IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 166/2002

In the matter between:

THABO SIMELANE APPLICANT

and

JD GROUP (SWAZILAND) (PTY) LIMITED RESPONDENT

CORAM

N. NKONYANE:ACTING JUDGE

E. HLOPHE :MEMBER

D. MANGO: MEMBER

FOR APPLICANT :MR. P.R. DUNSEITH

FOR RESPONDENT:MR. Z.D. JELE

JUDGEMENT - 24.06.05

The applicant in this matter is Thabo Simelane a former employee of the respondent.

The respondent is a company that is involved in the furniture business.

The applicant brought an application for the determination of an unresolved dispute in terms of Section 85 of the Industrial Relations Act No.l of 2000. In his application the applicant claims that he was unlawfully terminated by the respondent under the guise of redundancy.

The respondent in its papers points out that the applicant was lawfully terminated on grounds of redundancy following the closure of the respondent's furniture

shops in Swaziland, being Score and Price v N Pride branches.

It is not in dispute that the applicant was employed in one of the respondent's furniture outlets trading as Score Furnishers. The applicant was employed on 16.02.1999 as a salesman. He was in continuous employment until 22.05.2001 when all the branches of the respondent trading as Score Furnishers and Price 'N Pride in the country closed down.

It is also not in dispute that the applicant was a top salesperson at Score Furnishers. He was earning E4,109.00 per month plus commission.

What is in dispute is whether or not the applicant did get a letter of notification that he had been retrenched. It is also in dispute as to how was the applicant paid his retrenchment package. The applicant said he was paid through the bank, but RW1, Robin Murray said he personally handed the cheque to the applicant.

The applicant's evidence before the court was that on 15.05.2001 during a staff meeting of Score branch No.627, the employees were told that there was going to be a retrenchment. The meeting was being chaired by the Manager, Eric Dlamini. He said Dlamini did not tell them the reasons for the intended retrenchment. He said on 22.05.2001 he got a letter informing him about the retrenchment. The letter appears on page 4 of Exhibit "A" and is dated 22 May 2001.

The applicant said he understood that letter to mean that the employer was going to look for alternatives before closing down the branch. He said he would have been prepared to accept a transfer to another furniture shop. He said he was never given a final letter of retrenchment. He also said he was not consulted about the retrenchment. He said he was still in the dark and could not go to work because the shop closed down.

The applicant said he was married and has four children. He said the news of the retrenchment affected him drastically and was embarrassed in the eyes of his wife who did not believe him when he told her that he was not given any package.

He asked for re-instatement or alternatively maximum compensation and also payment of his terminal benefits.

At this point the court will point out that the applicant was finally paid his provident fund contributions when the matter was already before the court. The evidence also showed that he was paid all his terminal benefits. His only query on the terminal benefits was that the calculations were not correct. It

seems therefore that the only prayer now remaining is that of re-instatement or payment of maximum compensation as an alternative.

The respondent's evidence was that the employees, the union (SCAWU) and the Labour Commissioner were notified about the retrenchment exercise. The respondent's witnesses said the retrenchment was necessitated by poor financial performance of the respondent's branches in Swaziland. The witnesses said the financial statements were furnished to the Labour Commissioner and the union. RW1, Robin Murray said he consulted with the applicant on the package and that he did serve the letter of termination on the applicant.

RW2, Renier Krige told the court that the retrenchment process was undertaken together with the union. He said the company closed down because of financial problems. He also said the union never disputed the computation of the terminal benefits.

RW2, presented the financial statements of the branches that were to be closed. He also presented the minutes of the consultative meetings that management held with the union. From the financial statements it was clear that the branches were not performing well, and were in fact making huge losses.

The court is satisfied from the evidence of RW2 that the reasons for the closing down were genuine. The question that follows is whether the retrenchment exercise was carried out in terms of the dictates of the law.

From the evidence before the court about one hundred workers were affected by the closing down of the shops. It is clear therefore that the applicable law was Section 40 of the Employment Act No.5 of 1980. Section 40(2) reads as follows:-

"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 remunerations 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."

