IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JS69/07

In the matter between:

CHRISTOPHER LEONARD KING APPLICANT

AND

DOUGHLASDALE DAIRY (PTY) LTD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This matter concerns the alleged unfair dismissal of the applicant, Mr King for operational reasons by the respondent. The applicant seeks compensation for the alleged unfair dismissal.

[2] The issue for determination is whether the dismissal of the applicant was procedurally and/or substantively fair. In this regard the Court has to determine whether or not the respondent in dismissing the applicant complied with the provisions of section 189 of the Labour Relations Act 66 of 1995 (the LRA) with specific reference to whether or not the respondent considered alternatives and consulted with the applicant prior to the dismissal.

Background facts

The case of the applicant

[3] The applicant commenced employment with the respondent during July 1999 as a checker and at the time of his dismissal, on 31st October 2006, he occupied the position of area manager at the respondent's Pretoria operations. At that time his salary was R19 500-00 per month.

[4] On 10th August 2006, the applicant received an email attached to it was a document setting out several business constraints the respondent was confronted with. One of the clauses in the attached document deals with the assessment of the area managers, their key performance assessment, and management of the branch, including sales complaints and administration. Subsequent to this email the issue of performance was, according to the applicant, discussed at the meeting convened by Mr Wolmarans (Wolmarans), in his capacity as the acting sales manager. The area managers present at this meeting explained that the problem with performance does not lie with them but with the factory and the general manager. Wolmarans undertook to raise the issue with the CEO, Mr Mathews.

[5] Another meeting with managers was convened on the 19th September 2006 which was attended on behalf of the respondent by both Wolmarans and van Loggerenberg. At that meeting van Loggerenberg, according to the applicant presented a new and final structure in terms of which the area sales managers and sales representatives' positions were made redundant. The positions were in the new structure replaced by the position of field sales representatives.

[6] After being presented with the new structure those present in the meeting were then, according to the applicant, told that application forms would be sent to those affected so that, if they wish, they could apply for the new positions. The closing date for the submissions of the applications was 30th September 2006.

[7] The affected employees received confirmation that their positions were redundant in an email on 22nd September 2006, which also advised them that they would, if they were to apply, find themselves competing with external candidates for the new positions and those who are unsuccessful would be retrenched. The employees including the applicant did not submit any application for the positions at that stage and as a result thereof the respondent sent them an email confirming this fact and reminding them that failure to do so by the 29th September 2006, would result in the respondent assuming that they were not interested in the new positions.

[8] The following day and in response to the said email the applicant addressed a letter to Wolmarans, applying for the position of field sales representative and also indicated in the same letter that he welcomes the opportunity to discuss the position further. The letter reads as follows:

> "*Further to the company restructure letter dated 19 September 2006, I hereby apply for the position of Field Sales Representative, and would welcome the opportunity to discuss the position further."*

[9] A news letter came out at about the same time welcoming Ms Potgieter as a new representative and Mr Mentor as new dispatch supervisor both for the Bryanston depot. These were two new appointments of external candidates. The news letter

further announced the appointment of the area manager for Bryanston under the old structure as the area sales representative.

[10] In the letter dated the 2nd October 2006, the respondent *inter alia* informed the applicant that his application was unsuccessful and offered him the position of the distribution supervisor at Bryanston. The applicant was required in terms of this letter to respond to the offer by close of business on that day. The applicant was also on the same day informed that his salary if he was to accept the position would be about R7500.00 per month. The applicant responded to this letter in an email dated 3rd October 2006 and in one sentence says:

"*It is with regret that I must accept the retrenchment package*."

[11]The applicant addressed another letter to the respondent on the 18th October 2006, wherein he sought to confirm what had transpired with regard to restructuring and the retrenchment. The thrust of this letter was that the respondent did not comply with the provisions of section 189 of the LRA and further requested the respondent to reconsider its approach and decision to appoint the field services support managers. In response to this letter the respondent contended that it had complied with the provisions of section 189 and offered the applicant the post of distribution supervisor at the Rustenburg depot. The applicant did not respond and insisted that the respondent should respond to his letter before he could respond to the offer.

[12] After being told by the bookkeeper to return his petrol card, the applicant received an email the following day, informing him that his retrenchment was effective on

that day, the 31st October 2006. The applicant then referred an alleged unfair dismissal disputes for conciliation and upon failure thereof, lodged this claim.

