IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 60/05

In the matter between:

SWAZILAND AGRICULTURAL

AND PLANTATIONS WORKERS UNION **Applicant**

and

ROYAL SWAZILAND SUGAR CORPORATION LIMITED **Respondent**

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M. MKHWANAZI

FOR RESPONDENT: N. J. HLOPHE

J U D G E M E N T - 23/02/05

The application serving before court was brought on a certificate of urgency on the 16th February 2005, seeking for an order in the following terms:

1. *Waiving the usual requirements of the rules of Court regarding the notice and service of the application and permitting that this matter be heard as one of urgency.*

2. *That the Rule Nisi returnable on a date to be determined by the above Honourable Court, is hereby issued calling upon the Respondent to show cause why an order in the following terms should not be made final.*

2.1 Interdicting and restraining the Respondent from carrying out the intended redundancies and/or retrenchment of over Seven Hundred positions held by Applicant's members in the Respondents undertaking pending the conciliation of the matter at CMAC.

3. *That the Rule Nisi operates with immediate effect pending the return date.*

4. *Costs of this application.*

5. *Further and/or alternative relief.*

The same was grounded on the Founding Affidavit of Siboniso Dlamini, the Secretary General of the Applicant, Swaziland Agricultural and Plantations Workers Union (Hereinafter referred to as SAPWU) Mhlume branch.

The application was augmented by supporting affidavits of Melvin Dlamini, the Secretary General of the Applicant's Simunye Branch and one of Stephen Dlamini, a registered member of the Applicant.

Annexed to the Application are supporting documents marked seriatim from a to P-
The matter first came up for hearing on the 16th February 2005 when it was postponed to allow the Respondent to file Answering papers.

Interim status quo order was issued by the court pending the hearing of the matter.

The Respondent has filed an Answering Affidavit deposed to by Thuto Shongwe, the Human Resources Manager Services of the Respondent.

Therein were raised points in limine that may be summarized as follows:

(i) The application was not urgent and should not be entertained as such because the so-called urgency is self actuated.

(ii) The application is premature because non of the Applicant's members have been retrenched yet but the Respondent was presently looking at means to avert and/or minimize retrenchments.

(iii) The only former employees of the Respondent whose services were terminated by mutual agreement as of 11th February 2005, are those who had applied for voluntary exit, hence the application has been overtaken by events with regard to them

(iv) That the application is predicated on the erroneous premise that the notice in terms of Section 40 must be given before the means of avoiding redundancies are effected (such as voluntary exits and redeployment).

(v) And that the court is being asked to stop consultations that are on going, which it is not entitled to stop but may redirect such where there is a need for it to do so.

The Applicant has filed in a Replying Affidavit in answer to the Answering Affidavit and the application was fully argued before court on the 21st February 2005.

Mr. Mandla Mkhwanazi (attorney) appeared for the Applicant whereas Nkululeko Hlophe appeared for the Respondent.

It was agreed by the parties that the Applicant would commence arguments on the merits and the points in *limine* simultaneously to be followed by the Respondent's arguments.

Closing arguments on points of law by the Applicant then followed.

The matter is thus ripe for making of a final judgement on the points of law raised by the Respondent and on the merits of the application as a whole.

THE FACTS

The Applicant is the sole recognized union at the Respondent's undertaking both at Mhlume and Simunye in terms of a Recognition and Procedure Agreement entered into on the 31st March 1993.

On the 18th November 2004 management and the union met in a special consultations meeting on establishment reduction exercise.

It was stated by management that the Respondent was not performing well and costs cutting measure had already been implemented which did not affect employees.
That the Board had taken a decision to undertake an establishment reduction exercise. That this decision by the Board could not be changed but they could look at ways of reducing the effects of the process.

SAPWU made a detailed objection to the proposed reduction exercise and sought clarity from the management as to what their real intention was.

Management stated that redundancy and retrenchments go hand in hand, but the company wished to explore the redundant positions first and once that had been done strategies to avoid retrenchments such as voluntary exit packages would be looked into.

SAPWU asked when management planned to start retrenchments and whether the Labour department had been informed. That the union did not believe that the employees were to be retrenched due to economic reasons but this was a result of the merger between Mhlume and Simunye operations. They pointed out that already a decision to retrench 700 employees and to outsource services had been taken without involving them and were now only required to rubber stamp it.

Management stated that it was not necessary to issue a Section 40 notice at that stage but the Commissioner of Labour had been appraised of the developments.

Management wished to consult with social partners prior to issuing this notice.

