IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

D 228/08
Reportable

In the matter between:

ANN SMITH APPLICANT

And

S.A GREETINGS (PTY) LTD RESPONDENT

JUDGMENT

CELE J

INTRODUCTION

[1] The applicant's claim has been brought in terms of section 191 (5) (b) (ii) of the Labour Relations Act 66 of 1995 (the Act) wherein she alleged that she was unfairly dismissed on the basis of the operational requirements of the respondent. She seeks compensation and the payment of the severance pay.

The respondent opposed the claim on the basis that her dismissal was substantively and procedurally fair but tendered a less amount of severance pay than was asked for by the applicant.

BACKGROUND FACTS

[2] The applicant commenced employment with Creative Productions (Pty) Ltd, the respondent's predecessor, on 1 August 1993 as a Desk Top Production (DTP) operator working 25 hours per week. In or around 2000 American Greetings, an American company, purchased Creative Productions (Pty) Ltd an S.A. Greetings (Pty) Ltd and merged them to form the respondent. Large scale retrenchments followed in February 2005 as a result of the merger but the reproduction department in which the applicant worked was not affected. A management buy-out of the respondent followed in or around 2006.

[3] During 2007 there were four employees who worked in the Reproduction Department in which the applicant was based. The applicant, Mr. Anil Rampersad and Mr. Mayan all worked as DTP operators. Mr. Mayan also worked as a Scanner Operator and Mr. John Dhara worked as a Photo lithographer. The Reproduction Department worked very closely with the Studio Department where artists worked. Applicant's colleagues

all worked a full day while she worked 25 hours per week, arranged as half a day's work. Also working for the respondent, in the Reproduction Department had been Mr. Vince Goode who left the respondent employment in February 2007 and Mr Eddie Azziz who was retrenched by the respondent in March 2007. The Reproduction Department used to have one person known as Vino as it's technically equipped Manager. He left the respondent in 2006. In consultation with the staff, it was decided not to replace him because it was felt that the department ran itself. However Miss Leanne Young, the respondent's Supply Chain Cost Executive was appointed to merely ensure workflow in the Reproduction Department and to report thereon to Mr. Roodt.

[4] In November 2007 Mr. Danie Delport, the respondent's Reproduction Manager who was based in Johannesburg, visited the Durban operation. The purpose of his visit was to investigate concerns raised regarding the "illustrator" computer program, the viability of the installation of a server and backup for the studio and Reproduction Departments and to obtain quotes for upgrades to computer programs used by the respondent.

[5] The respondent's production was closed from 21 December 2007 to 14 January 2008. The applicant returned to work on 21 January 2008 after being refused an early return to work but granted an additional week's unpaid leave.

[6] The applicant, Messrs Rampersad, Mayan and Dhara attended a meeting with Ms Helene de Villiers, the respondent's Human Resources Manager from Johannesburg, on 21January 2008. Ms de Villiers gave the applicant and her colleagues a notice of proposed reduction of staff within the Repro/DTP division and possible termination of one employee in that department. The meeting ended but later on the same day she came back to follow up on what had earlier been discussed. The matter was not finalized at that stage. Miss Young did not attend that meeting.

[7] On 25 January 2008 Mr. Robert Roodt, one of the Directors of the respondent, paid a visit to the Reproduction Department and advised that the proposed retrenchment was due to technological advances. One of the programs used in the Studio Department was the illustrator program.

[8] A further meeting held was on 29 January 2008 between the applicant, her colleagues and Ms de Villiers. Ms de Villiers advised the applicant that the respondent had identified her as the person to be retrenched. The applicant stated that she was not the employee with the least service in terms of LIFO and that she believed her proposed retrenchment had to do with her relationship with Miss Young. Ms de Villiers told the applicant that Pinetown Printers were looking for DTP Operators and that she could telephone them to find out if they would offer the

applicant employment. She was advised that if she could perform the tasks of the shortest serving member, being Mr. Mayan, and was prepared to work a full day, she would not be retrenched but that he instead would be retrenched. She was told that the severance package on offer for a retrenched staff would be one and a half weeks remuneration for every year of service. She sought an opportunity to discuss the matter with her husband. Ms de Villiers and Miss Young held a meeting with the applicant's colleagues in her absence on the same day, as she normally worked half a day.