The case of the respondent

[13]Following the above email Wolmarans, the sales and distributions manager of the respondent, convened a meeting 23rd August 2006, with the area managers. Contrary to the version of the applicant that the meeting was called to discuss performance the respondent contend that the meeting was called to discuss the restructuring of the distribution division of the branches.

[14]Another consultation meeting was according to the respondent called on the 4th September 2006, where Wolmarans handed a copy of the proposed retrenchment to the employees. It was at this meeting that a copy of the proposed new structure was shown on the computer screen. The applicant responded by indicating support for the new structure.

[15]After this meeting and on the 18th September 2006, the respondent sent an email to all affected management including the applicant, convening a further consultation meeting The email advised that the meeting was to be held the following day, the 19th September 2006. The email which was sent by Lesley Mestre, the human resource management, reads as follows:

> **"***NOTICE OF PROPOSED RTERENCHMENT DUE TO OPERATIONAL REQUIREMENTS*

By reason of the operational requirements of the business severed drop in sales the last moths, the employer is of the view that it is necessary to restructure his business operations and will have to retrench a number of staff in order to reduce operating expenses and to ensure the survival of the business in the long term."

[16] At the consultation meeting the respondent was represented by Mr van Loggerenberg, of the employer organization JOBLAW. There was no one at this meeting from Middleburg because there was no area manager in that branch and the reason for there being no one from Bryanston was because those affected in that branch were consulted the previous day at the branch. The reason for this meeting according to the respondent was to discuss and present the reasons why the need to restructure. At this meeting the restructuring was again discussed using a visual touch board screen to explain the new structure. After explaining the reason for the restructuring and the new structure, the employees were informed that the position of the area manager would be come redundant with effect from 1st November 2006. The affected employees were also advised during this meeting that they should provide alternatives to retrenchment by the 30th September 200.

[17] According to the respondent most of the points made during the aforesaid meeting were contained in the notice of the meeting which was sent to the applicant the previous day, 18th September 2006. The relevant parts of the letter read as follows:

"*Due to the proposed restructuring i[t] will be come necessary to retrench some of the employees that is (sic) currently holding then*

proposed redundant positions applied for the newly created position and were unsuccessful. Also those who fail to apply the positions on offer."

It is further stated in the same letter that:

"*1. The reason for the proposed retrenchment:*

By reason of the operational requirements of the business namely that the business is being re-structured, the employer is of the view that it may be necessary to retrench staff members in order to reduce operating expenses and to ensure the survival of the business long term.

2. Alternatives that were considered before proposing retrenchment and the reasons for rejecting such alternatives. The employer had already retrenched two of its managers, Mr Guy Frazer and Mr Ducan Dewar in order to reduce operating costs and yet the business is still deteriorating resulting in losses in sales. The current sales are equal to that of four years ago. In 2002 the company achieved the current sales and with 190 staff members and currently employ 250 employees."

[18] In addition to being advised to provide the alternatives to retrenchment the affected employees were advised to apply for the new post of sales manager and that all the applications should be supported by curriculum vitae. External applications would be accepted and considered. The vacant positions and the selection criteria for such positions were confirmed in the email on the 22nd September 2006. The two vacant positions were field sales representative and dispatch supervisor.

Analysis

[19]In terms of section 189 of the Labour Relations Act 66 of 1995 (the LRA) an employer is required to consult with its employees or their representatives before embarking on a retrenchment exercise. The consultation process must commence as soon as the employer contemplates dismissals due to operational requirements. This means that a final decision to retrench must not have already been taken at the time the consultation process commences.

[20]The employer must also before taking the decision to retrench give reasonable notice of the need to retrench to the likely to be affected employees or their representatives. The notice must be given in writing and provide the employees sufficient information and time to enable the employees to consider and make suggestions on the alternatives to retrenchment. In addition the notice must set out the reasons for the proposed retrenchment, the alternatives considered and the reason why it is deemed the alternatives would not be appropriate.

[21]The notice should also indicate the number of employees likely to be affected and the job categories in which they are employed including the selection criteria to be used in choosing those of the employees to be dismissed. Important as they are, these requirements need not be applied like a check list in the assessment of whether or not the employer has complied with them. In this respect the Court in *National Education Health and Allied Workers Union v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic (2005) ILJ 501 (LC),* held that:

"[43] What is therefore required is not a mechanical exercise of simply checking the evidence of the employer against the requirements of the LRA but rather to consider the totality of the applicable facts and circumstances and to make a value judgment as to the fairness of the dismissals in the light thereof giving due weight to the interests of both the A employer as well as the employees (cf Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 (LAC); [1998] 12 BLLR 1209 (LAC) at para 29)."

