

SOUTH AFRICA / JUDGMENT

Maloney v Gentravel (Pty) Ltd (J4080/98)

[1999] ZALC 120 (13 August 1999)

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COURT

Labour Court

BEFORE

Kennedy

CASE / FILE NUMBER

J4080/98

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J4080/98

In the matter between:

MALONEY, D Applicant

and

GENTRAVEL (PTY) LTD Respondent

J U D G M E N T

KENNEDY, AJ:

[1] The applicant's services with the respondent were terminated for operational reasons during September 1998. She brings this

application to challenge the fairness of her retrenchment on the basis of a failure to comply with section 189 of the Labour Relations

Act, No. 66 of 1995 ("the Act") and she seeks compensation in terms of section 194 of the Act. She does not seek reinstatement.

[2] Applicant was employed by Keyser and Gentry in 1986. Due to a merger and other restructuring of the

organisation the respondent became her employer from

approximately September 1995. At the time of her retrenchment the applicant was the manager of the respondent's Sandton branch dealing with retail travel business and her office was based in Woodmead. Also based in Woodmead was another division of the respondent known as Transworld. That was operating under the management of Ms Debby Duncan. Transworld was also involved in the travel business but specialised in group tours and conferences.

- [3] Evidence of both the applicant as well as the respondent's only witness, its financial manager, Mr Eric Wasserman, showed that the company was experiencing financial difficulties over a substantial period. Both the Sandton retail branch under the applicant as manager and the Transworld Division under Ms Duncan as its manager, were during most months incurring substantial losses. During the 14 month period which ended on 28 February 1998 the company as a whole incurred losses of approximately R6 million.
- [4] Senior management decided to take remedial action. Accordingly, during July 1998 the Board of Directors met and approved the restructuring of the company on the basis that the Sandton retail branch and the Transworld division should be merged.

The main objective of this restructuring was to save costs, in particular personnel costs which represented approximately 70% of the division's operating costs. Apart from other savings and economies the merger of the two divisions would result in dispensing

with certain staff positions including one of the two positions of managers of the respective divisions.

- [5] A few weeks later, during August 1998, the three executive directors, namely the managing director Mr

Nel, the financial director Mr Wasserman and the marketing director Ms Hunter, took steps to implement the Board's decision. The three executive directors decided that Ms Duncan should be appointed to manage the newly amalgamated division created by the merger of the Sandton retail branch and Transworld. They decided this, according to the evidence of Mr Wasserman, on the basis that although Ms Duncan had less service with the company than the applicant, namely five years compared with the applicant's 13 years service, the applicant had experience only in retail travel and not group tours and conferences whereas Ms Duncan had experience in both areas.

- [6] It is common cause that the applicant was not notified in advance that the directors had taken or were contemplating the decisions, that is firstly, the

decision to merge the two divisions and secondly, the decision to appoint Ms Duncan in preference to the applicant to manage the new entity. It is also common

cause that the decisions were not preceded by any discussions with the applicant and she was not given any opportunity to influence the taking of those decisions. Furthermore, Mr Wasserman conceded that once these decisions were taken they were final. The applicant was not given any opportunity to seek to have them reviewed or changed. Indeed, the directors would not have considered any reversal of those decisions and they were not amenable to reopening the issues.

[7] There was a delay in notifying the applicant of these decisions due to the fact that the applicant's father

was seriously ill at the time and subsequently passed away. The applicant was granted a week's compassionate leave at the time of his death.

[8] On the morning of her return to work, namely on 17 September 1998, the applicant was called to a meeting with Mr Nel and Mr

Wasserman. They decided that they could not delay any further the implementation of the Board's decision to merge the two divisions and the executive directors' decision to appoint Ms Duncan to head the new operation. Nel informed the applicant of these decisions. She did not immediately respond as the

news of this came as a considerable shock to her. The applicant then asked what was to become of her. Mr Nel told her that she had certain options available. The first option was to leave the company immediately with a retrenchment package. The second option was that she could take up a position in what is referred to as BSP. That, I was told, refers to the bank settlement plan operations involving administration of debit and credit arrangements with airlines. It was made clear to the applicant that this was only a temporary position for three months, at the end of which there would be no promise or certainty of any further employment, whether permanent or temporary. The applicant was asked to decide and inform management whether she would accept the temporary BSP position or take immediate retrenchment.

[9] There is a dispute on the evidence as to whether the applicant was also invited at this meeting to consider or make suggestions on any other possible role that she

could continue to play in the company. I shall, for reasons which will become apparent later in this judgment, assume that the

respondent's version is correct in this regard.

[10] It is common cause that at her request the applicant was to be furnished in writing with the details of the

retrenchment package which had been mentioned but not discussed in detail during their discussion.