[9] Ms de Villiers held two meetings with the applicant on 30 January 2008. She advised Ms de Villiers that she was unhappy about the severance package being offered to her and requested four (4) weeks for every year of service. The respondent declined her request. She indicated an intention to keep her job. She was requested to sign a copy of a letter dated 30 January 2008 to confirm the discussion she had had with Ms de Villiers and that she fully understood and accept the conditions pertaining to her retaining/preserving her employment. A letter was issued to her informing her that an intention of the respondent to retrench her was being withdrawn and that discussions for retrenchment would instead commence with Mr. Mayan.

[10] The remuneration package for the full day position offered to the applicant meant that she would only earn an additional

R100.00 per day for an extra 3 hours work which equated to approximately R33.00 per hour for the additional hours. She was earning R79.00 per hour at the time. Ms de Villiers advised the applicant that neither the remuneration package for the full day position nor the severance package were negotiable.

[11] On 4 February 2008 Ms de Villiers addressed an e-mail to the applicant explaining to her that the respondent had decided to keep her employment on the basis that she would be "bumping" Mr. Mayan and was therefore to work full day with no salary increase. She was invited to respond to the offer on or before 6 February 2008. Before she could respond to the e-mail, the applicant received an e-mail from Ms Young intended for Mr. Roodt entitled "Ann Smith". It reads –

> "Hi
>
> If in any doubt as to who should be leaving, take a peak (sic) below.
>
> My blood boils when I think we may lose Mayan to this lady. Call it personal if you want.
>
> Regards
> Hot Headed"

[12] Attached to the e-mail was a spreadsheet of the leave taken by the applicant from July to 2007 to February 2008. Ms Young had written the email in anger when it came to her knowledge

that the applicant had made personal remarks about their relationship. The applicant wrote an e-mail to Ms de Villiers on 6 February 2008 advising that it was apparent that she had been selected for retrenchment because she worked half day and that it was clear that her retrenchment had been pre-determined. In addition she advised that it was confirmed by the e-mail she had received from Ms Young earlier that day. She advised that the remuneration package for the full day was not acceptable.

[13] The respondent wrote to the applicant on 11 February 2008 confirming her rejection of the full day position and advising her of the termination of her employment. The respondent set out the applicant's severance package and advised that it would be paid on 14 February 2008. The applicant was advised that she was not required to return to work to work out her notice. The negotiations with Mr. Mayan for his retrenchment had not yet been commenced by the respondent.

[14] The applicant was aggrieved by her dismissal and she referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 13 February 2008. The conciliation hearing took place on 17 March 2008. Conciliation was unsuccessful and a certificate of outcome, confirming that the matter was unresolved, was issued on 20 March 2008. The respondent initially withheld payment of the applicant's severance package. The respondent paid the applicant the

balance of her severance package of R 42 507.37 less R 2 251.32 being PAYE due as per tax directive from SARS (No 7597897) on 16 May 2008.

The trial

[15] The onus to prove the procedural and substantive fairness of the dismissal was on the respondent. Three witnesses were called by the respondent, being –

* Mr. Robert Roodt;
* Ms Leanne Yung and
* Ms Helene de Villiers.

The applicant thereafter closed her case without testifying.

The version of the respondent

[16] In late November 2007 Ms Young furnished to Mr. Roodt man/hour management reports for 2006 and 2007, which documents confirming that notwithstanding the retrenchment of Mr. Aziz from the respondent's Reproduction Department in February 2007 and the resignation of one Mr. Vince Goode, the capacity of the reproduction department exceeded the workload of that department i.e. there was spare capacity. Upon receiving these reports Mr. Roodt's first step was to confirm the information contained in the reports, which he did, and

thereafter he met with the respondent's other directors to discuss the situation with them. These discussions concerned what the reports meant for the respondent and to develop a strategy going forward. By that stage the directors had the benefit of the financial budgets for the following year and there was nothing in those budgets which indicated that the utilisation of the Reproduction Department resources in the following year would be any different to what it was in 2007. The directors determined that there was an overcapacity in the reproduction department and that such capacity would have to be reduced;

