

CASE NO. P256/00

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

DATE 3.11.2000

In the matter between:

ANTHONY CROUCH

Applicant

and

KURLAND BRIK (PTY) LTD

Respondent

J U D G M E N T

LANDMAN, J:

[1] Mr Anthony Crouch was employed at the Port Elizabeth

office of Kurland Brik (Pty) Ltd (Kurland) as a regional manager with the sale of bricks being his principal function. He was appointed by Kurland in 1995 while his father-in-law, George Simpson, was a director of the company. During January 1999 the shares were transferred to Mr Clifford Alfie and Mr Graham Black, the former factory manager, who became the new managing director. Mr Simpson stayed on as a consultant and Mr Crouch remained in his position as regional manager, Port Elizabeth. I should add that although he was termed the regional manager he did not appear to have more than one employee reporting to him. Mr Crouch's salary at the date of the transfer of the shares had risen from R8 000,00 per month to R15 000,00 per month.

It was common cause that the Port Elizabeth office was breaking even at all material times. It was not, how-

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Judgment 1

ever, thriving. Mr Black thought that a target should be set for the Port Elizabeth/Jeffreys Bay region and

he set the target at 400 000 bricks per month. This target was not achieved. The target was lowered to 200 000 bricks per month. Even this was not achievable in the first half of 1999, owing in part to the depressed economy.

[2] During April/May of 1999 a meeting of directors was held at the Plettenberg Bay factory of Kurland. Mr Simpson, the consultant, was also present. It was decided that in order to increase profits, cost saving measures would be introduced in the P.E. operations. The Port Elizabeth office, which Kurland rented, would be closed. Mr Crouch was instructed to attend to this. Mr Crouch assumed that it was incumbent upon him, as the Port Elizabeth regional manager, to try and find free office space. He made various approaches to various companies but was unable to secure any free premises. Mr Crouch's endeavours to find office space was no doubt fuelled by his own views that it was not feasible for him to operate without an office. He was not able to operate from his garages at home as his wife conducted her business there.

[3] As at 19 August 1999 Mr Crouch did not have any clear instructions as to how he was to operate in Port Elizabeth. On 20 August 1999 Mr Crouch was informed by Mr Black that the Port Elizabeth sales office would be closed down. The way of doing business in Port Elizabeth would change. Mr Black again mooted, on that occasion, an earlier proposal that Mr Crouch convert to /....

a commission only basis. He fleshed out his proposal. He proposed that Mr Crouch be an agent selling Kurland's products on the following terms:

"Up to 200 000 bricks available for sale in P.E. area, a further quantity would be made available for products sold in J/Bay area. The commission on the sale of these bricks is set at 15% of gross sale value before VAT. To assist in setting yourself up in September Kurland Brik will pick up 100% of any shortfall between commission earned and costs incurred as laid out in P.E.199 spreadsheet. This period will also serve as a notice period for changes to your historical working conditions. In October 75% of shortfall, in November 50%, December 25%. From January 2000 only R & M on the bakkie will be paid by Kurland and at this stage there is no intention to replace that vehicle. Anthony I mentioned to you that you can use this offer for as long as you want and do not have to feel committed but if it works for you and you include J/Bay into the numbers I don't see why it should not. I would love to keep you on board.
Kind regards
Graham".

[4] Mr Crouch informed Mr Black that he was not interested in the commission option, principally because he was

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married, had a family and preferred the security of a monthly salary. He sent an e-mail to Mr Black expressing the hope that they could come to some mutually beneficial arrangement. On 25 August 1999 Mr Black fired a bolt out of the blue. He reviewed the history of the business and his expectations and Mr Crouch's position in the company since and subsequent to the sale of the shares. He expressed his disappointment that Mr Crouch did not want to accept the commission only option. He ended by saying that a clean break would be best for both parties. Mr Black concluded that Mr Crouch's position as Kurland's representative is on notice and will terminate on 30 September 1999. Mr Black admitted in his testimony that he had not mooted the possibility that Mr Crouch would be retrenched prior to his sending this e-mail on 25 August 1999.

- [5] After receiving notice of termination of his services Mr Crouch contacted Mr Black about the possibility of a retrenchment package. Eventually some monies were paid but this did not constitute severance pay. Mr Black maintains that Mr Crouch is not entitled to severance pay. Mr Crouch worked until 30 September 1999. He later sued in this Court for relief, alleging that he had been unfairly dismissed. At the commencement of the trial he made it clear that he did not challenge the substantive reason for his dismissal, save to allege that because the dismissal was in his opinion procedurally unfair, it meant that the dismissal could also be substantively unfair. Mr Crouch seeks the maximum com-

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Judgment 5

pensation permitted in terms of Sec 194 of the Labour Relations Act 66 of 1995 and his costs.

