IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J 3487/99

In the matter between:

Applicant

and

Respondent

JUDGMENT

FRANCIS AJ

Introduction

1. The applicant was dismissed by the respondent with effect from 30 June 1999 on the grounds of the respondent's operational requirements. The applicant contends that his retrenchment was both substantively and procedurally unfair. The respondent denies that the retrenchment was substantively and procedurally unfair and pleaded that the parties had reached an agreement on 15 June 1999 in terms of which the applicant agreed to be retrenched.

2. During October 1999 the respondent filed a special plea to the effect that the applicant's services were terminated by agreement between the parties on 15 June 1999. At the commencement of the proceedings, both parties wanted me to first deal with the special plea that was raised. As a result of the similarities between the special plea and defence on the merits I did not deem it appropriate to first have to consider the special plea and then the defence on the merits.

The Evidence Led

3. The respondent called Abraham Wagemaker, its general manager as its only witness. Wagemaker testified that the business of the respondent is the selling and installing of burglar alarm systems. They also service,

adapt and monitor the activation of the burglar alarms. They also respond to burglar alarms that are activated.

4. The applicant was employed on 7 March 1997 by a franchise in Bedfordview. The respondent was formed in August 1998 and was not a branch of the Bedfordview franchise. The respondent existed on its own. It was a franchise with its own shareholders and directors. It has its own budget and employs and dismisses its own employees. The applicant commenced his employment with the respondent as a sales consultant. In late 1998 or 1999 he became a sales manager.

5. At the time when the applicant was a sales manager, he had a team of between 14 and 15 sales consultants who reported to him. The sales consultants were employees of the respondent. The sales manager generated referrals. Once a referral was generated, the applicant would give it to a sales consultant and would guide and direct him. The sales consultant did the sales.

6. Sometime in 1999, the sales consultants gave the respondent notice that they wanted to become independent sales consultants. Several meetings were held with the sales consultants. It emerged from the meetings and negotiations that the sales consultants preferred to enter into contracts with the respondent and to be bound contractually. This new direction was going to have repercussions for the sales department and in particular the applicant's position. The sales consultants were no longer going to be employees of the respondent. The respondent would not be able to discipline the sales consultants. They were going to generate their own work and business. They would qualify their business, assess clients' needs, see what clients could afford and refer the business to the respondent. The respondent would then have an option to finalise the sales and if so get its own technicians to instal the burglar alarms. The applicant was no longer going to have sales consultants reporting to him. He was also not going to have a department to manage. The respondent accepted that the sales consultants would become independent consultants.

7.As a result of the new developments that had taken place, Wagemaker wrote the applicant a letter in terms of the provisions of section 189(3) of the Labour Relations Act, 66 of 1995 ('the Act'). The letter is dated 28 June 1999. The parties agreed that the date on the letter is incorrect and should be 8 June 1999. The letter reads as follows:

" Dear Sir

CONTEMPLATED RETRENCHMENT

Due to restructuring of the Sales Department it has become necessary to re-organise the Sales Department.

Unfortunately, due to operational requirements as above, it has become necessary to contemplate a retrenchment, which affects your position.

Accordingly in terms of Section 189(3) of the Labour Relations Act No.66 of 1995 you are informed as follows:

(a) Reasons
The Sales Manger position has become redundant due to the restructuring of the sales consultants remuneration packages whereby each sales consultant is responsible for generating his own sales.

(b) Alternatives
The only alternative that can be offered is that of sales consultant.

Further at this juncture there are no other suitable alternatives to consider at BBR Pretoria.

(c) Selection criteria
Only one person is affected based on the only sales manager position within the department.

(d) Timing of the Retrenchment
It is proposed to complete the contemplated retrenchment on or by the 30/6/99.

(e) Severance pay
One (1) week for each completed year of service.

(f) Assistance by the employer
Any reasonable requests by employees will be considered by the employer.

(g) Re-employment
At this stage no guarantees of re-employment can be made.

In order to commence with the consultation process, it is proposed that we meet on Tuesday, 15 June 1999, at 09:00.

We understand that this will be difficult period for you, however, we will appreciate your co-operation during the consultation period as the situation is one that unfortunately has to be explored."

8.Wagemaker met the applicant on 10 June 1999 and gave him the letter. He told the applicant to read it and to discuss it with him. The applicant approached him a few minutes later and enquired whether they could meet on 14 June 1999 instead of 15 June 1999 as proposed in the letter. Wagemaker agreed to meet him on 14 June 1998.