[17] The directors gave this matter a lot of thought and were unable to come up with any other solution to the situation other than reducing the number of people in the reproduction department. At that time the respondent employed two and half people performing the DTP function and based on the man/hour requirements of the department, determined that it required two full time DTP personnel and it was further decided that, in order to achieve this, the respondent would have to employ the criteria of LIFO with retention of critical skills;

[18] At some point in this process, Mr. Roodt had done an exercise, using the aforementioned criteria, and had identified the applicant as the person who would be selected for retrenchment in his "paper" exercise. By this point the respondent's factory had closed for its annual shutdown and when the applicant returned to work on the 21st January 2008

Ms de Villiers immediately commenced meetings with the applicant and her colleagues in the Reproduction Department regarding this matter;

[19] Mr. Roodt did have an impromptu meeting with those persons on or about the 24th or 25th January 2008, when he called at the respondent's Durban premises. All the persons concerned, including the Applicant, were present at that time. He was kept up to date by Ms de Villiers regarding the meetings which she held with the employees and it was reported to him that the applicant had informed Ms de Villiers that she had the skills to perform the functions which Mr. Mayan performed and, on that basis, the respondent made an offer to the applicant to place her in Mr. Mayan's position, as she had longer service than him, and the respondent would give her the necessary training, provided she agreed to work on a full day basis;

[20] The Applicant rejected the offer of Mr. Mayan's position at which time the respondent proceeded to retrench her and to pay her a severance package of one and a half weeks per completed year of service, although this severance package was never agreed. The severance package paid to the applicant was in accordance with what the respondent historically paid as a retrenchment package;

[21] The business of the respondent was seasonal with peaks in the workload at various times of the year and as a result, by

reducing staff in one area, the respondent might be caught short in a peak period. The studio department was not taking work away from the reproduction department and reproduction work was no longer going through to the reproduction department because of technological advances, but that the reproduction department was still required to perform the function of stepping.

[22] A full time position equated to 1808 man/hours per annum, and with two full time and one half-day employee in the department this meant that the respondent had a capacity of approximately 3600 man/hours together with the applicant's half day position which equated to another 25 man/hours per week times 47 weeks, giving a total capacity of over 4000 man/hours per year. In terms of the manpower management reports, the man/hour requirement for the Reproduction Department was approximately 3400 man/hours per annum.

[23] Based on these figures the respondent required to reduce its man/hours in the reproduction department by 25 hours per week and, following the applicant's retrenchment, the Reproduction Department had worked at 90 to 95 % of its capacity. During 2009 the respondent had retrenched a further person from the reproduction department, that being the aforementioned Mr. Dhara. There had been no growth in the studio department and the only graphic artists who had been employed since the retrenchments of Messrs Azziz and Dhara

were to replace staff that had left in those departments. Ms Young conceded that the number of hours which the Respondent required to reduce in the reproduction department, namely 25 hours per week, could have been spread across a few of the people in the reproduction department with their agreement, but explained that such a measure could not have been implemented on a permanent basis.

[24] Mr. Mayan, who was initially employed as a DTP operator, had later become a scanner operator when the respondent acquired a scanning machine and he had taken over the photography function when Mr. Vince Goode had left the respondent's employment. The scanning machine had broken down but the respondent had purchased a second scanner and the need for scanning had waned because of the employment of graphic artists.

[25] The applicant had superior skills to and a longer service than Mr. Mayan's but the respondent had only become aware of this after the applicant had been informed that she was identified for retrenchment and she was then offered a full time position. The applicant would not have been identified for retrenchment if the respondent had prior knowledge of her skills.

[26] The respondent was continually looking at cost cutting measures such as stationery, purchasing and faxing costs.

[27] It would not have been a prudent and good business decision to do away with the thirteenth cheque which the respondent paid to all its staff to avoid a retrenchment because the respondent employed a total of 570 people and it was the contractual entitlement of all of those employees to receive a thirteenth cheque. The respondent had considered alternatives and it considered the relocation of people to other departments but believed it would be pointless to transfer a person to another department which would then become overmanned. The Respondent had not simply decided to retrench the applicant and to send Ms de Villiers to Durban to do so.

