IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JS 374/08

In the matter between:

WILNA VAN ROOYEN AND 12 OTHERS	**APPLICANTS**
and	
BLUE FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LTD	**RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicants were all employed by the respondent until February 2008, when they were dismissed for reasons relating to the respondent's operation requirements. The applicants had previously been employed by Future Finance (Pty) Ltd (FF), which changed its name to that of the respondent after a sale of shares in FF to the respondent's holding company. This transaction initially assumed some significance in these proceedings – the applicants claimed initially that the reason for their dismissal was related to the transfer of a business as a going concern, and that it was therefore automatically unfair. This claim was abandoned during the course of the trial after the applicants conceded that the nature of the transaction in terms of which the shareholding of FF was acquired by the respondent's holding company did not trigger the provisions of section 197.

[2] The parties agreed during the course of the trial that the applicants' dismissal fell to be regulated by the provisions of s 189 of the Labour Relations Act (LRA), despite interlocutory proceedings in which the applicants had claimed relief in terms of s 189A (13). Be that as it may, the parties agreed that the affidavits filed in the application for urgent relief under s 189A (13) would be admissible as evidence in these proceedings. The parties also agreed that a schedule prepared by the respondent reflecting the date of engagement of each of the applicants and the rate of remuneration received as at the date of dismissal, should be admitted as evidence. Finally, it was agreed that the experts' notices filed by the parties would be admitted as evidence and that neither party would call its expert to testify.

[3] The applicants, all of whom were previously engaged by the respondent as regional managers, claim that their dismissal was substantively and procedurally unfair. None of them seeks reinstatement into the respondent's employ; all of them seek the maximum possible compensation.

The facts

[4] The only witness to give evidence was Mr. Christo Klopper, the respondent's head of operations for South Africa. The material facts can be gleaned from his evidence, and can be summarised briefly as follows.

[5] In February 2007, the staff previously employed by FF was introduced to and received training in what was referred to as Blue products, the product lines added to those previously offered by FF. As early as March 2007, the respondent's management formed the view that sales of Blue products at the former FF branches were not satisfactory and by August of the same year, an investigation was initiated, including an assessment of the business model that then applied. The respondent identified the structure of the regional manager position as the sole significant cause of the poor sales performance.

[6] By early September 2007, the respondent appointed SHL, a management consultancy, to develop a profile for the position of regional manager. By 11 October 2007, SHL had made a report to the respondent on the ideal profile for a regional manager.

[7] On 25 October 2007, a meeting was held with all of the regional managers, including the applicants. At the meeting, Klopper informed the applicants that the efficiency, productivity and relevance of all positions had been undertaken, and that a restructuring exercise was to be commenced, beginning with the regional managers. In response to questions raised by the applicants, Klopper advised the applicants that the respondent's decision was not based on individual performance, but that it was intended to streamline the respondent's existing structure, and to reduce the number of regional manager posts. The applicants were informed that they would have to undergo assessments, and that the outcome of those assessments would determine their eligibility for appointment to the new posts.

[8] After the meeting, each of the applicants was handed a letter styled an 'I invitation to consult regarding possible outcomes and potential consequences of the changes in the Regional Manager position of Blue Employee Benefits RSA in accordance with Section 189 of the Labour Relations Act.' In essence, the letter comprises a summary of what was conveyed to the applicants at the meeting. The respondent indicated that it envisaged that the consultation process would be complete by end November 200, and that a final decision would be communicated to the applicants on 1 December.

[9] By 31 October 2007, the respondent had begun the process of obtaining quotes on the various options for the assessment of the regional managers. This process was completed by 5 November. On 15 November, one of the applicants, Christa Prinsloo, forwarded a request for information to Klopper in respond to the letter dated 25 October. The information sought related to the proposed

restructuring and the rationale behind it. Klopper replied to this letter on 16 November, in brief terms, in effect stating that the information requested was premature and that the issues raised would be the subject of discussion in due course. The letter concludes, in the obfuscatory style that characterised the respondent's communications, as follows:

> "*The information as requested by you is premature at this time as the evaluation of the effectiveness of you're position and you're employment contract will only be done on completion of the current process, and it's effect on the area currently managed by you.*
> *We would like to emphasise that this process can only be successful if you and all role players involved actively participate herein by giving your point of view as to whether this process is in any way required and, or if required, the possible structures that should be implemented, be assured that you opinion is sincerely sought and will be given due consideration*" (sic).

