

LABOUR COURT JOHANNESBURG

JS358/05

Lakomski

Applicant

TTS Tool Techin Systems (Pty) Ltd

Respondent

Francis J:

Introduction

[1]

The applicant referred an unfair retrenchment dispute to this Court for adjudication after she was retrenched by the respondent. She contended that her dismissal was both substantively and procedurally unfair and sought compensation.

[2]

The referral was opposed by the respondent on the basis that the dismissal was both substantively and procedurally fair.

The evidence led

[3]

The respondent called Andreas Hinze (Hinze) as its only witness. He was at the time of the dispute the respondent's general manager. He is no longer employed by the respondent. The respondent's mother company is in Germany. The applicant was employed as a personal assistant of his predecessor, Robert Burkard (Burkard). Hinze testified that he was involved in the process leading to the applicant's retrenchment. After he took over in July 2004, he looked at the respondent as a whole in South Africa to see if it was profitable. He looked at the warehouse of the respondent and decided that it should be out sourced which resulted in the employees' positions in the warehouse becoming redundant. The respondent had two sales sides, for the protool brand and festool brand. It was decided that the sales side should sell both brands, for example, the person in Cape Town would sell both brands. There were a few resignations and no person was replaced. There was one redundancy in Cape Town. After a meeting took place in Germany, it was decided that the national sales manager of festool and national sales manager of protool be made redundant and he, Hinze then became the national sales person for both brands. He had a new responsibility and was involved in the marketing area and ran the respondent. The respondent needed a marketing assistant and no longer a general secretary since they could do those functions on their own. A month or so after Hinze had taken over, the applicant's position was changed to that of general secretary. He had decided to change this because he did not need a personal assistant and due to computers

did much of his own correspondence. The applicant answered telephones, looked at warranty cards for both brands and did general office duties. She was a general secretary for officials like him and the financial manager. The need for a general secretary also changed. Each person at the applicant had a function and they were doing it. The focus was on sales and they needed someone in the marketing side to take the respondent forward. He needed a marketing assistant for himself.

[4]

On 5 November 2004 Hinze addressed a letter to the applicant inviting her to a meeting on 9 November 2004. The letter informed her that management had started a restructuring process a few months ago and that she was aware of the outsourcing of the warehouse functions to Excel during July 2004. Further that at a recent management meeting the respondent confirmed its intention to continue with the process to become more competitive in the marketplace, the need was identified to increase their sales and market share in the industry. On 4 November 2004 he and Brandon Molyneux sat around a table and discussed the restructuring and it was agreed that he would become a sales person. He indicated that he would want to sit with the applicant to discuss the restructuring process and goals of the respondent. To consult and discuss constructively he had prepared a list of items for discussion on 9 November 2004. The items to be discussed were to consider possible alternative ways to avoid any potential retrenchments; the number of employees likely to be affected and job categories; criteria for selection of employees to be retrenched, if retrenchments had to take place; a timetable of the potential measures which may have to be taken; if retrenchments were unavoidable, to discuss what benefits and assistance/severance pay could be provided by the respondent to the affected employees; assistance in the process, possible re-employment or other alternatives and any other relevant matter for discussion between the parties.

[5]

Hinze met the applicant on 9 November 2004. The applicant came to his office for the meeting. She did not sit at her desk. She stood halfway between his door and the door way. He wanted her to sit. The meeting was brief. He had explained what the meeting would be about. He wanted to discuss the restructuring since the applicant would be affected and they had to look at what she would do in the future. The respondent's goals were to get them administratively correct and to grow the respondent's sales in South Africa. This was to make it profitable. She asked him what would happen next if the restructuring process failed. He told her that there could be a retrenchment but did not tell her that she would be retrenched. There was a discussion on why her position was redundant and the need for a marketing assistant. The applicant told him that when she had worked in Germany she worked in the marketing department. He told her that it was fine and asked her for her curriculum vitae (CV). She said that there was a CV at the respondent. He looked for it but could not find it. She asked for the job description for the marketing assistant position. She cut the meeting short so the agenda items listed in his letter of 5 November 2004 were not discussed. There was no employer employee discussion. The discussion had taken place while she was standing. She said that she needed to

consult with someone and he agreed. She then left.