It is worth noting that on the 24th August 2004 management had issued a special management Brief No. 19 to all the stake holders outlining its precarious financial position and the need to adopt a cost reduction programme to improve the financial status of the group. The cost cutting measures were outlined therein.
On the 25 November 2004, a further special consultation meeting on the reduction programme was held between the management and SAPWU.

Upon proding by SAPWU as to the details of the intended redundancies and retrenchments, management stated that by the week following, the redundant positions would be known, but management wished to discuss the issue with SAPWU first. It was pointed out that retrenchments were the last step.

Management would have to select first those employees allowed to take voluntary packages and to look at redeployment.

The union requested that the entire exercise be put on hold pending intervention by the King to whom they had already appealed but was still in seclusion.

A follow up meeting of management and SAPWU was held on the 2nd December 2004. Management indicated its intention to proceed with the voluntary exit packages categorized as follows:

(a) Voluntary exist packages - open to all.

(b) Voluntary ill-health exit packages applicable to those with medical conditions.

(c) Voluntary retirement exit packages - open to employees of 50 years and above.

A brief on the packages was to be published the following day.

There was haggling about the recording of the minutes and the taping of the proceedings which took a significant part of the meeting.
SAPWU indicated that the process was being rushed and they wanted the identity of the positions to be affected first before the packages were discussed.

SAPWU went ahead to outline pertinent issues that needed to be discussed in relation to the packages such as MPF, SNPF, life skills training and whether employees with AIDS were to be included in the ill-health exits and also what subsidized medication programmes were to be in place for them once they were out of employment.

SAPWU further proposed payment of three (3) months notice pay to enhance the exit packages and that with respect to the additional notice and severance pay, the first year service be included in the payment.

That *ex-gratia* payment of 12 days basic salary or wages be applicable to all categories and finally the period within which to apply for the voluntary exit be extended to two months.

Other suggestions by the union were that; parents with children at school be allowed to stay on the estates and their costs be subsidized as those of the employees and the packages be paid prior to the repatriation. Further, that management should be specific on the effective date of effecting the exits. Management was further requested to approach government for tax relief in respect of the packages.

Management responded to the union proposals outlining the way forward before close of the meeting.

On the 16th December 2004, management issued a Special Management Brief No. 26 on the Establishment Reduction Exercise. Of most significance was the declaration of 700 redundant positions. It indicated that the occupants of the redundant positions would be duly notified; in terms of a standard guideline.

Secondly, options and initiative to minimize the effects of the establishment reduction exercise were outlined which included in greater detail, the voluntary exit package, the voluntary early retirement package and voluntary ill-health retirement package.
The package offers were valid from 20th December 2004 to 17th January 2005. Then came the controversial passage:

"*Employees occupying redundant positions are encouraged to seriously consider applying for the voluntary packages because these are enhanced with an ex-gratia pay element and the standard retrenchment package is not*".

Guidelines for applying for the voluntary packages were outlined and same were to be made to management through line managers *inter alia.*

Equally controversial was the pronouncement of the exercise of identifying services for outsourcing. This according to the union was an indication that further retrenchments, after the exit packages were still inevitable. It was stated therein;

"*Advertisement of the services to be outsourced at this stage will be done after the affected employees have been informed by their respective line managers.*"

According to the Applicant this ought not to have happened before the positions had been identified and a notice in terms of Section 40 issued to the union and the Commissioner of Labour.
These employees too were encouraged to avail themselves of the voluntary exit packages.

On the 20th December 2004 the individual employees occupying the identified redundant positions were duly notified by a letter written by the head of departments. They were also informed of the offered enhanced packages which they had to accept by the 20th January 2005. The letter partly reads as follows: "*1. If your application for the voluntary exit package is not received by 5.00 p.m. on Thursday 20 January 2005, you will be deemed to have declined the offer of these enhanced packages. In the event, that you are retrenched, you will only be entitled to the standard retrenchment package without enhancements*".

According to the Applicant this is the blow that downed the camel. The element of voluntariness was by the aforesaid phrase, dealt a terminal blow.

The process in the Applicant's view amounted to compulsory retrenchment and a notice in terms of Section 40 (2) of the Employment Act, was necessary before the process could continue any further.

On the 28th January 2005, the Applicant reported a dispute to the department of Labour in terms of Section 76 and 77 of the Industrial Relations Act, No. 1 of 2000. The dispute was crystallized as follows:

"*The Respondent employers have declared about seven hundred (700) positions redundant and also declared the intention to outsource some departments. The union therefore urges the Commissioner of Labour to halt the retrenchment process and compel the Respondent to first comply with Section 40 as amended and also comply with agreed retrenchment procedures and establishment reduction process*".

The Commissioner of Labour duly forwarded the report of dispute to the Conciliation Mediation and Arbitration Commission (CMAC). CMAC invited the parties on the 10th February 2005, to attend a conciliation meeting at Siteki CMAC offices on the 22nd February 2005.

