

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 66/02

In the matter between:

SIPHO SHONGWE

APPLICANT

And

**SWAZILAND MEAT INDUSTRIES
LIMITED**

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

ERNEST HLOPHE: MEMBER

FOR APPLICANT MR. N. MTHETHWA

FOR RESPONDENT ADV. P. FLYNN

Instructed by

Cloete/Henwood/Dlamini

Associated

JUDGEMENT -17 /04/2008

[1] The trial of this case started on 27 October 2005. It was allocated two days of trial. However, as usual the parties could not finish within the allocated time frame. The other problem that the court experienced was an administrative one involving one of the court members Mr. Ernest Hlophe. The parties agreed towards the end of the trial that the case

should proceed in his absence and also that none of the parties will take this as a point for review or appeal.

[2] The applicant was employed by the respondent in terms of a written contract as Cattle Procurement Manager with effect from 7th April 2001 to 7th April 2003. He was however terminated by the respondent before the expiration of the contract on 31st October 2001 on grounds of redundancy.

[3] He reported a dispute but the dispute was not resolved, thus he filed this application for determination of the unresolved dispute in this court.

[4] In his papers he stated that;

"5. On or about the 31st October 2001, the respondent terminated the services of the applicant on the grounds of redundancy, notwithstanding that the duration of the contract had not lapsed.

6. The termination of applicant's services was both unlawful, unreasonable and unfair in all the circumstances in that it was not made in compliance with Section 40 of the Employment Act No. 5 of 1980 for the following reasons;

6.1. Other people were engaged by the respondent to perform applicant's duties.

6.2. The respondent failed to consider ways to avoid applicant's retrenchment or redundancy.

6.3. The respondent failed to give the applicant reasonable notice of the decision to retrench him.

6.4. The respondent failed to apply fair and objective criteria when retrenching the applicant.

6.5. The respondent failed to consult with the applicant and consider any representations by him.

6.6. The respondent's decision to retrench the applicant was unreasonable, made in bad faith and had no commercial rationale."

[5] The respondent denies that the termination of the applicant was unlawful, unreasonable and unfair. It averred in its papers that the termination of the applicant's service was as a result of the applicants post being declared redundant.

[6] The evidence led before the court revealed that at the time of the applicant's termination of his employment by the respondent on 31st

October 2001, he was on a three year fixed term contract and was employed as Cattle Procurement Manager. The fixed term contract was from 7th April 2001 to 7th April 2003. It was not in dispute that on 31st October 2001 the applicant had not finished the three years as per the fixed term contract that the parties had entered into.

[7] The respondent was engaged in the business of buying cattle and then slaughtering and packaging the products for sale mainly in European markets. The respondent had feedlots at Simunye which it was forced to close down when there was an outbreak of foot and mouth disease in 2000. It was a very tough period for the respondent. The export of beef to the European markets came to a halt for some time.

[8] The respondent was faced with a situation where it was very expensive for it to procure or source cattle to slaughter. The respondent decided that to cut these costs it was going to concentrate on its core business, that is, the slaughtering and packaging of beef. It decided that it was going to outsource the Cattle Procurement Department. The respondent also decided that it would find a new company to run the feedlot. The respondent, accordingly teamed up with another company called TWK Agriculture Limited and formed a new company called Swaziland Cattle Company Limited.

[9] A new site for this project was found at Mafutseni. This was done with the assistance of the applicant. This new company has however since liquidated and is no longer in existence. A post of Feedlot Manager was advertised and a candidate of South African origin was appointed.

The applicant in court cried foul about these developments and suggested that he was overlooked for this post as the person who helped set up or relocate the feedlot from Simunye to Mafutseni. The applicant's evidence in chief gave the impression that he was overlooked and a South African given the post. The applicant in his evidence in chief also pointed a dark picture that the formation of the new company to run the feedlot at Mafutseni was done behind his back as one of the Managers and shareholder with the respondent.

[10] During submissions, the applicants counsel submitted that;

10.1. The termination of the applicant on grounds of redundancy was unlawful as a fixed term contract cannot be terminated on operational grounds.

10.2. The respondent continued to source cattle from a certain Mr. Howe even after the Cattle Procurement Department was outsourced which showed that the service of the applicant was still required.

