IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J2584/00**

In the matter between:

P E BLEWETT Applicant

and

RANDRIDGE TECHNICAL SERVICES (PTY) LTD Respondent

JUDGMENT

JAMMY AJ

The performance of the Respondent company, which carries on business as electrical engineers and contractors, was a cause for some concern during 1998 and necessitated a restructuring, implemented by its managing director, Mr A C Mills, pursuant to which, through an employment agency retained for that purpose, the Applicant was appointed to its staff as a business development manager with effect from 8 February 1999.

An agreement was simultaneously concluded by the Respondent with a close corporation, Clisal Investments CC, of which the Applicant was a member, in terms of which Clisal would **"seek out opportunities"** for the Respondent **"to participate in the selected or otherwise process of tender bidding on appropriate projects in the Electrical and/or Instrumentation Construction environment throughout Southern and**

Sub-Sahara Africa". It would also assist in the preparation and presentation of tenders and would be remunerated on a scale of fees structured against the value of tenders acquired by and awarded to, the Respondent.

The Applicant proved unable to introduce projects to the minimum annual value which, Mr Mills testified, had been indicated to him at the commencement of his employment, as the Respondent's basic requirement. So constrained did the Respondent's financial circumstances become that its cash flow woes precluded the payment of salaries to its staff, including the Applicant, in October and November 1999, although, as far as the Applicant was concerned, this was eventually redressed.

Discussions accordingly ensued between the Applicant and the Respondent early in February 2000 in the context of the agreement with Clisal Investments. The commissions aspect of the Applicant's salary had been payable to the close corporation whilst his own basic salary remained unaltered. In October 1999, Mr Mills met the Respondent's sole shareholder, Mr C P Quinn, in Europe when the state of the company's affairs was reviewed and ways and means of cutting its operating costs were discussed. One possibility in that context was identified as the retrenchment of staff and the Applicant's position was considered. It was decided however that he would not be identified for retrenchment at that time but that, if necessary, the matter would be reviewed again early in the new year. The position of every other member of staff, including the Respondent's senior management, was also reviewed and the retrenchment of its financial manager, a certain Slowe, was considered. In his case as well however, action was deferred for compassionate reasons, - his wife at that time was terminally ill.

By the end of January 2000 the company's position had deteriorated further and Mr Quinn travelled to South Africa where, on 31 January, discussions were held between him, Mr Mills and the Applicant. At that stage, for the first time directly, the Applicant's future role in the company was assessed. He was informed that, in the prevailing circumstances, the Respondent could no longer afford him on the existing basis and a possible change in his status was mooted. It was suggested by the Respondent that his relationship with the company thenceforth, rather than continuing as one of employment, should be on a fully contracted basis in terms of which all income earned should be paid

directly to the close corporation. It would be assessed on performance results and calculated on an increased scale of commissions.

The Applicant undertook to consider the proposal and revert to Mr Quinn and Mr Mills. Those two however were scheduled to be in Botswana the following day, 1 February 2000 and a further meeting was accordingly arranged to take place the next day, 2 February. It is the Respondent's contention that the time of that meeting was fixed as 10.00 a.m. The Applicant disputes that any specific time was arranged. It is the events of 2 February 2000 which are the kernel of this dispute and two different versions thereof were presented in evidence. Mr Mills testified that he and Mr Quinn, in general discussion in his office that morning, awaited the Applicant's arrival but that he did not appear. This, said Mr Mills, was regarded as a **"snub"** and at approximately lunch time a letter was prepared informing the Applicant that he had been retrenched. In order that, theoretically, a full calendar month's notice would be given to him, the letter was backdated to 31 January 2000. It read as follows:

> **"Further to our discussions today we hereby confirm that we are giving you one month's notice of the Company's intention to retrench you. Your employment with Randridge Technical Services (Pty) Ltd will terminate on 29th February 2000.**
>
> **We would be grateful if you could submit a full breakdown of entitlements you consider due to yourself. These we intend to settle without delay.**
>
> **Wishing you a successful future".**

This letter was apparently collected by the Applicant from his secretary later during the day, said Mr Mills. It was met with an e-mail message from the Applicant dated 5 February 2000 to the effect that, with the reservation of all his rights, the matter had now been referred by him to his attorneys.

