IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN **Reportable**

CASE No. D 655/06

In the matter between:-

CEDRIC MUNTU DUBE **Applicant**

And

ITHALA DEVELOPMENT BANK LIMITED **Respondent**

JUDGMENT

GUSH, J

1.

The Applicant in this matter was employed by the Respondent in 1988. On the 31st March 2006, the applicant was dismissed by the respondent due to operational requirements. At the time of his dismissal the Applicant held the position of "Divisional Manager Micro-finance" in the Financial Services Division of the Respondent.

2.

Whilst the Applicant conceded in the pre trial minute that there was a general need for the Respondent to retrench he averred that his retrenchment was firstly procedurally unfair; and secondly substantively unfair on the grounds that it was not necessary to retrench him specifically. The Applicant sought reinstatement on terms and conditions no less favourable than those he enjoyed at the time of his dismissal.

3.

During August 2004 the Respondent commenced a restructuring exercise of its financial division. During the course of this exercise the Applicant was, in October 2004 appointed to the position of acting Senior Manager: Microfinance. When the position of Senior Manager: Microfinance was advertised on the 12th November 2004 the Applicant applied for and was appointed to the position with effect from the 1st January 2005.

4.

It is apparent from the evidence and the documents contained in the consolidated bundle that the restructuring process continued after the 1st January 2005. The Applicant referred in his evidence to a number of emails or memos addressed to the Respondents staff regarding further changes in the structure and personnel of the finance section. The Applicant's evidence

was that after his appointment to the permanent position in January, he was required, as were his fellow managers, to establish a staff structure for his section. He explained that he had attempted to do so but had not managed to persuade his immediate superior nor the CEO to make the appointments he had recommended.

5.

According to the Applicant this caused him considerable stress as he had no staff to assist him and on the 10th June 2005 the Applicant testified that as a result of suffering blackouts he consulted his General Practitioner who referred him to a Psychiatrist. The Psychiatrist concluded that the Applicant was suffering from stress caused by his working environment and booked him off on sick leave. It appears from the sick leave records in the bundle of documents that the Applicant was initially booked off from the 10th June to the 19th June and again from the 4th July to the 17th October 2005.

6.

On the 13th June 2005, some two and a half weeks prior to the Applicant being booked off the Respondent appointed a new "Chief Operations Officer: Financial Services", Mr. Omega Shelembe, to whom the Applicant reported. The Applicant had had little contact with Shelembe prior to his sick leave, save that shortly before the onset of his blackouts he had, together with the other managers, presented their proposals on their divisional structures. Shelembe, according to the Applicant, had been hostile to the Applicant's proposal and had "torn it apart".

7.

On the 20th September 2005, during the Applicants sick leave, Shelembe wrote to him recording his concern at the amount of sick leave that the Applicant had taken during the current sick leave cycle. Shelembe invited the applicant to meet with him on the 29th September to discuss this matter. It is relevant as that in his letter Shelembe makes no mention of the respondent having embarked on any restructuring initiative involving either the financial section or the Applicant himself.

8.

Up until this point the facts are essentially common cause. At this point however the versions of what transpired begin to diverge. Each party called only one witness. The Applicant himself gave evidence and the Respondent only called Mr. Mxolisi Msomi, a manager responsible for the Respondent's employee relations. Msomi had only been appointed on the 1st of September 2005, some months after Shelembe's appointment. It appeared that Shelembe was no longer an employee of the Respondent but apart from that fact no explanation was offered as to why he did not give evidence.

9.

It is common cause that the meeting Shelembe had proposed did in fact take place on the 29th September 2005. What is in dispute is what was discussed at this meeting. The Applicant's evidence was that the discussion was confined to the topic set out in the letter, viz his ill health, while Msomi's evidence was that after discussing the health of the Applicant the discussion moved on to the restructuring that had taken place in the Financial Services Division. In the absence of any indication to the contrary, and taking into account the contents of the letter of the 20th September 2005 the probabilities favour Applicants' evidence that the subject of restructuring was not discussed. The Applicant indicated that he had undertaken during this meeting to consult his doctor to determine when he could return to work. He had done so and following the consultation with his doctor he telephoned Shelembe to advise him that his doctor had said he could return on the 17th August 2005 as he had "handled the meeting with Shelembe and Msomi well"

10.