[10] . On 15 November 2007, the applicants were advised that they were required to undergo assessment by SHL. The online assessments were completed by 23 November.

[11] On 26 November, Colin Dorian, a consultant mandated by the applicants to act on their behalf, wrote to Klopper requesting a meeting and stating that while businesses needed to review their situation from time to time, the process adopted needed to be fair, credible, legitimate and inclusive. Klopper initially declined to meet with Dorian, but later relented. Klopper and Dorian met on 5 December 2007, when Klopper presented Dorian with certain documents. The next day, 6 December 2007, Dorian wrote to Klopper requesting further information that he indicated was necessary for the applicants to participate in a joint decision-making process, a request to which Klopper responded on 11 December. In the interim, on 10 December, SHL had presented the respondent

with the outcome of the assessments. Only five of the applicants were assessed as being ‘acceptable’ candidates. On 14 December 2007 Klopper and Dorian held a further meeting, where the applicants were given an opportunity to propose their own organisational structures, job profiles and remuneration structures by no later than 31 December 2007.

[12] On 28 December 2007, the applicants submitted a memorandum to the respondent. The memorandum is some 12 pages long. It challenges the respondent’s assumptions for the inefficiencies identified, and makes detailed proposals that establish a basis for further discussion. For example, in relation to the regional manager job profiles, the applicants acknowledge that the job profiles drawn up by the respondent are comprehensive, but suggest that the profile be assessed in terms of the profiles of provincial managers and branch or market manager roles, i.e. that a framework be agreed before particular positions were profiled.

[13] The applicants’ proposal was met with the respondent’s letter of 11 January 2008, effectively announcing the outcome of the consultation process (a decision to establish 11 new regions and to the decrease in the number of regional manager posts). The applicants were also informed that the restructuring would go ahead as per the letter handed to them on 25 October 2007. By 14 January 2008, three of the 17 regional managers had been selected for appointment to the post of regional manager, and letters offering the choice of ‘redeployment’ or retrenchment had been sent to the applicants. It is common cause that none of the applicants (but for Schoeman) applied for alternative positions.

[14] On 28 January, the applicants (but for Schoeman) were given letters notifying them of the termination of their employment with effect from 28 February 2008. Schoeman was later advised that her application for alternative employment had been unsuccessful, and she was given notice of the termination

of her employment on the same terms. On 21 February 2008, the applicants were provided with feedback on their assessments.

The applicable legal principles

[15] The test to be employed when determining the substantive fairness of a dismissal for reasons related to an employer's operational requirements is now well established. In relation to what is commonly referred to as the 'need to retrench', the court must not defer to the employer, at least not in the sense that the court is bound by the employer's say-so[1] or that it should necessarily accept the rationale proffered by the employer for the retrenchment at face value. In other words, fairness is found not only in the consultation process and in the justifiability of the employer's decision on rational grounds;[2] the reason must be fair. This is an objective enquiry that the court must undertake on the basis of the information available to it. The applicable principle is well expressed in *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 (LAC), where the Labour Appeal Court (per Davis AJA) said the following:

> *"The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which*

[1] *CWIU v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).
[2] See *SACTWU & others v Discreto (a Division of Trump and Springbok Holdings)* [1998] 12 BLLR 1228 (LAC).

would have been chosen by the court. Fairness, not correctness is the mandated test" (at 2269J- 2270A).[3]

[16] The application of fair selection criteria is the second component of substantive fairness. There is a procedural component to the enquiry – s 189(2)(b) requires the parties to consult and to attempt to reach consensus on the method for selecting the employees to be retrenched. Section 189(7) gives substantive content to this requirement by stipulating that the employer select the employees to be retrenched according to selection criteria that have been agreed or, in the absence of agreed criteria, fair and objective criteria must be applied.