The evidence before the court revealed that there was in existence a trade union, namely the Swaziland Commercial and Allied Workers Union (SCAWU) which the respondent's management negotiated with. There was also evidence that the Labour Commissioner was notified of the respondent's intention to retrench.

The court is satisfied that the respondent did serve those notices in order to comply with the requirements of Section 40(2) of the Employment Act. That section however is couched in general

terms. There are issues that will necessarily require consultation with the individual employee, which if not done, the employee will be prejudiced.

There was evidence in this case that there were few vacancies where other employees could be placed. Clearly that required consultations with the individual employees to find out if they could qualify to be placed.

RW2 told the court that he did consult with the individual employees. He said he did serve all the employees with letters of retrenchment. He said during that exercise he was in the company of a certain John Zulu, the Regional Manager. RW1 "C" was handed to court as proof of service to some of the employees.

The applicant denied that he was consulted about the package and given the letter of retrenchment. RW2 failed to produce proof that he did serve the applicant with the final letter of retrenchment. John Zulu was not called to corroborate RW2's evidence that he did serve the applicant with the final letter. It is hard for the court to believe that a company as big as the respondent does not keep records. The court will come to the conclusion that RW2 failed to produce the copy of the letter because the copy is not there and that the applicant was never consulted.

RW1 produce a document RW1 "D" as proof that he did consult the applicant about the package. The applicant denied that it was him who signed that document. Although no handwriting expert was called to testify, the signature on that document was patently dissimilar to the applicant's signature that appears on page 4 of Exhibit "A"

It was also submitted on behalf of the applicant that he was not given any notice of the retrenchment as he was given the notice by JD Trading (Proprietary) Ltd, which was not the employer of the applicant.

This argument was based on pages 1-3 of exhibit "A" where an application was made to the Registrar of companies to change the name of Winna Furnishers (Swaziland) (Pty) Ltd to JD Group (Swaziland) (Pty) Ltd.

The evidence before court however as seen on exhibit "A" page 4, showed that the applicant was served with the notice of retrenchment written on the letter heads of Score/Price 'N Pride. There was no evidence that the applicant was unsure as to where that letter came from.

RW1 said he gave the applicant his package on 04.09.2001. He said he gave the applicant a cheque. There was evidence that the applicant's cheque went through the bank system on that same date in First National Bank in the Republic of South Africa. It was a mystery how the cheque could have been cleared on the same day.

It became clear to the court that RW1 was not a trustworthy witness. He seemed prepared to say anything in court as long it suited the respondent's interests.

From the evidence presented in court, the substantive justification for retrenchment for operational reasons has been proved by the respondent.

The respondent however failed to consult with the applicant on his personal circumstances. RW2 told the court that there were a few vacancies in which some of the employees could be placed. The evidence showed that two employees were thereafter employed by Bradlows, Mbabane. There was a dispute whether they were placed or they applied for the jobs.

Whether the two employees were placed or not, the importance of that evidence was that the applicant was prejudiced by the non-consultation as he did not get a chance to compete for the few available positions.

The termination of the applicant's employment in the manner and in the circumstance in which it was effected was unfair.

The court will therefore come to the conclusion that the applicant's termination was procedurally unfair for lack of consultation.

The court must now consider the remedies available.

In terms of Section 16(4) of the Industrial Relations Act No.l of 2000, if the termination is unfair only because the employer did not follow a fair procedure, compensation payable may be varied, as the court deems just and equitable.

The applicant in its papers prayed for re-instatement. The evidence showed that furniture shop was closed down. There is clearly no way that the court can make an order for re-instatement.

The only available remedy is compensation. In making a fair and reasonable award the court will take into account that the applicant was a top performer. He has failed to get another employment. He is married and has four children. The evidence showed that he did go to work on 30.06.2001 only to find the place closed. He said he was embarrassed in the eyes of his wife who did not believe him that he was not given any exit package at work.

Taking into account all these factors the court will make an order that the respondent pays the applicant as compensation a sum of money equivalent to five months salary calculated at the applicant's rate on the date of termination, being E4,109:00x5 =E20,545:00.

No order for costs is made.

The members agree.

N. NKONYANE

ACTING JUDGE - INDUSTRIAL COURT