IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO. J 1587/00

In the matter between:

T S GOLOLO **Applicant**

and

RECKITT BENCKISER SA (PTY) LIMITED **Respondent**

JUDGMENT

TIP AJ

This action concerns the retrenchment of the applicant on 29 November 1999. She had begun work with the respondent company, then Reckitt & Colman South Africa (Pty) Limited, in the course of January 1999 as a wage clerk.

It is common cause that the retrenchment flowed out of a merger, conducted on a global basis, between Reckitt & Colman and Benckiser, then an independent company that manufactured and supplied similar goods to those of Reckitt & Colman. The merger process got underway in 1999. It was a rather prolonged process, being effectively completed only in the course of September 1999. By that time, the post held by the applicant had been upgraded to that of payroll administrator and

her salary had been improved. This upgrade was concluded on 19 July 1999 in response to the then intended resignation by the applicant, who considered that the post of wage clerk was too junior for her.

Although there are minor differences in the accounts given by the parties, it is agreed that there was a meeting of the human resources department on 28 September 1999, at which Mr Maqubela (then Regional Director for Human Resources) made a presentation of what was to happen with the human resources department in South Africa in consequence of the merger. He displayed two organograms. The first showed the then existing structure, with a staff complement of approximately 20. Under the merger, that complement was to shrink to 8 members of staff. This reduction of staff reflected a compromise that had been struck between Reckitt & Colman and Benckiser. The latter had operated with a single human resources department based in its head office in Amsterdam. It did not maintain a human resources presence in its enterprises throughout the world. Unlike this, Reckitt & Colman had operated human resources departments in all the countries where it had a presence. The compromise was that the human resources department in South Africa might be retained, but that it would in any case be very substantially reduced.

The organogram displaying the new structure was referred to in evidence as a “template”. It had been decided upon in London. There had been no input from the South African office in relation to the staff composition that it described. Clearly, from the perspective of a retrenchment exercise, it amounted to a *fait accompli*. The template identified positions, but did not place person in those positions. Everybody who wanted a position, it was made clear, would have to apply for it. At the staff session, Mr Maqubela sought input from them for the narrow purpose of making submissions to Mr Caspers (of the head office) that there should indeed be a human resources office. The input

and proposals were not in any way to be directed to a modification of the structure that had come from London with the status of an instruction. Inevitably, there would be retrenchments. As Mr Maqubela testified, that is precisely what he explained to the staff when he presented the two organograms. He assured them that the retrenchments would be done in an open and fair manner and invited staff to approach him at any time concerning any misunderstandings or any suggestions that they might have.

Two other witnesses were called on behalf of the respondent. Mr Manthree is the Administrative Director. Mr Langehoven had in 1999 acted as the Human resources Administration Manager; he had since successfully applied for the position of Compensation and Benefits Manager in the new structure. Their evidence on these aspects, relating to the restructuring, is consistent with the account given by Mr Maqubela. It is in my view clear that there was not at any time any meaningful consultation with the staff of Reckitt & Colman in relation to ways and means of avoiding retrenchment dismissals. Mr Antonie, for the respondent, did not suggest otherwise.

In terms of section 189(1) of the Labour Relations Act, 66 of 1995 ("the LRA"), an employer is obliged to consult when it "contemplates dismissing one or more employees for reasons based on the employer's operational requirements". In my view, it is clear that the obligation to do so arose at the stage that the human resources department was being re-designed in terms of its functions and staff complement. The consultation contemplated by the Act should accordingly have begun before the template arrived from London, alternatively that template should have been presented as a starting proposal for meaningful consultation. In fact, however, the template was a fixed and settled prescription for the future. No consultation on it was invited and none was carried out. It follows that no opportunity was afforded to potentially affected employees to consult in an attempt to reach

consensus on appropriate measures to avoid the dismissals altogether or to minimise their number, as provided in section 189(2)(a)(i) and (ii) of the LRA.

There was also no consultation concerning the method for selecting employees who were to be dismissed, referred to in section 189(2)(b). By the time the template arrived from London, the associated process had already been determined. Job descriptions for the positions that were tabulated on the template followed. Quite simply, the employees who were eventually to be dismissed were those who were unsuccessful in applications by them for one or more of the positions set out in the new structure. In effect, all employees had notionally been retrenched. The retrenchment would take effect however only in respect of those who did not successfully secure one of the newly defined positions. Ms Bredenkamp, for the applicant, incorporated in her submissions the view that the retrenchment process arose only after the unsuccessful interview of the applicant for one of the new positions, as described more fully below. Ms Bredenkamp correspondingly submitted that section 189 and its requirements only arose for consideration and implementation after that interview, on 22 November 1999. For the reasons that I have set out above, I consider that those submissions have been too narrowly cast.