[6]

A day or two later the applicant was given the job description for the marketing assistant position. The requirements are a diploma or degree in marketing (IMM); 2 to 3 years experience in the Industrial sector as a marketer and could converse both in English and Afrikaans. The package was between R7 000 and R9 000 per month depending on experience. Hinze testified that this was a wish list and was very negotiable. The duties are also set out in the job description. The wish list was not discussed. It could have been changed. He could not say whether if the applicant had applied for the position that she would have been appointed. He was willing to negotiate 100% but she did not apply for it.

She had to have an idea about marketing and would have to bring value to the respondent. She did not have to be trained but it was a mere wish list. She was conversant in English. As for the duties, she had to see where the brands were kept, deal with discounts, monthly specials, what customers needed for the respondent to stay competitive in the market. They had to upkeep the product portfolio.

[7]

Hinze was not certain whether any meeting had taken place between 9 and 18 November 2004. He had heard through the grapevine that the applicant would accept a similar package given to the retrenched employees in the warehouse with an extra month's salary. He then prepared a termination of employment retrenchment agreement (retrenchment agreement). According to his letter of 23 November 2004 he had a meeting with the applicant on 18 November 2004. He told her that he had a document and that he wanted to have further discussion with her on the restructuring. She told him that she had been advised not to talk to him about the restructuring, not to sign any documents and that he should contact advocate Hiemstra. She had already received the job description but did not recall that there was a discussion on it. He told her that he would like to carry on the discussions with her and she refused. None of the agenda items were discussed on 18 November 2004.

[8]

Hinze testified that he received a letter dated 22 November 2004 from the applicant's attorneys referring to the retrenchment agreement. He had at no stage tried to waive her rights but it was a document to indicate further correspondence with the applicant about the restructuring. She was at that stage not retrenched. He wanted to communicate with her.

The applicant had been reluctant to consult with him. He felt that the matter was between him and her or between an employee and an employer and not with the attorneys. Her attitude was that he had to consult with her legal representative. He responded to the letter on 23 November 2004. He emphasised that the applicant had not been dismissed and that she had communicated about what had happened to her legal representative. He emphasised that there was a restructuring in 2004 and that they had started the consultation process. He set out what had happened so far and what her response was. He had then proposed a settlement agreement. He had wanted to consult with her but felt frustrated.

There was no two-way communication. The applicant's representative had said that he wanted to get rid of her. There was no basis for this. He was getting mixed messages about what she wanted.

[9]

Hinze testified that the applicant had applied for leave from 13 December 2004 and then changed it to 29 November 2004. He needed to resolve the matter with her before she went on leave. He could not consult with her when she was on leave. He had asked for her personal response before she went on leave. The feeling that he got was that she was not prepared to communicate and in her own mind something was settled. She did not want her leave to be paid out. He felt that the matter had not been finalised and was still under discussion. He could not leave it unresolved. She wanted to communicate through her legal representative. He referred them to Andre van Rensburg, an Employers Organisation official. At no stage did he want to retrench her as stated in her attorney's letter of 24 November 2004. It was not his intention to retrench her and the impression that he got from the said letter was that she should retrench her. It was up to her if she wanted to challenge her retrenchment. It was stated in paragraph three of the letter that she had participated up to a point where the respondent had decided to retrench her. He had given her the requirements for the marketing assistant post. She had said that she had marketing experience and that they had her CV. They did not receive anything further from her. She had said that she was advised not to speak to them further. He was dumbfounded. There was no discussion on the wish list. She had said that further consultations would be futile. He felt that they had to resolve the matter and that all communications had broken down. She was then offered a final package. He responded to their letter with his on 26 November 2004. After 18 November 2004 they had another discussion on 25 November 2004. They tried to discuss the restructuring and she wanted the same financial package offered to the retrenched employees in the warehouse. They had received an extra month's salary in addition to the financial package. His reaction was that since they were communicating he conveyed this to her attorneys. She responded that she wanted to apply for the marketing position. He told her that he did not receive her CV. After he told her about the CV, she said that she would not talk to him and that he should speak to advocate Hiemstra. He received her attorney's reply on 26 November 2004. What was expected of her was to communicate and sit and discuss the issues with him. The issue of whether there was a need to retrench did not come up. At no stage were any of the issues discussed that she had. The applicant did not express any unhappiness about the job description with him personally. She was not told that she could not apply for the position. She was not excluded. His new proposal was the retrenchment package since there was no other communication and she had withdrawn from further consultations. On 26 November 2004 he wrote the applicant a letter which he gave to her on the same day. All the communications had been done through their legal representatives except the meetings he had with her. He had asked for a response to his letter by 26 November since she was going on leave on 29 November 2004. He received no response to his letter and then gave her a letter dated 29 November 2004. He had set out in his letter what had happened so far.

