CASE NO D669/03

DELIVERED 4 NOVEMBER 2009

REPORTABLE

In the matter between

W N RICHARDS APPLICANT

and

UMGENI WATER BOARD RESPONDENT

JUDGMENT 26 OCTOBER 2009

PILLAY D, J In this claim for unfair retrenchment the applicant employee claims procedural unfairness on the grounds that the respondent employer Umgeni Water (UW) omitted to notify him of its intention to restructure its business and retrench its employees. He also claims substantive unfairness on the ground that he should not have been selected for retrenchment given his exceptional knowledge, qualifications and expertise.

The employee specialised in water science and management of water services. The employer recruited him in 1984 from Scotland to be its first Chief Chemist. In 1988, he held the position of Director of Scientific Services of UW.

In 1993 the parties concluded fresh contracts of employment. The object was to secure the services of six UW senior executives who were eligible to retire immediately, and to facilitate affirmative action.

The material terms of the contract relevant to this dispute were that the executives had to resign and be immediately reemployed. They were credited with pension for several years of service. In the employee's case

he was credited with 10 years service. In these proceedings, the parties could not agree as to what amount this translated to, the employee alleging that it was half a million rand, and the employer claiming that it was R1 million. Either way, it was a substantial amount of money paid pre-emptively in 1993.

The employer undertook to employ the executives in the same capacity for at least two years. Thereafter, their employment could be terminated on six months written notice by either party.

In 1997 the employee was tasked with establishing Umgeni Water Services (Pty) Limited (UWS), a commercial subsidiary of UW and in 1999, to be its Managing Director.

In June 2000 UM acquired a new Chief Executive Officer, Cromet Molepo, who brought UWS under Umgeni Water Enterprises, a division of UM. A month later, the employee became General Manager of Environmental and Laboratory Services in Umgeni Water Enterprises.

In 2001 the employee was seconded to the University of Natal's School of Business to establish its MBA in its Water Management Programme and to remain as a director of the programme until December 2002.

However, in October 2001 the employee received a notice that his contract of employment would not be renewed beyond 2001. Following a grievance hearing the employer, now represented by Acting Chief Executive Officer Mshengu, reinstated his contract of employment.

In April 2002 Gugu Moloi became UW's new Chief Executive Officer. She too set about restructuring UW. Barely six weeks after taking up her

appointment Moloi notified the employee that his employment would be terminated in December 2002. Moloi gave no reasons for the termination.[1]

Although the letter was dated 13 May 2002, the employee received it only on 7 July 2002. The employee referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), which resulted in UW withdrawing the dismissal notice in September 2002.

On 26 September 2002 the management of UW met the employee to discuss his future. They resolved that the employee would apply for a new post created in the process of restructuring. If he was not appointed to one of the posts he would be retrenched and compensated.[2]

On 8 October 2002 the employee applied for three posts. He was short listed for one post only. He was unsuccessful and retrenched on 2 April 2003.

Procedural Unfairness

Mr Seggie submitted that the Court is precluded from determining the procedural fairness of the dismissal as the retrenchment was in terms of section 189(A) Labour Relations Act No. 66 of 1995 (the LRA). Under sub-section (18) an employee must challenge procedural fairness by way of an interdict while the process is under way. Thereafter, he loses the opportunity to contest procedural fairness. So submitted Mr Seggie.

The employee denied knowing that any retrenchment was underway at all, let alone one that was in terms of section 189(A). After a CCMA

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1 A171
2 A180

commissioner declined jurisdiction on the grounds that the retrenchment was a group dismissal involving possibly 200 employees, the employee became aware that section 189(A) might apply. He disputed that it did apply because section 189(A) came into effect on 1 August 2002, after UW contemplated restructuring and retrenchment. Furthermore, even if section 189(A) did apply retrospectively, the number of persons to be dismissed did not meet the minimum prescribed in section (189)(A)(1).

An employer who relies on section 189(A) to resist challenges to the procedural fairness of its retrenchments must meet all the requirements prescribed in that section. These include written notice to the employee that it contemplates retrenching in terms of section 189(A). The notice should also inform the employee of the number of employees affected.

Implicit in the meaning of “notice” is that it must precede implementation. Naturally therefore, as section 189(A) came into effect after the employer implemented its restructuring, it cannot be valid notice.

Furthermore, section 189(A) cannot apply retrospectively; there is a presumption against retrospectivity. The effect of the retrospective application in these circumstances would be to deny the employee of an existing right to challenge procedural fairness in an action for unfair retrenchment. Retrospective application of legislation which has such an effect is obviously unfair and impermissible.

