IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 197/05

CEBSILE NDLELA **APPLICANT**

and

BEAR LUBRICANT PTY) LTD **RESPONDENT**

CORAM

N. NKONYANE: ACTING JUDGE

G. NDZINISA: MEMBER

D. MANGO: MEMBER

FOR APPLICANT: B.S. DLAMTNI

FOR RESPONDENT: S. NSIBANDE

JUDGEMENT - 05.07.2005

This matter came before the court on 21.06.05 on a certificate of urgency.

After having heard the applicant's attorney the court granted a rule nisi and was made returnable on 28.06.05.

The matter was argued on 28.06.05 the respondents having served and filed its answering affidavit.

The applicant did not file a replying affidavit.

From the Founding affidavit the applicant stated that she was employed by the respondent as a clerical worker in January 2002. She said she was earning E1,800.00 per month.

She said the respondents main business was to supply various vehicle lubricants. She said on or about 03.06.05 she was served with a letter notifying her that the respondent was going to close down on grounds of operational requirements.

She said no consultation was held between herself and the respondent. She said she was not paid any terminal benefits.

The respondent in its papers said that it was appointed as Engen Swaziland's Lubricant agent for Swaziland in October 1999. The respondent said it also had an agency agreement with Engen South Africa.

The respondent said the Engen Oil Company that controls Engen South Africa and Engen Swaziland was taken over by a Malaysian company last year. The new company cancelled the agency agreements in South Africa and Swaziland.

The respondent said due to the cancellation of the agency agreements it had no option but to close down.

The respondent said the applicant was well aware of these developments. The respondent said the applicant refused an offer of a position in Port Elizabeth. The respondent also said the applicant refused an offer to work in a new company trading as Libhele Petroleum which the respondent intends to hire to distribute its remaining stock.

The respondent tendered to pay the applicants the sum of E4, 320.00 as her terminal benefits.

The respondent's answering affidavit was accompanied by a confirmatory affidavit deposed to by one Jabu Manana.

Jabu Manana stated that the workers, that is, the applicant and himself, were advised about the imminent closure of the company. He said they had been aware since April 2005 that the company was going to close down in June 2005 due to the cancellation of the agency agreement.

It was argued on behalf of the applicant that there was a dispute whether consultation took place or not. It was also argued that the respondent's conduct was nothing but a "Fly by Night." It was further argued that this was a take over or transfer of the business by a new company.

On behalf of the respondent it was argued that the applicant's service was going to be terminated in terms of Section 36(J) of the Employment Act No.5 of 1980. It was also argued that since the applicant did not file a replying affidavit the averments in the answering and confirmatory affidavits remain unchallenged.
As already pointed out herein the applicant did not file a replying affidavit. The applicant did not see the need to do that even though there was a confirmatory affidavit

accompanying the answering affidavit. Presently, the averments in the confirmatory affidavit remain unchallenged.

When the applicant's attorney was addressing the court in reply, he applied for leave to file the replying affidavit. The application was opposed on the basis that the matter has already been argued.

The respondent after serving and filing its answering affidavit, and the confirmatory affidavit by Jabu Manana, it was incumbent upon the applicant to file a replying affidavit to address the issues raised in those papers.

The applicant's attorney was also at liberty to apply for a postponement before the matter was argued to file the replying affidavit.

It was argued on behalf of the applicant that there was a dispute of fact whether consultation was held by the parties. This argument was pursued so that the matter could be referred to oral evidence.

Reference to oral evidence presupposes that all the affidavits would have been filed. The applicant cannot fail to challenge issues raised in the answering affidavit, and hope that the court would refer the matter to oral evidence.
The applicant also failed to prove that the company that will distribute the remaining stock of the respondent has the same director or directors as the respondent company.

The court will therefore proceed on the basis that this was not a take over or transfer of business by the respondent.

It was also not in dispute that the respondent will close down business in Swaziland on 30.06.05.

The respondent is a South African based company. Presently its remaining stock and assets are held by the Deputy Sheriff.

From the papers as they stand, its clear that the applicant has failed to prove its case on a balance of probabilities. That would ordinarily mean that the court should order that the rule be discharged.

Such an order however will not be fair and just especially in the light of the undisputed evidence that the respondent will cease its operations in the country on 30.06.05. The respondent has already tendered an amount of E4, 320.00 as terminal benefits.

The court therefore in a bid to promote fairness and equity in terms of Section 4 (l)(b) of the Industrial Relations Act, 2000, will make an order under prayer (e) of the applicant's application as follows:-

That the parties' representatives meet and consider the terminal benefits due to the applicant within five days from the date of this judgement

If no agreement is reached as to the amount of terminal benefits, the respondent's assets, excluding the Nissan 1400, to remain under attachment to allow the applicant to report a dispute and to remain so attached until the matter is finalized.

No order for costs is made.

The members agree.

N. NKONYANE

ACTING JUDGE - INDUSTRIAL COURT