On the 17th October the Applicant returned to work and discovered that in his absence his post had been re-designated "Divisional Manager: Co operatives and Microfinance"; advertised; and that the closing date for applications had been the 13th September 2005. The Applicant decided as a result of this information to request a meeting with Shelembe. Shelembe had

only been available on the 20th October when the meeting took place. There was a dispute over whether Msomi attended this meeting together with Shelembe or not. The Applicant was adamant that Msomi had not been present whilst Msomi insisted that he had. The Applicant explained that when he had requested the meeting on learning that his post had been re-designated and advertised, he had not disclosed to Shelembe the reason for his wanting to meet. In those circumstances he maintained that there was no reason for Msomi to have been present. Again the probabilities favour the Applicant's version particularly in the absence of any evidence to the contrary from Shelembe or any reference Msomi's presence in the subsequent memo from Shelembe recording what he averred had been discussed at the meeting.

11.

Following this meeting the Applicant received a memo from Shelembe dated the 31st October referring to the meeting of the 17th October and purporting to record the issues that had been discussed. Msomi gave evidence that he had drafted the memo on Shelembe's behalf. The memo does not refer to Msomi's presence, nor is it copied to Msomi, as is the case in later meetings when it is not disputed that Msomi was present. In the absence of Shelembe it is noteworthy that Msomi claimed to have been present and the author of memos signed by Shelembe which ex facie the memos were authored. Whilst the Applicant indicated that he had some concerns over the contents of the memo he did confirm that Shelembe had advised him that:

11.1 The finance section had been reorganized;

11.2 That his position no longer existed;

11.3 That a new post Divisional Manager: Co operatives and Microfinance had been established in its place; and

11.4 That this post had been advertised.

12.

It was apparent from the evidence that a number of new posts had been created in the Financial Services Division during the Applicant's absence; viz Divisional Manager: Micro and Cooperative Finance; Divisional Manager: Insurance; Divisional Manager: Credit Risk; Divisional Manager: Insurance; Divisional Manager: Group Finance; Divisional Manager: Property Asset Management. The Applicant also confirmed that Shelembe had told him that these posts had not been filled and that despite the fact that the closing date for applications had passed he, the Applicant, could "put [his] application forward for consideration before Friday 04 November 2005."

13.

What the memo does make very clear is that as a result of the Applicant's illness he had not been included in the consultation process which had taken place prior to the implementation of the Respondents restructuring exercise.

14.

The Applicant replied to the Shelembe memo on the 4th November detailing his concerns but did not apply for the positions as he was invited to nor did he in his reply indicate why he had not applied. In his evidence, however, the Applicant referred to a meeting he had held with Shelembe on the 25th October in which meeting the Applicant said he had advised Shelembe that he did not intend applying for the position until he received further information.

15.

Whilst the Respondent's Msomi gave evidence that later during November 2005 further memos had been addressed to the Applicant which the Applicant denied having received there were no significant developments during the latter part of November or December which any bearing on the final outcome, viz the dismissal of the Applicant. In addition the Applicant's sick leave records show that during November and December he was in any event absent for a further 17 days.

16.

The next step in what the Respondent relied on as the consultation process, commenced in January 2006. On the 5th January 2006 the Respondent issued an email to all employees advising them of the appointment of the new

Divisional Manager: Micro and Cooperative Finance. This was the post that the Applicant believed was his post and was one of the posts that he had been invited to apply for but had not.

17.

On the 10th January Respondent's Shelembe addressed what purported to be a letter in compliance with section 189(3) of the Labour Relations Act (LRA) inviting the Applicant to meet on the 16th January for the purpose of attempting to reach consensus on those issues enumerated in section 189(2) of the LRA. A careful perusal of this letter reveals that it materially does not comply with section 189(3) in that there is no disclosure of any of the "relevant information' the section required the Respondent to make. This letter, as with previous correspondence addressed to the Applicant (the memos of the 31st October and the 28th November) simply refers to "previous consultations" during which consultations it is averred that the details of the restructuring were discussed. No evidence was lead by the Respondent nor was any documentation produced to explain the rationale behind restructuring which had lead to the Applicants position becoming redundant. No evidence was adduced or explanation provided surrounding the procedure followed in the restructuring of the finance division which necessitated the creation of the new posts viz Divisional Manager: Micro and Cooperative Finance; Divisional Manager: Insurance; Divisional Manager: Credit Risk; Divisional Manager: Insurance; Divisional Manager: Group Finance; Divisional Manager: Property Asset Management.