He had approached her directly on 29 November 2004. He pointed out that her position had become redundant and that her notice period would be from 30 November 2004 – 31 December 2004 and that she would be paid severance pay of one week's salary for every completed year of service; an additional month's salary and accrued leave pay. He pointed out that she had refused to consult with him. She was given the same package as that given to the warehouse employees.

[10]

Hinze testified that the marketing position was filled by a Theresa Howden (Howden). She was appointed as a marketing coordinator. In 2005 after the applicant had left, the respondent gave the wish list to an employer's consultant. Howden was interviewed. She did not meet all of the requirements. There were no changes made to the wish list. She did not have a diploma or degree but had more than two to three years experience. The respondent accepted this. She was offered a package of R12 900,00 and paid the same salary as the applicant. They decided to call the position marketing coordinator after it was discussed with Howden. She started on 1 April 2005 but she had signed the contract on 9 February 2005. It was untrue that the requirements for the marketing position were structured so that the applicant would not qualify. He denied that the bar had been set too high for the applicant. The applicant had worked for the respondent. She could speak German and could converse with the departments in Germany. No wish list was put on the marketing position. The position of general secretary was not resurrected.

[11]

During cross examination Hinze said that he had drafted the letter of 5 November 2004 with the assistance of an employer's organisation official. There is nothing profound about the first two paragraphs. The second paragraph dealt with Molyneux's position. He conceded that neither of the first two paragraphs dealt with why the applicant's position might be affected. At that stage she was not the only one who could be affected. They had to restructure sales. They had tried to be open and discussed issues in a small company that consisted of 12 to 15 employees. Her position as general secretary had nothing to do with the sales office and the warehouse. She was the likely employee who was going to be affected. The selection criteria had nothing to do with her. He could consult with her on the rest of the other items on the agenda. It was not stated in the letter that she would be retrenched. The idea was to communicate with her about her future. The purpose of the letter was to give her an opportunity to come well prepared and to discuss her position. He was asked why it was not stated in the letter that there was no need for a general secretary. He said that it was his intention to start discussing it and did not want to make a hard effect on her. He was asked whether it provided meaningful discussions on her position. He said that he tried to get a discussion on the future of the respondent and possible reshuffling. He had an agenda for the meeting. It was put to him that none of the issues affected her unless it was decided to retrench her and he said that he never got to discuss it. She had stood half way in the door. She was polite and did not say that she was refusing to sit. He was asked why he did not ask her to sit. He said that it happened quickly and it was an

unfortunate thing that happened. He could not remember why he did not tell her to sit. Her first question was that if the restructuring process ended what was the possible outcome and he said that it could be a retrenchment. It was the beginning of the consultations between them. It was put to him that it was a reasonable question to ask what the outcome would be. He said that it was a fair statement but said that she needed to consult further. It was put to him that she did not refuse to consult further. He replied that she cut it short when she said that she needed to speak to someone else. The marketing position came up on 9 November 2004. He was trying to be helpful and it was stressful to him. It was put to him that it was improbable that she stood the way he said she did. He said that when he invites somebody he tells the person to sit. He knew her and was dumbfounded when she did not sit.