Meanwhile on the 8th February 2005, the Respondent through its General Manager issued out acceptance letters of the Applications received for the voluntary packages.

The Applicants were informed that their last working day with the company was the 11th February 2005. As at this time, the Respondents were aware of the dispute reported to the Labour department that was pending at CMAC.

Indeed, at a meeting held on 19th January 2005, between management and SAPWU, the union had indicated its intention not to participate in the consultation meetings on the Establishment Reduction Exercise and had instituted legal proceedings.

Management continued with the process notwithstanding still urging the union to change its mind. SAPWU was adamant that the process should start afresh.

The Respondent's simple answer to the case of the Applicant is as follows:

1. It had not yet taken a decision to retrench any given number of its employees and therefore, there was no need as yet to give a notice to the union and to the Commissioner of Labour in terms of Section 40 (2).
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 months 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 (added A.5/1997)*

(f) *What other opinions have been looked into to avert or minimize the redundancy (Added A.5/1997).*"

The Respondent has stated that in line with Section 40 (2) (f) it had embarked on giving of the voluntary exit packages as an option to avert or minimize redundancies. That pursuant to this exercise, approximately 1077 employees applied for voluntary exit. That out of the number, the Respondent had approved 760 exit packages.

It was submitted further for the Respondent that the correct interpretation of Section 40 (2) was that any measures to be taken with a view to avert or minimize redundancies is to be carried out before the notice in terms of the Section is issued out. That indeed the results of such an exercise, such as the voluntary termination of 760 employees was information required to be included in the notice.
Furthermore, the Respondent had yet to determine how many positions were to be declared redundant pursuant to the very successful terminations by agreement of the parties.

The Respondent added that in any event such voluntary termination had already taken effect as of the 11th February 2005 and thus the hands of the court were tied in that it could not reinstate the 760 employees, unless they followed the gamut under Part 8 of the Industrial Relations Act No. 1 of 2000 and sue for unfair dismissal.

It was however conceded by the Respondent that non of the affected 760 employees had yet received the voluntary packages but were due to do so on the 24th February 2005.

The court must note at this point, that the Respondent appear to have put the process at high gear well aware of the pending dispute before CMAC with a clear mind of side stepping the process.

The question that the court must answer is whether it was procedurally fair and in conformity with Section 40 (2) for the Respondent to embark on the voluntary packages exercise in the three categories aforesaid and to declare outsourcing prior to giving the statutory notice to SAPWU and to the Commissioner of Labour.

It has been stated time and again that for retrenchment to be valid it must be substantially and procedurally fair and just towards the affected employees. In the cases of Antlantis Diesel Engines (Pty) Ltd v NUMSA 1994 ILJ 1242 *(A).* and Sfonza v Lekato vet AG LTD 1994 ILJ 408 (IC), was restated that the employer is entitled to decide in principle to retrench employees but not to finalize and execute the decision without consulting the trade union or employees involved.

It is not sufficient that the employer acted in good faith, the requirements of procedural fairness towards employees must still be complied with See NUMSA v Antlantis Diesel Engines (Pty) Ltd 1993 IU 642. It is also imperative that the employer complies with an agreed procedure, SACCAWU v Checkers SA Ltd 1992 IL 411 (IC)

It is a well established requirement of labour law that the employer must adequately notify the other consulting party about the proposed retrenchments prior to consultation and termination of employment. In the case of South Africa, the notice is in terms of Section 189 (3) of the 1995, Labour Relations Act (LRA).

In terms thereof in the written notice the following information should be disclosed:

i) The reasons for the retrenchment

ii) The alternatives considered by the employer to avoid retrenchment and the reasons for rejecting them.

iii) The number of employees identified to be affected and their job categories.

iv) The selection criteria to be applied.

v) The date of termination of the services.

vi) The proposed severance pay.

vii) The assistance to be offered to employee likely to be affected by the retrenchments.

viii) The possibility of the future redeployment of the retrenches.

This notice must be given to the employees within a reasonable time.

In the case of Swaziland as indicated in Section 42 (2) where it is contemplated terminating the contracts of employment of five or more of the employees for reasons of redundancy, the employer shall give not less than a month's notice in writing to the Commissioner of Labour and the union (if any) as foresaid.

It is common cause that no such notice has been given, the Respondent maintaining that the invitation to apply for voluntary packages for reasons of redundancy (see correspondence earlier referred to) does not amount to a declaration of redundancy within the meaning of Section 40 (2) of the Act, but to the contrary was an action intended to minimize the redundancy in terms of Section 42 (f) thereof.