[6] Prior to 25 August 1999 Kurland consulted with Mr Crouch regarding the cutting of costs and, somewhat am-

biguously, about the future of the Eastern Province operations. However, this consultation was not done under the threat or shadow of an impending retrenchment. When the retrenchment materialised, no means of avoiding the dismissal were explored. The timing of the dismissal was not discussed. If it had been discussed, some accommodation as regards the preservation of the Christmas bonus or the October increase could possibly have been considered. The increase would also

have affected the question of the quantum of severance pay. There was no discussion of severance pay prior to the decision to dismiss Mr Crouch and no severance pay was paid thereafter. No proposals were made to mitigate the effects of the retrenchment. For instance, no time off was allowed to Mr Crouch to seek other employment or to rearrange his working life.

[7] I am aware that Kurland is a small employer and that according to JOHNSON & JOHNSON (PTY) LTD v CWIU [1998]

12 BLLR 1209 (LAC), Sec 189 is not to be approached mechanistically. I have also considered whether any of the activities of Kurland, which took place prior to the decision to retrench (which was in fact the date of

contemplation of retrenchment) should be taken into account. The primary purpose of the activities engaged into prior to 25 August 1999 was to save costs and to save the P.E. operations in the sense of making it more

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Judgment 6

profitable. Kurland's activities during this period had in effect been taken into by Mr Crouch because he accepts the economic rationale for the abolition of his post. I do not think that the events can be milked to achieve much more than this. Nevertheless, it could reasonably be expected of Mr Crouch to have made some counter-proposals about Mr Black's suggestions regarding a change to his position. But Mr Crouch's conduct is offset by Mr Black's failure, despite five invitations to do so, to inform Mr Crouch that his job security was in jeopardy.

[8] In the premises I am convinced that the dismissal of Mr Crouch by Kurland was procedurally unfair. I find it unnecessary to find if it was substantively unfair but I am willing to presume this to be the case.

[9] In terms of the JOHNSON & JOHNSON decision I am enjoined to consider whether I should award compensation, which in this case amounts to R180 000,00, which is an amount equivalent to Mr Crouch's remuneration, estimated conservatively in the absence of full details about his benefits, and not awarding him compensation at all. Mr Wilcox, who appeared for Kurland, urged me to make no award for the following reasons:

- (a) Mr Crouch immediately obtained other employment;
- (b) I should have regard to the actions of Kurland prior to the decision to dismiss Mr Crouch; and
- (c) it would be unfair to Kurland to order it to pay compensation.

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Judgment 7

Mr Kroon, who appeared for Mr Crouch, has urged me to award compensation to the fullest extent permissible in terms of Sec 194 of the Labour Relations Act. He submits that I should exercise my discretion against Kurland because:

- (a) of the gross nature of Kurland's disregard of its obligations in a retrenchment situation;
- (b) Kurland's failure to obtain advice as to how to retrench an employee fairly;
- (c) the fact that Mr Crouch was misled into believing that his position would not be made redundant; and
- (d) Kurland's high-handed attitude to the matter of severance pay.

[10] The considerations raised by Mr Wilcox must be viewed in the light of the rationale for awarding compensation for procedural unfairness. FRONEMAN, D J P in the JOHNSON & JOHNSON case at 1220B put it this way:

"The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who had breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some

form of redress. The party who committed

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Judgment 8

the wrong is usually not entitled to benefit from external factors which might have ameliorated the wrong in some way or other."

It follows that the fact that Mr Crouch obtained other employment is not a factor which I should take into

account. The actions of Kurland prior to the decision to retrench Mr Crouch have already been taken into account. To the extent that they still play any role they do not weigh heavily with me. If I were at large I would probably not award Mr Crouch more than six months' compensation but I do not have a discretion to order what is just and equitable. I am bound by the statutory formula.

[11] In the circumstances I find that Mr Crouch is entitled to his full compensation, even though in my view he is being over-compensated. However, to make no award would be more unfair towards Mr Crouch than it would be fair to Kurland.

[12] As far as severance pay is concerned, it is Kurland's contention that alternative employment was offered to Mr Crouch, that he refused this and therefore he is not entitled to severance pay. The payment of severance pay in this case is governed by Sec 41 of the Basic Conditions of Employment Act 75 of 1997. Sec 41(4) reads as follows:

"An employee who unreasonably refuses to accept the employer's offer of alterna-

tive employment with that employer or
any other employer, is not entitled to

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Judgment 9

severance pay in terms of sub-section 2."

In the context of the Basic Conditions of Employment Act
employment has a longstanding meaning. It does not
include work in the nature of an independent contract.

This is what was being offered to Mr Crouch. He was not being
offered alternative employment although
that may have been possible. In the circumstances
therefore Sec 41(4) does not apply in this case. Mr
Crouch is entitled to three weeks' severance pay.

[12] In the premises therefore the respondent is ORDERED to
pay to the applicant:

- (a) R180 000,00 as compensation for his
unfair dismissal;
- (b) R11 250,00 as severance pay;
- (c) Interest at the prescribed rate on
the amount mentioned in paragraph
(b) as from 30 September 1999 to
date of payment; and
- (d) The costs of this suit.

A A LANDMAN
JUDGE OF THE LABOUR COURT