

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No.: J

4320/99

In the matter between

FERDINAND PETER HARMSSEN

Applicant

and

ALSTOM ELECTRICAL MACHINES (PTY) LTD

Respondent

JUDGMENT

REVELAS, J.

- [1] The applicant was retrenched by the respondent at the end of February 1999. The applicant challenged the fairness of his dismissal on the basis that it was both procedurally and substantively unfair.
- [2] The applicant, was 56 years old when he was retrenched and in possession of a BsC Chemical Engineering Degree as well as an MBL.
- [3] The applicant was employed by the respondent on 15 February 1995 in the position of Group Manager: Logistics within the respondent's

ELMAC Manufacturing Division where he reported to the Managing Director. Prior to his appointment with the respondent, the applicant served as a senior executive and managing director of several companies *inter alia* at Toyota Automotive

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Component and Barlow Equipment.

- [4] When the applicant was appointed it was anticipated that after a period of six months the applicant would be made a director dependant on his performance. This was expressly stated in his letter of appointment. His level of remuneration at the time of his appointment was in line with that of a general manager.
- [5] As a result of the appointment of a Mr Erasmus to the position of “the Portfolios of Industrial Engineering and Commercial in Small Motors” the applicant was appointed to the position of Manufacturing Manager: Large Machines. This position was below the level of general manager for which he was remunerated. The applicant’s case was that he was persuaded to take the position on because of the problems he as Manufacturing Manager could help to sort out. The applicant was later on also not elevated to be general manager. A Mr Ernie Muller was.
- [6] On 23 January 1998 the applicant was formally seconded to the

respondent's F3 project as project leader. The F3 project involved the transfer of skills relating to a new motor developed by the respondents' French parent company, for which a production line was to be established in South Africa. It was agreed that until an alternative "career path" was established, the applicant would remain in his then current position as Operations Manager: Large Machines and on completion of the project, revert to his original duties. This agreement came about in a letter the applicant wrote when he was seconded.

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- [7] During the course of the F3 project, the applicant also became involved in planning a proposed joint venture with a Zimbabwean company. The applicant was to drive this process on the instruction of Mr Mangen the Managing Director.
- [8] Mr Mangen was succeeded by Mr Cuthbert in October 1998. The applicant sent him a memorandum on the Zimbabwean Project. The memorandum contained information regarding the venture and the applicant's opinions as to the latest status of its viability and the threat held by the fall in the value of the Zimbabwean dollar. The memo offered suggestions regarding alternative ways by which this project could proceed profitably. Mr Cuthbert did not reply to the memo.
- [9] At that time the executive management team consisted of Mr Muller

(Large Machines), Mr Romano in the Low Voltage Section, Mr Boshoff in Laminations and Tooling and Mr Colborne as the Export Manager.

- [10] Six weeks after Mr Cuthbert's appointment, he negotiated Mr Romano's departure and reassigned Mr Boshoff to his position as General Manager of Low Voltage. Peter Colborne became General Manager of Laminations and Tooling. The position of export manager was not filled by anyone. This was about the same time as the applicant was identified as a retrenchee.

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- [11] Since his employment with the respondent, up to the time prior to the Zimbabwean project and the retrenchment in question, the applicant never filled the position of general manager. The three general manager posts were held by Mr Boshoff, Mr Muller and Mr Joliffe respectively.

- [12] On 12 November the applicant was called to a meeting attended by Mr Cuthbert, Mr Muller and Mr Ron Watkinson the respondent's Human Resources Manager.

According to the applicant, Mr Cuthbert informed him at this meeting of his retrenchment, introducing the subject with the words "I guess there is no easy way to say this". According to the respondent, this 12

November meeting was no more than to advise the applicant of the possibility that he might be retrenched and to open discussions. What occurred at this meeting was in dispute.

- [13] According to the respondent, the following aspects were discussed during a meeting of some 45 minutes in duration:

1. The end of the F3 project
2. Since the applicant was involved in the F3 project and setting up the Zimbabwean venture, Large Machines had continued without an operations manager since 1998. So that position had become redundant.

