IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

REPORTABLE

CASE NO: P 79/09

In the matter between:

DAVID CALLAGAN Applicant

AND

PAM GOLDING PROPORTIES Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in this matter contends that his dismissal for operational reasons was both procedurally and substantively unfair and for those reasons claims that he is entitled to the maximum compensation as provided for by section 194 of the Labour Relations Act 66 OF 1995 (the LRA).

[2] The main legal issues which this court is required to determine are set out in the pre-trial minutes as follows:

> *3.1.1 Whether or not the respondent sought to consult the applicant within the meaning of section 189 of the LRA, both in relation to its commercial rationale and the further requirements of section 189 of the LRA.*

3.1.2 Whether or not, as a matter of fact, the respondent adopted the position that the redundancy of the applicant's post would automatically imply his selection for retrenchment

3.1.3 Whether or not and to what extent the respondent embarked upon consultation regarding alternatives and, further more, made a bona fide endeavor to secure an alternative post for the applicant.

3.1.4 Adopting the premise that the respondent had a valid commercial rationale for doing away with the applicant's position, whether or not the applicant ought to have been accommodated either within the respondent's local structures, or within the group.

3.1.5 Whether or not the respondent disclosed all relevant and material information as required by section 189 (3) of the LRA.

3.1.6 Whether or not the respondent consulted the applicant regarding both the method of selecting him and or the criterion to be applied in determining who was to be retrenched.

3.1.7 Whether or not the respondent consulted the applicant regarding matters raised in section 189 (2) (a) and (c) of the LRA.

3.18 Whether or not the respondent acted reasonably and fairly

in rejecting the applicant's proposal for his consensual retrenchment (as conveyed at their meeting on the 4th December 2008)."

Background facts

[3] It is common cause that prior to his dismissal, the applicant was employed as a branch manager of the respondent's branch office in Port Elizabeth. The applicant's salary excluding the respondent's contribution to the pension fund and medical aid was R26 228.00 per month.

[4] It is apparent from the evidence presented that after identifying its financial difficulties, the respondent sought ways to address that challenge. A meeting was held in June 2008 where the financial difficulties were discussed. One of the resolutions adopted at the June meeting was that there is a need to significantly reduce the costs. It is recorded in the minutes that one of the attendees of the meeting, in making his submission during the meeting"*…warned that potentially we would need consider reducing people as well, as hard as it is."*

[5] In relation to the Port Elizabeth office it is specifically stated in the minutes that the branch had suffered a financial loss in the amount of R1.4 million. The minutes also reveal that the meeting contemplated evoking the provisions of section 189 of the LRA. It is specifically recorded in this respect that: "*legally, once we have an understanding of who might be impacted, we have a responsibility to communicate with them. Each region and division to give a list ….of people who may be affected."*

[6] The executive committee convened another meeting on the 1st October 2005. It was resolved at that meeting that there was a need to reduce the costs by R 2 million per month. Again the Port Elizabeth office was specifically referred to and the two options considered was either to close the branch or sell the branch to one of the employees.

[7] On the 28th October 2008, the executive committees met with the managers of the respondent. At that meeting the regional managers were entrusted with identifying which of their branches would not succeed in turning around the economic down turn. The managers were also mandated to close down the offices which could not be salvaged. The regional managers were required to recruit the "*best branch manager and also in that respect to review their staff base and identify potential, future managers.*"

[8] During August September 2008 the respondent appointed as a sales manager, Mr Wright ("Wright") in the Port Elizabeth office. The sale manager's function was prior to that appointment performed by the applicant.

[9] On 2nd December 2008, Mr Van Niekerk ("Van Niekerk"), the regional office manager convened a meeting to be attended by him, Mr Jammy (Jammy) and the applicant. In arranging this meeting Van Niekerk never disclose its purpose to the applicant.

[10] At the meeting the applicant was handed a letter headed "*Proposed Restructuring and Possible Retrenchment.*" The applicant was required to read the letter and immediately thereafter, and after the departure of Van Niekerk, to

enter into a consultation process with Jammy concerning the restructuring of the respondent.