[28] A possible reduction of working hours was also considered but it was the respondent's experience that by doing this, skilled people within the organisation started looking around for other jobs and the result would be that skills would become lost to the respondent and it was not willing to take this risk.

[29] Reassurances had not been given to the staff in the Reproduction Department regarding the security of their jobs and the respondent always made it clear to staff that it could not guarantee there would be no further retrenchments, and further no guarantee had been given to staff in the Reproduction Department as was suggested by the staff to Ms de Villiers at the meeting on the 21st January 2008. However Ms Young had, at one point, when the staff expressed concerns

about their job security informed them that if any of them left they would not be replaced.

[30] It would not have made any difference to relocate the reproduction department into the studio department because all that would have changed would have been the locality of the department. The skills of an artist in the respondent's business would always be required irrespective of where the staff in the reproduction department were located.

[31] The respondent had considered the feedback which was received from Ms de Villiers regarding the severance package and had explored this and further in this regard stated that the severance pay of 2.25 weeks per completed year as evidenced by the retrenchment agreement, had been a once-off situation and this had been made clear to the staff.

[32] The Respondent had not consulted with Mr. Mayan regarding his possible retrenchment but that it was because the applicant had at no time committed to working on a full day basis. The Respondent had not overzealously protected Mr. Mayan. A further consideration was that the business of the Respondent was slowly migrating to Johannesburg and that there was an overlap between the respondent's Durban and Johannesburg branches in the Reproduction and Debtors Departments.

Submissions by the parties

Respondent's submissions

[33] The decision to retrench is fair if it is a measure of last resort and all viable alternative steps have been taken to prevent a retrenchment or to limit retrenchments to a minimum.

[34] It is clear from the evidence of Roodt and Young that, with the shift in the respondent's studio department from conventional artists to graphic artists, which according to Mr. Roodt's unchallenged evidence was necessary because the respondent's business had fallen behind in the industry and to ensure the respondent's success in a market which relied on impulse buying, that certain functions formerly performed by the respondent's Reproduction Department, and particularly the DTP function, were now being performed by graphic artists and this resulted in an excess capacity in the respondent's Reproduction Department. This was confirmed by the respondent's man/hour management reports which showed a reduction in the workload in the respondent's Reproduction Department from 2006 to 2007.

[35] An analysis of the man/hour management reports of the Reproduction Department for the year 2007 show that the total hours worked in the department in 2007 were 3 388.48. With advances in technology, the respondent's Reproduction

Department was slowly becoming phased out and it is inevitable that the department will eventually close down altogether. This is further borne out by the subsequent retrenchment of Mr. Dhara.

[36] None of the alternative options suggested on behalf of the applicant were viable for reasons stated by the witnesses of the respondent.

[37] Insofar as the relationship with Ms Young is concerned, Ms Young stated in her evidence that she had a reasonable relationship with the applicant. Mr. Roodt said that he had been unaware of any difficulties in the relationship between the applicant and Ms Young and Ms de Villiers said that this was not a factor which played any part in the identification of the applicant for possible retrenchment. In the transcript of the meeting held between MS de Villiers and the applicant on the 29th January 2008, this issue was raised by the applicant and she was given the assurance by Ms de Villiers that, if she worked a full day and picked up Mr. Mayan's skills, then he would be selected instead.

[38] It is clear from the evidence that the applicant was selected for possible retrenchment on the basis that she was the second shortest serving employee in the Reproduction Department and the respondent needed to retain the skills of the shortest serving member. When it emerged on the 29th January 2008

that the applicant had the skills of the shortest serving member, which it was unaware of up till that point, it immediately proposed to the applicant that she should take Mr. Mayan's position and the respondent would commence consultations with Mr. Mayan.