1. If the respondents found itself unable to approve the Zimbabwean project - which at that stage Mr Cuthbert was, at the very least, sceptical about - and there was no alternative position found for the

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applicant, he will be retrenched.

[14] According to the respondent, the applicant was “acutely aware of these dynamics” before he went to the meeting. This of course does not accord with the applicant’s testimony that he went into shock when told of the retrenchment. His view of the meeting, was that he had been presented with a *fait accompli*.

- [15] After the meeting, on 15 November the applicant addressed a letter to Mr Ellis, the Human Resources Director at the respondent’s head office in which he enclosed a copy of his curriculum vitae for distribution locally and internationally. He attached the contribution he had made at Large Machines, indicated his preferences in regard to international positions and his willingness to improve his French language skills.

- [16] Mr Cuthbert, who by now, had clearly sought legal advice, wrote to the applicant on 16 November 1998 as follows:

“Dear Peter

PRIOR NOTICE: RETRENCHMENT

This serves to confirm our discussion on 12 November 1998 with regard to the question of retrenchment.

As you will be aware from that discussion, it appears that, for reasons of the operational requirements of the Company, your retrenchment has become a possibility.

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That being the case, we intend that the process complies with the substantive and procedural requirements of the Labour Relations Act no 66 of 1995. This means that we wish to consult with you over the following:

- 1. the decision leading to your retrenchment**
- 2. disclosure and other relevant information**
- that supports the decision**
- 3. alternatives we have considered to avoid**
- your retrenchment**
- 4. severance package**
- 5. follow - up issues**
- 6. the proposed time frame to manage this**
- process**

We would like to reiterate that the procedure means you are entitled to put forward anything which you feel might have a bearing on this matter. In particular, if you feel that there are any ways in which your retrenchment can be avoided or handled differently, you are invited to say so.

Throughout the process we will examine this matter and if

we feel we are able to find alternatives that are reasonably open to us to avoid your retrenchment, we shall let you know.

It is with considerable regret that we have to take this course and we do wish to ensure that all possible avenues are explored. Therefore, anything you wish to put forward at any stage, will receive careful attention.

**Yours sincerely
PA CUTHBERT
MANAGING DIRECTOR”**

[17] The applicant requested a week to respond to the issues raised in Mr Cuthbert’s letter. Mr Cuthbert, on 18 November 1998 responded as follows:

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“I am pleased that you are considering alternatives to the issues raised. I am also aware that Mr Ellis has forwarded your C.V. to both Reunert and ALSTOM overseas. I must advise though that this can not delay the process at Electrical Machines but must be viewed as part of the process. I share your hope that this results in the process becoming academic but must advise a measure of caution as the current global market situation has certainly had an impact on employment levels across the industry.

As an alternative I would encourage you to discuss and consider any available vacancies at Electircal Machines with Ron Watkinson who will approach you in this regard on 19 November 1998.”

[18] On 20 November, following discussions with Mr Watkinson the

previous day, an offer of alternative employment Logistics Manager Low Voltage was made to the applicant. The Level of remuneration was at 41% of his current salary, at level E3 the position being at Patterson D1.

Mr Watkinson also stated in his letter:

“...Should you agree to consider accepting the position, we would be prepared to offer two alternatives, viz

1. **an entitlement to a trial period of one month during which time if it is felt that this post is not one which is suitable to you, and no other alternative positions have been secured to you, you will revert to your previous position of Operations Manager, Lager Machines, without any break in service. In that case, of course, it appears at this moment that there will be no alternative to redundancy, or,**
2. **that your services as Operations Manager, Large Machines, are terminated, and that you are re-employed in the position of Logistics Manager: Low Voltage. In this case you will be entitled to severance benefits in terms of the company's retrenchment procedure and calculated at the difference between your present basic salary and that of the basic salary**

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of Logistics Manager as per this letter. You may also elect to be paid out all your accrued and Pension/Provident Fund benefits, or keep these intact.”