[11] The reasons for the restructuring are set out in the letter in the following terms:

> *"In keeping with the Company's strategy to stream line structures where possible, we have reviewed the staffing structure in the Port Elizabeth branch office and I am of the opinion that operating efficiencies would be increased if the Branch Manager position were (sic) made redundant and reporting was done directly to Louis Van Niekerk. We are therefore proposing that your position of Branch Manager be made redundant."*

[12] The selection criterion set out in the said letter is based on "*the retaining of necessary skills, expertise and experience ….*"

[13] The letter set out the alternatives in the event of the implementation of the restructuring of the respondent as follows:

> *"4.1 that you be moved into a vacant position within the Company;*
>
> *4.2 that you be placed into an existing post in the Company structure at the expense of the incumbent in that position; and*
>
> *4.3 any other proposal made by you during the consultation process."*

[14] The letter goes further to state in the same paragraph that:

> *"Due to the nature of the positions within the company, and on application of the proposed selection criteria of retention of necessary skills, expertise and experience, the Company does not anticipate retraining your services at the expense of an incumbent within the*

Company. Your own input on this issue would be considered at the appropriate time. Should the Company not been in a position to retain your services under the circumstances envisaged in four above, it is anticipated that you will be retrenched.

While not an alternative to retrenchment, the Company would like you to consider the option of contracting to it as an agent on a commissioner only basis."

[15] As concerning the timing of the retrenchment, it is indicated in the letter that:

"It is proposed that, if the termination of your employment is the out come of consultation process, your notice period would be discussed and agreed with you."

[16] It is common cause that subsequent to the meeting of the 2nd December 2008 the parties held several other meetings. The points discussed during those meetings are recorded in the minutes. The summaries of what transpired in those meetings are set out in the applicants heads of arguments as follows:

4.20.1 At the first meeting (on the 2nd December 2008) the applicant specifically indicated that he did not expect that his position would be affected…. The applicant however indicated that he was unable to relocate.

4.20.2 A further meeting was held on the 3rd December 2008. The meeting was largely confined to the applicant protesting the respondents proposal, raising personal facts or considerations and requesting an opportunity to seek advice.

4.20.3 Richard Wright was however also raised during the course of the meeting. The applicant questioned why that appointment was made given the market condition and he referred specifically (and predictably) to the fact that he had been requested to take a cut in his salary.

4.20.4 A further meeting was convened on the 4th December 2008, a number of important issues were raised including the applicant protesting against the timing of the exercise, the respondent's alleged failure to explore all alternatives.

4.20.5 He also during the course of this meeting indicated that although not accepting the fairness of either the process or appointment of Richard Wright, he was prepared to live with the respondents decision provided he received an extra month remuneration. This issue was then pursued latter that morning.

4.20.6 In the contexts of changing the timing of the applicant retrenchment the respondent proposed that it be adjusted until the end of December – as opposed to immediate- and that January served as the applicants notice period.

4.20.7 The applicant indicated that on account of his financial situation, he wished March to serve as his notice month. He was also at this stage asked whether he had any further alternatives to propose. The applicant had none.

4.20.8 Within an hour or so another meeting was convened and applicant's proposal rejected. This apparently on the basis that the respondent was intend upon saving costs, and that the payment would not be fair to other individuals who might be retrenched… The applicant once again protested the fairness of his retrenchment, and reiterated his request for March his notice month.

4.20.9 That same day (in a yet further meeting) the position of Richard Wright was again raised. Although the applicant once again sought to alter the timing of his retrenchment, the respondent's response appeared to have been that it was bound to consider alternatives and not a (settlement).

4.20.10 Later that date the applicant handed the respondent a typed letter (incorrectly dated 4th November 2008) in that letter he recorded his dissatisfaction with the process initiated by the respondent and the fact that, in his view his retrenchment was a fatal compile. He also records his unhappiness with having to make important decisions on short notice, and without a fair and proper opportunity to consider his position.

4.20.11 He in closing complianed regarding adequacy of disclosure, the absence of genuine attempt to consult, and the respondents unwillingness to accommodate the fact that the

applicant required more time to secure alternative employment."

[17] On 5th December 2008, Jammy informed the applicant that his proposal to extending his period of departure and notice period was rejected and told him that the respondent was only prepared to extend his salary until the end of December with the notice period commencing in January 2009. It would appear that the possibility of the applicant applying for the post ear marked for Wright was also raised. The applicant indicated that it would serve no purpose because the same people who appointed Wright would seat in the consideration of the appointment.

[18] Thereafter, on the 5th December 2008, Jammy presented the applicant with the draft retrenchment agreement which the applicant refused to sign.

The legal principles governing retrenchment

[19] The legal principles governing dismissal for operational reasons are provided for in s 189 read with s 188 (1) of the LRA. Section 188 (1) of the LRA requires the employer to show that the *"reasons for dismissal is a fair reason …based on the employer's operational requirements" and that the dismissal was "effected in accordance with a fair procedure"*.

