IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 261/03

ERIC DUMA DLAMLNI APPLICANT

And

SWAZI PAPER MILLS LIMITED RESPONDENT

CORAM

NKOSINATHINKONYANE: ACTING JUDGE

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR THE APPLICANT MR. N. MTHETHWA:

MR. DUNSEITH ATTORNEYS

FOR THE RESPONDENT MR. M. SIB AND ZE:

CURRIE & SIBANDZE ATTORNEYS

JUDGEMENT - 08.12.2005

This is an application for the determination of an unresolved dispute between the parties. It was brought before the court in terms of Section 85(2) of the Industrial Relations Act No. 1 of 2000 as amended.

The applicant is a former employee of the respondent company. He claims that he was unfairly dismissed by the company on 30th May 2005 when his position was declared redundant and he was retrenched.

The respondent argued to the contrary that the applicant was not unfairly dismissed, but his position was declared redundant and consequently terminated his service.

In his application the applicant stated that he was employed by the respondent on the 8th April 1992. He said he was in continuous employment until 30th May 2003 when his position was declared redundant.

The applicant says that his service was unlawfully terminated because of the following reasons and I quote verbatim:-

"6.1. The Company never consulted with the applicant union representative.

6.2. The company never consulted with the applicant.

6.3. The company did not apply fair and reasonable criteria in selecting applicant for retrenchment;

6.4. The company did not consider the applicant's personal circumstances in particular that the applicant is disabled due to a work accident;

6.5. The company did not consider or discuss with the applicant ways and means to avoid his retrenchment;

6.6. The company retrenched the applicant in bad faith, because he was disabled not because he was redundant;

6.7. The company never gave proper notice of the redundancies in terms of the Employment Act 1980 (as amended);

6.8. The retrenchments were effected contrary to an order of the Industrial court."

The applicant is claiming maximum compensation in the sum of E18,645:12. In his evidence under oath the applicant told the court that whilst under the employ of the respondent, he got injured during a soccer match on 12th October 1996. His doctor made a finding that he suffered a

20% disability. He said his physiotherapist recommended that he should not stand for more than two hours. He said the company did not however follow that recommendation.

The applicant said the company took care of him at first but it stopped doing so later. He said the company only paid him for eight months and then stopped paying him his salary. During cross-examination he told the court that his foreman told him that he was going to be terminated. He did not deny that the company did consult with the employees' representative during the retrenchment process.

On behalf of the respondent, RW1 Robert Makhanya testified before the court. He told the court that he used to work for the respondent as a Human Resources Manager and Industrial Relations officer. He said he left the respondent company in 2003. He said he was presently self-employed. He said the applicant was one of the hundred and seven employees earmarked for retrenchment. He said the cause of the redundancy was that the respondent was unable to meet its overheads. He said a notice in terms of Section 40 of the Employment Act was written to the Commissioner of Labour. He said audited financial statements were attached and that meetings were held between the respondent and the workers' representatives. Makhanya also told the court that there were also consultations with individual employees. He further told the court that the applicant was offered a transfer to the Laboratory, but he declined the offer. Makhanya also said the last in first out (Lifo) principle was used.

During cross-examination it was put to Makhanya that the Lifo system was not used as there was an employee who joined the company after the applicant, but he was not retrenched. Makhanya was unable to deny that. It was further put to him that the applicant was retrenched just because he was then disabled. That was denied by Makhanya.
From the evidence presented before the court, it became clear that the applicant's main contention was that he was unfairly retrenched just because he had sustained the injury at work and therefore the company did not want him there anymore.

That contention was however not supported by the evidence before court. The evidence showed that on the day that the applicant was injured an injury on duty (IOD) form was filled and he was

taken to hospital. The evidence also showed that whilst still recovering the company ambulance would fetch him home and take him to hospital. The evidence showed that the company continued to pay him his full salary.

The court will reject the applicant's evidence that the company at some point stopped to pay him his salary. If that was correct, it is strange^ that he did not claim arrear salaries up to the date of his dismissal.

The evidence that audited financial statements were attached to the notice of the retrenchment was not denied. Further, the evidence of consultation between the respondent and the workers representative was not disputed.

In terms of the law the burden of proof that an employee was fairly terminated is on the employer. The employee need only to prove that at the time his service was terminated, he was an employee to whom Section 35 applied. (See Section 42 of the Employment Act No.5 of 1980).

In the light of the undisputed evidence before the court that the respondent company was unable to meet its overheads, and that a notice in terms of Section 40 of the Employment Act was made, and the evidence of four consultation meetings between the employer and the workers representative, the court will come to the conclusion that the respondent has proved that the termination was one permitted by Section 36 of the Employment Act.

The respondent's witness was unable however to dispute the evidence that the (Lifo) system was not faithfully applied. The applicant told the court that there was an employee by the name of Mxolisi Zwane, employment No. 3901, who was still working yet he joined the company after the applicant. The evidence showed that the applicant's employment number was 3156. The evidence showed that the employment numbers were made sequentially depending on one's date of employment.

It is clear therefore that although the company lawfully engaged in the retrenchment process, it did not however follow a fair procedure in the selection process of those to be retrenched.

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

RELIEF:-

The applicant told the court that he is unemployed since his termination in 2003. He said he was trying to find alternative employment but he is unsuccessful. He said he was earning El,553:76per month. He is married and has three children. One is in Form 1. The second is doing standard 4 and the last one is ten months old. He is the sole breadwinner and is only thirty-three years old. Taking into account all these factors the court will make an order that the respondent pays the applicant an amount equal to six months' wages as compensation for the unfair dismissal.

The court will accordingly make an order that the respondent pays the applicant an amount of El,553:76 x 6) = E9,322:56.

The members are in agreement.

NKOSINOTHI NKONYANE

INDUSTRIAL COURT ACTING JUDGE