

**IN THE INDUSTRIAL COURT**

**OF ESWATINI**

**CASE NO. 364/2007**

In the matter between:-

**MALUNGISA DLAMINI**

Applicant

AND

**UBOMBO SUGAR COMPANY**

Respondent

**Neutral citation:**        *Malungisa Dlamini vs Ubombo Sugar Company*  
364/2007 [2018] SZIC 111 (October 11, 2018)

**Coram:**                    N.NKONYANE, J  
(Sitting with G. Ndzinisa and S. Mvubu,  
Nominated Members of the Court)

Heard submissions:        16/08/18

Judgement delivered:    11/10/18

**SUMMARY---**Labour Law---Applicant was employed by the Respondent as a service truck driver---His main duty was to deliver fuel to the

company machinery in the fields---The Respondent is involved in the sugar production industry---The price of sugar in the world markets fell and this impacted negatively on the Respondent necessitating that a restructuring exercise be carried out---The Applicant was one of the employees that were affected by the exercise---The Applicant was aggrieved and he reported a dispute---The dispute could not be resolved by conciliation and he filed an application for determination of the dispute in Court.

Held---The decision whether or not to effect a restructuring is a managerial prerogative---There must be a commercial rationale for the decision to engage in retrenchment---In casu, the rationale was not in question that there was a drop in the price of sugar in the world markets---Termination of the Applicant's services was therefore fair---Application accordingly dismissed.

## JUDGEMENT

1. This Applicant instituted the present legal proceedings in terms of **Section 85 (2)** of the **Industrial Relations Act No.1 of 2000** as amended as read together with Rule 7 of the Industrial Court Rules of 2007.

2. The Applicant is a former employee of the Respondent. The Respondent is a public company that is involved in the sugar production industry and is based in Big Bend in the Lubombo District.
3. On or about 30 June 2006 the Respondent retrenched about 70 of its employees due to financial difficulties brought about by reduction of the selling price of sugar in the world markets.
4. The Applicant was one of the retrenched employees.
5. The Applicant was first employed by the Respondent on 21 January 1983 as a Service Bay Attendant. **(See: page 1 of the Respondent's Bundle of Documents)**. The Applicant remained in continuous employment until 30 June 2006 when he was retrenched by the Respondent.
6. The Applicant did not accept the Respondent's decision to retrench him and he reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. The parties were unable to have the dispute resolved amicably and the Commission issued a certificate of unresolved dispute. **(See: Annexure B of the Applicant's application.)**
7. The Applicant thereafter filed the present application for determination of the unresolved dispute and he claims that the termination of his

services by the Respondent was both procedurally and substantively unfair and unreasonable because;

- 7.1 *The Respondent disregarded Article 5.4 of the Memorandum of Agreement between the Union Representative of the Applicant and the Respondent and declared redundant the Applicant's position of Field Service Man on basis of his ex-work station as Fuel Clerk.*
  - 7.2 *The Respondent discriminated against the Applicant on arbitrary grounds by selecting him for retrenchment and leaving behind his colleague Michael Ndwandwe with whom he shared the same position and responsibilities.*
8. As the result of the alleged unfair termination, the Applicant is claiming re-instatement or alternatively, maximum compensation.
  9. The Respondent opposed the Applicant's application and duly filed its Reply thereto. In its Reply the Respondent stated that the termination of the Applicant's services was both lawful and fair. The Respondent also stated that the restructuring was brought about by economic considerations which impacted on the viability of the Respondent, and that the process of restructuring was conducted in accordance with the

provisions of the Collective Agreement and it complied with all requirements for a fair retrenchment.

10. The issues for determination by the Court therefore are; whether or not the Respondent disregarded Article 5.4 of the Memorandum of Agreement, and secondly; whether or not the Respondent discriminated against the Applicant when selecting him for the retrenchment and leaving behind his colleague Michael Ndwandwe.
  