9.Wagemaker met the applicant on 14 June 1999. The applicant told him that he got the impression from the sales consultants that they wanted to become independent sales consultants and this was going to affect his position as sales manager. Wagemaker agreed with the applicant. He told the applicant that the only alternative that he saw was for the applicant to become a sales consultant which was a position that he had held previously. He told the applicant that if he was interested, he could be employed by the respondent or could become an independent sales consultant. This was a fair offer to the applicant. The respondent had looked at other alternatives in the technical and financial departments. The applicant knew how burglar alarm systems functioned. He could however not programme, function and wire burglar alarm systems. There were no vacancies in the technical department. The technician was an independent consultant. There was a vacancy in the financial department for an accountant with qualifications. The applicant did not have the necessary qualifications. The applicant then enquired whether any other alternatives had been considered at the other branches of the respondent. Wagemaker had at that stage not approached the other franchisees. Wagemaker told the applicant that the respondent was independent with its own shareholders and directors. However he undertook to make the necessary enquiries and to revert to the applicant.

10.Wagemaker made enquiries at Kempton Park, Boksburg, Bedfordview and Roodepoort. There were no vacancies or alternative positions for the applicant. Later that same afternoon, Wagemaker met with the applicant and told him that there were no vacancies. The applicant then enquired about the corporative sales consultants post. This was the position of a person who looks after corporative clients. The applicant wanted to be the clients' contact person with the respondent and to look for other business and generate it. Wagemaker told the applicant that he would have to discuss this with the managing director, Jakes Becker and would report to him the next morning.

11.Wagemaker met with the applicant on 15 June 1999 in the morning. He reported to the applicant that the corporative sales consultants post was already in place. The respondent's clients had their own corporative

consultant through whom they contacted the respondent. The applicant could not think of any other alternative and said that he would have to go. Wagemaker again told the applicant that he should consider the sales consultants post as he could earn three times the salary that he was earning. He could also become an independent sales consultant and would generate his own work. The applicant declined the post on the basis that he used to be the sales consultants' senior and said that he would rather go. The applicant requested that he not be required to work any notice. He said that it was uncomfortable for him to remain and wanted to attend interviews. Wagemaker agreed. Wagemaker told the applicant that it was his own decision and that he would have to draw up a document to record what was discussed. It was at that stage that they reached consensus.

12. Wagemaker reduced the agreement to writing in the afternoon of 15 June 1999. Before the applicant signed the retrenchment agreement, he requested that certain changes be made to paragraph 3 of the agreement which were made. He had asked that the severance pay be increased from one week to two weeks. He would only have been entitled to one week's severance pay. The agreement was signed by the applicant in Wagemaker's presence on 15 June 1999. It contains the applicant's requests. The agreement reads as follows: .

"15 June 1999

on: Mr D Botha
Mr W Wagemaker
Retrenchment Agreement

Dear Danie

Our consultation of this morning has reference.

*1)*The retrenchment was accepted and agreed to by both parties.

*2)*Your services will seize on 30/6/00 you will not be required to work in this period, although the company will remunerate you.

*3)*All outstanding remuneration including leave, medical aid, pro rata commission and 2 weeks notice and 2 weeks severance pay will be made available to you on 30/6/99 along with all relevant documents as prescribed in the Act.

Our best wishes accompany you on your future ventures.

Yours faithfully

_____ _____

DANIE BOTHA
Sales Manager"

13.Wagemaker denied that the applicant was coerced to sign the agreement. At no stage did the applicant say that he was signing the agreement under protest. The applicant had asked that the agreement be adjusted to reflect what was fair. This was done. The tone of the meeting was relaxed and not hostile. There was a spirit of co-operation.

14.Wagemaker testified that they had to reach consensus on alternatives. The applicant was the only employee who was retrenched. He did not ask for the timing of the retrenchment to be changed. He had only asked that the notice be changed. The proposed assistance that the applicant was given was when he was paid notice pay without having to work the period. The severance pay was increased to mitigate the applicant's retrenchment. They had both looked at alternatives and reached consensus. The applicant rejected the alternative position that was offered to him.

