IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Not reportable
Case No: JS 565/08

In the matter between:

V NAIDOO	Applicant
and	
MB TECHNOLOGIES (PTY) LTD	First Respondent
M B T SERVICES (PTY) LTD	Second Respondent
ADVANCED CHANNEL TECHNOLOGIES (PTY) LTD	Third Respondent
TARSUS TECHNOLOGIES (PTY) LTD	Fourth Respondent
GLOBAL OUTSOURCING SERVICES (PTY) LTD	Fifth Respondent
CHANNELWARE (PTY) LTD	Sixth Respondent
M B T INVESTMENTS (PTY) LTD	Seventh Respondent

Date of Hearing: 14, 15, 16 March and 4 May 2011

Date of Judgment; 26August 2011

JUDGMENT

GUSH J.

1. The applicant was employed by the second respondent on 1 December 2006. On 25 April 2008, the applicant was given a letter terminating her services with the

second respondent for operational reasons with effect from 31 July 2008 on the grounds that her position with the respondent had become redundant.

2. The applicant claims that the reason for her dismissal was automatically unfair on the grounds of discrimination alternatively both substantively and procedurally unfair as it was not effected in accordance with section 189 of the Labour Relations Act (LRA)[1] and seeks an order declaring it to be so. The applicant claims fair and reasonable compensation arising from her unfair dismissal. In addition, the applicant claims the payment of an amount of R18,600 in respect of an unpaid bonus.

3. The respondents opposed the matter on the grounds that the position to which the applicant was appointed viz. Manager-Special Projects had become redundant and that it had followed a fair procedure in effecting the termination of her employment for operational reasons. (The respondents abandoned their special plea that the applicant had agreed to be retrenched). In addition, the respondents denied that the applicant was entitled to the unpaid bonus but agreed the quantum of the bonus which had not been paid to the applicant.

4. The applicant agreed to start and only the applicant gave evidence in support of her claim. The respondents led the evidence of a Mr Leo Baxter, who at the time of the applicant's employment was the CEO of the respondents' group of companies, and the group's financial director Mr Glenn Fullerton.

[1] Act No. 66 of 1995.

5. At the time that the applicant was offered employment by Baxter, she was employed by South African Breweries as a trainee manager. The applicant, a chartered accountant, had been introduced to Baxter who had been impressed by her. Baxter had met with the applicant on a number of occasions and had arranged for her to meet the respondents' senior managers. This process had led to her being employed.

6. The applicant gave extensive and detailed evidence regarding the discussions she had had with Baxter leading up to her employment and what she understood to have been offered to her. What was clear from the applicant's evidence was her understanding of what she had been offered was unrealistic. She seemed incapable of distinguishing between the discussions she had had with Baxter and the actual offer of employment that was made. Suffice to say that the applicant was employed by the 2nd respondent on the strength of a written contract of employment "in the position of Manager-Special Projects". Her evidence regarding what she understood or believed Baxter to have offered her in the discussions leading up to the formal offer of employment and her signing of the formal contract of employment was largely relevant only in the sense that it explained the background to why the relationship between the applicant and the respondents soured.

7. Baxter, whose evidence the applicant conceded, was forthright and honest, explained in detail the contents of his discussions with the applicant and the extent of

his undertakings to the applicant regarding her employment. Baxter made it clear in his evidence that he had been impressed with the applicant's qualifications and that as the respondent was "embracing transformation" employing the applicant and grooming her for a senior role "if not the most senior role" fitted in with the respondents plans. He candidly admitted that he had actively sold the idea of working for the MB technologies group of companies on the strength of the opportunities it offered to the applicant and that he had thereby "induced" the applicant to resign from her position with SAB and accept employment with the respondents' group of companies.

8. What was abundantly clear however from the evidence of both Baxter and the applicant, was that she was employed in accordance with a written contract of employment which although it described the applicant's job as "Manager-Special Projects" that the intention was to mentor the applicant with a view to her progressing to a senior position within the group. Crucially in response to the proposition that the applicant's role had not become redundant, during his cross examination,, Baxter agreed.

9. Although the applicant averred that her dismissal was automatically unfair for reasons of discrimination I am not satisfied that her evidence established this. The applicant averred that as one of the reasons for her appointment was to promote transformation by terminating her employment, the termination was automatically unfair on the grounds that the respondents' had discriminated against her.

10. The matter therefore involves an assessment of the circumstances surrounding the applicant's dismissal by the respondent for operational reasons and specifically whether the applicant's dismissal was for a fair reason, in accordance with a fair procedure and in compliance with section 189 of the LRA.