[17] To the extent that the present case concerns a requirement that employees apply for posts within a restructured organisational template, the legitimacy of this approach was recognised by the Labour Appeal Court in *Vancoillie v Santam Life Insurance Ltd* (2003) 24 *ILJ* 1518 (LAC). It is not a strategy that is without risk to the employer seeking to implement it. In his article "Corporate Restructuring and 'Applying for your own Job'" (2002) 23 *ILJ* 678. Prof Alan Rycroft warns:

"Caution must be applied when an employer declares all jobs to be redundant because, unless the employer is closing or moving, that clearly cannot be an accurate description of what changes the employer is seeking to make. Modifying a job and its responsibilities does not make that job redundant because jobs are normally constantly being redefined and adapted. It is difficult not to see the device of making all positions redundant as anything else other than a mechanism to avoid the basic purpose of retrenchment law, namely the protection of employees from dismissal over which they have no control and for which they are not at

[3] To the extent that this is a later decision by the same court, it supersedes the approach adopted in *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) where the court required that an employer establish that termination of employment is the *only* reasonable option in the circumstances.

fault. The mechanism is open to abuse because jobs can be redefined in a way that deliberately excludes existing employees, whilst in reality the function performed by those employees are not redundant but simply allocated to another position. This mechanism all too easily lends itself to retrenching employees who are perceived to be 'dead wood' or 'difficult' but who would be awkward or difficult to dismiss by means of an ordinary disciplinary hearing. For these reasons, employers will bear the onus of showing how the new jobs are different from the old jobs. If they are not sufficiently different, the employer will have to show why skills could not have been upgraded rather than resort to retrenchment" (at 682).

[18] Prof. Rycroft observes that a decision by an employer that all jobs in a department are redundant avoids the need to decide selection criteria 'up front' for those who will be ultimately retrenched. The selection criterion effectively for becomes the employee's failure to be appointed to a 'new' job, or the failure to apply for it. Prof Rycroft suggests in this regard that the criteria for appointment to the restructured position to be fair, they have to be clear and transparent – the more vague the criteria, the more likely it is that in reality, the selection is made on the basis of a subjective view, thus crossing the line between a no-fault dismissal and one based on performance (at 680 -681).

[19] Fair procedure primarily requires that the parties engage in a meaningful joint consensus-seeking process. This obligation, which has its origins in *Johnson & Johnson v Chemical Industrial Workers Union* (1999) 20 *ILJ* 89 (LAC), requires at least that that the parties attempt to reach consensus on the issues listed in s 189 (2) and (3). More precisely, the employer must invite representations on these issues from the appropriate consulting party, seriously consider and respond to any representations that are made. Both parties are required, in good faith, to seek consensus. This is not a mechanical process – meaningful joint decision-making requires that the parties act with the honest intention of exploring the prospects of agreement. If no joint consensus-seeking

process has occurred, the court is obliged to determine which party was responsible for this state of affairs. If it was the employer party, the dismissal is procedurally unfair (see *Johnson & Johnson v Chemical Industrial Workers Union (supra).*

Evaluation

[20] This present case is not one of those where an employer seeks to draw a line between the corporate equivalent of excessive bleeding and imminent death, and to justify dismissal as a life-saving measure. There is no dispute that the business previously operated by FF was profitable, and that the new product lines introduced after the purchase of the equity in FF did not render the business unprofitable. The new management demanded a more favourable return on their investment and that the proposed restructuring was the means to that end. The applicants concede that the sales of Blue products were not at a level which was acceptable to the respondent's management. What they contest is that the predominant reason for this lay in the existing managerial structure, and that the new structure developed by the respondent addressed the problems identified by the respondent as inhibiting the achievement of the levels of profitability that it demanded.

[21] Klopper's evidence that the original business model (based as it was on micro-loans) was inadequate and that a new model was needed to sell the range of Blue financial services products efficiently, was not seriously contested. The conclusions to which the respondent ultimately came were that structural change was necessary (at least in so far as the regional managers were concerned) and that the job profile relating to the regional managers required revision. In the respondent's view, the restructuring that it proposed was justified by the failure of the FF structure to meet the required targets, and the need to implement an efficient and effective business model to sell the full range of products. As it transpired, the ultimate decision to reduce the number of regions from seventeen

to eleven, which the respondent contended would improve its operating efficiency and result in an increase in the sales of the new product range appears to have been vindicated by the respondent's improvement in performance in the months following the restructuring.