[19] The severance benefits offer is unlawful. On the same day the applicant wrote the following letter to Mr Cuthbert:

“In order to enable me to consult with you regarding the aspects indicated in your letter dated 16

November 1998, I request the following information and documentation:

- 1. Confirmation of the position of employment with the group from which it is proposed I be retrenched.**
- 2. Written reasons for my proposed retrenchment.**
- 3. Any documentary evidence relative to the reasons that support such a decision.”**

[20] Six days later, on 26 November 1998 Mr Cuthbert responded as follows:

“Dear Peter

RETRENCHMENT

1 As indicated in our offer of alternative employment dated 20 November 1998 and during our initial discussing of 12 November 1998, it is the position of Operations Manager, Large Machines, that has been affected by the current operational requirements of the Company and from which it appears you will be retrenched.

Your official secondment to the F3 project is now largely complete and unfortunately no further projects in which your services could be utilised are planned for the foreseeable future.

1. **Regarding reasons for your proposed retrenchment, you**

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will no doubt be aware that the profitability of Large Machines has reached the point where it has become necessary to critically examine the continued viability of selected positions with Large Machines. Regrettably, the position of Operations Manager has been identified as being superfluous to requirements and is, therefore, to be made redundant.

For ease of reference I have attached hereto graphs which reflect the current and anticipated situation with Large Machines, viz

1. **Recoveries forward forecast to March 1999**
2. **sales forward forecast to March 1999**
3. **Orders received for fiscal year 1997/1998**

I would be happy to discuss these with you should you feel the need to do so.

I am informed by Johann Ellis that your position was discussed at ALSTOM executive meeting on 24 November 1998 and that your CV has been forwarded to both Reunert and ALSTOM, France. Naturally, we will keep you informed of any developments in this regard as and when these may arise.

I would like to take this opportunity of pointing out that there is an urgent need to fill the

position of Logistics Manager, Low Voltage and would accordingly appreciate you giving an indication as to your intentions in this regard by Monday 30 November 1998. Should you not be interested in applying for the post, we will have no option but to look for a suitable replacement both internally and from elsewhere within the Group.

I must also inform you that while we are actively seeking alternative employment for you within the organisation,

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your notice period will commence on 1 December 1998 and end on 28 February 1999 should re-deployment prove unsuccessful.”

[21] On 1 December the parties met and the applicant handed a letter to Mr Cuthbert which stated:

“Your letter of 26 November 1998 refers.

I do not believe that the information provided in this letter justifies the decision taken to retrench me, and will certainly avail myself of the opportunity of discussing the issue with yourself at a time suitable to you.

In the interim, I request an undertaking from the company that the process will be stayed and no final decisions made, until the consultation process has been completed.”

[22] Mr Cuthbert reiterated the need to fill the Low Voltage position and wanted to know if the applicant was going to accept it. He was also

unwilling to extend the time table set for the retrenchment.

[23] The applicant was then retrenched and subsequently found alternative employment.

[24] The applicant's case was that his dismissal was unfair because the respondent failed to engage with him in consultation concerning the redundancy of his post as Operations Manager: Large Machines, to consider him for appointment to one of the executive director posts of General Manager Lamination and Tooling or for General Manager Low Voltage Motors, to consult him on the timing of the retrenchment and to consult with him in regard to his severance package.

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[25] The respondent's case is that it had a valid commercial rationale for effecting the applicant's retrenchment. The reasons forwarded were that:

1. The position as operations manager of Large Machines was operationally redundant.
2. The situation in Large Machines had reached alarming proportions in the run up to year and with all order patterns clearly not the same as in previous years.
3. The company could no longer afford the applicant at the level he was appointed.

[26] The respondent also argued that since the applicant was a managerial employee, it was not obliged to consult with the applicant in the same way as an employer would consult with a blue collar worker as the applicant had ample knowledge of the respondent's financial circumstances and always knew that his position with the respondent was precarious. Much emphasis was placed on the fact that the applicant never became general manager as hoped for and expressed in his letter of appointment and was overlooked twice for promotion. It was argued that he could not reasonably have expected to be appointed in a position he had not held for almost a year in Large Machines or to be appointed to an executive position when his position became redundant.

