

IN THE LABOUR COURT OF SOUTH AFRICA(HELD AT CAPE TOWN)**Of Interest**CASE NO: C619/05

5 DATE: 18 MAY 2007

In the matter between:

WENDY McCAFFERY Applicant

and

ASCOT VENTURE CAPITAL Respondent

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J U D G M E N T

PILLAY D, J:

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[1] The applicant was employed on 1 April 1998. On 1 September 2001 she was transferred to the respondent. From about 2003 she worked as the personal assistant to Mr Mark Paulsmeir, the managing director of the respondent. Other than her, the respondent employed only a char.

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[2] On 8 March 2005, the applicant was informed that there would be a meeting the following day. On 9 March 2005 she was called to the boardroom. Mr Jacobs, who was then a director of the respondent, was present to witness the discussion. Mr Paulsmeir informed the applicant of the poor state of the business and the possibility of it being closed. He proposed to the applicant that she be employed until 24 June 2005 and if by that stage the

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business was not turned around by a new strategy, or she did not find alternative employment, her services would be terminated. She was also free to take time off to look for alternative employment. The applicant acquiesced in this arrangement. At the end of that discussion, Mr Paulsmeir gave the applicant a pre-typed letter recording the proposal.

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[3] The respondent's case is that the applicant agreed on these terms to the termination of her services on 24 June 2005. As the termination was by agreement it did not amount to dismissal. The applicant persisted that she did not agree to the termination of her services, that she was dismissed and that her dismissal was procedurally and substantively unlawful and unfair.

[4] The Court finds for the following reasons that the applicant was dismissed unlawfully and unfairly:

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1. The letter given to the applicant on 9 March 2005 records: "You are hereby officially notified that your services are terminated with effect from 24 June 2005". The plain meaning of that sentence is that the termination of the applicant's services was effected not by the applicant. The use of the passive voice makes this clear. The only other party who could have terminated her services was the respondent.

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2. The letter was pre-typed. As such it evidences an absence of good faith engagement about the applicant's future with the respondent. It was also contrived and an exercise in commencing the evidential paper trail that must precede a retrenchment. For instance,

the letter refers to an “information session”. When cross-examined about that, Mr Paulsmeir testified that it referred to informing the applicant of the meeting the next day. That hardly qualifies as an “information session”, which is a term used during consultations that precede negotiations between employer and employee.

3. The applicant’s acquiescence in the terms of the letter and the discussion cannot by any construction amount to a waiver of her rights to be engaged timeously about suitable alternative employment and about severance pay.

(a) Working for Mr Paulsmeir through some other entity for half her salary was always an option. However, it was only presented to her on 21 June 2005 when she was paid her final cheque. She did not meet Mr Paulsmeir after that because he went on leave and Mr Jacobs told her that her services were terminated with effect from 24 June 2005. Whether this would have been a suitable alternative was not properly canvassed prior to her dismissal. The respondent made a vague offer of relocating to Johannesburg. She refused it outright as that was not an option for her.

(b) Severance pay did not ever enter the discussion. That is one of the items about which the respondent had to consult in order to render the dismissal

fair. As it was common cause that the respondent did not discuss severance pay, it follows that the dismissal is unfair on that ground alone. Severance pay is a right accorded by the law to employees who are retrenched. A waiver of a right is effected if the employee was aware of it and chose to waive it. It is common cause that neither party was aware of this right during the discussions on 9 March 2005. Consequently the applicant could not have waived it. On the probabilities, the applicant was hardly likely to forego seven weeks of severance pay when she faced the prospect of unemployment and raising a teenage daughter.

4. The 9th March proposal kept the door open to the possibility of her employment continuing with the respondent after 24 June 2005. On 21 June 2005 it became explicit that her services would be terminated. The respondent should have notified the applicant before 21 June 2005 that its new strategy was unsuccessful. It was submitted for the respondent that the applicant was fully aware of the status of the respondent's business. As Mr Paulsmeir's professional assistant she was his typist and his telephonist. In the opinion of the Court, having information about the status of the respondent did not mean that the applicant would interpret that information in the same way that the respondent did. In any case, it is hard to fathom precisely what the

status of the respondent is, despite the disclosure of its financial statements and the evidence of Mr Paulsmeir. For 2003, 2004 and 2005, the respondent's financial statements reveal that it generated more revenue than previously. On paper, it appears that the respondent had an asset of R40 million, which was the intellectual capital it owned. This asset has since been sold for US \$500 million. But the purchase price has yet to be paid according to Mr Paulsmeir. As recently as 16 August 2006 when the respondent held its annual general meeting, its shareholders approved the payment of US \$125 million for its philanthropic program.

[5] The respondent has an issued share capital of one million rand. As Mr Paulsmeir would have the Court believe that the respondent is a valuable asset to its shareholders, the Court has no hesitation in awarding compensation. If the respondent has a cashflow problem, that will evaporate as soon as the respondent is paid the purchase price for the intellectual property that Mr Paulsmeir alleges has been sold. Alternatively, the balance of its capital, after paying dividends which it resolved at its August 2006 annual general meeting to use for philanthropic purposes, can be used towards the compensation awarded. After all, charity begins at home.

[6] The applicant seeks the maximum compensation R120 000. She found employment in October 2006 at R3 000 which was less than the salary paid by the respondent. She was paid provisional leave pay and bonus. She was also forewarned three months ahead of the probabilities of her retrenchment and allowed to find alternative

employment. By these means the respondent mitigated the hardship of the dismissal. The appropriate compensation is R60 000.

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[7] In the circumstances, the order that I grant is in the following terms:

1. The applicant was dismissed.
2. The dismissal was unfair.
- 10 3. The respondent is ordered to pay the applicant R60 000 as compensation.
4. The respondent is to pay the applicant's costs.

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PILLAY D, J

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Edited : 13 June 2007