[11] In support of the submission in paragraph 10.1 above the court was referred to the case of **BUTHELEZI V. MUNICIPAL DERMACATION BOARD (2004) 25 ILJ 2317 (LAC)**. In this case it was held that it is not unfair to hold the employer to the terms of the fixed term contract even where operational requirements may necessitate termination. The case is however distinguishable from the present case. In the present case, the contract permitted the parties to terminate the agreement prior to the end of the period by giving one month's notice. The second proviso to Article 2 of the contracted states that;

"And provided that either party may terminate this agreement prior to the end of the period by giving one calendar month's notice in writing to the other."

[12] The evidence in this case indeed showed that the respondent did give the applicant the one month's notice by the letter dated 28th September 2001 marked "A7" at page 38 of annexure "A".

[13] As regards the second submission on behalf of the applicant in

paragraph 10.2 above, the evidence revealed that it was common for Mr. Howe to just call any person in management at the respondent's place and indicate that he had cattle to sell. In that instance there was therefore no middle man required. It is therefore not correct that the service of the applicant was still required after his termination.

[14] The court must now deal with the requirements of Section 40 of the Employment Act No.5 of 1980. The applicant averred in paragraph 6.1 of its application that his retrenchment was unfair and in violation of this section of the law because other people were engaged by the respondent to perform his duties.

[15] The applicant told the court that the respondent should have transferred him to work in its new feedlot at Mafutseni. During cross-examination however it transpired that the applicant was either misled about this situation or was deliberately telling lies in court. The evidence showed that the feedlot at Mafutseni was a new project and it was run by a completely different company called Swaziland Cattle Company limited. That company hired its own feedlot manager by the name of Petrus Burgher. It is therefore not true that the respondent engaged other people to do the applicant's work.

[16] In paragraph 6.2 of the application the applicant stated that the

respondent failed to consider ways to avoid applicant's retrenchment or redundancy. The evidence before the court revealed that meetings were held between the applicant and the three other cattle buyers to discuss the pending retrenchment. One of the ways that the meetings came out with was that affected individuals could work for the respondent as commission agents.

[17] In paragraph 6.3 the applicant averred that the respondent failed to give the applicant reasonable notice of the decision to retrench him.

Again this was not correct. The parties did hold pre-retrenchment consultations. The applicant was given one month's notice of the intended retrenchment. During this period the applicant was told that he could take time off to look for alternative employment. This notice was also in line with the contract of employment between the parties which required either party to give one month's notice to the other if it wanted to terminate the agreement.

[18] The applicant also stated in paragraph 6.4 that the respondent failed to apply a fair and objective criteria when retrenching the applicant.

There was no suggestion or evidence of what could have constituted a fair and objective criteria in the circumstances of this case. As the three cattle buyers were also retrenched, it is not clear as to what would have the applicant been left to do as he was their supervisor. From the

evidence before the court, there was clearly no way that the applicant could have avoided the retrenchment if the cattle buyers of whom he was in charge were also retrenched.

[19] The applicant in paragraph 6.5 said that the respondent failed to consult and consider any representations by him. This was clearly not correct. The evidence showed that the applicant was consulted on more than one occasion. The evidence showed that he also suggested that he should not be consulted together with the three cattle buyers as he was a manager. That request was granted meetings were held with him alone. In paragraph 6.6 the applicant stated that the respondent's decision to retrench him was unreasonable, made in bad faith and had no commercial rationale.

[20] The evidence before the court showed that the respondent found that it was expensive to buy cattle the way that they were doing at that time as personnel costs were too high. The respondent had data to support this conclusion. This evidence by the respondent was not challenged.

[21] From the evidence presented before the court, the court is satisfied that the applicant was adequately consulted before the retrenchment and that there was a commercial rationale for the retrenchment. The

court therefore comes to the conclusion that the termination of the applicant was fair because it was for a reason permitted by **SECTION 36 OF THE EMPLOYMENT ACT** and that taking into account all the circumstance of the case, it was reasonable to terminate the service of the applicant.

[22] The application is therefore dismissed with no order as to costs.

The member agrees.

NKOSINATHI NKONYANE

JUDGE - INDUSTRIAL COURT