by appropriate amendment to Section 19 that could give this Court the power. This Court cannot subvert the will of Parliament and arrogate to itself powers not given in the Enabling Legislation.

[25] The Attorney General plays a pivotal role both in Parliament's legislative process as well as in the formation of the Rules of this Court; hence, he is better placed to influence and initiate an amendment to Section 19 which would give this Court the power to condone late filing of Appeals. It is common cause

that bills in Swaziland originate from the Executive Arm of Government with the Attorney General involved not only in drafting the bills but in giving the necessary advice and guidance to Cabinet. When the bill is presented and debated in Parliament, he also participates in giving the requisite advice to both Houses. He is better placed to initiate the necessary amendment of laws which are not in line with the country's constitution.

[26] There is a great need to amend Section 19 to give this Court the power to condone late filing of appeals in deserving cases where the reasons for non-compliance are legally sound, and there are reasonable prospects of success on Appeal. The appellant could have filed his Appeal late for a variety of legally sound reasons including sickness, lack of resources to engage an Attorney, the loss of the Court Record from the *Court a quo,* the disappearance and loss of cassettes in the custody of Court officials which recorded the proceedings in the Court a quo. The list is endless, and to shut the doors to condonation in deserving cases denies litigants their right to a fair hearing. This may particularly be the case where the aggrieved parry is a dismissed worker who does not have all the resources at his disposal as does the employer.

[27] Section 21(1) of the Constitution provides that:

> **"In the determination of civil rights and obligations ... a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial Court..."**

[28] Section 21 (10) of the Constitution provides that:

> **"Any Court or other adjudicating authority prescribed by law for the determination of the**

> **existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a Court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

[29] Section 33 (1) of the Constitution provides that:

> **"A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by the law including the requirements of fundamental justice or fairness and has a right to apply to a Court of law in respect of any decision taken against that person with which that person is aggrieved."**

[30] Section 32 (4) (d) of the Constitution provides that:

> **"Parliament shall enact laws to protect employees from victimization and unfair dismissal or treatment."**

[31] The Right to a Fair Hearing and the Right to Administrative Justice include not only the Right to be heard but the Right to appeal against a decision of a lower Court. The requirements of fundamental justice or fairness require that an aggrieved litigant be allowed to apply for condonation for the late filing of an appeal. It is the duty of the Court to apply what it perceives to be fundamental justice or fairness in deciding whether or not condonation should be granted; in doing so, the Court will have

regard to the underlying reasons for the default as well as the existence of reasonable prospects of success on Appeal.

[32] Having interpreted Section 19 as I have done above, I agree with the Respondent that this Court lacks jurisdiction to condone the late filing of the appeal in the instant case. Until such time that Section 19 is amended as stated above, I have no reason to depart from this Court's earlier judgment in **Manzini City Council v. Workers Representative Council Industrial Court of Appeal case No. 2** of **1999** at **page 4;** the issue before Court was whether it had the power to condone the late filing of an appeal; the appeal was late by one day. **His Lordship Justice Sapire JP** who delivered the unanimous judgment of the Court stated the law as follows:

> "There would however be difficulty with condonation of the late noting of the appeal. The time for noting the appeal is fixed by statute. The statute makes no provision for the court to extend the period or to condone non-compliance therewith. The only conclusion to which it is proper to come is that the legislature intended that the appeal had to be noted within the three months allowed, without the possibility of condonation or extension where the appeal was not timeously noted.... Rule 17 which gives the Court power to excuse non-compliance...refers specifically with the Rules. It does not and could not apply in cases of non-compliance with the terms of the Statute itself. It is perhaps undesirable that the legislature has seen it fit to prescribe a time limit, which the court itself normally imposes, by either rule or practice. This would allow for some flexibility where as in this case the Statute prescribes the time limit, condonation for non-compliance is only available to the extent provided for by the Statute itself."

[33] **Lord Binghamin in R. v. Weir (2001) Criminal Appeal 141 part 2 (HL)** at **147 quoting Petch v. Gurney (1994) 3 all ER 731 at 738** stated the law as follows:

> "Where a time limit is laid down and no power is given to extend it, the

ordinary rule is that the time limit must be strictly observed."

[34] During the hearing of the application for condonation both parties were invited to address the Court on the existence of reasonable prospects of success on appeal. It is apparent from the Record the submissions made by the parties during the hearing of the appeal for condonation as well as the judgment of the *Court a quo* that the appellants do not have reasonable prospects of success on appeal. I am satisfied that the *Court a quo* was correct in coming to the conclusion that the Respondents when effecting the retrenchment, complied with Section 40 of the Employment Act. Similarly, the evidence proves that the Voluntary Exit Scheme was conducted lawfully; and, that the Appellants were not compelled, as alleged, to the Exit Package. It is common cause that during the Restructuring Exercise and the subsequent retrenchment, the Appellants were lawfully represented by the Swaziland Union of Financial Institutions and Allied Workers. It is the Union which accepted the Restructuring Report on behalf of the Appellants; it further advised the Appellants to accept the Voluntary Exit Scheme.

[35] The Consultant's Report on the Restructuring Exercise led to a number of posts identified as surplus and declared redundant. After the Appellants were paid their terminal benefits, they expressed concern that they were not adequately compensated in terms of the redundancy and pension packages. In order to address these concerns, in 1998 the Respondent and the Union appointed Mr. Obed Dlamini as Facilitator to deal with these concerns. Inturn, the Facilitator recommended to the parties that an independent auditor be engaged to carry out an audit of the terminal benefits of the Appellants.

[36] The Auditor's Report is contained in pages 102-122 of the Record. The Auditors found that the Respondent made Statutory payments in the form of One Month's Salary in lieu of Notice, Additional notice, Severance allowance in terms of Article 4 of the Collective Agreement, Pension pay and leave pay. In addition, the Respondent paid one Month's salary incentive to entice Voluntary retirement, a 12.85% salary increase for workers affected and all the benefits paid earlier and the difference was paid, a Refund of Severance allowance deducted from the pension; and, this was paid as an *ex-gratia* award to the Appellants following the intervention by the Minister of Finance. In conclusion, the Auditors found that the Respondent paid the Appellants their terminal benefits in accordance with the law and collective Agreements on redundancy; it further concluded that the calculations of the terminal benefits were accurate. The refund of severance pay is contained in Appendix 7 at pages 144-150 of the Record; it details the list of employees and the moneys paid to them. Needless to say that all the Appellants received the refund of the Severance pay.

[37] In the circumstances I make the following order:

1. The appeal is dismissed.
2. The order of the *Court a quo* is confirmed.
3. No order as to costs.

M.C.B. MAPHALALA

JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI

JUDGE PRESIDENT

I agree:

J.N. HLOPHE

ACTING JUSTICE OF APPEAL