18.

The so called s189 (3) letter requested that a meeting take place on the 16th January 2006. This meeting duly took place and at this meting the Respondent confirmed that the position of Divisional Manager: Micro and Cooperative Finance had been filled and that the Applicant's position had accordingly become redundant. The Applicant was then invited to apply for any one of the following positions: Divisional Manager: Insurance; Divisional Manager: Credit Risk; Divisional Manager: Insurance; Divisional Manager: Group Finance; or Divisional Manager: Property Asset Management. On the 18th January Shelembe sent an email to the Applicant recorded his understanding of what had transpired at the meeting.

19.

The Applicant remained dissatisfied with the process and invoked the grievance procedure by lodging a grievance regarding the retrenchment process on the 18th January 2006. At first the Respondent's Msomi acknowledged the grievance and indicated that it would be dealt with, but later on the 23rd January appeared to have had a change of heart and responded to the Applicant advising him that the Respondent was of the opinion that it had correctly followed the process required by the LRA and that the Respondent's Grievance procedure did not allow for grievances regarding a restructuring process.

20.

Despite this the Applicant, as he had been invited to, made application for the posts of Divisional Manager: Credit Risk; Divisional Manager: Insurance; Divisional Manager: Group Finance; or Divisional Manager: Property Asset Management on the 31st January 2006. In response to the Applicant's applications that the Respondent itself had asked him to submit he was advised by the Respondent's Msomi that:

> "*I have forwarded your request to relevant Executives. However, I should note that, when reviewing your CV, your application does not meet the required competencies for positions you have requested to be considered for" (sic)*

It is important to note that the Respondent had some 12 months earlier appointed the Applicant to the position of "Senior Manager: Microfinance-E Band" as part of the initial stages of the restructuring.

21.

It must be recorded that the requirements, competencies or qualifications of the posts Divisional Manager: Micro and Cooperative Finance Divisional Manager: Credit Risk; Divisional Manager: Insurance; Divisional Manager: Group Finance; or Divisional Manager: Property Asset Management appears to have been very similar and devoid of any specific detail or distinguishing feature relating to each specific post. The requirements are set out in three brief paragraphs and in fact the only difference in the various job

descriptions is that “requirements” for the different posts contain a paraphrased reference to the specific job title. If the Applicant did not “*meet the required competencies”* for the positions he applied for in January 2006, he most certainly would not, on the strength of the job descriptions, have met the competencies for the post he did not apply for viz “Manager: Micro and Cooperative Finance” . Despite this, Msomi was at pains to point out that he was of the opinion that the Applicant did satisfy the competencies for the position “Manager: Micro and Cooperative Finance” and it was suggested that his failure to apply for this ultimately lead to his dismissal. What remained unexplained was why if the Applicant had been suitably qualified to be appointed to the post of Senior Manager: Microfinance barely twelve months earlier, a post with very similar requirements he was now no longer “[*met] the required competencies”*.

22.

Unsurprisingly the Applicant was only invited to be interviewed for one of the posts and was unsuccessful in his application. The Applicant was advised of the interview on the 13th February and the interview was scheduled for and took place on the 14th February 2006

23.

As the Applicant's existing post was redundant and as the Applicant was unsuccessful in his application for an alternative post, the Respondent played out the remaining steps in the retrenchment process by dismissing the Applicant for operational reasons with effect from the 31st March 2006 and paid him his severance benefit as required by the Basic Conditions of Employment Act.

24.

The pre trial minute recorded that the issue in dispute was whether or not the Applicant's dismissal was substantively and procedurally unfair.