11. It became abundantly clear during the evidence of both the applicant and the respondents' witnesses that the relationship between the applicant and the respondent had soured for a number of reasons. The most notable of these reasons appeared to be the applicant's unrealistic expectation she believed had been offered to her and what was expected of her once she was employed. The applicant was dissatisfied *inter alia* with having to perform an internal audit function, complained of not having been mentored as she expected, was of the opinion that Baxter had offered, but had not sent her to study at Stanford university in the USA and that she had felt out of her depth at the board meetings she was expected to attend. It became clear during her evidence however that the applicant expectations if not unrealistic certainly did not coincide with what the respondents' expected of her. During the evidence however it became clear that the applicant did not make the effort to seek assistance from her fellow board members before meetings. What the applicant did make abundantly clear during her evidence was that she was extremely unhappy and that by the time the so called retrenchment consultations commenced, the employment relationship was doomed. The applicant during her evidence confirmed that the relationship had soured and that she had met with Baxter after his accident to explain "how unhappy"

she was In fact during her cross examination the applicant conceded that the relationship had become intolerable.

12. The crisp issue however given that the respondents' stated reason for termination the applicant's employment was that her position had become redundant is whether the respondents' reasons for retrenching the applicant were fair, whether the procedure adopted was fair and whether there had been compliance with section 189 of the LRA.

13. In this regard, taking into account the evidence regarding the redundancy of the applicant's position, the evidence of the respondents' second witness the group's financial director, Mr Glenn Fullerton, is decisive. Counsel for the applicant submitted that Fullerton's evidence was unsatisfactory. I agree. Not only was Fullerton at times evasive but his version of the events surrounding the purported consultations was at times fanciful at best. For example, regarding the subsequently (and appropriately) abandoned special plea, Fullerton persisted in endeavouring to explain his interpretation of the so-called minutes of the consultation meetings and his recollection of what transpired therein and therefore justify the conclusion that the applicant had not only agreed that her position was redundant but that she had in fact agreed that her contract of employment be terminated and that the respondent had followed a fair procedure.

14. In his evidence, Fullerton maintained that the reason for embarking on the retrenchment exercise was that the applicant's job viz "Manager-Special Projects" had become redundant in that there were no special projects requiring the applicant's attention in the future. Unfortunately for Mr Fullerton, this evidence was not only in direct contrast with the evidence of the applicant but also with the evidence of Baxter. That being so, the stated reason upon which Fullerton and accordingly the respondents relied for terminating the applicant's employment was in fact not the reason at all.

15. The sequence of events which led to the applicant's dismissal were as follows:

15.1. On 20 March 2008, Fullerton and the group CEO McGregor addressed a letter, purporting to comply with the provisions of section 189(3) of the LRA to the applicant advising her of her possible retrenchment. The letter advised the applicant *inter alia* that she had been employed primarily to perform an internal audit function and in addition to attend to *ad hoc* special projects from time to time. The letter went on to advise the applicant that the "law " precluded a "main board director" from performing internal audit function and that her role as acting financial manager of the 3rd respondent was no longer available as it had been filled permanently. It also suggested that he applicant had declined to take on this position permanently.

15.2. This was followed by meetings on 31 March 2008, 9 April 2008 and 22 April 2008. At the meeting on 22 April 2008, matters reached an

impasse. Fullerton advised the applicant that there had been a breakdown of trust and that she was to hand over the companies' property and leave the premises. The applicant left escorted by the respondents' human resources manager (Bettencourt) to applicant's office from whence she left the premises.

15.3. After each meeting, Fullerton purported to prepare minutes of the meetings. In the case of the minutes of the meeting of 31 March 2008, they are not signed. The minutes of 9 and 22 April 2008 are both signed by Fullerton and Bettencourt but not by the applicant. Somewhat bizarrely what purports to be a minute of the meeting held on 22 April ends with a description of the applicant leaving the meeting, being accompanied by Bettencourt to her office and includes comments regarding what supposedly happened there.

15.4. On 25 April 2008, the respondents' attorneys addressed a letter to the applicant headed "Notice of Termination of Employment with MBT Services (Pty) Ltd" in which letter the applicant was advised that the 2nd respondent intended terminating the applicant's employment for operational reasons and gave her three months notice that her employment would terminate on 31 July 2008.

16. During their evidence, both Fullerton and the applicant gave extensive evidence of the breakdown of the relationship between applicant and the respondents' senior management. This evidence included accusations by the applicant that she had

been marginalised and left to her own devices and evidence by Fullerton that the applicant was perceived as being lazy and out of her depth. Both the applicant and Fullerton referred to meetings they had had late in 2007 and early 2008 where both parties dissatisfaction had been expressed and discussed. Fullerton insisted that the applicant had directly expressed her desire to leave the respondents' employ whereas the applicant insisted that she had not. Neither version was entirely plausible and suffice to say that what was clear was that neither party was happy with the other and that the relationship was doomed.