[20] Section 189 of the LRA sets out a number of requirements which the employer needs to comply with in order for it to be certain that the dismissal was fair. The employer is in terms of subsection (1) of the section required to consult with the affected party or parties when it contemplates dismissal for operational

requirements. In other words the employer has a duty to put in motion the consultation process as soon as it contemplates dismissal for operational reasons.

[21] Once the consultation process has been initiated both parties are required to engage in a meaningful joint consensus seeking process with the view to agreeing on measures to (a) avoid the dismissal, (b) minimizing the number of dismissals, (c) change the timing of the dismissal and (d) to mitigate the adverse effects of the dismissal.

[22] The other requirement of subsection (1) (b) is that the consultation must also be geared towards reaching consensus on the selection criteria, failing which the employer is obliged to ensure that the selection criteria it applies is a fair one.

[23] Section 189 (3) of the LRA requires the employer to initiate the consultation process by way of issuing a formal notice inviting the other party or parties to the consultation process. In the notice the employer has to disclose all relevant information which will assist the other party or parties to engage in a constructive and meaningful consultation. Subsection (3) obliges the employer to disclose in writing all relevant information including, but not limited to –

> *"(a) the reasons for the proposed dismissal;*
>
> *(b) the alternative that the employer considered before proposing the dismissal , and the reason for rejecting each of those alternatives;*
>
> *(c) the number of employees likely to be affected and the job categories in which they are employed;*
>
> *(d) the proposed method for selecting which employees to dismiss;*

(e) the time when or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) the assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

[24] During the consultation process the employer must ensure that other parties are afforded the opportunity to make representations about the matters disclosed in terms of section 189 (3) of the LRA, including other matters that may concern the retrenchment itself. The employer is then required by subsection (6) of that section to consider and respond to the representation made by the other party and give reasons on those aspects of the presentation that it does not agree with.

[25] The other important aspect in the retrenchment process is the selection criteria. The employer is required to implement the agreed selection criteria and where no agreement has been reached, apply fair and objective criteria.

[26] It is clear and has been accepted that the reading of section 189 indicates that the obligation set out therein is geared towards *"joint consensus seeking process"* had also implicit therein also is the recognition of the right of the employer to

dismiss for operational reasons. In *Johnson & Johnson (Pty) Ltd v Cwuiu (1999) 20 ILJ 89 (LAC) at paragraph [24] – [28]* the court held that it is also clear that once recognizing the right to dismiss for operational reason, the employer is also enquired to ensure that it acts in a fair manner in effecting the dismissal. *SACTWU & Others v Discrete (a division of Trump and Springbok Holdings) (1998) 12 BLLR 122A (LAC).*

[27] It has generally been accepted that in dealing with the requirements of section 189, the court should not adopt a *"formal check list"* approach. *See Johnson & Johnson* supra at paragraph 96, *Alpha Plant & Services (Pty) Ltd Simons & Others (2001) ILJ 359 (LAC)* at paragraphs 9 &10, *Wolf R AEA DT & Another v Industrial Development Cooperation of SA (2002) 23 ILJ 1610 at para 18.*

[28] The *"none check list"* approach, if I may call it that, does not mean that the court should not scrutinize the fairness or otherwise of the dismissal. *In Moodley v Fidelity Cleaning Services (2005) 26 ILJ 889,* the court relying on the dicta if *Johnson & Johnson* correctly held that:

> *"A mechanical checklist approach was not appreciate and that the proper approach was to ascertain whether the purpose of section 189 (3) had been achieved."*

[29] In this respect the piece meal approach as was observed by Mlambo J commenting in the context of the law prior to 2002 amendment in *Keil v Foodgro (a Division of Leisure Net Limited) (1999) 4 BLLR at page 349 G-I* is opposite the point made and it is stated therein as follows:

"Having identified retrenchment as a way of addressing its operational problems, respondent had to comply with section 189 of the Act. It is through the constructive engagement implicit in this process that the need to retrench is confirmed as well as the selection of those employees who are to be retrenched. This court has in a number of decisions stated that the consultation process envisaged in section 189 is not sporadic nor superficial. It is a process that must be embarked upon by the employer before it has decided who to retrench. The employer keeps an open mind during the consultation phase and must accede to request for information on the issue by the consulted parties (see NUMSA & others v Comark Holdings (Pty) Ltd [1997] 5 BLLR 589 (LC); NUMSA & other v Precious Metals Chains (Pty) Ltd [1997] 8 BLLR 1068 (LC); CWIU v Johnson & Johnson (Pty) Ltd [1998] 9 BLLR 1186 (LC); Manyaka v Van de Wetering Engineering (Pty) Ltd [1997] 11 BLLR 1458 (LC)."