24.1Substantively; the Applicant recorded that he believed his dismissal to have been unfair in that he satisfied the competencies of and was able to perform the duties of the restructured posts and that it was not only unnecessary to have dismissed him but to have employed outsiders to fill the newly created positions was unfair. The Respondent's reply to this was that Applicant was selected to be dismissed because his position was affected by the restructuring, became redundant and that there was no suitable post where he could be absorbed.

24.2 Procedurally; the Applicant complained that the Respondent had not properly nor meaningfully engaged him as required by the section 189 of the LRA; that the outcome viz his dismissal was a fait

accompli and that the efforts of the Respondent were simply designed to pay lip service to the process. The Respondents reply to this was that as the Applicant had been on extended sick leave and as the restructuring was important the Respondent could not be held to ransom by the Applicants indisposition and therefore it had proceeded in with the process without him; and that its efforts on his return were sufficient to render the process procedurally fair.

25.

In the matter of UNITED PEOPLE'S UNION OF SA on behalf of KHUMALO v MAXIPREST TYRES (PTY) LTD (2009) 30 ILJ 1379 (LC) Molahlehi J relying, on FAWU & others v SA Breweries Ltd [2002] 11 BLLR 1093 (LC) at 1109B-D and Decision Surveys International (Pty) Ltd v Dlamini & others [1999] 5 BLLR 413 (LAC),
held:

> *"…that the test for substantive fairness in dismissals for operational reasons is whether the retrenchment is genuinely justified by operational requirements."* (at page 1387 para 39)

In the pretrial minute the Applicant conceded that there was a general need to retrench but argued that that need did not extend to the Applicant.

26.

In the matter of UNITRANS ZULULAND (PTY) LTD V CEBEKHULU [2003] 7 BLLR 688 (LAC) Zondo JP in rejecting the

> *"… contention that the substantive and procedural fairness were so intricately linked that, once the court a quo had found that the dismissal was procedurally unfair, it could not find that it was substantively fair..."*

held:

"Substantive fairness relates to the existence of a fair reason to dismiss. In relation to substantive fairness the question is whether or not, on the evidence before the court, and not on the evidence produced during the consultation process, a fair reason to dismiss existed" (page 696 para 25)

27.

It was clear from the evidence that the restructuring process had not been finalized during 2004 and that despite the Applicants appointment to the position of Senior Manager: Microfinance at the time of the initial restructuring in 2004, during the Applicants absence on sick leave certain further changes to the proposed structure had been decided on and given effect to by re-designating the erstwhile "**senior** managers" posts as "**divisional** managers." This change in nomenclature however was not a

matter that Respondent relied on to distinguish between the posts as Shelembe in his memos to the Applicant described him as the "Divisional Manager: Microfinance". Save for the letter Shelembe addressed to the Applicant recording his concern (understandably) at the Applicants protracted absence from work there was no documentary evidence produced to support the decision to rename and designate the posts which ultimately lead to the Applicant's dismissal let alone a explain why there was a fair reason to do so.

28.

Unfortunately for the Respondent, Msomi, who was Respondent's only witness, was similarly unable to establish a reason for the Applicants dismissal save for the fact that the Applicant had not applied for the Advertised post of Divisional Manager: Micro and Cooperative Finance and that in his opinion the Applicant did not satisfy the requirements for the remainder of the vacant divisional manager posts. His evidence on this aspect of the matter was not supported by the various job descriptions. The respondent made no effort to explain why in the light of the Applicant's appointment to the position of Senior Manager: Microfinance or (as Shelembe regarded it) Divisional Manager: Microfinance his qualifications and experience no longer satisfied the Respondents' requirements. Whilst one might speculate that the Applicant's inability to cope with the stress of the job and his lengthy absence could have been reasons for his unsuitability the Respondent studiously avoided this aspect and it was not proffered as a reason.

29.

In the absence of evidence of a fair reason for the dismissal of the Applicant it must be concluded that his dismissal was substantively unfair.

30.