When UW purportedly gave notice of the contemplated retrenchment to the unions and to the employees, the employee was based at the university. He testified that he was not aware of the restructuring. Mr Seggie for UW insisted that he must have known of the retrenchment

because it was widely discussed in Pietermaritzburg.

At a meeting with the employee on 27 November 2002, and in the presence of Moloi, Colin Heads the attorney who assisted the employer with the retrenchment, conceded that because the employee had been seconded to the University, he was not notified of the restructuring.[3] Even if the Court were to accept Mr Seggie's submission that the employee might have known that retrenchments were underway at UW; he would not have known that he was affected. UW produced no evidence of having notified the employee in terms of section 189(3), section 189(A) or in any other way, of the pending retrenchments.

The Court finds that the employer gave no notice whatsoever to the employee or anyone purportedly mandated by him. The employer therefore cannot seek refuge behind subsection (18) to resist the claim for procedural unfairness.

Even if section 189(A) applied, the Court finds that UW did not comply with it. It was not an exhibit. Furthermore, from the available evidence, the number of employees affected varied from 100[4], 200[5], 300[6] and 393[7].

The finding of the CCMA that the retrenchment was a group dismissal was made in the context of determining the CCMA's jurisdiction. This Court's inquiry is a different one aimed at establishing whether UW can invoke section 189(A) to resist a claim for procedural unfairness. The CCMA ruling therefore has no impact on this Court's discretion to entertain the

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3 A200
4 Evidence of Cyprian Sandile Dlamini
5 CCMA Ruling – Exhibit K
6 Evidence of Richard Themba Mthembu
7 A294-296 a cost benefit analysis prepared after 13 March 2003

claim for procedural unfairness.

Once UW became aware that it had not notified the employee of the pending restructuring it conceded that it was an oversight. The oversight was material in this instance. UW's attempts to rescue itself from a procedurally unfair retrenchment were contrived and unconvincing.

Consultations with him were triggered by the employee challenging in the CCMA Moloi's decision to dismiss him on notice. At the first consultation which occurred on 26 September 2002 the employer did not disclose any of the critical information to either justify retrenchment or the steps it took or intended to take to avoid the retrenchment. Moloi merely asked the employee what he wanted. When he said that he wanted to be reinstated or paid up to age 60 years, Moloi replied that there were no positions at executive level.

When the employee agreed to apply for the advertised posts in those circumstances, he had no alternative. The method of restructuring had already been decided and implemented; the posts were advertised two weeks later in the Sunday Times on 6 October 2002. He was hardly in a position to reverse the process.

Advertising the posts externally in the Sunday Times also made no sense if the compelling purpose of the restructuring was the need to contain costs and to reduce the deficit. An external advertisement would have attracted external candidates. Replacing an internal candidate with an external candidate would have escalated costs as severance would have had to be paid to the internal candidate. It could have resulted in a cost saving if the severance pay was off-set by a lower rate of remuneration for

the new incumbent. However, that would not been fair to the employee unless he was invited to remain in employment at the lower rate. Therefore, in so far as the external advertising and filling of posts was the method by which the employer intended to restructure the business, it was a fatally flawed and an irrational way of reducing the deficit.

If the purpose compelling the restructuring was the transformation of the demographics of the organisation, that was not stated either during the consultations with the employee or advanced during the trial. The employer had acquired the right in the 1993 contract to dismiss the employee on six months notice in order to implement affirmative action. It did not have to subject the employee to a retrenchment charade.

Another reason why the failure to notify the employee of the contemplated restructuring and to elicit his participation from the outset is a material procedural irregularity is that as a long serving experienced executive, the employee could have made a valuable contribution if he had notice of the restructuring and retrenchment before these decisions were taken. Even if he did not favour affirmative action - and the Court makes no finding in this regard - his technical competence coupled with his managerial experience added a voice that should have been heard.

Despite the obvious omission and concession that it was an oversight, UW persisted throughout the pre-dismissal discussions and in this trial that the employee was aware of the consultative forum that it had established to elicit stakeholder participation in the restructuring and that Bongi Mshengu, the human resources director, had represented the executives.

The employee denied ever giving a mandate to Mshengu. He was not aware that Mshengu had been tasked with representing the executives. Mshengu was not called to testify that he had a mandate from the employee. None of the employer's witnesses could adequately refute the employee's evidence that Mshengu neither obtained a mandate from the employee nor represented him at the consultations.