[12]

It was put to Hinze that he was not dumbfounded and that he was quite happy up to the 18 November 2004. He disagreed and said that it was frustrating. He said that the turn around was on 18 November 2004 when she was refusing to consult with him and said that she would not talk to him. He was asked how the marketing position was discussed on 9 November 2004. He said that he told her that the general secretary position would be redundant and the position of marketing assistant would come at the end and would be more valuable to the respondent. It was put to him that she had asked him if he was offering her the position. He said that he told her that he would have liked her to apply so that the person who met the criteria would get it. She had asked him if he was offering her the position but said no and that she must apply for it. At that stage he did not have the job description available for the position. It was not yet completed. After the meeting he compiled the requirements for the position. It was put to him that he knew that she did not have a diploma or degree. He said that he could not answer it because he had not seen her CV. It was put to him that there was no reason to believe that she had those requirements. He said that he did not know and it was not discussed. It was put to him that he knew that she did not have two to three years experience in the industrial sector as a marketer. He agreed. He also agreed that she was a general secretary and had not given herself as a marketer. She was a German immigrant who was not conversant in Afrikaans. It was put to him that after the meeting he had put down the three requirements for the position well knowing that she would not qualify. He said it was not their intention and that they needed a marketer. It was put to him that she had not complied with the three requirements and her natural response was that it was not her position. He said that it was not his intention to put the requirements that she could not fulfil. He was asked what the applicant was supposed to think when she could not meet the requirements. He said that most of it was a wish list. It was put to him that it was not put to her that it was a wish list and that he had only come up with it. He said that it was his intention for it to be a wish list. It was put to him that she was about to lose her job and why she was not told to apply and for them to be flexible. He said that they did not get to a discussion when this was raised together. It was put to him that they had an open relationship and she could have been told not to concern herself with the three requirements. He repeated that it was not his

intention to exclude her. He was asked what his intention was. He said that she had asked for the duties of a marketing assistant. It was put to him that he had known her for eight months and was asked if he thought that she could not do it. He the telephones. It was put to him that the lady who did the capturing of the information on warranties became overburdened with that work. He said this was quite a long time after it. It was put to him that the applicant did a huge job. He said that the nature of the job had changed. It was not done before. It was put to him that the overwhelming tasks that she did were still there. He said that they were split between the others. It was put to him that Howden was appointed and took many of the applicant's duties. He agreed that she took some of them. He was asked what she did for Burkard. He said he knew vaguely and that she was his personal assistant. He agreed that Burkard had signed a letter setting out the applicant's duties. He did not know all of her duties but she did some of it. He agreed that there were some marketing functions but had no idea of those functions. Organising exhibitions is a marketing function. He was asked whether he had asked her what marketing experience she had. He replied that she said that she had marketing experience in Germany and she undertook to let him have her CV which she said was not in her file. He was asked whether he went back to her. He replied that he did not have an opportunity to do so. On 18 November 2004, she told him that she had been advised not to speak further to him. It was put to him that she would dispute this version.

[13]

Hinze agreed that on 18 November 2004 he gave the applicant a termination agreement and that the retrenchment package was less valuable than that given to the other employees. It had an "in full and final settlement" clause that meant that she could not challenge the fairness of her retrenchment and would waive her right to do so. Had she signed it, she would have accepted her retrenchment and capitulated. The whole idea was to get a discussion. She had told him that she had no reason to sign it. It was put to him that he told her that he needed a marketing assistant and gave her a job description and that she did not have those requirements. He said that he did not tell her that she would not get it. He was asked what she was expected to do when she did not meet the requirements. He said that he wanted to discuss how they could go forward. They would have discussed what she had done previously to see if she had the experience and if she were suitable. He generally wanted to get down with her to discuss things. It was put to him that the ball was in her court and that he wanted to retrench her. He had raised the marketing position and he had expected her to do something. She did nothing and she did not know what she had to do and he was asked what she was required to do. He said that if they went back to the first meeting they did not sit to discuss where the respondent was going to, why they were restructuring and what restructuring they had to do. He was trying to be open. They tried to achieve it. The marketing position was open. She said that she had marketing experience in Germany. She spoke German and this would have been an advantage in South Africa. He had expected her to come back with her CV. She did not return and did not apply for the position. It was put to him that it was his agenda and she did not call the shots. He disagreed.

