

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS849/02

2003-02-03

In the matter between

F MENTZ

Applicant

and

JOINT MUNICIPAL PENSION FUND

Respondent

J U D G M E N T

LANDMAN J: Mr Francois Mentz was employed by the Joint Municipal Pension Fund, to which I shall refer as the Fund, for some eight years prior to his dismissal on 28 February 2002. Mr Mentz was one of two portfolio managers left after one of their number had been transferred at a stage prior to 28 February.

The Fund was faced with a crisis when 13 000 members and 2 500 pensioners of the Municipal Employees Pension Fund withdrew their mandate to the Fund to administer their investments. This resulted in a loss of earnings of about R9 million. The property division headed by Mr Horn was also affected. It lost some of the buildings which it administered.

The result was that there was little work to keep both portfolio managers busy.

Several steps were taken to combat the threat to the Fund. These included a program to commercialise the Fund and the involvement of a private company initially known as Biz Africa 1312 (Pty) Limited. This company was to perform the administrative obligations of the Fund. Restructuring of the business of the Fund was indicated. The restructuring and its implications for the Fund and its staff were discussed from time to time at a forum known as the Personnel Work Group.

Management and SASBO, a trade union representing the union members employed by the Fund, assisted by a SASBO head office official, met regularly. Policy regarding retrenchments was in place and proposed retrenchments of staff were discussed. Consensus was reached as regards the need for retrenchment, the selection criteria and the identification of the proposed retrenchees, the package and related matters.

A first wave of retrenchments ensued during August 2001. Further retrenchments were foreshadowed. Mr Horn, head of the property division, donned his managerial bowler hat and recommended that Mr Mentz's post as portfolio

manager be declared redundant. This recommendation was accepted by higher management. On 26 October 2001 the Fund advised SASBO that further retrenchments were contemplated and that during the coming months the proposed retrenchees would be identified. A copy of the letter was sent to Mrs Unteid, the chairperson of the SASBO shop stewards at the Fund.

. A meeting between management and SASBO in the form of the personnel work group was convened for 13 November 2001. Management attended and named five persons, including Mr Mentz, for retrenchment. The SASBO contingent included Mr Horn, who was now wearing the cloth cap of an employee, as well as the deputy head of his division, Mrs Unteid. The SASBO members allegedly agreed to the retrenchment of the five persons including Mr Mentz. The minutes of the decision taken at the meeting do not identify the names of the retrenchees, but I have no doubt that their identities were revealed at the meeting. Mrs Vanessa Botha, who represented SASBO head office at the meeting, correctly conceded that she could not recall that the names had been mentioned. The other members of the meeting, including Mr Crous, the deputy general manager, and Mrs Van Rooyen, a

SASBO shop steward, would have had more reason to know who the proposed retrenchees were. The names would have made sense to them.

After the meeting certain events took place, which are in contention. Mr Horn, having now exchanged his cloth cap for his managerial head gear, spoke to Mr Mentz. He informed him that he would “possibly be retrenched” and invited him to respond within two weeks. Mr Horn, although he did not tell this to Mr Mentz, would have to make a report or recommendation to the executive committee and the board of trustees on 28 November.

Mr Horn's evidence regarding the events immediately preceding Mr Mentz's dismissal is set out in an internal memorandum of 21 January 2002. This memorandum was one compiled after Mr Mentz had been dismissed and had indicated that he was considering litigation. The memo reads as follows:

"(a) Retrenchment - the following information can be recollected:

1. Informal discussions were held with Francois Mentz prior to 28 November stating that there is a possibility that he may be retrenched. He was not overly concerned and requested two weeks to think about it.

2. When the two weeks were up, he stated that he would be satisfied to go (as he has other businesses) and requires the necessary information in figures. I referred him to the correct person to obtain the necessary figures. In addition to his retrenchment he wanted a cleaning contract from the Fund, as he operates a cleaning company, or a car as he had a company car. I stated that I do not have the power to decide on that, but will find out for him.
3. No formal discussions were held between myself and F Mentz regarding his retrenchment until after the work group made the decision to retrench him.
4. The trustees made the decision to retrench F Mentz on 28 November 2001.
5. At this stage Mentz was on sick leave and I requested Mrs Louw to arrange a meeting with Mr Mentz.
6. At this meeting I told him the following:
 - a. I am speaking to him and informally as the department head and that the personnel office shall also have discussions.
 - b. At this meeting I explained that the Joint Municipal Pension Fund had decided to retrench him, as we are not going to expand the portfolio by taking the 'Broll' Building in-house to manage as was originally envisaged. It was also discussed

that in the event of the 'Broll' Property Group buildings being managed in house, that there would probably be a place for him at the Joint Municipal Pension Fund. But it was clearly stated that this was not to be the position.