Arguments and submission by the parties

[30] Mr Rautenbach, counsel for the respondent, argued correctly so, that the court should not in determining compliance or otherwise with the provisions of section 189 of the LRA adopt what has already been stated above under the principles of law as a "*check list approach*". He argued that account should be taken of the lack of participation by the applicant after he was invited to the consultation process.

[31] In relation to the letter which was handed to the applicant on the 2nd December 2008, Mr Rautenbach argued that it was made clear therein that the applicant had an opportunity to make submission regarding the redundancy of his position. He further argued in this respect that it does not follow from the reading of the letter that the respondent had made a final decision regarding the position of the applicant. The other argument put forward on behalf of the respondent is that there is no basis upon which the applicant could have held the believe that the respondent did not have an open mind regarding his position. According to this summation the applicant could not hold this believe in particular if regard is had to the fact that Mr Jung invited him to make input on a number of occasions and further ask if there were gabs in the consultation process. Consideration should, according to this argument, be taken of the fact that at the time the applicant was asked about the gabs in the process, he had at that stage already consulted with his lawyers.

[32] Mr Rautenbach conceded that the process was not perfect but consideration should be had to the fact that Jammy was willing to come back the following week for further consultation.

[33] As concerning the notice of the consultation the respondent conceded that the requirement of law is that the employer should notify the employee as soon as it becomes aware of the possible redundancy or retrenchment.

[34] It was not denied that the applicant was shocked when he received the letter on the 2nd December 2008. It was however contended on behalf of the respondent

that the shock was ameliorated by the postponement of the process and the opportunity afforded to the applicant to see his lawyer.

[35] The issue of whether the selection criterion was a matter for consideration by this court was highly contested by the respondent. The submission on behalf of the respondent, as I understood it, was that the selection criteria was not an issue because firstly it was not raised in the pleadings and secondly because it was not taken up during cross examination of Mr Jung and also because Mr Wade for for the applicant, objected when an attempt was made to canvas this issue during re-examination of one of the witnesses of the respondent.

[36] The argument that the selection criterion was not placed in dispute was based on the responses given to the question asked in terms of the Judge President Directive; Regarding Dismissal for Operational Requirements.

[37] The relevant clause in the pre-trial minutes which the respondent sought to rely upon is clause 16.3 in terms of which the applicant was required to state the basis for contending that the selection criteria was unfair. In response to this issue the applicant states the following:

> "*Given the fact that the respondent maintains that its commercial rational necessitated the redundancy of the applicant's positions, the fairness or otherwise of the selection criteria per se "utilised by the respondent" <u>is not likely to be</u> (my underlying) an issue in the proceedings."*

[38] In response to the question whether or not someone else should have been selected for retrenchment in his place the applicant responded by giving the name of Mr Richard Wright.

[39] The respondent in responding to the contention that Mr Wright should have been selected replied as follows:

> *"Applicant did not have the skills or experience to perform Richard Wright's functions and Applicant confirmed this himself during the consultations."*

[40] When invited to explain the phrase *"it is not likely to be an issue"* referring to the selection criteria, Mr Rautenbach submitted that it was not an issue because he was prevented from raising it during re-examination of one of the witnesses of the respondent as indicated earlier.

[41] It was argued on behalf of the applicant that the fairness of the selection criteria remained in dispute. The applicant had however accepted for the purposes of trial that there was a need to retrench. It is generally accepted that parties are bound by their pleadings but may however depart from them if they canvassed the issues in evidence.

[42] In my view the applicant did not concede to the fairness of the selection criteria. The pleadings do not assist the respondent in this regard in that as indicated earlier it is simply stated in the pre-trial minutes that the issue of the selection criteria, *"…is not likely to be an issue."* This in my view does not exclude the issue of the selection criteria from being placed in dispute. It is very clear in this

context that the issues depended on the evidence to be presented. In fact at paragraph 16.5 has already indicated the issue was placed pertinently in dispute by the contention that the person that ought to have been selected was Mr Wright.

[43] It was argued in the alternative that even if the selection criteria was placed in dispute the selection criteria applied was in any case fair in that Mr Wright had more experience than the applicant. I do not agree with this contention because on the version of the respondent itself the selection criteria were never applied. In this respect Mr Jung testified that the inclusion of the selection criteria in the letter of the 2nd December 2008 was superfluous.