15.Wagemaker testified that it was untrue that the marketing manager was retrenched on 30 June 1999. The applicant was technically still at work on 30 June 1999 but was not reporting for duty. The marketing manager did not have any staff who reported to him. It was impossible for the applicant to have been told to take charge of the marketing department when he was away and there was no marketing staff that reported to him. The former sales consultants are now independent sales consultants. This continues to be the position. No sales manager has been employed since the applicant's post was made redundant.

16.The applicant's version is that he was first employed in Kempton Park. He was transferred to Bedfordview and then to the Pretoria office. He was employed as a sales consultant and then as a sales manager. Before he

was promoted to the position of sales manager, he and Wim van Wyk were appointed as sales consultants for a month. Thereafter van Wyk was appointed as the marketing manager and the applicant as the sales manager. The applicant gave the sales consultants basic training on what a security system entailed, how it worked, the technical aspects of the services that the respondent rendered and sales techniques of burglar alarm systems. The applicant's duties as a sales manager were to employ sales consultants, train them in setting up of security systems, monitor their sales, how to generate leads and problem solving of new and existing clients.

17.The applicant testified that he was aware of the retrenchment of van Wyk. After van Wyk was retrenched, Becker told the applicant to take over his duties. The duties entailed the placing of advertisements in newspapers and the marketing of burglar alarm systems. There were also newspaper campaigns. He had to control new contracts brought in by the sales consultants. The applicant believed that he was going to be appointed in van Wyk's post.

18.The applicant testified that the sales offices and the main administration building of the respondent are two separate buildings. On 14 June 1999 while smoking outside the administration building, Wagemaker gave him a letter. The applicant joked about it and asked Wagemaker whether he was also going to be retrenched. Wagemaker told him to look at the contents of the letter and to talk to him about it. He went to see Wagemaker on the same day and made an appointment for 15 June 1999.

19.On the morning of 15 June 1999, the applicant met with Wagemaker. He told Wagemaker that he was in a state of shock and wanted to know what the reason for his retrenchment was. Wagemaker gave him no reason. The applicant accepted that he had been chosen for retrenchment. He then told Wagemaker to ensure that all payment that was due to him including the medical aid was correct. This is all that was discussed. There was no broad discussion on all aspects of the retrenchment except the use of the company motor vehicle up to 30 June 1999.

20.The applicant testified that he signed the agreement of 15 June 1999 after he had told Wagemaker to ensure that

he was paid correctly. He had no choice but to sign the agreement which meant that if he signed it, he could be retrenched. He accepted that the salary was correct and accepted the retrenchment. He had only met with Wagemaker. He did not discuss the issue of severance pay with Wagemaker. He did not request to be paid two weeks severance pay. They also spoke about whether the notice should be two or four weeks. Wagemaker returned to him and told him that it would be two weeks.

21. The applicant denied that the consultations that he was involved in were aimed to reach consensus. He was in the parking bay when Wagemaker told him to contact Coin Security who were looking for a person. Wagemaker gave him their telephone numbers. He raised the issue about whether he could do corporative clients for the respondent in a private discussion with Wagemaker. This was not during the consultation process. Wagemaker told him that this would not be possible. The alternative position of sales consultant meant that he had to work for a commission. There was no medical aid or a company motor vehicle. He could not see himself in the position where he would have no benefits. It was not profitable to accept such a position.

22. The applicant testified that after he had signed the agreement, he consulted a colleague who referred him to one Jaap Gouws for further assistance.

The Issues to be determined

23. The issue that present itself for determination in this matter is whether the parties had indeed reached an agreement on 15 June 1999 that the applicant could be retrenched. If the question is answered in the affirmative, it is the end of the matter. If it is answered in the negative, the next leg of the enquiry is whether the retrenchment was both substantively and procedurally fair.

Analysis of the evidence led and arguments raised

24. In terms of section 188(1) of the Act, a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the employer's operational requirements and that the dismissal was by

means of a fair procedure. The requirements for operational requirements are defined as requirements based on the "economic, technological, structural or similar needs of an employer" (section 213).

25.It is trite that the duty to consult arises once the possible need to retrench is identified and before a final decision to retrench is reached. This Court has stated in a number of decisions why section 189 of the Act must be complied with. Dismissal based on operational reasons cannot be ascribed to any fault on the part of the employee. For that reason employees found to be affected by that situation must be treated fairly as possible. It is also necessary to comply with section 189 for the simple reason that the employees have a different view to the one held by the employer. For this reason employees must be afforded an opportunity to bring a different perspective to the situation. There is another compelling reason why section 189 should be complied with. This is to safeguard the arbitrary high-handed action on the part of the employers which could bring about labour unrest.