[14]

It was put to Hinze that the respondent's case is set out in paragraphs [3] and [4] of their statement of response. He has dealt with the meeting of 9 November 2004. It is not stated that there was no progress and that she had cut short the meeting or stood in the middle of the office. He said he could not explain this. He did not recall when the meeting of 18 November 2004 was scheduled. It was put to him that the applicant would say that the meeting of 18 November 2004 was not a scheduled one and that he came to her and told her that he had her retrenchment agreement and that he would like her to sign it. She disagreed with the contents and wanted to get advice. He said that it was his offer to her. It was put to him that in paragraph [6] of his statement of response, it was stated that the applicant had refused to participate in the consultation. It was put to him that this was not true but that she had refused to sign the retrenchment agreement and had not consulted with a lawyer. He said that she had told him so at that stage. It was put to him that after she had received the retrenchment agreement she took it to her attorney who wrote him a letter on 22 November 2004. He said that she could have consulted her attorney but she had definitely told him that she was advised not to discuss the matter with him. It was put to him that no attorney would tell her not to discuss the matter with him. He replied that this is what she told him. It was put to him that on 18 November 2004 the marketing position was out and that he wanted to make the position redundant and he said that he did not want to discuss it. He disagreed. It was put to him that she was given the requirements but did not meet those requirements. He did not answer the question. It was put to him that in his letter of 26 November 2004 he had said in paragraph [2] that he attempted to discuss the restructuring with her on 25 November 2004 but the content focussed on why she should participate. He had said that after she had said that she wanted the same financial package he said they could have meaningful consultations. It was put to him that she denied that she said that she wanted the same package but had said that she had asked how she could sign it when the package was different. She did not say that she would not accept it. He replied that this was not how it came across. It was put to him that he had said that he did not need a general assistant. He was asked that if she had said that she was happy to take the package why she did not snatch it. He said that he did not have an answer. She then went to the marketing position and discussed it. He was asked whether he had looked for her CV. He said that he looked for her CV before hand and could not find it. He was asked why he had looked for her CV when she had said that she was not interested. He said that he wanted all his ducks in a row. He was asked why he had not asked her to bring her CV. He said that he did not ask for her CV and had told her that he could not find it in the file. It was put to him that it was irrational or illogical to say that she applied and he wanted the CV and she did not give it to him. He replied by saying well. She then decided not to talk to him. He was asked if it was the first time that he was in correspondence and he said that she refused to talk to him. He said that this was on 18 November 2004. He conceded this. It was put to him that he did not say that her legal representative said she should not talk to him. He said that on 18 November 2004 he said that she said that she took advice from her lawyer and was advised not to talk to him. He referred to his letter of 23 November 2004. It was put to him that she would deny it and said that her husband told her not to

sign any letters at that stage. He disagreed.

[15]