[44] The testimony of Mr Jung that the applicant did not challenge the selection criteria and that that assertion is supported by the fact that the applicant never came back after obtaining legal advice does not advance the case of the respondent when the circumstances and totality of the evidence in this case is taken into account.

[45] I now turn to deal with the extent and the nature of the consultation process on the part of the respondent. In this respect, I agree with Mr Rautenbach that it is not uncommon in retrenchment exercises for an employer to appoint either its own employee, a lawyer or for that matter a consultant to act as its representative. The picture presented by Mr Jung is not that of a representative as could have been envisaged in the process of this nature. The picture presented is that of a messenger who had no authority to engage with the applicant and to

guide the process with the view of getting a solution either to avoid the retrenchment or failing which, ameliorate its impact on the applicant.

[46] During cross examination, Mr Jung conceded that the applicant did complain that he was used as a scape goat because Mr Wright was employed in October as a sales person when the respondent was already aware of its financial difficulties. This evidence in my view indicates clearly that had Mr Jung been a representative in the true sense and not a mere messenger, acting like "conveyer belt" he would have appreciated that what the applicant was complaining about concerned the selection criteria. And had the respondent taken this process seriously and given the representative a proper mandate of seriously engaging with the applicant with the view to finding a solution to the *"no fault"* situation in which the applicant found himself in, then fairness would have dictated that the following ought have happened:

- Mr Jung ought to have paused and reflected on what was raised by the applicant
- Assuming the selection criteria as stated in the letter was used, then he would have engaged with the applicant provided and disclosed to him information as to in what way Mr Wright was better qualified than him.
- In the light of the fact that the applicant had performed both the office management and sales functions for the period of two years, Mr Jung ought have applied his mind and assessed the experience gab between Mr Wright and the applicant. Had he done this he

might have found that there was in fact no gab between the two. If assuming he found that there was a gab between the experience of the two, he may as well have found that the gab was not so serious that it could not be addressed by a simply training or for that matter coaching of the applicant. I say this because it was not the case of the respondent that its financial difficulty was necessarily due to poor performance on the part of the applicant. Its case was its financial difficulty arose due to the economic down turn in the market which was clover phenomenon. This is even more so if one has regard to the fact that at the time of the dismissal of the applicant Mr Wright had been with the respondent for a period close to two months. Mr Wright was brought in as part of a strategy to turn around the economic woes of the respondent.

[47] The critical information which the respondent ought to have disclosed to the applicant as soon as the issue of retaining Mr Wright was raised, was not only his specific historical experience but also in fairness his contribution towards the turn around strategy of the respondent in the two months of his (Mr Wright) taking over the position at Port Elizabeth. Part of the key reason why the law requires employers to disclose information to employees is to avoid the very situation that has occurred in the present instance. The fact that the applicant acknowledge that Mr Wright had better sales experience than him is not good enough. As I said earlier had Mr Jung not been a mere messenger he would have

engaged with him objectively and in a formal manner to establish his limitation in as far as his skills were concern.

[48] The testimony of Mr Van Niekerk seems to suggest that it was not necessarily due to expertise through which Mr Wright was retained but rather that he was retained because he had a fixed term contract of employment with the respondent. The fixed term contract was for a six months period and thereafter that contract was renewed on a monthly base. This evidence shows very clearly that the respondent did not apply its mind to ensuring that proper consultation was in place to ensure that the consensus was reached. The respondents further the test of fairness in the second leg of the selection criteria. Even if it was to be assumed that no consensus was reached in the selection criteria the respondent still fails the test of fairness, because on its own version no selection criteria was applied. Thus the retention of Mr Wright was not fair and objective criteria.

[49] In the light of the above analysis, I am of the view that the dismissal of the applicant was both substantively and procedurally unfair. In the circumstances of this case I see no reason why costs should not follow the results.

[50] In the premises the following order is made:

1. The dismissal of the applicant was both substantively and procedurally unfair.

2. The respondent is ordered to compensate the applicant in the amount equivalent to the 12 (twelve) months compensation

calculated at the salary received at the date of the applicant's dismissal.

3. The respondent is to pay the costs of the applicant.

Molahlehi J

Date of Hearing : 15 March 2010

Date of Judgment : 20th May 2010

Appearances

For the Applicant : Adv R.B. Wade

Instructed by : Kaplan Blumberg Attorneys

For the Respondent: Adv NF Rautenbach

Instructed by : J Del Monte Attorneys