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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS396/01

2001-10-24

In the matter between

NOMFUNDO MAYOSI

Applicant

and

WOMEN'S DEVELOPMENT FOUNDATION

Respondent

J U D G M E N T

LANDMAN J: Ms Nomfundo Mayosi was employed by the Women's Development Foundation as an advocacy and policy manager.

Ms Mayosi's case, as it appears from the pleadings, her letter to the Foundation of 19 December 2000 and her evidence in chief can be summarised as follows: On 15 December 2000, when the Foundation was to close down its operations for the December holiday, she was called to the office of the chief executive officer. A meeting was held and she was advised by the chief executive officer that she was being retrenched with effect from that day, ie 15 December 2000. No reasons were given as to why she was being retrenched. At the

conclusion of the meeting the CEO handed her a letter dated 15 December which contained the reasons for her retrenchment. Her retrenchment was necessitated by the deterioration of the Foundation's fund and the restructuring that had been going on from February 2000. She says that she was never consulted in regard to the deterioration of the funds or the restructuring exercise. She only became aware of the reasons for her retrenchment on 15 December 2000. Because the office closed there was no opportunity to make representations at that stage. On 19 December she drew up a letter which was sent to the Foundation in which she dealt with certain matters and made a demand that she be reinstated or paid compensation. The Foundation replied by 4 January 2001.

Ms Mayosi complains that her dismissal, which took the form of a retrenchment, was unfair. It did not comply with the section 189 of the Labour Relations Act 66 of 1995 and the relevant provisions of the Human Resources Manual of the Foundation.

During the course of her evidence Ms Mayosi also mentioned a meeting of staff members which was held on 12 June 2000. This meeting was held to respond to a strategy report which had been drawn up at the request of the Board. Ms Mayosi was one of the staff members present at this meeting. The meeting was addressed by Mr Zabala, who was, at that stage, the acting CEO. Ms Mayosi testified that neither the strategy report nor the presentation made by Mr Zabala to the staff members mentioned anything about retrenchment. After Mr Zabala had left the meeting, the staff drew up a written response. This was presented to the Board at a later stage. She says that the response did not deal with the possibility of retrenchment. So much for her evidence.

Mr Zabala gave evidence on behalf of the Foundation. His evidence is that the Women's Development Foundation is registered as a trust. It is dependent on

grants from the benevolent institutions and persons, particularly overseas donors, for financing its activities.

During February 2000 the Foundation realised that it had a serious financial problem. Part of the problem was that its funds were drying up. The Board of Trustees commissioned a strategy report in May. The report surveyed the activities of the Foundation, listed the Foundation's predicament, sought a way out of those difficulties and listed four possible options which the Board could take. One of these options was to close down the Foundation. However, the report recommended that the Foundation refocus itself. Paragraph 6 of the report explicitly records that "in this refocused WDF certain programs might have to be closed down."

Ms Mayosi and the other managers of the Foundation were shown the report and were asked to assist in presenting it to the staff in such a way as not to cause panic. Ms Mayosi admits that management met Mr Zabala and discussed various issues. But she says that none of these discussions touched on the question of retrenchments.

A meeting of the staff members was convened on 12 June, as I have outlined above. The written response presented to the CEO and the Board demonstrates that the staff showed great insight into the financial position of the Foundation. For present purposes it is necessary only to refer to certain portions of the response. Under the heading "Negative implications" it is said:

- "1. WDF's financial constraints. By December 2000 WDF will have a deficit of R500 000, excluding the salary of the CEO. The current funds will deplete in 2.66 months; and
 7. The possibility of having to close down certain programs in the refocused WDF."
- Under the heading of "Staff Conclusions and Concerns regarding the Implications"

it is recorded:

Staff jobs are on the line.

Retrenchment of staff is looming.

Drastic, timeous measures may hold retrenchments at least until the end of the year."

The image of WDF would be tarnished should retrenchments take place."

The response also dealt with the staff recommendations and I refer to four of them:

- "(i) Other options should be explored before a final decision is made on retrenchment.
- (ii) The consideration of trauma that goes with job losses, which also means the inability to carry existing family responsibilities. This would also add to the country's unemployment statistics.
- (iii) Appeal to avoid flashbacks of trauma experienced when trainers have to handle retrenchments of provincial facilitators and co-ordinators in 1999, it is a sense of first experience trauma and last experience trauma.
- (v) Should retrenchments become inevitable, to follow the WDF HR Manual on retrenchments (2.2)."

The response ends with the following conclusion:

"The staff is sad and moral is down. Although the resolutions of the document lead to the inevitable retrenchment, the staff wishes the Board to consider other options. However, in order to prepare psychologically for the inevitable, the staff would like to hear the final decision of the Board urgently."

It is unthinkable that anyone present and reading the response and indeed taking part in the preparation of this response, should not have understood that the Foundation was in dire financial straits and that retrenchments were in the

offering.

True, the approach adopted by the Board was an innovative one. But which took place in the true spirit of consultation and focused on possible solutions to avoid the looming retrenchment. It was a sort of socratic method which caused the staff to investigate the problem and draw their own conclusions, conclusions which proved to be very accurate. Moreover it was a process which took place within the ethos of the Foundation which was to empower women, including the members of staff who are all women, save for the acting CEO, Mr Zabala.

The retrenchment of some 5 or 6 members of staff followed on the meeting of 12 June 2000. *Prima facie* their retrenchments were not in accordance with the HR Manual, but that does not affect the case of Ms Mayosi.