17. However in, in justifying the decision to retrench the applicant, Fullerton relied heavily on the appointment of the applicant to the position of acting financial manager of the 3rd respondent and her supposed refusal of an offer to take up the post permanently. This according to Fullerton was one of the main reasons why it was necessary to retrench the applicant in addition to the supposed drying up of special projects. Apart from denying that the post was formally offered to her, the applicant in addition explained that she had not been employed to become a financial manager but was employed to be mentored and trained, a conclusion justified by the evidence.

18. Despite the extensive evidence led in this matter, the simple issue that the Court is required to decide is whether the reason given by the respondents' Fullerton and McGregor for retrenching the applicant was a genuine or fair reason and whether the procedure adopted by the Fullerton which lead to the applicant's dismissal was

fair. The breakdown of the relationship is only relevant to the issue of compensation should it be found that the dismissal was substantively and/or procedurally unfair.

19. What is clear from the evidence is that the applicant had been employed in order to be mentored and trained for a senior position in the respondents' group of companies. The terminology used in the contract viz "special projects" was explained by the applicant although considerably embroidered. Baxter however, candidly and lucidly corroborated the essence of the applicant's evidence concerning the nature of her employment. In particular, he clearly and unequivocally stated that the applicant's position had not become redundant. This evidence stands in stark contrast to Fullerton's disingenuous attempts to try and persuade the Court that due to the absence of any special projects in the near future the applicant's role had become redundant and that in any event the applicant had agreed that her dismissal for operational reasons was fair both substantively and procedurally.

20. I am in no doubt that the real reason for the applicants retrenchment was the fact that her employment had not turned out as it had originally been envisaged. This was due in equal measures to Baxter's accident which essentially took him out of the picture, the reluctance of Fullerton and McGregor to embrace his intentions regarding the applicant's employment and the applicant's unrealistic expectations of the job and her failure to apply herself.

21. It is so that had the matter been approached differently by Fullerton the issues could have been amicably resolved. The applicant both in her evidence and in documentation did indicate that the employment relationship had become intolerable and that was prepared to consult with the respondents' in an attempt to resolve the issues.

22. The record of the consultation process and the evidence of both the applicant and Fullerton suggest at the very least that it was prematurely concluded and that the required meaningful joint consensus seeking process had not been exhausted. In the so called minute of the final meeting, Fullerton recorded that he believed that the applicant's suggestion that the company deal through her lawyer constituted a breakdown of trust and that she was to hand over the companies' property and leave the premises. This was followed by the letter of termination addressed to the applicant by the respondents' attorneys. Given these circumstances and those dealt with above, it cannot be said that the applicant's dismissal was procedurally fair or in accordance with the provisions of section 189 of the LRA.

23. I am accordingly satisfied that the termination of the applicant's employment was neither substantively or procedurally fair.

24. Where an applicant seeks compensation for an unfair dismissal, the Court must exercise its discretion to determine what compensation would be "just and equitable in

all the circumstances".[2] I have taken into account the parlous state of the employment relationship between the applicant and the respondents and the issues discussed in the meetings between the applicant and the respondents' management prior to the commencement of the retrenchment process, the reasons given by the respondents why the applicant was no longer required (the so-called operational reasons), the procedure adopted by the respondents leading up to the applicant's dismissal and the retrenchment benefits paid to the applicant on her termination. I am of the view that compensation of an amount equivalent to six months remuneration is just and equitable in the circumstances of this matter.

25. As regards the issue concerning the bonus, on 31 May 2007, Fullerton advised the applicant that she would be paid a bonus for the year ended 28 February 2007 but despite her having commenced her employment on 1 December 2006, she was to receive a prorated bonus for two months (January February 2007). Fullerton's explanation for not taking into account December 2006 was that the applicant had not made a contribution to the respondents' performance during her first month. Unfortunately for the respondents Fullerton's email notification that the bonus was to be paid refers to a "contracted annual bonus". The bonus was to be paid "on achievement of performance criteria as set by the ... directors. The criteria will be communicated and agreed upon by yourself". This was not done and the email does not suggest in any way that the applicant had not met a "performance criteria". There

[2] Section 194 of the LRA.

is according no reason why the applicant should not be paid the unpaid bonus in the agreed amount of R18,600.

26. In the circumstances, I make the following order:

26.1. The termination of the applicant's employment by the 2nd respondent was unfair;

26.2. The 2nd respondent is to pay to the applicant compensation in an amount equivalent to six months remuneration;

26.3. The 2nd respondent is to pay to the applicant an amount of R18,600 in respect of the unpaid portion of her bonus;

26.4. The 2nd respondent is to pay the applicant's costs.

GUSH J

Appearances

For the Applicant : Adv Sniders instructed by

Instructed by : Perrot Woodhouse Mtyolo Inc

For the Respondent: M. T Mills; Cliffe Dekker Hofmeyr Inc