[11] Mr Nel and Mr Wasserman accordingly sent the applicant a letter on Tuesday, 8 September 1998, which read in

its relevant parts as follows:

"The poor financial performance of the Woodmead branch has made it necessary to restructure our operations to improve its financial viability. This restructuring includes the amalgamation of the Woodmead branch with Transworld.

It is with sincere regret that we have to inform you that your position has become supernumerary as a result of the restructuring.

As discussed a retrenchment package is made up as follows:

1. Your basic salary up to 31 December 1998.
2. An amount equal to one month's basic salary in lieu of the annual bonus normally payable at the option of the company.
3. ...[There then follows a number of paragraphs setting out various other amounts which would be payable]...

If you however choose to accept the alternative temporary position offered to you, the conditions and benefits attached to the aforementioned

retrenchment package will no longer be valid and

any such package will have to be renegotiated.“

[12] The applicant asked for clarification of certain issues in her letter of reply dated 9 September 1998 which read as follows:

"Firstly, if I choose to accept the temporary position offered to me for a period of three months, what position would be offered to me thereafter and would this be a temporary or a permanent position? If no position would be forthcoming, what would the renegotiated retrenchment package consist of? Secondly, with regard to the immediate retrenchment package, I still require the purchase price of the motor vehicle. Finally, I would also like clarification with regard to the payment of my uniform. Obviously the above information is required before I can advise you of my decision."

[13] Mr Wasserman replied the same day in a letter which stated:

"In reply to the two questions posed by you in the abovementioned letter, I would like to respond as follows:

1. We are unfortunately not in a position to commit ourselves as far as permanent or temporary position is concerned after expiry of the three months period (if you accept the offer of performing BSP functions for that period). We, however, endeavour(sic) to look for possible positions during those three months.
2. If you accept the temporary position of BSP the available package at the end of that period will be as follows: Your salary

will be paid up to January 1999. All current benefits will be maintained up to the end of the three month period (30 November 1998) whereafter all benefits such as pension and medical aid contributions will cease. You will retain use of the company vehicle for the three month period up to 30 November 1993 only."

[14] Apart from this correspondence it is common cause that a number of discussions took place during the course of that week between the applicant and Mr Wasserman. The primary issue raised by the applicant related to the question why the applicant had been selected for termination of her employment rather than appointing her instead of Ms Duncan. It was, however, made clear that the directors were not prepared to reconsider that issue.

[15] On Friday, 11 September 1998, the applicant again met with Wasserman. She questioned why she had not been

offered one of a number of positions which were then vacant for senior sales consultants. This had not been offered to or raised with the applicant by either Nel or Wasserman during their discussion. The explanation offered by Mr Wasserman was that this had not been done because the positions were at a lower level and status than that of divisional or branch manager and that the applicant might find such demotion humiliating. Mr

Wasserman stated that Mr Nel had invited the applicant to make other suggestions and that she could raise this

possibility with him. Nothing came of this however. It was not pursued either by the applicant or by the directors. Instead the

applicant informed Mr Wasserman that she felt that she had been treated badly and she wanted to get away from the company and would

therefore be taking the retrenchment package.

[16] The applicant accordingly left the service of the respondent on that day, i.e. 11 August 1998. She and Wasserman discussed the payment of the package and the other monies which were due. They also discussed a delay which would arise while a tax directive was obtained. The applicant indicated that she needed some money to tide her over. By agreement she was paid the sum of R20 000.

Mention was made during this trial both in evidence and argument of monies in respect of notice and severance payment and other

issues

due in terms of the letter of 8 September which remained outstanding and apparently were not paid pending the outcome of these proceedings. Those, however, are not amounts claimed in these proceedings and the attorneys confirmed in court that they will between them seek to resolve what is payable in that regard, regardless of whether and what compensation may be awarded in these proceedings. That issue of the other amounts accordingly does not concern this court further.

[17] What remains in issue, however, is the fairness of the

retrenchment. Having regard to the facts apparent from the evidence, it is, in my view, clear that the

requirements of section 189 of the Act were not satisfied.

[18] It was submitted by Mr du Preez, who appeared on behalf of the respondent, that the process followed at least allowed the applicant the opportunity to make representations on the severance package and certain related issues. She was also invited to make other suggestions as to other positions for which she might be considered in the company thereby possibly avoiding retrenchment.

Even if it is assumed, though not decided, in respondent's favour that this opportunity was afforded to the applicant, the way in which the respondent dealt with the matter overall, in my view, clearly falls substantially short of what is required by section 189 of the Act.