- 11.** The evidence before the Court revealed that the Applicant was employed by the Respondent on 21 January 1983 in the Tractor Pool Department as a Service Bay Attendant. There was a dispute as to the precise position that the Applicant held when he was first employed on 21 January 1983. In terms of the history sheet (Page one of R1), the Applicant was employed as a Service Bay Attendant. In Court the Applicant said that he was employed as a Service Truck Assistant. He told the Court that in 1998 he was promoted to the position of Stores Controller. He said at the time of his termination he was holding the position of Field Service Man. He said his duties involved waking up in the morning to service the company machinery and also filling the machinery with petrol or diesel. He told the Court that he was still performing those duties at the time of his retrenchment in June 2006.

12. The Applicant told the Court that his department was called Agricultural Engineering - Workshop. He reported to an Induna by the name of Simon Nhleko and the Head of Department was Mr. Oswald Magwenzi. He told the Court that Michael Ndwandwe was performing the same duties as he was. He said Michael Ndwandwe was employed in 1984 as a Truck Driver.
  
13. The Applicant was a member of the Union that was recognized and was operating at the Respondent's establishment by the name of SAPWU. From the year 2000 to 2002, he was the Branch Chairman. From 2002 to 2004 he was the Vice Branch Chairman. From 2004 to 2006 he was a Committee member. He was part of the Negotiation Team during the consultations that culminated in the retrenchments in June 2006. His main cause for dissatisfaction was that he was classified under a department that he did not work in. He said they were performing the same duties with Michael Ndwandwe and that they worked in shifts, Michael Ndwandwe resumed duty in the morning, he would clock-in in the afternoon.
  
14. During cross examination the Applicant agreed that his employment contract was the one that appeared in the Respondent's Bundle of Document at pages 5 to 6. That document showed that he was first employed by the

Respondent as a Service Bay Attendant. When this evidence was put to him, the Applicant told the Court that although it appeared in that document that he was employed as a Service Bay Attendant, he was however performing the duties of Service Truck Assistant.

15. Further, during cross examination the Applicant agreed that on 24 September 1987 he was moved to Service Bay. He also agreed that on 28 November 1991 he became a Storeman in the Tractor Pool Department. On 14 July 1993 he assumed the position of Fuel Clerk. The Applicant also agreed that he held the position of Fuel Clerk until 2004 when the Agriculture Fuel Department was closed. After that he was re-assigned to the position of Service Truck Driver which he held until his retrenchment in June 2006.
16. The Applicant conceded during cross examination that Michael Ndwandwe was on 11 January 1995 promoted to the position of Senior Handy Man in the Mechanical Section and was paid in terms of salary Grade B3. The Applicant agreed that his salary scale was Grade B2 which was lower than that of Michael Ndwandwe.
17. The Respondent led the evidence of RW1, Samuel Mabila. He told the Court that he was employed by the Respondent on 01 April 2000 as a

Workshop Manager. He was reporting to Mr. Oswald Magwenzi, the Engineering Services Manager. He said the retrenchments were as the result of the drop of the price of sugar and the Respondent decided to outsource some of the non-core business sections. He said these were; building department, tyre bay and the fuel department. He said during the consultative meetings that were held, the Applicant was present in his capacity as a shop steward. He said the tyre bay was outsourced to Bandag Tyres and the Fuel Department was outsourced to Shell.

18. RW1 told the Court further that as the Applicant was responsible for issuing fuel, his duties were going to be affected as they were going to be taken over by Shell. RW1 said the Applicant's position fell under the Tractor Pool Workshop. He said the Applicant was selected because he was under the Sections that were identified as non-core sections. He said Michael Ndwandwe was the first one to be employed in that Department. RW1 denied that the Applicant was selected because of his Union activities.
19. During cross examination RW1 told the Court that it was Management that recommended the Sections that were to be outsourced.

