

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS864/02

Heard on: 2003-09-04

Delivered on: 2003-09-04

In the matter between
B MCKONIE

Applicant

and

MINEWORKERS DEVELOPMENT AGENCY

Respondent

J U D G M E N T

PILLAY J:

1. In this disputed retrenchment the applicant was employed initially by Etaleni Central Buying Agency (Etaleni). A forensic audit undertaken and completed on or about 26 October 2001 of Etaleni confirmed that there was wide spread financial and administrative mismanagement. The board of the respondent, the Mineworkers Development Agency (MDA) and the sole shareholder of Etaleni resolved *inter alia* to transfer all the latter's assets and liabilities to the MDA, write off its debt and that Etaleni would cease to trade.
2. In January 2002 the principle funders of the MDA, namely the Department of International Development (Southern Africa) (DFID) a British funding agency, undertook a review of the MDA and found *inter alia* that the MDA was unlikely to realise its objectives. A change of strategy was required and various other proposals were made in that regard. The funding by DFID was also to terminate by March 2004.

3. The staff of the MDA was reduced from about 70 to about 15 currently. This reduction occurred over a period of two years. The new strategic focus of the MDA was to play a facilitating role rather than to be a deliverer of services to its clients or users. Against this background there was no serious challenge by the applicant to the substantive rationale for the need to retrench.
4. Her case is based on the following:
 - There was no proper consultation.
 - There were no selection criteria such as last in, first out (LIFO) or first in first out (FIFO) followed.
 - She was the only person retrenched.
 - She was promised a job and position with MDA in 2001 by the then CEO, Kate Phillip.
 - The MDA did not consider the past service that she had rendered.
 - It had employed people after her retrenchment.
 - Her qualifications were not considered.
 - The alternatives she proposed to retrenchment were rejected.
5. As to whether there was a promise of employment in 2001, it is quite clear from the communications between the parties and in particular from Miss Kate Phillip, that the promise in so far as it existed, was not to transfer or retrench the applicant when Etaleni closed down. That promise was fulfilled as she was retained by the MDA for almost a year after the closure of Etaleni.

6. Even on her own version the promise to be retained in MDA's employment does not and could not possibly have implied that she had lifetime employment with the MDA. The life span of the MDA itself is dependent on donor funding and she could not reasonably have inferred that there will be such employment for her.
7. The applicant denied any knowledge of the restructuring and reasons for the decision to close down Etaleni. Her statement of claim and other communications proved otherwise. Several e-mails to her confirmed that there was a need to restructure as a result of the losses sustained by Etaleni. It was also not disputed that Etaleni had become insolvent by 2001.
8. That she was the only person retrenched at the time is not surprising. She was the only person employed as a bookkeeper by Etaleni. Furthermore, on her own version she was not doing any work as from July 2001. This admission made in the pre-trial conference is born out by various communications which appear in bundle A and the applicant's pleading.
9. She was not able to refute the evidence of Mr Mphaka for the MDA that when he arrived at the MDA in March 2002 he had found that she was not performing any functions. As far as the consultations are concerned it is manifest from the communications that the applicant was aware that her position was redundant as she was not performing any functions July 2001. This is confirmed in an E-mail by her of 22 November 2001, document A16.
10. There were several discussions with her which formally commenced on 27 March 2002 that led to her eventual retrenchment in June 2002.

During that period she was given an opportunity to make proposals to avoid the retrenchment. The proposals she made were rejected for reasons set out in document A73(C). This is a record kept by the applicant of the MDA's responses to her proposals. She has not advanced any evidence in this court or counter offered any further proposals to the MDA. I cannot, therefore, conclude that the MDA's rejection of the proposals alternative to retrenchment were unreasonable.

11. During the consultation phase applicant was also offered alternative positions. There were three of them, one of which meant relocating to a place about a thousand kilometres out of Johannesburg. However, the other two positions which the applicant did not mention in her evidence in chief, but which was drawn out in the cross-examination, were positions within Johannesburg although they involved some travelling away from the Johannesburg offices. These were the positions of trainer and sales representative.

12. In the circumstances, I cannot find any basis on which the applicant could seriously suggest that the respondent did not take every reasonable step to avoid her retrenchment.

13. The MDA did advertise for new posts this year. There is no evidence from the applicant that she applied for any of those posts. In fact, the evidence from Mr Mphaka is that he had not seen an application from her.

14. The applicant is currently employed. She was paid severance pay at the rate of two weeks per year of service which is above the statutory minimum. She was also paid a further *ex gratia* amount of R5 000,00. Although the MDA required her to sign an acknowledgement of the latter

payment as acceptance of a voluntary severance package, it did not insist on her doing so when she refused. She nevertheless received the amount of R5 000,00.

15.It appears to me that the MDA went out of its way to ameliorate the hardships occasioned by the retrenchment of the applicant. It must be remembered that it is itself a publicly funded entity and is accountable for its expenditure and performance to its funders.

16.In the circumstances, I find that that the applicant's claim must be dismissed.

17.However, there is a question of costs including those incurred in previous appearances in this court. I agree with the witness Norton for the MDA that the applicant's case was wholly frivolous and vexatious. Her claim in this court that she believed in the organisation and was concerned for its welfare rings hollow having regard to the way in which she has pursued this claim and the circumstances in which she has done so.

18.I have no hesitation, therefore, in awarding costs against her, including the costs reserved on 6 February 2003 and 8 and 9 May 2003.

19.The order I make therefore is the following:

The claim is dismissed with costs, including the costs of 6 February 2003 and 8 and 9 May 2003.

Pillay D, J
14 October 2003

Appearing for Applicant: PERSONALLY
Appearing for Respondent: CHEADLE THOMPSON AND HAYSOM

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