In evaluating whether or not the requirements of section 189 have been met, it is inappropriate to consider its provisions in a mechanical or "check list" fashion. Cf. *Food & General Workers Union & Another v Fidelity Guards Holdings (Pty) Ltd t/a Pritchard Cleaning* (1999) 20 ILJ 2052 (LC); *Vermeulen v Cabelec Electrical & Mechanical Suppliers (Pty) Limited* (1999) 20 ILJ 2968 (LC). The true enquiry is to examine the relevant circumstances in order to decide whether there has been a *bona fide* and purposeful joint problem solving exercise. Cf. *Johnson & Johnson (Pty) Limited v*

Chemical Workers Industrial Union & Others (1999) 20 ILJ 89 (LAC); *NUMSA & Others v Comark Holdings (Pty) Limited* [1997] 5 BLLR 589; *Kotze v Rebel Discount Liquor Group (Pty) Limited* (2000) 21 ILJ 129 (LAC).

In this case, I have no doubt that the invitation from Mr Maqubela and other members of management that members of staff could approach them with questions and suggestions was put out in good faith. Equally, I have no doubt that none of those questions or suggestions could have had any impact on the core of what was unfolding, namely a substantial reduction in the staff complement. In short, there was not at any time a true problem solving exercise in relation to the real issue of the impending retrenchments in the sense contemplated in the Act, the relevant Code and in the authorities.

0. It is therefore my conclusion that the measures adopted by the respondent in the present case did not satisfy the material procedural requirements of section 189 of the LRA. For the purpose of this judgment, I accordingly need not mechanically trawl through the provisions of section 189(3). It is common cause that, by and large, there was not formal compliance with it, but it is also clear that a good deal of written information was made available to employees on a regular basis and that there were substantial interactions at meetings where relevant information was conveyed and that extensive discussion arising out of it took place.

1. The uncontested facts in this matter clearly establish that there was a sound commercial rationale for the merger. Two global companies were experiencing financial pressures and their combination, together with the consequential redeployments and rationalisations of staff, evidently made good

accounting sense. I need not detail all the underlying considerations. The applicant's approach to this matter has not been directed in any significant way to the proposition of substantive unfairness. The applicant's complaints in this regard are confined to the two payroll administration positions that are here at issue. I will deal with those aspects below. For the present, it is sufficient for me to note that I find that substantive unfairness has not been demonstrated.

2. Before the merger, there were two payroll administrator positions. The one was occupied by the applicant and the other by Ms Michele Filby. Organisationally, those positions were placed on a par with each other. Both reported to Mr Langenhoven, from whom the chain ran through Mr Manthree to Mr Maqubela. As between the applicant and Ms Filby, there were some suggestions in the evidence that Ms Filby was the more experienced and functionally the more senior of the two. The applicant contests those suggestions. It is unnecessary for me to make a finding on that aspect.

3. The new structure was significantly different in respect of these two payroll positions. The new job definitions followed upon substantial investigation by Mr Langehoven. The result was that the two positions were no longer on a par with each other. There was now a distinct hierarchy in relation to seniority, responsibility and functional complexity of the work to be done. The lower position was described as "Payroll Administrative Assistant". That post reported to a "Payroll Administrator" reporting, in turn, to the new Compensation and Benefits Manager and, from there, to Mr Manthree and Mr Maqubela as before.

4. At the time that personnel were invited to apply for new positions, job descriptions in respect of all of them were made available. I need not detail these descriptions. Perusal of them makes clear that

the position of Payroll Administrator was significantly more senior and responsible and that the tasks to be fulfilled by that person were more complex, than in respect of the post of Payroll Administrative Assistant.

5. Notwithstanding the respondent's largely uncontested evidence that employees were not only invited but actively encouraged to apply for all positions for which they might qualify, both the applicant and Ms Filby applied only for the senior post of Payroll Administrator. Neither of them submitted an application for the assistant position.