The next development in the saga, Mr Mills testified, was a letter which the Respondent received from the Applicant's attorneys. It recorded the Applicant's contention that the

proposal that he should conclude an independent contractor relationship with the Respondent was an ultimatum against which, if not acceptable to him, he should either resign or be retrenched. His subsequent purported retrenchment was substantively and procedurally unfair in terms of the provisions of Section 189 of the Labour Relations Act and other statutory enactments. A demand was accordingly made for payment of salary, bonus and other amounts allegedly due to the Applicant as well as for twelve months salary **"as compensation for his unfair dismissal".**

The Respondent, Mr Mills testified, immediately sought legal advice and was advised unequivocally that its purported retrenchment of the Applicant was seriously open to legal challenge. He himself was not conversant with the applicable law in that regard and in the result, on 29 February 2000, a letter was addressed by the Respondent's attorneys to the Applicant's attorney, recording the Respondent's version of the historical development of its relationship with the Applicant to that point and acknowledging that his purported retrenchment by the Respondent, in the manner in which it had been effected, was not in accordance with the law and more specifically with the requirements of the Labour Relations Act. What was then stated was the following:

> **"Having regard to the above, we have been instructed by our client to inform you that your client is reinstated with immediate effect with all the benefits which were previously enjoyed by him".**

9. Their client had however, the Applicant's attorneys were informed, been **"earmarked for retrenchment"** as a consequence of the operational requirements of the Respondent and was invited to consult with the Respondent and to attend appropriate meetings for the purpose of reaching consensus in relation to what was then set out in the letter as the detailed requirements laid down by the legislation. Those consultations would be approached by the Respondent **"with an open mind"**. The Respondent being **"prepared to consider various options, in order to mitigate the possible harm to your client".** All relevant information would be made available in that context.

. The letter concluded with the request that the Applicant attend a meeting at 11:00 a.m. on 7 March 2000, when the consultation process would be pursued.

. A scheduled meeting duly took place in the presence of the legal advisors to the respective parties. At that meeting, Mr Mills said, the Applicant refused to accept his reinstatement or to continue working for the company. He was informed that his services were needed but that, in the context of its cash flow constraints, it could not afford to retain him in its employ on the existing basis. An impasse was reached and the meeting terminated. Statutory dispute resolution procedures were then invoked by the Applicant, resulting in the issue now before this court.

. The gravamen of the Applicant's testimony was to the effect that he had never at any stage before 31 January 2000, been consulted on any meaningful basis regarding the company's affairs and their possible impact on his own position. The proposals that were put to him in that meeting were essentially in the form of ultimatums. He was either to assume the altered status of an independent contractor, resign or be retrenched. It was correct that he undertook to revert to the Respondent on that basis on 2 February 2000. He had arrived early that morning but had been denied access to Mr Mills' office, being informed by his secretary that he was in a meeting with Mr Quinn. It was not true that a fixed time for that meeting, whether 10.00 a.m. or otherwise, had been set. He continued with his work and later that day was handed by Mr Mills' secretary the letter dated 31 January informing him of his retrenchment. He was totally shocked and sought legal advice.

. At the meeting on 7 March, he was informed that the Respondent could not retain him on the same terms and conditions but could do so only on the basis of an independent contract. He did not regard this as having been reinstated, said the Applicant. Had he perceived the offer as one of genuine reinstatement on the former terms and conditions of his employment, he would have accepted it. He was not prepared to work on a **"no duck, no dinner"** basis. He was asked to leave and revert with alternative proposals but did not do so. On the other hand the Respondent had not reverted with any other suggestions as he requested them to do.

5. Cross-examined by Advocate Nowosenetz for the Respondent, the Applicant made certain significant concessions. It was correct, he said, that he had a **"fair insight into the financial strength"** of the Respondent. His relationship with Mr Mills was a relatively informal one and they had **"an open line of communication"**. Asked if it was still his contention that there was no operational rationale for his retrenchment, he replied that they **"still needed someone to identify and obtain business"**. He could not however, he answered to a question from the court, dispute the Respondent's perception that they could not afford him.