Turning to the alleged procedural unfairness there is abundant authority for the proposition that in engaging in "meaningful joint consensus seeking" the parties are required to openly and honestly address alternatives to the retrenchment. In **JOHNSON & JOHNSON (PTY) LTD v CHEMICAL WORKERS INDUSTRIAL UNION (1999) 20 ILJ 89 (LAC)** the Labour Appeal Court set out clearly the requirements for compliance with the procedural aspects of section 189 of the Labour Relations Act. The court held:

> *"The important implication of this is that a mechanical, 'checklist' kind of approach to determine whether s 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved (cf Maharaj & others v Rampersad 1964 (4) SA 638 (A) at 464; Ceramic Industries Ltd t/a Betta Sanitaryware & another at 701G-702H (BLLR), 676B-677C (ILJ); Ex parte Mohuloe (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H-1138D)."*
>
> *"Mention has already been made that s 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 invariably result also in the dismissal being unfair for failure to follow proper procedure. It is difficult to envisage a situation where the result could be different."(at page 96/7 paras 29 and 31)

31.

The lack of attention to detail in the procedure adopted by the Respondent and the somewhat belated efforts to satisfy the required procedure were met with a somewhat petulantly response by the Applicant. This however does not gainsay the fact that the Respondent did not comply with the procedural requirements of the LRA and did not produce any evidence to substantiate or justify the fairness of the decision to dismiss the Applicant. The Respondent had decided whilst the Applicant was on sick leave to continue with the restructuring process without input from the Applicant in circumstances where the proposed restructuring would have a substantial effect on the Applicant and neither did the Respondent attempt to disclose "*all relevant information*" as is required by section 189(3) of the LRA. All that the Respondent was able to offer in support of its contention that it had complied with the procedural elements of section 189 of the LRA and in particular the "relevant information" were the memos and emails which somewhat glibly referred to the "consultations" where it was averred that the detail of the proposed restructuring had been "*shared with you on our discussion" (sic)*; and *"… part of the consultation session of the 20th July*

2005, I informed you of the re-organisation of the Financial Services Department and that you are still in this SBU".

33.

The facts of this matter particularly required disclosure to enable the Applicant to engage in the consultations meaningfully given his recent appointment and that his position was now in jeopardy. The failure of the Applicant to apply for the position of Divisional Manager: Micro and Cooperative Finance was understandable in the circumstances where the applicant had not been provided with the "*Proposed organisational structure for the Financial Services Department"* which had been "*outlined to employees and the implications hereof identified"*. The Respondent's Shelembe stated clearly in his memo to the Applicant on the 31st October that having shared the information with the employees they had been invited to "*make input"* and "*give their motivations thereof" (sic).* Shelembe in the same memo continues to advise the Applicant that having followed this procedure the positions had been advertised and input sought from the affected employees. Shelembe's regret that the Applicant had not been part of this process due to his being on sick leave does not excuse that fact that the Applicant had been excluded from the process.

34.

I am satisfied that the procedure followed by the Respondent was unfair and that accordingly his dismissal was procedurally unfair.

35.

The Applicant persisted in his claim for retrospective reinstatement. The Applicant gave evidence that he had been unemployed for a period of 18 months and had thereafter been employed by the Department of Economic Development as a Deputy Manager where he was still employed.

36

The court has discretion to direct in circumstances where a dismissal is unfair that the Respondent either reinstate or re employ the Applicant. In his evidence Msomi indicated that the Respondent had undergone numerous restructuring exercises subsequent to the Applicant's dismissal the positions had changed and that the Applicant's job no longer existed. This evidence was not challenged. In those circumstances it is more appropriate to order his reemployment as opposed to reinstatement and to make the reemployment retrospective for the eighteen months that he had been unemployed.

37.

In all the circumstances I make the following order:

37.1 The dismissal of the Applicant was both substantively and procedurally unfair;

37.2 The Respondent is ordered to re employ the Applicant with effect from the 1st January 2009 in a position and on a level commensurate with the position held by the Applicant at the time of his dismissal;

37.3 The Respondent is ordered to pay the Applicant's costs.

Gush J

Date of Hearing: 3rd, 4th and 6th May 2010

Date of Judgment: 7th June 2010.

Appearances:

For the Applicant: Advocate M Naidoo, instructed by Brett Purden Attorneys;

For the Respondent: A. P Shangase of A P Shangase and Associates.