- c. I stated that the Joint Municipal Pension Fund shall not award him a cleaning contract, nor shall they give him a car.
- d. Mr Mentz was not happy about this and he eventually requested whether he could not purchase his company car.
- e. It was agreed that he would obtain three trade in quotations.
- f. At this meeting Mr Mentz stated that he would not need union representation and that he would gladly be retrenched.
- g. I stated to him that the personnel office would handle the process from their side.
- h. Mr Mentz exerted pressure on the personnel office to obtain the necessary letter of retrenchment.
- i. At no stage was he forced or intimidated in any process. He in fact stated that he was glad that he had his own companies and that he could now concentrate on growing his business."

Mr Horn, however, stated that paragraph (a)(1) is incorrect where it states Mr Mentz requested the two weeks to think about what he had been told. It was in fact Mr Horn who gave him two weeks to consider the matter.

Mr Mentz says that Mr Horn did not tell him about his impending retrenchment. He was on sick leave when Mrs Louw of the personnel department called him after 28 November. Mr Horn told him that he should consider voluntary retrenchment, or if he did not want this, he would probably be retrenched anyway. Mr Horn said that he might be able to arrange cleaning contracts for Mr Mentz and undertook to consider Mr Mentz's proposal regarding the motor vehicle.

I do not find Mr Horn's version credible, for the following reasons:

- (a) He has contradicted himself about what Mr Mentz is alleged to have said at the first meeting.
- (b) Mrs Louw's evidence regarding the instructions she received from Mr Horn to contact Mr Mentz is contrary to the version of Mr Horn.
- (c) On his own version Mr Horn omitted critical information which he should have conveyed to Mr Mentz about SASBO's decision that he be retrenched, even though the executive committee had still to confirm it. This aspect is particularly disquietening.
- (d) Mr Horn says that Mr Mentz consented to his retrenchment, but this is not the Fund's case on the pleadings before me.

- (e) Mr Horn's inability to perceive that his position as a SASBO representative and his managerial role vis-à-vis Mr Mentz gave rise to a conflict of interest. This inability is an indication that his evidence must be approached with caution.

Even if I accept Mr Horn's evidence, then it is clear that the Fund breached Mr Mentz's terms and conditions of employment regarding his retrenchment. The Fund might have complied with regard to its obligations towards the union. However, the procedure to be followed in regard to an employee is set out in clause 6 of the policy document, which is incorporated in the terms and conditions of employment. The Fund breached these obligations in the following way:

- (a) LIFO, in the property department, was not considered on levels other than that of portfolio manager. See clause 6.4.2.
- (b) No notice of Mr Mentz's impending retrenchment was given to him. Notice was required in writing. See clause 6.5.1.
- (c) It follows that no opportunity was thereafter afforded Mr Mentz to deal with such a notice and to make representations within the time limit mentioned in the terms and conditions of employment. Indeed, Mr Crous takes Mr Mentz to task in his letter of 9 January 2002 for not responding within the five day period. This notwithstanding that the written notice was not

given to Mr Mentz. See clause 6.5.2.

- (d) The steps which the Fund took to avoid the retrenchment of Mr Mentz were not disclosed to him. They should have been disclosed to him. See clause 6.5.2.
- (e) The Fund failed to disclose the reason for declining Mr Mentz's request for assistance regarding the vehicle allocated to him, and his request that he be afforded a cleaning contract. The Fund, of course, was not obliged to comply with this request, but in terms of the policy (see clause 6.6) it was obliged to take steps to mitigate the retrenchment. This would have included considering and providing reasons for refusing to grant Mr Mentz's request.

Although the consultation with SASBO, as I have mentioned, would have complied with the requirements of section 189, the policies agreed upon and incorporated in Mr Metz's terms and conditions of employment require consultation with the employee in the manner and in respect of the subjects mentioned in clause 6. This was not done. The breach of procedures is so gross that it may be indicative of *mala fides*. I do not need to decide this last issue.

The gross disregard of procedure means that Mr Mentz's continued employment, although not as a portfolio manager,

could have been secured. I do not know whether or not this would have been of any longlasting value, and I do not know whether the Fund should have bumped the centre manager and replaced him with Mr Mentz. The reason that I do not know this, is that the procedure is so deficient that I am unable to come to the conclusion that the dismissal was substantively fair. In the result I am satisfied that the dismissal was substantively unfair. I have already found that the dismissal was procedurally unfair.

Mr Mentz seeks reinstatement in his employment with the Fund. This is the primary remedy. No facts have been presented which would serve to deny him this remedy. In the result

1. The applicant is reinstated in his employment with the respondent on the same terms and conditions that applied to him before his dismissal.
2. The order in paragraph 1 is made retrospective to 1 March 2002.
3. The retrenchment benefits paid to the applicant are to be recovered from any amounts due and payable to him flowing from this order.
4. The respondent is to pay the applicant's costs.

**SIGNED AND DATED AT BRAAMFONTEIN ON 26
FEBRUARY 2003**

A A Landman

Judge of the Labour Court of South Africa

ON BEHALF OF THE APPLICANT: MR COETSEE

RESPONDENT: MR DE VILLIERS- MOHR