6. Both the applicant and Ms Filby were unsuccessful in their quest for the senior post. Although the applicant was critical of the interview process, describing it as having been more like an "interrogation", there is no basis in the evidence as a whole for me to conclude that the interviewing panel was actuated by malice or any other improper motive. There is no evidence amounting to a bad relationship between any of the players in this dispute, nor anything to suggest that grudges were held which were now being vented. To the contrary, I accept the evidence of Mr Manthree and Mr Langenhoven that the applicant was inadequately qualified for the senior position. According to Mr Manthree, the new job description differed substantially from the applicant's former role as payroll administrator. The new post required a higher level of skill in relation to *inter alia* knowledge of tax principles, accounting principles, business principles and an advanced knowledge of the VIP computerised system employed by the respondent. According to him, it was the assistant post that compared closely with the job description attached to the position previously held by the applicant. The evidence of Mr Langenhoven, who had played a central role in re-writing the job descriptions, was to similar effect.

7. Ultimately, the applicant herself accepted that she did not have all the necessary qualifications for the new and senior position. She had no formal qualification in payroll and accounting procedures. She did not have sufficient knowledge of tax matters. When it was put squarely to her that she knew that she was not qualified for the senior post, the applicant's answer was: "Yes, I applied for the senior post on the basis that if one of us got the administrator post, the other would get the assistant position". Equally clearly, she stated in the course of cross-examination that "the assistant position was close to the job that I was doing".

8. The question that hence presents itself is why the applicant did not apply for the position of payroll administrative assistant. This enquiry falls into three categories: first, what the respondent's witnesses had to say about suggestions made to the applicant that she should apply for that position; second, whether or not there was an explicit offer of the position to the applicant; third, what the applicant advanced as her reason for not applying for the position. I will consider each component in turn.

9. According to Mr Maqubela, the applicant was invited to apply, in fact "encouraged" to apply for any position (including that of the assistant post). After the applicant complained to him about the interview process, Mr Maqubela took it up with the panel and thereafter discussed the position with the applicant. He gave her feedback and explained that he had been shown all the documentation as well as the ratings and scores. He then raised with her the assistant position. He squarely told her that he thought that she would get it. He thought that it was the right position for her. The applicant reacted by mentioning a concern she had about an outstanding company loan. Again, Mr Maqubela told her to "go for the assistant position". However, the applicant turned it down. She

didn't explain why. She merely indicated that it was a junior position compared to what she believed that she should be doing. She concluded by requesting that the respondent should write off her housing loan, because she indicated her intention to apply for the severance package. He testified further that he had on a later occasion again spoken to her about the post, but the applicant still turned it down. Mr Maqubela made a good impression on me as a witness and there is no inherent reason for me to doubt any part of the account thus given by him.

0. The evidence of Mr Manthree includes an element that is consistent with this. According to him, he and his co-panelist called the applicant in after the interview, but before the formal notification that she had been unsuccessful, in order to give her feedback. In the course thereof, it was asked of her why she did not apply for the assistant post. Her response was clear: she said that she wasn't interested in an assistant position and didn't want to be reporting into the new structure. Mr Manthree also testified that he had informed the applicant that her current salary would not in any way be impacted upon if she took up the assistant post. He made it clear further that the respondent needed either herself or Ms Filby to continue with the company in order to ensure continuity, particularly since the pressure of the end of year returns was upon them. I may add that it was put to Mr Manthree that Ms Filby would say that he had told her that salaries would be frozen for four years, apart from small increases in September of each year. There is nothing to corroborate that understanding. In any event, the applicant herself has made no such suggestion.

1. According to Messrs Manthree and Langenhoven, there was also an occasion where both the applicant and Ms Filby were present, when the assistant position was expressly offered to them. Both the applicant and Ms Filby denied that an exchange of this sort had taken place. In argument,

Mr Antonie submitted that Ms Filby's evidence should not be accepted because, as he put it, she was clearly disgruntled and angry with the respondent for the loss of her position. That may or may not be so, but the proposition was not squarely put to Ms Filby in the course of cross-examination and she has had no opportunity to deal with it directly.

12. In the course of cross-examination, Mr Manthree indicated that he had conveyed retrenchment notices to all affected employees in the course of the period between 22 and 30 November 1999. In this context, he explained that he had spoken twice to the applicant: once when he offered her the position of assistant and on another occasion when he took her through the package. In my view, that evidence clashes with the account given by Mr Manthree, described above, of how he and his co-interviewer had explained the outcome of the interview and had made the suggestion that the applicant should apply for the assistant post.