26.Consultations in terms of section 189 of the Act are not supposed to be one sided. Both parties must take part in the said consultations in an endeavour to reach joint consensus. The ultimate purpose of section 189 is thus to achieve a joint consensus-seeking process. Once the parties have reached consensus, it brings the consultation process to an end. An applicant will not be permitted to raise new issues at a later stage if the said issues were not raised with the respondent for consideration during the consultation process. This would of course be different if the respondent prevented the applicant from raising the issues during the consultation process. The purpose of consultations is to afford both parties an opportunity to raise issues, to consider such issues and to provide reasons why they were rejected. When an applicant agrees to accept his retrenchment, he then brings the consultation process to an end.

27.The applicant's case in a nutshell is that there was no substantive reason for his dismissal as a result of the restructuring and rationalisation of the sales department. Further that the respondent had omitted to offer him an alternative post or to create one or to accommodate him at all. The applicant contended that the

respondent acted procedurally unfairly towards him. At no stage did the respondent consult with him adequately on the rationalisation and/or restructuring and more specifically his accommodation on an alternative post. Further the respondent applied a selective criteria unfairly against him. The applicant contended that when he signed the agreement, he was placed under pressure by the respondent as an institution to sign it.

28.The respondent's case is that the applicant was dealt with on a substantive and fair manner when his services were terminated. The respondent acted procedurally fair against the applicant. An alternative post was offered to the applicant. Several consultations were held with the applicant. An agreement was reached which settled the retrenchment. A fair severance package was paid to the applicant.

29.Mr Le Roux, for the applicant, raised a number of issues that are not necessary for determination. The first was whether the respondent could raise a point-in-limine when it was agreed between the parties at the pre-trial conference that no point-in-limine would be raised. The second was whether the rules of this Court permits a party to a raise special plea. It is trite that once parties have at a pre-trial conference reached an agreement on what the issues in dispute are, what is admitted etc., parties are not permitted to deviate from such an agreement and can only do so either by amending the pre-trial minutes or by seeking the other party's consent. Because the point-in-limine is closely linked to the respondent's defence in the main, it becomes unnecessary to deal with the argument that was raised. It also becomes unnecessary to determine whether the rules of this Court permits a party to raise a special plea and at what stage may it be raised.

30.Wagemaker testified extensively on all aspects of the manner in which the respondent dealt with the dispute. During cross examination he was questioned on several issues in dispute and aspects that were favourable to the applicant's case. I found him to be an honest and open witness who took the court in his confidence. His views and factual events were unqualified and expressed without any doubts. He was not unsettled during cross examination. His evidence around the restructuring of the sales department, the reason for the

termination of the applicant services, the nature and duration of the consultations with the applicant, the alternative post that was offered to the applicant, the conclusion of the agreement about the termination of the applicant's services on 15 June 1999, was satisfactory and more convincing than the evidence given by the applicant.

31. The applicant also testified extensively during examination in chief on all aspects of his case. However I found him to be an unsatisfactory, unreliable and an evasive witness. He attempted to clarify contradictions in his statement of case by stating that his oral testimony was correct and that what appeared in the statement of case and other documents were incorrect. The applicant pleaded ignorance on the rationalisation of his post whilst he had knowledge about the discussions on the sales consultants salary packages. His assertions during cross examination that he did not realise what the impact and implications of the said rationalisation of the sales consultants on his own post and position was going to be, especially when taking into account his senior position in the hierarchy, should have been obvious to him. The testimony that he gave about the meeting of 15 June 1999 that he knew that his position was in jeopardy was more acceptable.