[27] The applicant argued that it was by no means clear that the situation at Large Machines was indeed as alarming as alleged by the respondent, or that the applicant was no longer affordable. The applicant also questioned the contention

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whether the applicant was operationally redundant to the position of operations manager: Large Machines. Here one might ask the question, if the situation in Large Machines was finally unsound, was this not perhaps attributable to the fact that the applicant was not there? He argued that he could have been retained in this position

whilst presiding over a works manager position as had existed previously. This possibility would have entailed removing manager Rob Lawery from the position of works manager.

[28] The applicant said that he could also have filled the positions of Mr Boshoff or Mr Colborne. Mr Cuthbert was, with the exception of Mr Romano, content with them in his team. The fact that he reassigned these persons, the respondent argued, did not mean that vacancies for the applicant arose. There is nothing wrong with this proposition. It is just unfair that this was discussed at the trial and not with the applicant.

[29] Appointing the applicant to the executive team would have meant, according to Mr Cuthbert, that his executive management team would revert to its former compliment and he had no need for an export director. He was satisfied with his team's performance. He also reviewed the applicant's personal file including the results of certain psychometric tests which had been undertaken. He did not believe the applicant was suitable for those posts even though the applicant had the technical ability and qualifications.

[30] With regard to the applicant filling the executive posts, I agree with the respondent that no employee has the right to be promoted as a means to avoid retrenchment. The applicant could also not really

expect that some other employee should be “bumped” so that he could fill that employee’s position. Mr Cuthbert held the view that the respondent, even though it had experienced a good year was headed for less prosperous times, in keeping with international trends in the electronics industry and the Alstom Group in particular, it would be very difficult to create a post for the applicant in these circumstances.

[31] I tend to agree with the applicant’s contention that the applicant needed to have been notified prior to 12 November that if the Zimbabwean project was not approved and the F3 project came to a close he was going to be retrenched. The argument that the applicant was acutely aware that he would be retrenched has no merit. It was quite clear from his evidence in cross-examination that he believed he would still rise in the company. Despite the disconsolate view held by the respondent of the applicant’s track record, there is no objective basis or fact from which it can be inferred that the applicant ought to reasonably have foreseen that he will be retrenched and that he need not have been alerted thereto long before 12 November.

[32] The probabilities tend to show the possibility of retrenching the applicant was not anticipated. Only when Mr Cuthbert was appointed some six weeks prior to the applicant’s retrenchment, did the retrenchment of the applicant begin to take form. It first started in Mr Cuthbert’s mind when he read the applicant’s

report on the Zimbabwean Venture dated 9 September 1998, to which he did not respond. The applicant was not consulted in relation to a position as general manager: Low Voltage Motors or a position as general manager Laminations and Tooling. Mr Cuthbert agreed that the applicant was qualified for these positions even though he later tried to retract that concession. Mr Cuthbert also appeared to have based the view that the applicant was not suitable for certain positions on psychometric testing results. Mr Cuthbert's reasons for retrenching the applicant sailed very close to the winds of a dismissal for poor performance. During the cross-examination of the applicant, an approach was followed during which the applicant was almost taunted with the history of his alleged lack-lustre career path. He was clearly deemed not fit to be a manager in the eyes of Mr Cuthbert. Yet this aspect was not raised by Mr Cuthbert during the consultations, and it should have been, if it was part of the selection criteria.

The respondent in this regard referred me to **JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon (2000) 21 ILJ 501 (LAC) at 517J-518A** where it was held:

“.... where an employer on reasonable grounds comes to the conclusion that a senior management employee is unsuited to the position which he holds, the

scope for having such a conclusion overturned in a court of law is small. It is in the highest degree desirable that an employer should, in the interests of

efficiency, be entitled to choose with as much freedom as is compatible with the honest exercise of a discretion, who it wants at or near the helm of its enterprise. Qualities like leadership, resolve, business acumen, judgment and effective administration are not readily provable in a court. A deficiency in such qualities

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is not readily provable either.”