13. It is also an unsatisfactory feature of the respondent's case that it specifically pleaded that, on being made the offer for the position of payroll administrative assistant, the applicant requested a period of time within which to consider the offer. That conflicted with the evidence to the effect that the applicant had immediately indicated that she was not interested and that it was Ms Filby who had said that she would take time to reflect. In his evidence, Mr Manthree explained that this was an error made by the attorney in drafting the statement of case. The reference to "applicant" should, he said, have been a reference to Ms Filby. He added that he had only realised that there was an error when he was preparing for court shortly before the hearing. However, he had informed the attorney that he had picked up this error. Despite this, nothing was said about it when the respondent opened its case and no attempt was made to correct the pleadings. To somewhat similar effect, Mr

Maqubela testified that he had offered the assistant position to Ms Filby. That, too, did not find its way into the statement of case. In all the circumstances, I am unpersuaded that I should find it to have been satisfactorily proved that an explicit offer of the assistant position was made to the applicant.

4. Although my conclusion on this aspect of the respondent's case is that it has not sufficiently clearly demonstrated that an explicit offer was made, that does not mean that such conclusion impugns to any substantial extent the otherwise favourable impression I have of the credibility of Messrs Manthree and Langenhoven.

5. I turn next to what the applicant has said about the assistant position. I preface this review with the observation that the applicant presented herself as an articulate and confident witness. She is clearly an intelligent person, who would have had no difficulty in following the unfolding events. It is also so that she has included a course on the Labour Relations Act amongst her various study programs. In particular, she stated that she is well aware of the requirements and stipulations of the Act in relation to retrenchment procedures and of her entitlement to consult on the matters set out in section 189.

6. I have already referred to her evidence that the post of assistant was close to the one that she had previously occupied. However, in the course of her evidence-in-chief, she described that she had applied for the position of Payroll Administrator, because she thought that it was the same as her present post. The evidence that she did not apply for the assistant position because she was under the belief that whoever didn't succeed in the senior post would automatically get the other one, does

not impress me as plausible. It is clear that nothing had been said by anyone on behalf of the respondent to that effect. To the contrary, the weight of the evidence points clearly to all employees having been encouraged to apply for as many positions as practicable. I also have no doubt that the applicant would have understood that the notion of an automatic appointment of the sort described by her should and could readily have been clarified with the respondent. It is clear that she made no attempt to do so.

7. The applicant tried to convey in her evidence that she would have had no problem in taking the assistant position. According to her, she would gladly have taken it and would have worked hard in it in order to please management. If that were true, it would make it even more difficult to comprehend why she didn't take the elementary step of establishing how she could ensure that she would be in line for that position. This portion of her evidence, too, does not impress me as being honest. On balance, I have no hesitation in preferring the evidence of the respondent's witnesses to the effect that the applicant had been dismissive of the notion that she should occupy the assistant post.

8. In consequence of the fact that the senior position had not been filled and because there had been no applications at all for the assistant position, the applicant advertised these posts externally in the middle of December 1999. The applicant was still working at the respondent and was aware of these advertisements. Again, she made no effort to apply for the assistant post. She did not discuss it with anybody within the respondent. Her explanation for this was that it had been made clear to her that the situation was "cut and dried" and that "the jobs were gone". This explanation is a shallow one, which I do not accept. It is not compatible with the expectation that she testified to elsewhere, that an unsuccessful candidate for the senior post would automatically be given the

assistant position. The applicant sought to avert this by singling out the letter announcing her retrenchment as having abruptly brought to an end any possibility of other employment. That can clearly not be the case, since the applicant was in as good a position as anyone else to react to the fresh advertisements for the assistant post. When taken up on this issue in cross-examination, she gave varying answers. On the one hand, she testified that “it never occurred to me”. She followed this by stating that she didn’t apply as she had been angered because the assistant post hadn’t been offered to her. When asked why she had not raised the possibility of the junior position with Mr Manthree, she fell back on the letter, asserting that the letter had terminated the employment and she therefore could not ask about the other position. When it was suggested to her that she could have demanded a consultation about the assistant post, her answer was that she was “not given any chance”. The applicant then went on to say that if Mr Manthree had come to her in mid-December 1999 with the suggestion that she take the assistant position, she would have taken it, because of her financial problems as a single mother.