[39] The reason why the applicant was retrenched was that, with the introduction of technology and the resultant reduction in workload in the Reproduction Department, the applicant's 25 hour per week position had become redundant. Although the respondent initially identified the applicant for retrenchment based on the criteria of LIFO and retention of skills, upon becoming aware of the applicant's skills, it withdrew her selection and offered her full time employment in Mr. Mayan's position. This is confirmed in the letter from de Villiers to the Applicant dated the 30th January 2008. The offer of full time employment made to the applicant was reasonable for various reasons.

[40] It is clear that the applicant was willing to work a full day and to perform Mr. Mayan's functions. The stumbling block was the salary that the respondent proposed to pay to her. The respondent made its position in this regard clear to the applicant in its letter of the 30th January 2008, the email from Ms de Villiers to the applicant of the 4th February 2008, the email from Ms de Villiers to the applicant of the 7th February 2008 and the email from Ms de Villiers to the applicant's

attorney of the 7th February 2008. The respondent initially requested the applicant to respond to its offer by the 4th February 2008. This deadline was extended to the 6th February 2008 and then to the 8th February 2008. The respondent could not be expected to offer the applicant employment at a salary calculated on the basis of an hourly rate extrapolated from her half day position, more especially as the applicant well knew that this was well above the market rate. Nor could it be expected of the respondent to continue to engage with the applicant in these circumstances. In short, there was no obligation on the respondent to meet any terms that the applicant insisted upon to ensure that she remained in its employment.

[41] To the extent that the Applicant contends that the Respondent did not commence the consultation process as soon as it contemplated retrenchment, it was the evidence of the respondent that the reports which gave rise to the contemplation of the retrenchment were received by Mr. Roodt at the end of November 2007 where after he held discussions with his co-directors and the decision to propose a retrenchment was only reached in December after the commencement of the respondent's annual shutdown. The applicant returned from her leave on the 21st January 2008 and that is the date on which the consultation process commenced.

[42] In his evidence, Mr. Roodt confirmed that, prior to consultations commencing, the directors of the respondent had decided that the solution to the excess capacity in the Reproduction Department was to reduce the staff by one and to use the criteria of LIFO and skills to achieve this reduction. It is clear, however, that these decisions were no more than decisions in principle. The retrenchment process is generally triggered by a decision in principle which is subject to consultation with the affected parties. This does not constitute a pre-determination. In her evidence, Ms de Villiers denied that the applicant's retrenchment was pre-determined. She said in cross-examination that her mandate was to make the employees in the Reproduction Department aware of the situation and to commence a process with them. She further stated that she was at no time instructed to retrench the applicant. It is equally clear that the applicant at all times understood that the decisions which had been made by the respondent were not final decisions. In her email of the 6th February 2008 the Applicant refers to herself as "the possible retrenchee" and "the potential retrenchee".

[43] The respondent consulted extensively with the applicant on the severance pay and on an offer of full time employment. The obligation to consult is not an obligation to negotiate. It does not follow from the fact that the parties failed to reach agreement on those matters on which they consulted, that the process engaged in by them was not a joint consensus seeking one. The respondent does not deny that the letter to the staff dated

the 21st January 2008 was not strictly in compliance with the provisions of the Act. The respondent denies however that this renders the dismissal of the applicant procedurally unfair. The information contained in the letter of the 21st January 2008 was supplemented with the discussions which took place on the same day and thereafter. It is submitted that all relevant information as required by Section 189(3) of the Act, to the extent that it had not been included in the letter of the 21st January 2008, was given to the employees. It is further submitted that there was no prejudice to the employees and to the applicant as a result of the shortcomings in the respondent's said letter of the 21st January 2008.

[44] The Applicant's contention that her dismissal was disguised as a retrenchment or as a basis to change her terms and conditions of employment is without any merit. This contention was never put to the respondent's witnesses in cross-examination for good reason because the validity and fairness of the operational reasons for the applicant's dismissal were proved through the evidence of the respondent's witnesses. The Applicant's allegation that the Respondent did not consider other options as alternatives to dismissal is also not borne out by the evidence. The Respondent could not be expected to consider options which have no commercial viability at all such as shutting down or suspending its operations. It did consider other options as testified to.