[22]An essential consideration when faced with retrenchment in a restructuring exercise is whether there is work available which the affected employee can perform. If there is, then fairness would require the employer to offer such a position to the affected employee. In a case where a position is available but the employee lacks skills to perform in that position, the employer is obliged to consider any additional training that may assist the employee in achieving the level of performance required. As part of the principle of seeking to avoid retrenchment, as envisaged in section 189(2)(a)(i) and (ii), the same consideration would apply where new positions are created. Similarly, if the new position requires a higher performance level and the employee lacks the skills thereof, training as a means to avoid retrenchment has to be an option to consider. In this regard the decision of the Labour Court in *Andre Johan Oostehizen v Telkom SA Ltd (2007) ILJ 2531 (LAC),* is instructive. In that case (at para 4) Zondo JP held that:

"Implicit in section 189 (2)(a)(i) and (ii) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if it

can be avoided. Accordingly, these provisions envisage that the employer will resort to dismiss as a measure of last resort. Such an obligation is understandable because dismissals based on the employer's operational requirements constitutes the so called no fault terminations."

Zondo JP went to further [at para 8] to say:

"In my view an employer has an obligation not to dismiss an employee for operational requirements if the employer has work which such employee can perform either without any additional training or with minimal training. This is the because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid it and employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirements ... A dismissal that could have been avoided but was not avoid is a dismissal that is without a fair reason."

[23]The foundation for the above approach can be found in *General Food Industries Ltd v FAWU (2004) 7 BLLR 667 (LAC)* where Nicholson JA said:

"The loss of jobs through retrenchment has such a deleterious impact on the lives of workers and their family that it is imperative for that -even though reasons to retrench employees may exist -they will only be accepted as valid if the employer can show that all viable alternative

steps have been considered and taken to prevent the retrenchment or to limit it to the minimum."

[24]In the present instance the respondent contends that it complied with the requirements of the LRA in that it addressed the letter dated 4th September 2006 to the applicant. However, the letter relied upon to support this contention was addressed to FAWU, the union with which the respondent had consultation with regarding the retrenchment process. The letter referred to another letter where the intention to retrench was apparently indicated by the respondent. It is also indicated by the respondent in the same letter that a consultation session would be held on the 19th September 2006. This letter sets out in great details the reasons for the proposed retrenchment, alternatives that were considered, the number of employees likely to be affected, the selection criteria to be applied, and the possibility of future re-employment.

[25]The respondent contended that it consulted with the applicant more specifically on the 23rd August 2006. The probabilities do not, in my view, support the version of the respondent that this meeting was a consultation meeting as envisaged in section 189 of the LRA.

[26]The version of the applicant is more probable than that of the respondent regard being had to the email and the documentation attached to it. The email in one sentence said:

"I expect drastic improvements on all levels of our business"

[27]The attached documentation says nothing related to consultation or retrenchment. At the end, the attached documentation states:

> *"We need to up our game and start reaching our goals. Employees, who fail to reach the required standards after being trained properly, should be dealt with."*

[28]The applicant's version is that what was discussed at this meeting was the *"constraints"* to the business as set out in the attached documents. According to him, the restructuring was only mentioned as an option should the performance of managers not improve. When it was indicated to him what the cause of the poor performance was, Wolmarans undertook to approach the CEO and highlight to him what the cause of the problem was. Thereafter, Wolmarans then introduced a new organisational structure.

[29]The meeting of the 23rd August 2006, cannot for various reasons be regarded as a consultation meeting as envisaged in section 189 of the LRA. The employees were not notified before hand that they were invited to a restructuring meeting and were also not advised of the topics they would be consulted on.

[30]Turning to the letter of the 4th September 2006, the respondent contended that this letter was served on the applicant and served as notice in terms of section 189 of the LRA. It was also testified by Wolmarans on behalf of the respondent that he informed the applicant on 1st September 2006 that he wished to have a meeting with him on 4th September 2006. This version is in conflict with that of the applicant who testified that he went on leave starting from 1st September 2006 and came back

to work on 18th September 2006. During his leave the applicant went on holiday in KwaZulu Natal from the 2nd September 2006 to the 17th September 2006, making the version that a meeting was held on 4th September 2006 highly improbable.

