

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 212/2011

In the matter between:-

SIFISO VILAKATI

Applicant

AND

SWAZILAND FRUIT CANNERS (PTY) LTD

Respondent

Neutral citation: *Sifiso Vilakati vs Swaziland fruit Canners (Pty) Ltd*
212/2011 [2018] SZIC 112 (October 12, 2018)

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

Heard submissions: 07/08/18

Judgement delivered: 12/10/18

SUMMARY---Labour Law---Dismissal on grounds of operational requirements---What the employer must prove for the dismissal to be regarded as fair.

Held---The employer must prove on a balance of probabilities that there was a genuine commercial rationale for the restructuring.

Held further---The employee is entitled to know the reason for the retrenchment.

JUDGEMENT

1. The Applicant is an adult female citizen of ESwatini and former employee of the Respondent. The Respondent is a limited liability company registered in terms of the Companies Law of the Kingdom of ESwatini, carrying on its business at Malkerns in the Manzini District.
2. The Respondent is part of the Rhodes Food Group of Companies. The Respondent is involved in the business of exporting fresh fruits and canned fruits. The Applicant started to work for the Respondent as Juice Line Controller. In 2007 there was an internal advertisement for the position of Trainee Packhouse Manager tenable at the Respondent's Citrus Estate which was based at Tshaneni. The position was also

advertised externally. The Applicant was appointed to the position on 03 September 2007 and she accordingly relocated to Tshaneni.

3. The Applicant remained in continuous employment until 09 March 2010 when her services were terminated by the Respondent on grounds of redundancy.
4. The Applicant thereafter reported a dispute to the Conciliation, Mediation and Arbitration Commission (“CMAC”) and claimed that her dismissal by the Respondent was unfair. The parties were unable to resolve the dispute by conciliation and a certificate of unresolved dispute was issued by the Commission.
5. The Applicant then instituted the present application in Court for determination of the unresolved dispute. The Applicant’s application was opposed by the Respondent which duly filed its Reply thereto.
6. In her statement of claim the Applicant stated that her dismissal was substantively and procedurally unfair because;
 - 6.1 There was no genuine, lawful and fair reason for the dismissal.
 - 6.2 The Respondent created a non-existent reason for redundancy and used it to get rid of her.

- 6.3 The Respondent purported to place the Applicant on fixed term contract after the dismissal which the Applicant worked for a few months and thereafter rejected it upon noticing that her position had been given to a foreign employee that the Applicant was instructed to train.
- 6.4 The Respondent failed to observe a fair retrenchment procedure.
- 6.5 The selection criterion used in selecting the Applicant was neither fair nor objective.
7. The Respondent in its Reply denied that the Applicant's dismissal was unfair. The Respondent stated in its Reply that;
- 7.1 There was a genuine reason for the termination of the Applicant's services in that the Respondent engaged in a restructuring exercise of the Swazi Can Citrus operations in an attempt to reduce costs and improve operational efficiency.
- 7.2 The Applicant was consulted prior to being declared redundant and applicant was invited to suggest alternative positions.

7.3 After consultations there was no viable alternative available and the Respondent had to terminate the Applicant's services and pay her all statutory benefits due.

7.4 The Applicant was thereafter engaged in terms of a fixed term contract for six months which the Applicant terminated by resignation.

8. The issues for the Court determine therefore are;

8.1 Was there a genuine reason for the redundancy/retrenchment?

8.2 Was a fair procedure followed by the Respondent when effecting the retrenchment process.

9. The Respondent told the Court that the Applicant's retrenchment was based on operational restructuring as a result of market or financial difficulties. It is a requirement of the law that the decision to retrench must be reasonable, made in good faith and that there must be a commercial rationale for the retrenchment.

(See: Phyllis Phumzile Ntshalintshali V Small Enterprise Development Company, case number 88/2004 (IC).)

10. The evidence before the Court revealed that Rhodes Food Group acquired the Tshaneni Citrus Estate in about 2005 from Inyoni Yami Swaziland Irrigation Scheme (IYSIS). The Packhouse Manager for the Citrus Estate was Mr. Jarvis Maluleka. Mr. Maluleka was about to retire hence the Applicant was employed as a Trainee Packhouse Manager with the intention of taking over the position from Mr. Maluleka.

11. From 2009 the Citrus Fruit business did not do well due to the global economic crisis which resulted in the going down of the price of citrus fruits in the world markets. The Respondent therefore had to take more fresh fruits to Malkerns for canning and juice production as opposed to selling them. The Respondent was making more money by selling the citrus fruits than selling fruit juice and canned fruits. The Respondent was therefore forced to consider engaging in a restructuring exercise. The Citrus Estate eventually closed down in 2011.

12. As a means to rationalize its operations and improve efficiency, the Respondent combined the Packhouse Manager position with that of Plant Maintenance and created the post of Operations Manager. The Applicant did not qualify for this position as she did not have Plant Maintenance experience.