[22] Klopper's evidence on the difference between the old and new posts was not unequivocal. He conceded that the respondent's profile and the described purposes of the positions were identical, and relied ultimately on a description of 'essential worker activities' to distinguish them. It is clear though that the regional managers would, in the restructured organisation, be required to undertake additional responsibilities in relation to the expanded product lines and that the nature of their function would change. On balance, I am satisfied that the respondent has established that the difference in job content between the old and the new profiles of the regional managers' positions was sufficiently significant to justify the requirement that the applicants be assessed for their suitability for appointment to the new positions. Indeed, this appears to be the approach adopted by the applicants themselves in their memorandum addressed to Klopper on 28 December 2007 in which they appear to accept that the new profile developed by the respondent was technically exact and complete, and that the additional responsibilities that regional managers would be required to assume had the consequence of an appreciable difference in job content. This conclusion distinguishes the present circumstances from those that applied in *The South African Mutual Life Assurance Society v Insurance and Banking Staff Association & others* (CA 10/00), where the Labour Appeal Court upheld a finding by this court (per Jajbhay AJ) that where an employer failed to demonstrate a difference in job content between the old and new structures, then it could not be said that the affected employees were redundant. In short, I am satisfied that the respondent has established a fair commercial rationale for its decision to restructure its business operations and that the change rendered the applicants redundant, at least in the sense that its decision to assess the applicants' suitability for the restructured posts was fair in the circumstances.

[23] To the extent that requirements of substantive fairness necessitate a separate enquiry into the fairness and objectivity of the selection criteria applied by the employer, it is common cause in the present instance that there was no agreement regarding selection criteria. In its s 189 (3) notice issued on 25 October 2007, the respondent proposed competency, qualifications and experience as fair selection criteria for placement. In the result, the respondent selected only those candidates who had been assessed as 'strong candidates' in the assessment conducted by SHL. Eight of the eleven new regional general mangers' posts were filled by external candidates who were subjected to the same assessments, and who were identified as strong candidates. The case pleaded by the applicants was that the only employees selected for retrenchment were those previously employed by FF. This is patently not the case; Klopper's evidence that two of the successful applicants were previously FF employees was not disputed. To adopt the approach suggested by Prof. Rycroft, the fairness of the selection criteria applied in circumstances such as the present is dependent on clear and transparent criteria. In my view, the approach adopted by the respondent meets this test. Without passing any judgment on the scientific validity of the assessment conducted by on the respondent's behalf, it cannot in my view be said that the process that formed the basis of the selection of those to be offered appointment to the new posts was entirely subjective or arbitrary (and therefore unfair), or that the criteria applied were not transparent.

[24] In relation to fair process, it is not disputed that following the meeting on 25 October 2007 at which the consultation process was initiated, there was only one further meeting (with the applicants' representative) on 5 December. At both meetings, information was exchanged - there was no search for consensus. The applicants were thereafter specifically invited to make written representations on the respondent's proposals by 31 December, which they did. The memorandum that they submitted on 29 December is a considered document, which called for a considered response and for further engagement with the applicants. Instead,

the respondent adopted a dismissive attitude to the memorandum and decided to dismiss the applicants. Klopper could not provide any reason why there was no further engagement on the applicants' proposals, and in particular why there was no measured response to the applicants' memorandum. The obligation to participate in a meaningful joint consensus-seeking process required the respondent to engage further with the applicants and their representative on the memorandum, to consider seriously the proposals made on their behalf and to attempt to reach consensus with them. The respondent made no attempt to reach consensus – it had clearly had adopted the attitude that the cut-off of 31 December was to be applied, regardless of the merits of the applicant's contribution. There was no reason why in the present circumstances the respondent could not have continued to consult with the applicants and their representative, at least to the point of a coherent and cogent response to their proposals.