[45] The last issue raised by the applicant related to the calculation of her severance pay. The respondent, in calculating the severance pay, divided her annual salary by 56 instead of 52 in order to arrive at her weekly salary. The effect of this, as pointed out by the applicant, is that the applicant's thirteenth cheque was excluded from the calculation of her weekly pay. The severance pay which the respondent paid to the applicant exceeded the minimum amount which the respondent was obliged to pay in terms of the Basic Conditions of Employment Act and, as such, it was entitled to exclude the applicant's thirteenth cheque from the calculation thereof.

[46] Accordingly, it is submitted that the respondent has discharged the onus on it to prove that the applicant's dismissal was substantively and procedurally fair and further that she is not entitled to receive any further amount in respect of severance pay.

Applicant's submissions.

[46] The applicant does not deny a need to make changes within the Department, but disputes whether such changes necessitated her retrenchment. The question is whether her retrenchment was properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances. The respondent had to show that the dismissal was a measure of last resort which could not be

avoided after all viable alternative steps had been considered and taken to prevent the retrenchment, or to limit it to a minimum.

[47] It is submitted that the evidence bore out the fact that all viable alternatives had not been considered at the time – the issue of short time was raised, but not considered; the issue of Mayan's relocation was raised but not adequately considered; the issue of the Applicant working a three-quarter day as was in fact required (1.75 people) was never even raised.

[48] It is accordingly submitted that the respondent has failed to establish that the applicant's retrenchment was the only viable option as a measure of last resort. The respondent's evidence was that the operational requirement was a reduction of 25 working hours and equated this to the loss of one person. It is submitted that the job loss does not necessarily follow and that other viable alternatives were not sufficiently investigated and explored. The job loss was preconceived and this is highlighted in the initial letter dated 21 January 2008 in which it is not the reduction of hours that is identified but rather the loss of one job.

[49] It is submitted further that the reason that the applicant was ultimately retrenched is that she was not prepared to drastically alter her terms and conditions of employment relating both to her salary and her working hours. This cannot be deemed fair

in any circumstances and was not shown by the respondent to be the only reasonable alternative. In the circumstances it is submitted that the respondent has failed to establish that the applicant's dismissal was substantively fair.

[50] In term of section (189) (1) (d) of the Act, when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult the employee likely to be affected. Mr. Roodt's evidence was that towards the end of November 2007 they had reached a point where they realised they were overstaffed, that the issue was discussed with his fellow directors and that the process had commenced at that point. All three of the respondent's witnesses confirmed that the situation in the department had been monitored for approximately eight months prior and that a decision to effect a retrenchment had been taken by December 2007.

[51] It is submitted that one of the requirements of a proper consultation process is that consultation must precede a final decision on retrenchment. The reason for this requirement should be obvious. It is impossible to determine beforehand what might emerge from the consultation process and to what extent these results might influence a final decision. Once a decision is taken without consultation, any representation after the event will be met with the natural reaction to justify the original decision.

[52] It is submitted that it is quite clear from all of the evidence presented that the decision to retrench was a *fait accompli* and that Ms de Villiers was merely given an instruction to implement that decision. The consultation process accordingly merely revolved around implementation and not whether it was actually necessary. In fact, any suggestions that related to alternatives to avoid the dismissal like the relocation of Mr. Mayan or placing employees on short time were dismissed without the scrutiny that one would expect from a *bona fide* joint consensus seeking process.

[53] It is submitted that an attempt to reach consensus on measures to avoid or minimise retrenchment was not discussed at all. In fact Mr. Mayan indicated that he would be prepared to relocate if he was in a corner and this aspect was not explored. The issue of spreading the 25 hour reduction over all 3 employees was also not explored. The issue of short time came up and was dismissed by Ms de Villiers making the assumption that no-one wants to work for a reduced salary.

[54] It is submitted further that whilst the alternatives referred to in the respondent's argument were raised and ventilated during the course of the trial, there was no evidence of them being considered at any stage prior to the applicant's retrenchment.

[55] An attempt to reach consensus on measures to change the timing was never put on the table and in fact the applicant was told to go immediately on being formally informed of the retrenchment. The respondent concedes that Ms de Villiers admitted that this issue was never discussed.