The International Labour Organization Recommendation 166 requires parties to "*seek to avert or minimize as far as possible termination of employment for reasons of an economic, technological, structural or similar nature without prejudice to the efficient operation of the undertaking, establishment or service and to mitigate the adverse effects of any termination of employment for these reasons.*"

This duty to consider alternatives, was endorsed by the Labour Appeal Court in Morester Bande (P t y) Ltd v NUMSA & Another (1990) 11 ILJ 687 (LAC).

In the case of Hadebe & Others v Romatex Industrial Ltd (1986) 7 ILJ 726 (IC) at 737 (D) the Industrial Court has suggested that if an employer is to allege that the retrenchment is inevitable, then there is a duty to produce evidence that all other cost-saving measures have been exhausted and the discharge of this duty will inevitably entail making full financial disclosure.

This is the purport of the procedure provided under Section 40 (2) of the Employment Act No. 5 of 1980.
Permissible measures to be carried out to avert or minimize the effects of retrenchment between the parties herein, are contained in the Retrenchment/Redundancy Procedure Agreement entered into between RSSC and SAPWU annexed to the application and marked 'K'.

Clause 5.4 (a) reads: "Measures to avoid or minimize retrenchments;

These will include consideration of the following:

ii) offering voluntary early retirement after an agreed upon packages by both parties;
iii) offering voluntary retrenchment after an agreed upon packages by both parties:
(emphasis mine).

It would appear that the parties in this procedure have agreed to the employer offering voluntary packages prior to declarations of retrenchments.

The only requirement is that the parties must first agree upon the package. From the exigencies afore-running, it would appear that during the initial consultations, the Applicant made its input as to the packages to be offered to the employees and there appeared to be consensus on the issue of the package.

In A Guide to South African Labour Laws by Alan Rycroft and Barney Jordaan at 234_r the implementation of an early retirement scheme is cited as one of the alternatives to retrenchment.

Furthermore, in their books, Principles of Labour Law, Van Jaarsveld and Van Eck at p.303 recognizes the institution of an early Pension Scheme (See Malthyser v De Beer Industrial Diamond Division (Pty) Ltd 1995 11 BLLR 61 (IC) as one of the alternative measures to be taken to avert retrenchments.

What is curiously missing in all the authorities I have looked at is the suggestion, even mildly, that a general offer of enhanced packages to the employees (in contradistinction to a retirement scheme) is an alternative measure to retrenchment of employees. Employees who do not qualify to get retirement packages, or in this case health exit packages, invariably terminated their employment for operational reasons at the behest of the employer.

That they were placed in a catch 22 situation to either take an enhanced package or take a lesser statutory package later underlines the involuntariness of the process, hence the need

to comply with all the statutory requirements prior to effecting that particular category of exit package.

The receipt of the enhanced packages does not thus detract from the cause of the exit, which is redundancy. This therefore in the court's view cannot be said to be a measure to avoid or minimize retrenchment. The fact of the matter is that the exit amounts to a retrenchment before the employer has complied with the requirements of Section 40 (2) of the Employment Act.

It may be argued that SAPWU condoned the process they now complain of, by firstly providing for it in Clause 5.4 (a) (iii) of the retrenchment / redundancy Procedure Agreement entered into between it and the Respondent. It also participated during the consultations in making proposals, that were incorporated into the exit package.

Whereas this may be the case, in terms of Section 27 of the Employment Act, no agreement of employment shall provide for any employee any less favourable condition than is required by any law. Any such condition which does not conform with the Act or any other law shall be null and void and the agreement shall be interpreted as if for that condition there were substituted the appropriate condition by law.

in conclusion, whereas, it was procedural for the Respondent to offer voluntary Early Retirement package to those employees between the ages of 50 - 59 years and Voluntary Ill-health Retirement Package to those who met the set medical criteria; it was procedurally unfair to offer General Voluntary Exit package to all employees, especially after informing them that their positions were redundant/or likely to be redundant without following the procedure laid out under Section 40 (2) of the Employment Act. Rather than being a measure to avoid or minimize retrenchment, it accelerated the same and placed the employees in a disadvantageous position than that contemplated by the Employment Act.

It is common cause that the termination agreements of all the employees in the three categories were concluded on the 11th February 2005 except that the packages and repatriation had not been carried out.

The court's hands are tied in this respect and cannot stop the process, until and when reports of un-procedural and unfair dismissal have been made by the individual employees and the cases, if not settled, come to this court.

The employer however, has the option with the benefit of hide-sight to re-think the entire process and engage the union in further consultations, upon issuance of the appropriate notice in terms of Section 40 (2).

There will be no order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT INDUSTRIAL COURT