

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.292/01

In the matter between:

BHEKISISA H. MOTSA 1ST APPLICANT

NHLANHAL MABUZA 2nd APPLICANT

AMOS FANA GAMEDZE 3rd APPLICANT

AND

CAPE CONTRACTS (PTY) LTD RESPONDENT

CORAM:

S. NSIBANDE: ACTING JUDGE

P. THWALA: MEMBER

A.M. NKAMBULE: MEMBER

FOR APPLICANTS: S. HLOPHE

FOR RESPONDENTS

JUDGEMENT

28th APRIL 2008

[1] When this application came before court, Mr S. Hlophe acting for the 2nd and 3rd Applicants informed the Court that the 1st Applicant's case had been heard in a separate hearing and that the court was to hear the application brought by 2nd and 3rd Applicants only.

[2] The Respondent was not before court nor was it represented. The Court, being satisfied that the Respondent had been duly served with the Application before it, continued to hear the matter *ex parte*.

[3] The 2nd Applicant, Nhlanhla Mabuza was employed by the Respondent in October 1994 as a general labourer in the Respondent's business at Usuthu Pulp, Bhunya.

[4] On 23rd January 1998, the 2nd Applicant was given a letter of termination in which he was notified that the company had found it necessary to retrench a number of employees and that he was one of the employees affected by the retrenchment. The company purported to give him notice of termination from 2nd January, 1998 to 30th January, 1998 which he was not required to serve. He was advised that he would be given first preference for re-employment if any work became available. Nothing was said about terminal benefits and none were paid by the Respondent. The letter of termination was handed into court as an exhibit.

[5] The 2nd Applicant reported a complaint at the Department of Labour in terms of the Employment Act, claiming his services had been unfairly terminated. The Labour Commissioner filed his full report as per section 41 Employment Act 1980 indicating that the dispute was unresolved.

[6] 2nd Applicant duly instituted an application in the Industrial Court claiming maximum compensation for unfair dismissal, Notice Pay, additional notice, severance allowance and payment in respect of under payments.

[7] The 2nd Applicant testified that the Respondent failed to observe fairness in carrying out the retrenchment exercise. In particular:

7.1. the Respondent did not consult with him prior to the retrenchment;

7.2 the Respondent did not comply with the provisions of Section 40 of the Employment Act 1980 (as amended)

7.3. the Respondent hired other people to replace those who were retrenched including himself.

7.4. the Respondent did not apply a fair selection criterion when making him redundant.

[8] The 2nd Applicant testified as to the circumstances of the retrenchment. He stated that he only became aware of the retrenchment on the morning that he received the letter of retrenchment. He stated that the Respondent did not discuss the retrenchment but simply told the employees that six (6) of them were to be retrenched. He further stated that in March 1998 new employees were hired to do the work he and his fellow workers who had also been retrenched, had previously done.

[9] The 3rd Applicant, Amos Fana Gamedze was employed on 16th March, 1998 in the scaffolding department of the Respondent's concern at Usuthu Pulp, Bhunya.

[10] He testified that on 15th December 2000, the Respondent terminated his employment verbally without the giving of any notice or reasons for same.

[11] The 3rd Applicant reported a dispute in terms of the Industrial Relations Act 2000 (as amended) claiming that his services were unfairly terminated and the Conciliation Mediation and Arbitration Council issued a certificate of unresolved dispute.

[12] The 3rd Applicant duly instituted an application in the Industrial Court

claiming one month notice, additional notice, severance allowance and maximum compensation for unfair dismissal.

[13] In his evidence the 3rd Applicant stated that he earned E800 or so per month. His statement of claim indicates he earned E860 per month at the time his services were terminated.

[14] In terms of Section 42(2) (a) and (b) of the Employment Act No.5 of 1980, once an employee has established, as the Applicants have, that he was an employee to whom Section 35 of the Act applied, the onus fell on the employer to show firstly, that it dismissed the employee for a reason permitted by Section 36 of the Act and secondly, that it was fair and reasonable to dismiss the employee in the circumstances of the case.

[15] By its default, the Respondent has failed to discharge this statutory onus. The court finds that the dismissal of the 2nd and 3rd Applicants were substantively and procedurally unfair.

[16] Having taken into account the personal circumstances of the 2nd Applicant, his four years of service with the Respondent, the fact that it took him about eight years to find alternative employment, the court awards compensation equivalent to ten (10) months remuneration in the sum of E7480.00.

[17] In addition the 2nd Applicant is to be paid by the Respondent, terminal benefits as follows;

Notice Pay	E748.00
Additional Notice	272.00
Severance Pay	680.00
Total due to 2 nd Applicant	E 9180.00

[18] No evidence whatsoever was led in proof of the claim for underpayments and the court finds that the claim for underpayments was not proven.

[19] Having taken into account the circumstances of the dismissal, the fact that 3rd Respondent had found no alternative employment and all his other personal circumstances, the court awards the 3rd Applicant compensation equivalent to ten (10) months remuneration in the sum of E8600.00.

[20] In addition, the 3rd applicant is to be paid by the Respondent the following terminal benefits.

19.1 Notice Pay	E860.00
19.2 Additional Notice	156.36
19.3 Severance pay	390.91

Total due to 3rd Applicant E10007.27

[21] The Respondent is to pay the costs of the Application. The members agree.

S. NSIBANDE
ACTING JUDGE