[19] It was rightly conceded by Mr du Preez that there was no compliance with section 189(1) of the Act. That section requires that when an employer contemplates dismissing an employee for reasons based on the employer's operational requirements, the employer must consult with the employee or his or her trade union or other representative. The requirement of consultation is fundamental to the fair process required for retrenchments. It seeks to ensure that the employer

does not take a decision which may affect or may even terminate the employee's employment for reasons unrelated to any fault on the part of the employee, without at least first providing an opportunity for the employee (or his or her representative) to seek to influence that decision. It allows the employee to provide input which may provide new insights and

possibilities to the employer and which may also provide suitable alternatives so as to avoid or delay retrenchment or at least to alleviate or minimise its prejudicial effects.

To ensure that the parties do not simply go through meaningless motions in this regard, section 189(2) specifically enjoins the parties to engage in consultation in which they must actively seek to achieve consensus on the various issues specified therein. These include in particular, appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing of dismissals and to mitigate its adverse effects. They must also seek to reach consensus on the method for selecting employees to be dismissed as well as severance pay for those who are dismissed. Section 189(3) requires disclosure of all relevant information, including the items specifically referred to in that subsection. One of these items is the proposed method for selecting which employee is to be dismissed. Subsections 189(5) and (6) require an employer to allow the employee or his or her representative an

opportunity during the consultation process to make representations about any matter on which they are consulting, for the employer to consider those representations and if the employer does not agree with them, to state the reasons for such disagreement. The position has been summarised by Froneman J in *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC), particularly at 95A to 97D. I quote certain extracts from that passage as follows:

"Every person has a fundamental right to fair labour practices (section 23(1)(a) of the Constitution). In the present context expression is given to this in the LRA by affording an employee the right not to be unfairly dismissed (section 185) and an employer the right to dismiss an employee for a fair reason based on the employer's operational requirements and in accordance with a fair

procedure (section 188(1)(a)(ii) and (b)). Section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons. It is a provision that is inextricably linked to the fairness or otherwise of a dismissal based on operational requirements. Apart from that it serves no other purpose."

After setting out in full the terms of section 189, the learned judge continued as follows:

"The section places some primary obligations on an

employer in order to ensure that an employee is not unfairly dismissed. The employer must initiate the consultation process when

it contemplates dismissal for operational reasons (section 189(1));

Cf *FAWU and Another v National Sorghum Breweries* (1997) 11 BLLR 1410 (LC) at 1420F- 1421B; 1998

(19) ILJ 613 (LC) at 623C-I). It must also disclose relevant information to the other consulting party (section 189(3)). It must

allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting (section 189(5)). It must consider those representations and if it does not agree with them it must give its reasons (section 189(6)). But all these primary formal obligations of an employer are geared to a specific purpose, namely to attempt to reach consensus on the objects listed in section 189(2). The ultimate purpose of section 189 is thus to achieve a joint consensus seeking process. In this manner this section implicitly recognises the employer's right to dismiss for operational reasons but then only if a fair process aimed at achieving consensus has failed. This is also apparent from section 189(7) which provides that the employer must select the employees to be dismissed on criteria either agreed to or if that is not possible, on criteria that are fair and objective. Achievement of a joint consensus seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under section 189(1), (3), (5), (6) and (7). The

other consulting party may do it by refusing to take part in any of the stages of the consultation process or by deliberately delaying the whole process. (Cf NEHAWU v University of Fort Hare

(1997) 9 BLLR 1054 (LC); UPUSA and Others v Grinaker Duraset (1998) 2 BLLR 190 (LC) at 204D; Fowlds v S A Housing Trust Ltd and Another, Case No. J561/98 (LC) at para 11). It may also appear that any one of

the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues

discussed. These different possibilities depend on the facts of each particular case. The important implication of this is that a mechanical checklist kind of approach to determine whether section 189 has been complied with is inappropriate. A proper approach is to ascertain whether the purpose of this section, the occurrence of a joint consensus seeking process has been achieved ... If that purpose is achieved there has been proper compliance with the section.

If not, the reason for not achieving the purpose must be sought. If the employer alone frustrated the process in some way or another, there can be no compliance. If the employer was not at fault and did all it could from its side to achieve the kind of consultation referred to above, the purpose of this section would also have been achieved. Mention has already been made that section 189 is inextricably linked to the issue whether a dismissal based on operational requirements is fair or not. In testing compliance with

its provisions by determining whether the purpose of the occurrence of a joint consensus seeking process has been achieved or frustrated,

a finding of non-compliance by the employer will almost inevitably result also in a dismissal being unfair for failing to follow a proper procedure. It is difficult to envisage a situation where the result could be different. Non-compliance would not, however,

necessarily result in a dismissal being substantively unfair. ..."

[20] In almost all respects in the present matter the respondent failed to comply with the requirements of section 189 and the purpose of that section.

