IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 275/2019

In the matter between:

MALCOLM BARLOW-JONES Applicant

And

FIDELITY SERVICES GROUP SWAZILAND (PTY) LTD 1st Respondent

MEYER JOOSTE 2nd Respondent

Neutral citation: Malcolm Barlow-Jones v Fidelity Services Swaziland (Pty) Ltd and Another (275/2019 [2020] SZIC 120 (11 September 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 02 July 2020

Date Delivered: 11 September 2020

[1] The applicant instituted proceedings against the Respondents by way of Notice of Motion seeking an order in the following terms:

"1. Ordering the Respondent to provide the Applicant through his attorneys with a breakdown of what was referred to in the pay advice as a retrenchment package.

2. Ordering the 2nd Respondent to cause and instruct the release of the payment for the Applicant's shares to the Applicant without further delay or condition.

3. Ordering the first respondent to pay to the Applicant monies in lieu of additional notice in the amount of E76 181.21.

4. Granting the Applicant further and/or alternative relief.

5. Ordering the Respondents to pay the Applicant's costs on the scale of between Attorney and own client as a sign of disapproval of the Respondent's conduct, the one paying, the other to be absolved."

[2] The application was opposed by the respondents who raised points *in limine* and further pleaded over, on the merits. The points *in limine* were argued and dismissed in May 2020 and the merits were set down for argument on 2nd July 2020. Before argument of the merits, the parties settled the issue pertaining to the release of the payment for the applicant's shares. The matter that remain for adjudication is that regarding additional notice. It is that matter with which this judgement is concerned.

[3] It is common cause that the respondent employed the applicant on 1st July 2003 and that he was in continuous employment until his retirement on 31st August 2019. On 8th July 2019 the respondent wrote to applicant referencing a meeting held in Johannesburg during May 2018 and reminding him that he had reached the age of retirement and that the respondent had decided to appoint a replacement. The letter advises applicant that he would be "expected to hand over all operations to Jan Ferreira as from 1 June 2019 to 31 August 2019, with your last day being Friday 30 August 2019. Applicant contends that this letter was the first formal notification given to him by the respondent that his employment would end on a particular date being the 31st August 2019.

[4] In his founding affidavit the applicant states that at the May 2019 meeting he was informed, for the first time, that the Respondent's retirement age was sixty-five (65) years of age. He was surprised because in the past the company had continued to employ people over the age of 65. He himself had reached the age of 65 in January 2018 but had been allowed to continue working despite that the Respondent was aware of his age. He was, in fact 66 years of age when he was told of the retirement age of 65 years of age.

[5] The applicant's attorney submitted that the first correspondence giving applicant notice of his retirement and the date of such retirement is the letter of 8th July 2019, which spelt out that his last day of work would be the 31st August 2019. Applicant sets out that he was entitled to additional notice of 90.4 days in terms of **section 33 (1) (c)** of the **Employment Act No. 5 of 1980**, less the 53 days notice given (calculated from 8th July). His total notice due was therefore 37.4 days *in liue* of which an amount of E76 181.21 was due.

[6] In its answering affidavit the respondents aver that the applicant was aware of his retirement as early as April 2019 since this had been indicated through correspondence dated 15th April 2019. The letter of 15th April 2019 merely advises the applicant that he has passed the retirement age and the consequences thereof. He was also being advised of his right to seek an extension. No date of retirement is set in this letter.

The respondents averred further that the meeting of 15th May 2019 also gave notice to applicant of his retirement in August 2019. The fallacy of this averment is the fact that the minutes indicate that the applicant was informed that he had two options – to retire effective end August with incentive and E50 000 or to retire at the end of December with no incentive and no R50 000 he was to make the election by the end of that

week. There being no unequivocal date of retirement set, this could not be said to have been notice.

[7] It is quite clear from the correspondence between the parties attached to the affidavits that the respondent decided to terminate the applicant's employ on the basis that he had reached the age of retirement. This happened approximately a year after the applicant ought to have retired. He was allowed to work beyond the retirement age of 65 and his retirement eventually came at the instance of the respondents and for the reasons they set out in the letter and in the minutes of 15th May 2019. Ordinarily when an employee retires there is no need for notice because the retirement age is known and the employee has reached such age. He would therefore not be entitled to any notice since he would have known that his employment would come to an end when he attained a particular age, as agreed. In casu, the respondents having allowed the applicant to work beyond the retirement age had to instigate the termination of the applicant's contract of employment and thus were obliged to give him notice in terms of **section 33** of the **Employment Act**. According to the said section, '*the minimum notice of termination of employment an employer may give an employee who has completed his probationary period of employment, and who has been continuously employed by that employer for more than one month shall be-*

(c) if the period of continuous employment is more than twelve months one month and an additional four days for each completed year of continuous employment after the first year of such employment.

[8] In the circumstances we cannot agree with respondents' attorney that the termination of the applicant's employment was by effluxion of time. We were further urged to consider that the applicant was paid an amount of R50 000 which was not due to him. In terms of the minutes of the meeting of 15th May 2019, the amount of R50 000 was to be paid to the applicant as some kind of incentive and to encourage him to take retirement in August as opposed to doing so in December. Although the applicant did not make an election to retire in August 2019, the respondent states in its letter of 8th July that the additional amount of R50 000 is a small token of appreciation for applicant's service and loyalty to the company. That being the case, it cannot be said that this amount must be deducted from the statutory additional notice, as it was never meant to constitute such notice. The obligation to pay notice in terms of **section 33** is statutory and parties cannot contract out of making such notice. We therefore come to the conclusion that the applicant is entitled to payment in lieu of notice as claimed.

[9] The applicant sought costs on the attorney and own client scale on the basis that the conduct of the respondents in resisting the application

bordered on perjury and extortion; that the deponents to first respondent's affidavits could not have genuinely and bona fide believed that applicant was employed in South Africa and not by first respondent, as they deposed. Further, that the second respondent's conduct was despicable in that the correspondence between applicant and the second respondent indicates that applicant was being extorted.

[10] In awarding costs on the attorney and client scale, the court has discretion to be exercised judiciously upon a consideration of all facts. As between the parties it is a matter of fairness to both sides. Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponents to be out of pocket.

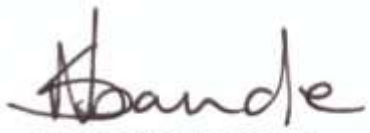
In casu, the respondents' conduct has been mendacious. This is particularly true of the 2nd respondent who appears, through his correspondence with the applicant, to have been hell bent on forcing applicant to abandon his claim. The withholding of the applicant's payment for his shares was without any merit whatsoever and appears to have been motivated by the second respondent's desire to fix the applicant for daring to seek to enforce his statutory rights.

In conclusion, the court is satisfied that this is a case where a punitive costs award is justified.

[11] In the premises the court makes the following order:

1. **The first respondent is ordered and directed to pay to the applicant the sum of E76 181.21 in lieu of additional notice due to applicant.**
2. **The respondents are ordered to pay costs of the application, on the scale as between attorney and own client, the one paying the other to be absolved.**

The Members Agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. Musa Sibandze (Musa M. Sibandze Attorneys)

For Respondent: Mr. H.N. Mdladla (S.V. Mdladla & Associates)