6. Although it was correct that he had open access to Mr Mills' office in the ordinary course on an informal basis, he had been prevented from entering it on 2 February 2000 by Mr Mills' secretary, who informed him that he **"would be called"**. He did not attempt to pursue the matter but awaited developments.

7. Questioned regarding the demands made and relief sought in the letter from his attorneys to the Respondent of 14 February 2000, and specifically regarding his claim for compensation, the Applicant answered that this had been made on the advice of his lawyers. Although he wished to stay in his job, it was again on the advice of his lawyers that he had not demanded this. He understood that the statement that he had reinstated was not an offer of reinstatement but a revocation of his retrenchment and the restoration of his employment on its existing basis. This had been explained to him but once again he had left further developments in that regard to his lawyers. He had not instructed his attorneys to accept that reinstatement and to pursue the consultation process on their advice. Discussions between the lawyers were however continuing. Asked whether he disputed that his reinstatement was *bona fide*, the Applicant replied that he could not comment.

8. At the meeting of the 7th March, he reiterated, his impression was that he had not really been reinstated but he accepted that the Respondent was entitled to retrench in its present circumstances. When it was put to him that he himself had made no effort in good faith to consult with the Respondent following its invitation to do so, the Applicant

answered once again that he had taken advice and been guided by his attorney.

. I am left in no doubt, from the broad *conspectus* of the evidence which I have felt it appropriate to review in some detail, regarding two salient aspects of this matter. The first is that, from 1998 until the culmination of these events in March 2000, the company operated in straitened financial circumstances and that the operational necessity for the retrenchment exercise which it subsequently followed, was a valid one. It is of relevance in that regard to refer to Mr Mills' evidence regarding the eventual retrenchment of the financial manager, Mr Slowe and the transfer of staff to associated companies abroad. The second is that, having been apprised of the illegality of its purported retrenchment of the Applicant on 2 February 2000, his retrospective reinstatement by the Respondent as conveyed by its attorneys in the letter of 29 February 2000, was not an offer but an unambiguous and unconditional fact. There was nothing to prevent the Applicant from accepting that position and responding to the proper invitation contemporaneously made to enter into a process of consultation with the Respondent regarding his future in the company. I am left with the distinct impression that his failure or refusal to do so, whether or not on the advice of his attorneys, was motivated more by the prospect of a financial reward than by practical considerations. There is nothing either in the evidence or the correspondence before me to suggest that, having been advised by its lawyers of its dereliction in the required process of retrenchment, the Respondent's attempt to remedy the situation was anything other than genuine and made in good faith.

. In my view, the Applicant's refusal, whether or not again motivated on legal advice, to engage meaningfully with the Respondent in the resumed discussions of 7 March 2000, constituted a repudiation of what had then be re-established as his employment relationship with the Respondent. By his own admission, he did not respond thereafter to an invitation to revert with alternative proposals. Instead, he embarked upon the legal avenues which he then proceeded to follow. In that regard, he is, in my opinion, manifestly the author of his own misfortune.

. There is an abundance of authority supporting the entitlement of an employer, where proper procedures have not been followed by it in the termination of an employment

relationship, to revoke its conduct and to reinstate unconditionally the *status quo ante.*

See for example: Van Niekerk v Check Guarantee Services (Pty) Ltd (2001) 20ILJ 728(LC)

Burger v Alert Engine Parts (Pty) Ltd (1999) 1BLLR 18(LC)

Scholtz v Sacred Heart College (2001) 3BLLR 368

. Where that action on the part of an employer is repudiated or rejected by an employee without good or rational reason, the entitlement to any form of consequential relief is negated. A broad allegation of lack of good faith is iadequate in that context. It is in my view certainly not substantiated in the circumstances of the present case.

. For all of these reasons, I find that the Applicant has failed to establish the unfairness on the part of the Respondent for which he contends or his entitlement to compensation or any other form of relief arising from the termination of his employment. No basis has been submitted to me as to why an award of costs in this matter should not conventionally follow the result and the order that I make is accordingly the following:

The application is dismissed with costs

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B M JAMMY
Acting Judge of the Labour Court

18 July 2001

Representation:

ant: Mr D Short: Sampson Oakes Higgins Inc.

ndent: Advocate L Nowosenetz instructed by Harry Goss