#### **ANALYSIS OF THE EVIDENCE AND THE LAW:-**



20. The economic rationale for the retrenchment exercise was not in dispute. The Respondent's evidence that there was a drop in the price of sugar in the world markets was not challenged by the Applicant. Dealing with the question of the need to restructure by an organization, the Court in the case of **Dumisa Lushaba v JD Group (PTY) LTD case number 210/2004**, stated the following;

*“This decision fell within the prerogative of the employer to restructure its establishment and to determine the size and character of its workforce in the manner most suitable for its requirements.”*

Even though it is the employer's prerogative to make the decision to restructure, the employee is however entitled to know the reason behind the decision so that the employee may be able to judge whether the decision to restructure is reasonable and bona fide. In the present application the commercial rationale for the restructuring was not questioned by the Applicant. The Applicant's main argument was that the Respondent disregarded Article 5.4 of the Memorandum of Agreement signed by the Respondent and the Union.

21. The Memorandum of Agreement was annexed to the Applicant's application and Marked **“Annexure A”**. Article 5.4 of this document provides that;

#### “5.4 RETRENCMENT PROCESS

*Due to the dictates brought about by the business climate within the sugar industry a number of jobs could be declared redundant. A sub-committee has been established to look at ways, inter alia, mitigating this impact. It is envisaged that this sub-committee should have finalized its deliberations by the end of June 2006.*

*Redeployed employees to vacant positions as existing in the complement would not be declared redundant as a result of their ex-workstations being affected by redundancy or outsourcing.”*

22. As already pointed out above, the Applicant’s main argument was that the Respondent disregarded Article 5.4 of the Memorandum of the Agreement. The Applicant stated in Paragraph 5.1 of his statement of claim that the Respondent “*declared the Applicant’s position of Field Service Man on basis of his ex-work station as a Fuel Clerk*”. It can to be safely assumed by the Court that by saying “*declared the Applicant’s position*” the Applicant in fact wanted to say “*declared redundant the Applicant’s position*”. The Applicant in his evidence in chief told the Court that at the time of his termination he was holding the position of Field Service Truck Driver. He told the Court that his Department was called Agricultural Engineering Workshop. He told the

Court that he was wrongly classified in the Respondent's list of the Departments earmarked to be declared redundant which led to him being unlawfully retrenched. He told the Court that he was not a Fuel Clerk, but Nathi Simelane whose name also appears under Workshop, was a Fuel Clerk.

23. During cross-examination the Applicant agreed that fuel was outsourced to Shell and thereafter to Galp. He also agreed that the person who was transporting the fuel therefore had no job to perform. He agreed further that service to the Respondent's field machinery was done by the Service Mechanic. When it was put to him that Michael Ndwandwe's position was Senior Handyman-Mechanic, the Applicant did not deny but only said he saw that for the first time in the document before the Court. The Applicant agreed that his position was not titled Mechanic.

24. Further, during cross examination the Applicant was referred to page 17 of "R1" being the minutes of the consultation meeting between the parties held on 04 May 2006. As part of the deliberations, the Management Representatives submitted as follows in paragraph 4;

*"With respect to the service truck, the management representatives stated that the selected fuel service provider (Shell) was going to take over the function of delivering fuel to machines in the fields. They added that the other function of*

*providing minor service to the machines shall be retained by the company and as such, the service mechanic would continue that function.....”*

25. As already pointed out, the Applicant did not deny that Michael Ndwandwe' s position was that of Senior Handyman-Mechanic. The Applicant also conceded that the function of delivering fuel to machines in the field was outsourced to Shell. There was no evidence before the Court that the Applicant was identified for retrenchment based on his ex-workstation as a Fuel Clerk. The evidence revealed that the Applicant was identified based on the position that he was currently occupying during the retrenchment exercise, that of service truck driver. His main duty as service truck driver was to deliver fuel to the company machinery working in the fields. That function was identified as a non-core function and was outsourced to Shell. The Court therefore rejects the Applicant's argument that he was wrongly retrenched based on his ex-workstation.
  