The Court is satisfied that the employee was not represented at the consultative forum. To suggest that he was consulted through Mshengu participating at the consultative forum is nothing short of cynicism.

In the circumstances, UW has failed to comply with the procedural requirements for a fair retrenchment.

Substantive Fairness

Moloi took over at a time when UW was in dire straits financially. Furthermore, the trade union Nehawu challenged the management on several issues, including corruption and transformation. Transformation was therefore high on the agenda. The Court accepts without deciding that the employer had to restructure to reduce its deficit and to transform the enterprise. However, the procedure it adopted of advertising and filling posts contaminated the substantive outcome.

Although the employee applied for three posts he was short listed for only one post. UW led no evidence as to why he was not short listed for the other two posts. Finding him unsuitable for the position of General Manager: South Africa, the consultancy that undertook the appointment process for the

UW, issued the following reasons:

> "Regrettably, your application was not successful, specifically as a result of the requirements for the relevant experienced candidate and/or those with specific potential to operate at the executive level within a reasonable period, having regard to the operational requirement of Umgeni Water."[8]

The reasons given are nonsensical in the context of the employee's extensive technical and managerial experience. Apart from its vagueness, it appears to be cut and pasted from a standard response reserved for an aspiring executive. The employee was already an executive.

The successful incumbent, a white woman, was preferred mainly because, as a member of Black Sash, she had good relations with stakeholders. Her technical experience and expertise were inferior to the employee. It also appears that she was an external candidate.

However, the stated purpose of the restructuring and retrenchment was to enable UW to rescue itself from dire financial straits and to render it financially viable. If the purpose was to facilitate affirmative action the employee should not have been subjected to the façade of having to apply for a post he was destined not to fill.

This was UW's third attempt in as many years to dismiss the employee. The Court finds that the reasons for his non appointment and consequent retrenchment are manifestly a sham.

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[8] A194

Remedy

The employee is past the retirement age of 60. In terms of his 1993 contract of employment he had no right to employment beyond two years. UW could have dismissed him on six months notice. The third notice of dismissal was as defective as the earlier two because they did not give the employee six months notice.

In terms of the 1993 agreement he could have had no expectation of more than six months notice after the two years had expired. The pre-emptive payment was a quid pro quo for dismissal on notice precisely because the objective was to facilitate affirmative action.

Subsequent to his dismissal the employee worked part time as a non-executive board member of the Lesotho Highlands Development Authority between March 2003 and April 2004. He also secured a contract as Director, South Australia Water Centre for Water Science and Systems at the University of South Australia between 22 August 2004 and 22 April 2005. In addition, he received a substantial payout in 1993.

UM is a publicly funded utility. Any award will hit at the pockets of taxpayers. Ideally, some of the management should make good this claim for violating the employee's rights; however, they are no longer employed at UW. Besides, this was not a remedy that the Court canvassed with the parties.

However, the Court did record its displeasure, particularly in way UW and its representatives conducted its defence. Its pre-trial preparation was appalling. The trial was especially scheduled for one week during the

October recess. It ran over both weeks of the recess. Almost on a daily basis UW introduced new bundles of documents.

Furthermore, without material documentary evidence such as a notice in terms of section 198(A) and the records of the employee's application for the three posts, and without crucial witnesses such as Mr Mshengu, the employee's purported representative at the consultative forum and Ms Moloi, who dismissed him, the employer and its legal representatives should have known that it could not overcome the onus of proving the fairness of the dismissal. If it had prepared for trial soon after the dismissal it might have gathered the material timeously and been better prepared to discharge its onus.

Even at the start of the trial, the employer should have realised the weaknesses in its case. It persisted doggedly to flog a dead horse over not one but two weeks. A better course of action would have been to concede the procedural and substantive unfairness and to ask the Court to determine the appropriate remedy. As much of the evidence relevant to the remedy was common cause, the dispute could have been disposed off in a day after hearing argument.

To mark its displeasure the Court considered a special order for costs. A punitive cost order also means burdening the taxpayer. Furthermore, it would not hit at the persons responsible for wasting public resources, namely the legal representatives and various members of management. It is also hard to say to what extent UW staff impaired trial preparations and frustrated the efforts of the lawyers. Otherwise, the Court would be inclined to deprive the legal representatives of all or some of their

costs.

In the circumstances the Court makes no special order for costs.

THE ORDER THE COURT GRANTS IS THE FOLLOWING:

a. The dismissal of the employee was procedurally and substantively unfair.

b. The employee is awarded compensation being the equivalent of six (6) months' remuneration.

c. The employer is directed to pay the employee's costs.

PILLAY D, J