[31]As concerning the alleged notice of retrenchment contended in the letter of 4th September 2006, I have already indicated that the letter was addressed to FAWU and not the applicant. The indications are that this letter was faxed to FAWU, there is no proof that the applicant received it.

[32]The letter of the 18th September 2008, which the respondent claims was handed to the applicant does not assists its case. The applicant denies ever receiving the letter and there is no proof to the contrary on the part of the respondent. And secondly even if it was to be accepted that the letter was served on the applicant, it would not assist the case of the respondent in that it is clear from the wording of the letter that a decision had already been made to declare the applicant's position redundant before the consultation could take place.

[33]On 19th September 2006, the applicant attended a retrenchment meeting which was scheduled for 10h30. At this meeting, the applicant was presented with a new structure, in which the positions of area sales managers and sales representatives were done away with and replaced with that of dispatch supervisor.

[34]It is common cause that the employees including the applicant were advised to apply for the new positions. There is however, conflicting versions as to how the applications were to be made. The applicant contends that they were told that they would be furnished with the application forms to apply. The respondent dispute

having promised the application forms and contends that the employees were expected to submit the applications accompanied by curriculum vitae.

[35]The facts and the circumstances surrounding the application or non application for the new posts is instructive in the broad assessment of the fairness of the retrenchment and is also revealing as to the consultation process. In this respect the applicant was, as indicated earlier, informed on 18th September 2006 of the retrenchment meeting to be held on 19th September 2006. At that meeting the applicant was presented with the new structure and informed about the retrenchment. The applicant was further informed to apply for the new positions. On the same day the 19th September 2006 the respondent sent a letter to the applicant confirming that the applicant had to apply for the new positions.

[36]In my view, the totality of these facts confirm the contention of the applicant that he was not consulted before his position was declared redundant and no alternatives were considered by the respondent before finalizing the new positions.

[37]It is common cause that the applicant only submitted his application which was not accompanied by curriculum vitae only after Wolmarans had requested him to do so on 28th September 2006. There is no mention in both letters of 19th and 28th September 2006 that the application should be accompanied by curriculum vitae.

[38]It seems to me, regard being had to the fact that the applicant was an employee who was faced with termination of his employment for no fault of his, fairness dictated that the respondent should have informed him that he was required to provide his curriculum vitae, if indeed this was one of the requirements for applying for the

new positions. The respondent also ignored the request in the applicant's letter of application that he would have liked to discuss the issue of the application further.

[39]It may well have been that had the respondent offered the applicant the opportunity to discuss the application, the requirement of the field sales representative position may have been discussed including the need to submit his curriculum vitae. Assuming the applicant did not meet the skills requirements for the post, discussions and considerations could have been given to the training needs to close the skills gap if it existed at all. The unfair approach adopted by the respondent resulted in the applicant being informed on 3rd October 2006, that his position was redundant and that his application was unsuccessful.

[40]The applicant was then offered the position of distribution supervisor in Bryanston. This position was according to Wolmarans the only position available at the Bryanston depot, which was already occupied by a certain Melville Mentor according to the respondent's own news letter. This position was lower than that which the applicant occupied and would, had the applicant accepted it, have resulted in more than double reduction in his salary. This position also entailed the applicant having to do work in the fridge from time to time. It was for these reasons including the fact that the applicant was diagnosed with cancer that the applicant rejected the offer.

[41]A close analysis of the facts and circumstances of this case reveals very strongly that, the respondent used the retrenchment exercise to address the poor performance of its managers including the applicant. In this respect the process commenced with

Wolmarans sending a letter to managers in which he complained about poor work performance. He indicated in the same communication that he: *"...expected drastic improvements (sic) on all levels of our business."* He also indicated that those of the employees who failed to match the required performance after training, would have to be dealt with. The new structure was introduced immediately after raising with the employees the issue of their poor work performance.

Conclusion

[42]In the light of the above discussion I find the dismissal of the applicant to be both substantively and procedurally unfair. The applicant has prayed for compensation only. It is also my view that the facts and the circumstances of this case dictates that the applicant should be awarded the maximum compensation.

[43]In the premises, I make the following order:

(i) The dismissal of the applicant for operational requirements reasons was both substantively and procedurally unfair.

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

(iii) The respondent is to pay the applicant's costs.

Molahlehi J

Date of Hearing : 5th June 2008

Date of Judgment : 7th January 2009

Appearances

For the Applicant : Adv Leon Pretorious

Instructed by : Smith & Peters Attorneys

For the Respondent: Johan Van Loggerenberg of AHI Employers Organisation