9. Viewing the evidence overall, I find the varying explanations given by the applicant as to why she took no step whatsoever to indicate an interest in the assistant post, to be more than a little unsatisfactory. By far the more impressive evidence has been that presented by the respondent’s witnesses. Save in the respects I have already identified, the picture that they have conveyed has been consistent and plausible. It accords with my sense of the probabilities inherent in this matter. Plainly, the respondent needed continuity in the department. It would have served it well to have either the applicant or Ms Filby continue with that work. There was no reason for them to have excluded them from that position. Indeed, Ms Filby herself confirmed that Mr Langenhoven had raised with her the desirability of an application by her for the assistant post. She had turned it down

and, thereafter, Mr Langenhoven had expressed his disappointment at that result. According to her this had taken place on or before 14 December 1999. I have heard nothing in the evidence to suggest to me that the respondent would have been interested in Ms Filby but not in the applicant. It is accordingly my conclusion that the applicant deliberately set her face against any interest in the assistant position. Her protestations to the contrary I find to be unacceptable.

0. Weighing up all the evidence, I find that the retrenchment of the applicant by the respondent was procedurally unfair. I find further that the respondent has not satisfactorily demonstrated that there was a clear and explicit offer to the applicant of the position of Payroll Administrative Assistant. Even on its own version, there was some uncertainty latent within what it called the offer, since it was made simultaneously to both the applicant and to Ms Filby. At the same time, I find it to have been clearly demonstrated that the applicant was more than once and by more than one senior manager of the respondent, actively encouraged to apply for the assistant position. Given that Ms Filby had rejected that post, it is in my view overwhelmingly likely that the applicant would have been appointed to that position, had she applied for it. There was ample opportunity for her to have done this and her continued employment could have been secured well before the advertisements were placed in the press on 15 December 1999.

1. It is finally necessary to consider whether, in all the circumstances, the applicant is entitled to relief in terms of section 194 of the LRA. In considering this question I have regard to, among others, the decisions of the Labour Appeal Court in:

Johnson & Johnson (Pty) Limited v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) at

99I-100C;

Alpha Plant & Services (Pty) Limited v Simmonds & Others (2001) 22 ILJ 359 (LAC) at paras. [100] – [109] and [127] – [128].

2. On the one hand, I have found that there were material shortcomings at a procedural level in relation to the most fundamental question of all, namely whether or not dismissals could be avoided or minimised. No consultation on that key aspect had taken place and there is no real prospect that any attempt to initiate consultation on those matters would in any meaningful way have been entertained. Against that, there is the picture of a substantial and continuing flow of information amongst the employees concerning the merger and its implications for them. I am satisfied that the applicant would have been quite clear as to the basic nature and pertinent details of this process. Given that she had been with the company for less than a year, the termination package offered to and accepted by her of R34 324,00 was on the generous side of the scale. This package included retrenchment compensation of two months' salary and an amount equivalent to 1,5 weeks in respect of a year of service or part thereof, as well as one month's salary in lieu of notice, leave pay and a pro rata bonus. It is so that the applicant did not receive the full package, because of her obligation to settle loans, but that does not alter the fact that the applicant was in no sense treated meanly. At a practical level, the company provided the service of a specialist outplacement agency in order to assist affected employees with alternative employment possibilities. I am satisfied also that the company throughout remained open to suggestions in respect of details like the last date of employment and other ancillary matters. None of those was taken up by the applicant. Finally, and most importantly, it is my conclusion that it lay within the hands of the applicant herself to avoid the

retrenchment by seizing the opportunity to secure the assistant position for herself. Weighing all these factors together, I am satisfied that this is a case where the applicant should receive no compensation notwithstanding that the retrenchment was procedurally unfair.

33. In respect of costs, Mr Antonie indicated that the respondent would not press for an order of costs in the event that this court should hold that no clear offer of employment had been proved. That approach accords with my own sense of what would be fair in the circumstances of this case. I accordingly make the following order:-

33.1. The application is dismissed.

33.2. No order is made as to costs.

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K S TIP
Acting Judge of the Labour Court

Dates of hearing : 19, 20 and 21 September 2001; 5 October 2001.

Date of judgment : 12 October 2001.

For Applicant : Adv C Bredenkamp
Instructed by Viljoen Attorneys

For Respondent : Adv M M Antonie
Instructed by Webber Wentzel Bowens