32. The applicant testified that there was only one consultation meeting that had taken place with him on 15 June 1999. This was only about the payment of monies that were due to him on termination of his services. Further that no reason was furnished to him for his retrenchment. During cross examination, the applicant conceded that other matters were discussed with him namely the continued use of the company vehicle, his exemption from duties, whether his notice period should be two or four weeks, the alternative post of sales consultant etc. Wagemaker had testified that the applicant was informed in writing on 10 June 1999 that the sales manager's post was made redundant and that a consultation was planned for 15 June 1999. The applicant requested that the consultation meeting should take place on 14 June 1999. On 14 June 1999 the applicant's position was discussed and Wagemaker undertook to enquire about possible posts at other branches. Wagemaker testified that a further consultation meeting took place on 14 June 1999 where a report back was made about other posts at other branches. At that meeting they also discussed the

possibility of the corporative consultant's position and Wagemaker undertook to make enquiries on the applicant's behalf. A third consultation meeting took place on 15 June 1999 where several issues were discussed with the applicant amongst others a report back about the corporative consultant's post. The applicant admitted in his testimony that the issue of corporative consultant was discussed with Wagemaker but not on 15 June 1999 but at another occasion which he could not identify. The applicant's version of the consultation meeting is improbable and is rejected.

33. The applicant adapted his evidence as the matter proceeded. His testimony that he was shocked when he received the retrenchment letter of 8 June 1999 is improbable and unacceptable. He had jokingly asked Wagemaker after he had received the retrenchment letter whether he was also going to be retrenched.

34. It is not in dispute that the parties entered into a written agreement on 15 June 1999 that the services of the applicant should be terminated. What is in dispute however is whether any pressure was brought to bear on the applicant when he signed the retrenchment agreement. The applicant in his statement of claim contends that he was brought under the impression by G J F Becker that he did not have an alternative but to accept his retrenchment and therefore agreed to sign the retrenchment agreement. However when the applicant testified, he admitted that consultations had only taken place between him and Wagemaker. He admitted that no pressure was placed on him by Wagemaker or any other person. The only pressure that was placed on him was by the respondent as an institution.

35. The applicant's version is highly improbable. The applicant was employed as a sales manager. This was a senior management position. He is not an illiterate person. I observed him closely when he testified in court. He did not strike me as a person who could easily give into pressure. He struck me as a strong-willed person. Several meetings had taken place between him and Wagemaker. Several alternatives were considered. The applicant was offered the post of sales consultant which he turned down. He told Wagemaker that he wanted to leave. Wagemaker told him that he would have to draw up an agreement. An

agreement was drafted and taken to the applicant for signing. The applicant requested that certain changes be made to the agreement which were made. The changes are reflected in paragraph 3 of the agreement. The agreement was taken back to him. He signed it. He made use of the company vehicle thereafter. He did not complain to any person about the pressure that was brought to bear on him. The applicant was vague about the pressure that was brought to bear on him. He could give no satisfactory reasons for his perception that he was placed under pressure to sign the agreement. During cross examination he declared that no person placed him under pressure but that the pressure came from the respondent as an institution. The applicant's dealing and explanation of the contradictions in his statement of claim in this respect namely that the impression that was created by Becker is that he had no alternative but to sign the agreement, against his own testimony that he was put under pressure to sign the agreement is also unacceptable and unreliable. He accepted the benefits that flowed from the agreement. He attended a farewell party that was arranged for him.

36. Mr Le Roux argued that in terms of paragraph 3.4 of the pretrial minutes the respondent admitted that should the applicant have refused to sign the alleged agreement, his services would have been terminated. This, he argued, supported the applicant's allegation in the same paragraph that he had no other choice and that he was under pressure to sign the agreement. He relied on the decision of *Van der Merwe v Mcdulling Motors (1998) 3 BLLR 332 (LC),* where it was held that the employer acted unfairly when "*.....by inducing its employees to enter into a retrenchment agreement without consulting their Union."* The instant case is different and is not a matter where the applicant was induced into signing the retrenchment agreement. The applicant was not a member of a trade union. He did not seek permission to be represented during the consultation process. All possible avenues had been discussed with the applicant who agreed that he could be retrenched. The respondent's version about how the settlement was reached is more acceptable than that of the applicant.

37. It is clear from the evidence that was led in this court that after several consultations were conducted, an agreement was reached on 15 June 1999 with the applicant that his services be terminated. The formal

signing took place later in the day after the agreement was finalised. The retrenchment was voluntarily concluded between the parties. It is therefore my finding that the parties reached an agreement on 15 June 1999 that the applicant's services be terminated.

38.This is not a matter where costs should follow the result.

39.The following order is made:

(a) The applicant's application is dismissed.

(b) There is no order as to costs.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: ATTORNEYS LE ROUX OF GOUWS & VENOTE

: ADVOCATE SR VAN JAARSVELD
INSTRUCTED BY HENNING VILJOEN ATTORNEYS

: 27 FEBRUARY 2001