13. A new person was appointed to the position of Operations Manager by the name of Izak Saaiman. Mr Saaiman possessed both Packhouse and Maintenance experiences.
14. Two consultation meetings were held with the Applicant. The Maintenance Manager, Mr. Claudio Martins, and the Packhouse Manager, Mr. Jarvis Maluleka were also consulted during the restructuring exercise. Their services were also terminated. During the consultations there was no alternative position for the Applicant that was identified and her former position at Malkerns had been filled. The consultations took place during the month of February 2010. Two options were put forward by the Respondent. One was to extend the Applicant's employment up to the end of August 2010 and thereafter take the retrenchment package. The reason for this was to observe if there would be any opening at Malkerns.
15. The second option was for the Applicant to take the retrenchment package immediately and then enter into a fixed term contract of six months. The Applicant opted for the second option. Whilst she was still working in terms of the fixed term contract, the Operations Manager, Mr. Izak Saaiman also resumed his duties. The Applicant was instructed to show him around or introduce him to the new working environment. The

Applicant was of the view that Mr. Izak Saaiman had come to take up her job. She felt that her retrenchment was unfair and a ploy to replace her. She therefore terminated the fixed term contract and reported a dispute based on unfair dismissal.

16. ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-

The evidence that the retrenchment exercise was due to the global economic crisis was not in dispute. There were, therefore, credible reasons for the retrenchment exercise. The Court therefore rejects the Applicant's contention that the Respondent created a non-existent reason for the redundancy. The evidence before the Court revealed that the Citrus Estate ceased operations in 2011 and the business was sold to RSSC.

17. The evidence before the Court revealed that the Applicant was consulted by the Respondent. The minutes of the meeting that was held on 24 February 2010 showed that alternative positions were considered but no suitable position could be found for the Applicant. (See:- page 14 of the Respondent's Bundle of Documents).

18. The evidence also showed that the Applicant appealed the Respondent's decision to retrenchment her by letter dated 17 March 2010. (See: page

6-7 of the Respondent's Bundle of Documents). The basis of the appeal was stated as being that there was no meaningful and objective consultation and that there was no genuine reason for the retrenchment. There was no evidence that the appeal was heard by the Respondent. Even if the Respondent did not respond to this letter by the Applicant at that time, before Court however the evidence showed that the Applicant was adequately consulted and that there was a genuine commercial rationale for the retrenchment exercise. The evidence before the Court showed that the separation of the parties was amicable and the Applicant was thereafter engaged by the respondent in terms of a fixed term contract for six months.

19. The main cause for concern by the Applicant as appeared from the pleadings and in Court was that a certain foreign national was hired to take her job. The evidence before the Court showed that the foreign employee was Mr. Izak Saaiman. The evidence also showed that Mr. Izak Saaiman was employed as the result of the Respondent's attempt to cut costs by fusing the two positions of Packhouse Manager and Plant Maintenance Manager. The Applicant did not have maintenance experience, hence Mr. Izak Saaiman was appointed.

20. From the evidence before the Court, it was clear that the reasons for the redundancy were not arbitrary or based on some ulterior motives. The abolishment of the Packhouse Manager's position was a reasonable and logical consequence of the fusion of the two functions of packhouse and maintenance at the Citrus Estate.

(See:- Dumisa Lushaba V JD Group (PTY) LTD, case number 210/2004 (IC).

21. The Applicant also argued that her termination on grounds of redundancy was procedurally unfair because she was not shown the financial statements of the Respondent. Although the financial statements were not produced in Court, however, the evidence that there was a financial downturn which impacted negatively on the Respondent's operations was not successfully challenged by the Applicant during cross examination of the Respondent's witnesses. It was also common cause that the Citrus Fruit Estate was indeed closed down in 2011 and all the employees were retrenched. The Respondent was not required to prove its case beyond any reasonable doubt. The Respondent was required to prove its case on a balance of probabilities.

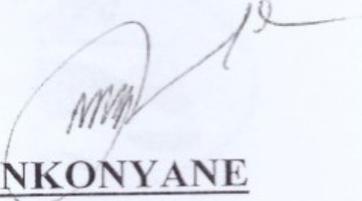
22. The Court therefore accepts the Respondent's evidence led before it and comes to the conclusion that the Respondent was able to prove on a

balance of probabilities that the termination of the Applicant was for a reason contemplated by Section 36 of the Employment Act No.5 of 1980 as amended and that it was therefore fair.

23. The evidence before the Court also revealed that the Applicant did accept the retrenchment benefits and thereafter signed the six months fixed term contract. The Applicant was not dismissed by the Respondent whilst she was engaged in terms of the six months contract. The Applicant terminated that contract herself by resignation.
24. As already pointed out herein, when the Applicant was terminated on grounds of redundancy the parties entered into a new employment contract. It was the Applicant that terminated the new employment relationship by resignation. The Applicant did not deny that she was paid all her terminal benefits when she was retrenched by the Respondent.
25. In the final result, the Court will come to the conclusion that the respondent was able to show on a balance of probabilities that it had a fair reason to retrench the Applicant and that the decision was reasonable and made in good faith. The Court will accordingly make the following order;

- a) The application is dismissed.
- b) There is no order as to costs.

26. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. S.M. Simelane.
(Attorney at Simelane-Mtshali Attorneys)

For Respondent: Mr. M. Sibandze.
(Attorney at Musa M. Sibandze Attorneys)