Mr Zabala said that in July when Ms Mayosi returned from a field trip, he discussed her position with her. He says she was told that funds for her program on local government would run out in December and her program would be closed. In the meanwhile she was asked to take on extra work. She would be paid a bonus for this. Her employment would cease at the end of December 2000. I may mention that the bonus was in fact paid to her by the new CEO. In the letter of congratulations mention is made of Mr Zabala's promise.

Mr Zabala's version of the discussion in July 2000, although it appears in the Foundation's statement of response, was not put to Ms Mayosi while she was giving evidence. For that reason I cannot take it into account. She has not had an opportunity to deal with it. However, it is clear to me that she was fully aware that the funds for her program were expected to be exhausted by the end of December. I find that the funds were so exhausted when December arrived. I do not accept her evidence to the contrary. I cannot explicitly find that she was advised that her retrenchment would come about in December.

The Board did not comply with the HR Manual in several respects. It is perhaps necessary to refer to a few of them. She was not given an opportunity to argue that she had special skills and that she should keep her job. Nothing was said about the skills of Ms Mayosi, vis-à-vis the other person who had lesser service and who was not discharged from service. Ms Mayosi was not given three months' notice prior to the effective date of her retrenchment. She was not given an opportunity to address the Board. She was not given time off to seek other employment.

The result is that I find that Ms Mayosi's dismissal was procedurally unfair. This could mean that there is a likelihood that it was also substantively unfair. But taking all things into account, the chances are so remote in the circumstances of this case, that it can safely be said that her dismissal was substantively fair.

An employee who has been unfairly dismissed without the proper procedures having been followed, is not entitled to re-instatement. The employee may be awarded compensation. The compensation, if it is awarded, must adhere to the statutory formula. This means that in a case of Mayosi she would be awarded, at least, compensation from 15 December 2000 to 23 October 2001, a period of slightly more than 10 months.

However, in terms of *Johnson & Johnson (Pty) Limited v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) the Labour Appeal Court held that this court has a discretion whether or not to award the whole amount of the compensation or none at all. This is a discretion which must be exercised judicially. The case also pointed out that the purpose of compensation for a procedural irregularity is to award a *solatium* to the injured employee for the loss of a procedural right.

In *Lorentzen v Sanachem (Pty) Limited* 1999 8 BLLR 814 (LC) at 819-B I had occasion to say:

"I agree that the test would require one to ask what fairness demands, but taking into account the interests of the employee and employer. But I do not think that the remainder of the test falls within the logic of *Johnson and Johnson* decision. Certainly not the *solatium* must be addressed to weigh up patrimonial loss against the *solatium* is illogical"

The reference here was to an observation by Dr Grogan "*All or Nothing Compensation for unfair Dismissal*" 1999 **Employment Law** 487.

In the *Johnson and Johnson* case, one of the factors that weighed heavily with the court was the fact that an attempt had been made to redress the procedural irregularity. The employer offered to reinstate the employees concerned.

In my opinion the following factors appear to be relevant in this case: Ms Mayosi knew that her days at the Foundation were numbered and that at the end of December there would be no funds for her project. Thus the failure of the Board to follow a procedure, although lamentable and unexplained, must be weighed up against the inevitable retrenchment. I accept that the absence of a procedure and especially advanced notice of the kind referred to in the HR Manual, i e, three months' notice, would have come to her as a shock. Certainly on 15 December it came as a shock. No explanation was offered as to why she was not informed that this was to happen on that date. It is incomprehensible that the Board did not, at any stage between June and 15 December 2000, say to her: "Let us give you a progress report. We have found no other funding and you know that this means that you will be leaving us at the end of December."

This would have been very easy to do.

Was there an attempt to compensate Ms Mayosi for the failure to comply

with the notice requirement? I refer to the three months' advanced notice of the impending retrenchment. Ms Mayosi was paid three months' salary, which is described in the letter of termination of 15 December 2000 as a "severance package." But it is common cause between the legal representatives that this was not a severance package, mainly because the letter goes on to deal with severance pay of two weeks per year, which is the severance pay provided for in the HR Manual.

The representatives were asked to make further submissions in regard to the meaning of the "three months" salary referred to in the letter. They were *ad idem* that it relates to paragraph 2.2.5 of the HR Manual. In other words when Ms Mayosi was dismissed, she was given three months' salary as some sort of compensation for the failure of the Board to comply with their procedures. It does, however, then appear to be clear that the dismissal of Ms Mayosi was a summary dismissal. She was not given eight weeks notice, which paragraph 2.3 of the HR Manual provided for in the case of resignation. This, of course, would also apply in the case of her dismissal by the Foundation.

It may be that the dismissal was also a wrongful dismissal and the question is would it be fair. Does it go to the procedure of the substance of a dismissal? These questions need not be answered in the light of my finding above and of the fact that the applicant relied on an unfair dismissal and not on a wrongful dismissal. Of course she may still have a claim in regard to the eight weeks salary, but I need not pronounce on it.

Taking all the circumstances into account, particularly that Ms Mayosi was a senior manager, that she knew what was happening and that she had received three months' compensation for the lack of the advanced notice, I am of the opinion that no compensation should be awarded.

In the result, although I find Ms Mayosi to have been unfairly dismissed, I make no order as to compensation and I make no order as to costs.

A A Landman

Judge of the Labour Court of South Africa

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