[25] As I have already indicated, the circumstances in which the respondent found itself was not one in which urgent and drastic measures were necessary in order to ensure the survival of the enterprise. The business in which the applicants were engaged was profitable, and the respondent's restructuring was designed and implemented to generate profit levels that it considered acceptable. While from the perspective of substantive fairness this court has recognised an employer's right to restructure for reasons relating to profitability and increased efficiency as opposed to reasons which threaten the financial viability of the business, it seems to me that in the former case, the obligation to give serious consideration to reasonable proposals made by employees or their representatives, especially in relation to alternatives to retrenchment and the prospects of accommodation in alternative employment is more onerous. This is not a case where any delay in the consultation process would have resulted in unsustainable losses for the respondent, or which might otherwise have justified bringing the consultation process to an abrupt end.

[26] Further, the respondent failed adequately at any stage to consult on selection criteria applied by the respondent. Given the significance of the assessments conducted by SHL (which effectively determined who was going to be selected for retrenchment); fair procedure demanded at least some engagement with the applicants on the outcome of the assessments that they had undergone, prior to their dismissals. Feedback on the assessment was provided only in February 2008, after letters of dismissal had been issued. Finally, the nature of the operational reasons relied on by the respondent to justify the applicants' dismissal required a concerted effort to secure alternative employment for those not appointed to the new posts. It was not sufficient, in my view, for the respondent simply to offer those who were declined appointment to the posts of regional manager the option of applying for appointment to vague and unspecified alternative employment, or to accept retrenchment on the respondent's terms. The obligation to consult over alternative employment and to take steps to accommodate affected employees in that employment is more onerous in circumstances such as the present, where the rationale for a proposed retrenchment is to improve profitability. The respondent failed to consult adequately on alternatives to retrenchment and failed to take sufficient steps to identify, offer and where possible accommodate the applicants in alternative employment. For these reasons, the applicants' dismissal was procedurally unfair.

Relief

[27] The applicants do not seek reinstatement. When assessing the app appropriate amount of compensation to which the applicants are entitled, the court must arrive at an amount that is fair to both parties, and in a case where there is a finding of procedural unfairness only, the court is required inter alia to take into account the magnitude of any procedural defect that is found to exist (see *Fouldien & others v House of Trucks (Pty) Ltd* (2002) 23 ILJ 2259). In the present instance, the following factors are relevant. The respondent made efforts,

however inadequate, to comply with the relevant procedural requirements. Notwithstanding the respondent's shortcomings in failing to identify alternative employment and to take proactive steps to accommodate the applicants, the fact remains that the applicants did not apply for alternative positions, notwithstanding the invitation to do so. They elected instead to accept the retrenchment option on a without prejudice basis. While I share the applicants' sense of pessimism about the existence of any reasonable alternative employment, their election to disavow this option (Schoeman excepted) is a relevant factor. There is no evidence before the court as to the extent of any patrimonial loss suffered by any of the applicants consequent on his or her retrenchment. (It is common cause that the applicants earned monthly salaries that ranged from R25 000 to R76 000 per month). Taking all of these factors into account to these factors, I consider an amount of compensation equivalent to four months' remuneration to be fair and equitable.

[28] Finally, since the applicants have succeeded in establishing an unfair dismissal and a right to compensation, there is no reason why costs should not follow the result. The order that I intend to make excludes the costs of the s 189A (13) application brought by the applicants as a matter of urgency on 26 August 2009, and the costs that are the subject of a judgment of this court dated 5 August 2009 (per Basson J) in which the applicants were ordered to pay the wasted costs occasioned by the postponement of proceedings on that date.

I accordingly make the following order:

1. The applicants' dismissal was procedurally unfair.
2. Each of the applicants is awarded compensation equivalent to four months remuneration, to be calculated on the basis of the agreed rate of remuneration of each applicant as at the date of dismissal.
3. The respondent is to pay the costs of these proceedings, but for the costs occasioned by the urgent application brought by the applicants on 26

August 2009, and the costs that are the subject of a judgment by this court dated 5 August 2009.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of trial: 3 to 6 May 2010
Date of judgment: 11 May 2010

Appearances

For the applicants Adv Chris Orr, instructed by Edward Nathan Sonnenberg Inc
For the respondents: Adv PH Kirstein instructed by Van der Merwe Du Toit.