26. The Applicant also argued that he was unfairly retrenched because he was discriminated against on arbitrary grounds by selecting him and leaving his colleague Michael Ndwandwe with whom he shared the same position and responsibilities. **(See: paragraph 2.2.2 of the Applicant's heads of argument.)**

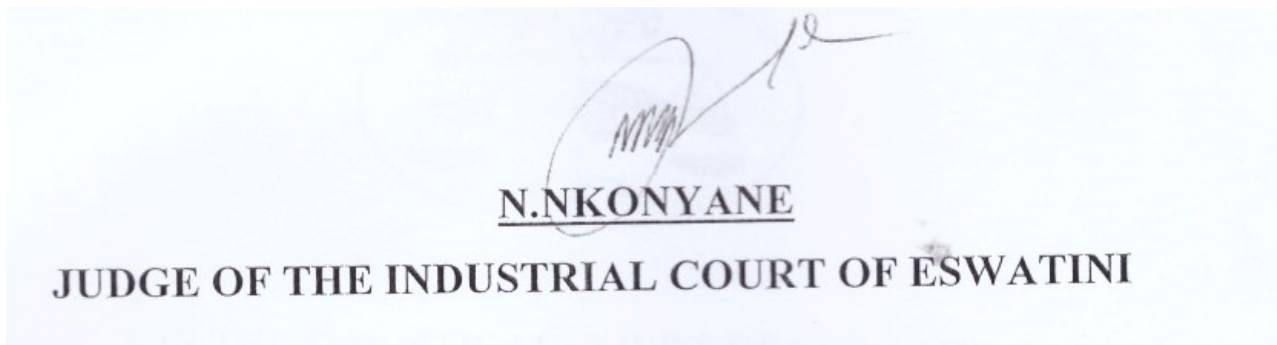
27. The Applicant's argument does not find support from the evidence before the Court. The evidence before the Court revealed the following;
- 27.1 The Applicant and Michael Ndwandwe were not holding similar positions. The Applicant's position was Service Truck Driver and Michael Ndwandwe was a Senior Handyman-Mechanic.
- 27.2 The Applicant's duties were to deliver fuel to the machinery in the fields, Michael Ndwandwe's duties involved doing service to the machinery.
- 27.3 Michael Ndwandwe had been in that Department earlier than the Applicant as he started on 04 October 1984 as Truck Driver.
- 27.4 The evidence revealed that the Applicant was on Grade B2 and Michael Ndwandwe was Grade B3.
- 27.5 Michael Ndwandwe remained because he had been in that Department longer than the Applicant and his job description was different from that of the Applicant and was on a higher grade than the Applicant. All this evidence was conceded by the Applicant during cross examination.
28. The Applicant's argument that he was discriminated against cannot therefore be sustained and it is accordingly dismissed.
29. The Applicant also argued that he was retrenched because of his union activities. There was no evidence that was led before the Court that showed

or suggested that the Applicant was identified for retrenchment because of trade union activities.

30. Taking into account all the evidence led before the Court, the Court is satisfied that the Respondent was able to prove on a balance of probabilities that the termination of the Applicant's services was for a fair reason. The Court is also satisfied on the evidence before it that the Respondent was able to observe all the standards and procedures necessary in a redundancy exercise in terms of **Section 40 (2) of the Employment Act No.5 of 1980 as amended**. The Court will therefore come to the conclusion that the termination of the Applicant's service was both substantively and procedurally fair and reasonable in all the circumstances. In the result, the Court will make the following order;

- a) *The Applicant's application is dismissed.*
- b) *There is no order as to costs.*

31. The members are in agreement.



For Applicant: Mr. A. Lukhele  
(Attorney at Dunseith Attorneys)

For Respondent: Mr. N.D. Jele  
(Attorney at Robinson Bertram)