[33] Why there was such undue haste in concluding the retrenchment process, is in my view not answered by the cost cutting which is alleged to have been necessary. Redundancy was what the applicant was presented with. I agree that a new manager is entitled to dispose of a position where the incumbent is earning a salary at a much higher level. Such an incumbent is too expensive. Yet the applicant quite aptly made the point during cross-examination, that because Mr Cuthbert had been with the respondent for only six weeks, if there was proper consultation, he could have persuaded Mr Cuthbert to consider alternatives to retrenchment. Furthermore, the applicant was never consulted on the basis that he was too expensive and had no chance of ever becoming a manager, due to his personality or lack of certain qualities. This failure goes to the substance of the consultation process.

[34] I gained the strong impression from the evidence that the applicant was confronted with a *fait accompli* at the meeting of 12 November after Mr Cuthbert had made that decision based on his view of the

applicant's performance. Legal advice appears to have been obtained and what then followed was a rather hasty endeavour to comply with the obligations imposed by the Labour Relations Act 66 of 1995, in particular section 189 thereof. At the same time, no changes or extensions were going to impede the plans made by Mr Cuthbert just before the 12 November meeting, for the retrenchment process.

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[35] Whereas I am in respectful agreement with the views expressed in the JDG Trading case (*supra*), the facts in that matter (a poor performance case) was distinguishable from the case at hand, which deals with retrenchment consultations, even though poor performance may have played a significant role in Mr Cuthbert's mind. I nonetheless take this principle into consideration in my assessment of the compensation which I must award because the respondent did not discharge the onus that the termination of the applicant's services was for a fair reason and that it followed a fair procedure.

[36] The applicant does not seek reinstatement. Accordingly I must award compensation. The applicant immediately found employment with a different company where he earned R270 000.00 per annum. At the respondent he earned R400 000.00 per annum. After two years the company which had employed the applicant, went into liquidation. The applicant has remained unemployed since.

[37] The right to compensation is a contingent right which rests on a finding pertaining to the substantive and procedural fairness of a dismissal. It is a discretionary remedy, although it is hedged by limitations on the quantum which may be awarded. An award of compensation as regards procedural fairness still encompasses as one harm suffered as a result of a procedural defect (**See: H. Fouldien and 34 Others v The House of Trucks (Pty) Ltd (2002) 23 ILJ 2259 (LC) at para 16-18 per Landman J).**

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[38] Compensation which is just and equitable to both parties must be considered. That would involve determining the actual loss suffered, which is normally in the form of lost remuneration and a consideration of whether the full amount of that loss is recoverable, dependant on various factors including the degree of unfairness (**See: Jones v KPMG Aiken and Peat Management Services (Pty) Ltd (1996) 17 ILJ 693 (LAC) at 695C to 696C).**

[39] Although I believe it was unfair to consult with the applicant during the notice period, there was no *mala fides* on the part of Mr Cuthbert. He was the “new broom” in the respondent who wanted to “sweep clean”. Unfortunately, in his enthusiasm he caused the applicant to

suffer harm which could have been avoided by proper consultation. On the other hand, the applicant was also criticized for not accepting a temporary position at 41% less of his current remuneration. The applicant did not decline the position out of hand, he first looked at other alternatives.

- [40] To award the applicant compensation equal to twelve months' remuneration at the rate of his salary earned at the respondent, would be very punitive, given the aforesaid factors. I believe it would be fair if I awarded the applicant compensation equal to the difference between the annual salary earned at the respondent (R400 000.00) and the annual salary earned at the new employer (R270 000.00).

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- [41] Accordingly the respondent is to pay the applicant compensation in the amount of R130 000.00, and the costs of this application.

REVELAS

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On behalf of the applicant: Adv. P Buirski
Instructed by Sampson Okes Higgins Inc.

On behalf of the respondent: Adv C.E. Watt-Pringle SC
Instructed by Fluxman Rabinowitz-
Raphaely Weiner

Date of hearing: 21 January 2003

Date of judgment: 8 December 2003