The occurrence of a joint consensus seeking process has not been achieved. This, in my view, was clearly due solely to the failure of the respondent to initiate or to allow such a process to occur. There was not even an attempt to consult on the relevant issues or to seek ways of avoiding retrenchment. As Mr Wasserman, the witness for the respondent, candidly admitted, before any contact was even initiated with the applicant a final decision had been taken, to restructure the organisation in a way which was aimed to ensuring the reduction of personnel costs and, in particular, the elimination of one of the positions of management,

likewise, without any prior consultation, it was implemented on the basis that Ms Duncan rather than the applicant would be selected to head the new merged operation. In all likelihood the applicant would be rendered effectively redundant. The latter decision was likewise a final one taken in the absence of any consultation and management was not even prepared to consider reviewing or reconsidering that decision.

[21] There was accordingly no opportunity to consult and no effort to seek consensus either on ways of avoiding retrenchment or on the process of selecting who was to remain and who was to leave the company's employ. Of particular concern in this regard in the present matter is the complete lack of any opportunity for the

applicant to make representations as to why she should not be selected to manage the merged divisions. She was clearly faced with a *fait accompli*.

[22] An attempt was made both by Mr Wasserman in evidence and by Mr du Preez in argument to portray the retrenchment as not being certain or inevitable in that the applicant was offered the three month BSP position (referred to previously) and further she was invited to make suggestions as to other possible positions. In my view neither of these possibilities addresses the fundamental requirements of section 189. The BSP

position was clearly stated to be a temporary one. Even if it were accepted it would mean that the applicant still lost her permanent

position. The termination of even the temporary work seemed highly probable, if not inevitable. It was also offered on the basis that if it was accepted, the retrenchment package offered in the letter of 8 September 1998, would fall away and would have to be renegotiated. The possibility of other positions was not one which the respondent seemed to regard as anything but speculative or unlikely. The applicant was offered Hobson's choice.

[23] It was suggested in evidence and in argument that the applicant accepted the retrenchment package and therefore cannot now be heard to raise any complaints regarding the retrenchment or at least to claim any compensation in that regard. In my view, this argument is spurious. The applicant did not voluntarily accept or acquiesce in her retrenchment and cannot be regarded, in my view, as waiving or compromising any right to claim compensation. The package, in any event, provided what was in effect equivalent to the minimum severance benefit ordinarily payable under our law for employees whose retrenchment occurs in a lawful and fair manner. It was never offered, let alone accepted, on the basis that it was to remedy or to substitute for a claim for unfairness in the process followed. As pointed out by her attorney, Mr McLaren, the severance package did not remove or remedy the unfairness of the process.

[24] I am also unpersuaded by the argument that the respondent's unilateral action can be justified on the basis that it acted in the interests of saving the company from further financial problems or that it was inevitable that Ms Duncan should be preferred and that the applicant would have to be retrenched.

This, in my view, portrays a complete lack of understanding of or regard for the fundamental and clear requirements of section 189 of the Act.

[25] Accordingly I conclude that the respondent failed in the most material respects to comply with the process requirements prescribed

by section 189.

[26] Since the applicant does not seek reinstatement, compensation would in the ordinary course be the

appropriate remedy. Mr du Preez submitted that I should favour the respondent and refuse such an award of compensation in the exercise

of the court's discretion either to grant or refuse compensation under

section 194. He referred in this regard to the remarks of Froneman DJP in relation to the discretion the court has in the case of Johnson & Johnson (supra) at 99I-100A.

[27] In my view the facts of this case do not favour the refusal of compensation. On the contrary, in my view the requirements of law and fairness are best served by an award of compensation. Both parties' attorneys agreed that in such event the appropriate award would

be compensation calculated for the period of 11 months, being the period since the date of dismissal to the conclusion of the court

hearing and that the applicant's monthly remuneration was R10 000. The compensation is accordingly calculated in the total sum of R110 000.

[28] With regard to costs, Mr du Preez submitted that my discretion should be exercised on the basis that each party should pay its own costs. In my view, the circumstances are such that the requirements of the law

and of fairness would best be served if costs followed the result.

[29] I accordingly make the following order:

- (a) The applicant's dismissal is held to be unfair for want of compliance with section 189 of the Labour Relations Act, No. 66 of 1995.
- (b) The respondent is ordered to pay the applicant compensation in the total sum of R110 000.
- (c) The respondent is further ordered to pay the applicant's costs.

ACTING JUDGE KENNEDY

ON BEHALF OF APPLICANT : MR Ian McLAREN

Instructed by : McLaren & Associates.

ON BEHALF OF RESPONDENT : MR L DU PREEZ

Instructed by : Hofmeyer,Herbstein

Giwhala Cluver Inc.

DATE OF HEARING : 12 AUGUST 1999

DATE OF JUDGMENT : 13 AUGUST 1999

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Prepared on 11 October 2026 · Esheria