[56] An attempt to reach consensus on a method of selection was not disclosed in the 189(3) letter and was first brought up in the preliminary meeting on 21 January 2008 as being voluntary or LIFO. During the meeting of 29 January 2008 it was also LIFO that was identified. LIFO then changed to include retention of skills which then changed to retention of skills on a full day basis. It is submitted that consensus was clearly never sought on the method for selecting a retrenchee and that the criteria were not applied objectively and fairly. It is submitted that it is curious that the chosen criteria of LIFO and LIFO plus retention of skills result in Mr. Mayan being the candidate for retrenchment and that the applicant was only permitted to "bump" Mr. Mayan out of his position if she would work a full day and not take any unpaid leave. This must be seen in the context of the overwhelming evidence indicating an over zealous attempt by the respondent to protect Mr. Mayan's employment.

[57] The issue of severance pay was never openly discussed. It was not included in the initial 189(3) letter and when the applicant queried it in the first meeting she was merely told that the

minimum of the Act was one week per year's service. It was common cause that the company policy is 1.5 weeks and when asked why she had not put it on the table initially, Ms de Villiers merely stated that it was risky to do so because employees might be tempted by the money. The severance pay proposed was first introduced on 29 January 2008 when Ms de Villiers pointed out that the company norm was 1.5 weeks. The applicant tried to open this up for discussion in a consensus seeking manner and these attempts were thwarted every time by Ms de Villiers. It is submitted that this must be viewed in the context of the issue having been negotiated before and the respondent having agreed to pay 2.25 weeks in large scale retrenchments in February 2005.

[58] The procedural requirement that section 189(3) seeks to achieve of furnishing the applicant with sufficient information to place her in a position to consult effectively was never fulfilled, neither in the notice nor in the subsequent discussions with Ms de Villiers. In the circumstances, it is submitted that the respondent has failed to establish that the applicant's dismissal was procedurally fair.

Evaluation

[59] Consultation as is envisaged by section 189 (1) of the Act is obligatory when an employer contemplates the dismissal of one or more of its employees on the basis of its operational

requirements. The objective to be achieved in the consultation is the initiation of and engagement into a meaningful joint consensus seeking exercise. Nothing short of the *bona fides* of each of the consulting parties is called for in such a process, see *Visser v Sanlam [2001] 3 BLLR 313 (LAC).* The mechanical check list approach in going through the requirements for subsections (2) and (3) of s189 should be avoided. It is not uncommon that a consulting party frustrates the process by direct or even indirect means, see *Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC)***.**

[60] Section 189 (1) notice must contain such relevant and sufficient information as is capable of placing the employee or his or her representative in a position to participate meaningfully even in the first consultation meeting. A compromise in the supply of such information may result in that employee taking such a prejudicial position in the consultation process as may be permanently irreversible. Such would be the position when the employer wrongly identifies an employee to be retrenched and such employee discloses unwittingly that he is not averse to being retrenched, while if the appropriate information had been supplied it would have informed him that he was not, in the first place, the employee to be considered for retrenchment. The inclusion of a proposed selection criterion in the notice would help to avoid such untold harm from manifesting itself.

[61] In the present matter, no selection criteria were proposed for a discussion. From the facts, it is clear that if LIFO was the proposed selection criterion the applicant would have immediately alerted the respondent that she was not the employee with the shortest service, without enquiring about the severance pay as if she was looking forward to leaving her employment, when she was not.

[62] Once LIFO had come up as a selection criterion and it became clear that Mr. Mayan was the last employee to have been taken in, discussions with the applicant should have ceased without anything more and discussions with Mr. Mayan should have commenced. That did not happen. Again LIFO with the retention of skills came up as a selection criterion. The experiences of the applicant which had been unknown were disclosed by her and apparently not questioned by Ms de Villiers. Again, at this stage any discussions with the applicant should have ceased, assuming in favour of the respondent that the applicant was not being targeted to the protection of Mr. Mayan. Had the consultation process with Mr. Mayan commenced as it ought to have, the solution to the problem confronting the respondent might have been found to be different to retrenchment. An employer has an obligation to avoid a dismissal where that makes a rational business sense. Even though reasons to retrench employees may exist, they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to

prevent the retrenchments or to limit these to a minimum, see *Oosthuizen v Telkom SA LTD (2007) 28 ILJ 2531 (LAC).* Mr. Mayan and not the applicant was the employee with whom consultations should have been held. A consultation with him ought not to have had any bearing on the applicant, in terms of the respondent's own chosen selection criterion which was never challenged by the applicant.

[63] The respondent was obliged to respect the terms and conditions of employment of the applicant, in terms of section 197 of the Act, after her services were taken over. Any change to these terms and conditions should have been done with her consultation and in terms of the Act. The selection of the applicant for a retrenchment was accordingly substantively unfair in the circumstances.

[64] Whomsoever the candidate for a retrenchment was, the respondent was obliged to consider alternatives to a dismissal, see *SACCAWU & others v Gallo (2005) 26 ILJ 2397 (LC)* It is important to point out that such alternatives ought to be considered during the consultation process. Such consultations underpin the *rationale* for a subsequent retrenchment. As has correctly been pointed out at the instance of the applicant, there is lack of evidence pointing to the respondent having genuinely considered alternatives to a dismissal, during the consultation stage. An experienced and astute Human Resources Manager can keep pretence that he or she is *bona fide* in the

consultation process when he or she is just going through the motions. An attempt was made during the trial to repair that harm, when witnesses of the applicant testified on why each of the alternatives raised by the applicant was not appropriate. The problem with that approach was that the respondent sought to explain these alternatives long after the dismissal of the applicant had taken place.

[65] By direct means, the respondent frustrated the consultation process when it failed to give the applicant a reasonable notice of the first consultation meeting. The applicant could not prepare herself for the meeting as she did not even know that one such critically important meeting was in the cards. She could not consult any person in preparation for the meeting. Nor could she apply her mind on whether she needed to be represented. As if it was not enough, two meetings were held with her on the very first day of the consultation process. The respondent could hardly be said to have acted in the spirit of the Act. Nothing was said in evidence as to why in December 2007, a notice was not issued at the same time it was decided that Ms de Villiers would come to Durban to commence the consultation process. If there was any problem with times, the consultation meeting could have been scheduled for a later date after the issue of a proper notice. The subsequent meetings were held on the basis of what had been discussed in the first meetings and could thus not cue the harm already caused in this case.

[66] The severance pay is part of the material on which consulting parties may engage each other in seeking to achieve a joint consensus. It is part of the information that should be covered in the notice, see section 189 (3) (f) of the Act. Ms de Villiers was clearly unwilling to re-open a discussion on the severance pay, save to re-iterate the position earlier taken by the respondent in a previous mass retrench in which the applicant was presumably not a party. It is not hard to see why the bona fides of Ms de Villiers may be question in the consultation process. However, the calculation of the severance pay by the respondent came across as being in line with a Government notice 691 published in Government Gazette N. 24889 of the 23rd May 2003 in terms of section 35 (5) of the Basic Conditions of Employment Act 75 of 1997.

[68] In conclusion, the dismissal of the applicant on the operational requirements of the respondent was substantively and procedurally unfair. The consideration of an appropriate amount of compensation to which the applicant will be entitled to, will include but will not be limited to the 14 years or so that she has had with the respondent, her age, which might be a factor in not easily finding an alternative employment, the fact that it is a no fault dismissal and the amount of deviation by the respondent from the precepts of the law. It will be fair that a costs order be awarded in favour of the applicant.

[67] The following order will consequently issue –

(1) The respondent is ordered to compensate the applicant in an amount of money equivalent to eight (8) months of her monthly salary she was earning on the date of her dismissal. Such payment to be made within 14 days from the date hereof.

(2) The respondent is ordered to pay the cost of this claim.

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CELE J

DATE OF HEARING : 06 November 2010

DATE OF JUDGMENT : 12 March 2010

APPEARANCES

FOR THE APPLICANT	:	Adv. M M Posemann
INSTRUCTED BY	:	Steele Attorneys
FOR THE RESPONDENT	:	Mr B A Readon of Millar & Readon Attorneys