Hinze was referred to the applicant's attorney's letter of 26 November 2004 where it is stated that they were talking at cross purposes and that the applicant was at a loss about what was expected of her. He said that he did not know why she wanted to speak to them and he said that he understood. He was asked if she told him this. He said no and that they wanted to sit and reach finality. It was put to him that he had to do it and should have told her what the issues were. He had drawn the process and should have told her. He said that when they wanted to talk to her, she said that they needed to consult with her attorneys and it was frustrating. It was put to him that she did not accept that there was a need to retrench her and she could not apply for the marketing position and did not speak Afrikaans. He was asked whether after he had received it, he told her that it was a wish list and that she qualified or that they were flexible and why he did not tell her this after he had received her attorney's letter of 26 November 2004. He said that they wrote a letter on the same day and wanted a written response by close of business on that day. This was a matter between him and the applicant. There was now a third party with a lawyer. He wanted to know where they were going to and she was not talking with him. There were no consultations with him but through a lawyer. It was put to him that in the attorney's letter it is stated in paragraphs [4] and [5] that she was not prepared to sign the so-called settlement agreement and that should the respondent wish to continue consultations it was incumbent for them to make fresh proposals to consider. He disagreed. He was asked why he did not respond. He said that he wanted her response and always received it through a third party. She was not yet retrenched. He was asked why the attorney could not say that she was not retrenched and would not apply. He said that he was advised that the consultation was between the respondent and the employee. He always wanted to consult and was told to consult with her lawyer. The intention was to sit with her and take it further. He was asked what kind of response he had expected from her. He said that they set down together, discussed it and sort it out between them. It was put to him that they spoke of a response and was asked if she had to attend to the agenda items. He said that they had to sit, go forward from there and have meaningful consultations between the two of them. He wanted to finalise the whole matter. He wanted to see what the outcome was and see if it were meaningful. The first objection is to restructure the respondent and take it forward. He wanted to do so on 9 November 2004 and had no opportunity to do so. It was put to him that his objective was to retrench her and the end result was to employ a marketer. He said no. He wanted to have a marketer to assist to take the respondent forward. She was no longer a general secretary and her position had become redundant. He was asked whether he had said to her that he proposed that the job be declared redundant and that he would pay her a package. He said he never had such an opportunity. It was put to him that the applicant was there on 9 November 2004 and she had asked him. He said he told her. He disagreed. It was put to him that in the final retrenchment letter of 29 November 2004 in the first paragraph he had requested her response. She was not sure what response he wanted. It was put to him that since 5, 9 and

18 November 2004 those reasons were not given to her. He had talked vaguely about it and the respondent would be sales driven. It was the first time that the reason for the retrenchment was spelt out. He disagreed and said that she was told that it would be sales driven with the restructure of the respondent and there was no need for a general secretary. He was asked that if the respondent was always sales driven why it would now be sales driven. He said that it was not 100%. They were not looking at customers' needs. It was put to him that these were words since the respondent was always a sales company. He disagreed. It was put to him that because the respondent was sales driven, there was no need for a general secretary and he was asked what made her job redundant. He said that her duties were taken over by other persons and the focus was on the market side.

[16]

The applicant testified and did not call any other witnesses. She was employed by the respondent in April 2001 as personal assistant of the managing director, Burkard a German citizen who was in South Africa on contract. She met Hinze a year before Burkard went back to Germany. He was the national sales manager for one product. He did not move office and knew what she was doing. Burkard gave her a reference letter setting out what she did for him. Her position as personal assistant did not change immediately. Hinze changed her position to that of a general secretary. Initially, she was doing some tasks and more were added like ordering from Germany and dealing with sales. She received a letter on 5 November 2004 from Hinze. In the first paragraph, he was referring to retrenchment and wanted to discuss relevant matters with her. She was concerned about the letter. After receiving the letter she was not prepared for the meeting. The meeting took place on 9 November 2004. Hinze version of the meeting was not true. She went to the meeting, closed the door and sat. She had paper to write down. He read the letter out and said that the position of general secretary had become redundant and that he was looking for a marketing assistant. He said that he did not need a general assistant or personal assistant. He gave no reason for this. She asked him if she could not do the position of marketing assistant as she did it in the past and he said no to her. She then asked if she could get its job description to have a look at it and he said that he would give it to her. A few days later she received the job description. She did not end the meeting nor did she say that she wanted to end it. The agenda items were not discussed. She was not offered anything else and was told that her job was redundant. She asked if there was any thing else as she knew that she could do the job of a marketing assistant. She has no diploma or degree and cannot speak Afrikaans. The package offered to her was low and she had been in South Africa for 10 years. She would be able to do all the duties, perhaps not immediately but could pick it up. She had asked for a job description and did not understand it to be a wish list.

[17]

The applicant denied that the meeting of 18 November 2004 was a scheduled meeting. She was called in. After Hinze handed her a letter, she asked him if he was offering her the position and he said no. He also handed her the retrenchment agreement. After reading it, she told him that she could not sign it.

When she had seen her husband with the first letter, he told her not to sign until they had discussed it. She saw the words "full and final settlement" and it bothered her. She did not agree with it and did not want to lose her job. After 18 November 2004 she sought legal advice about what she had to do. She was prepared to talk with Hinze and was not advised otherwise. She denied that she had said to Hinze as stated in his letter dated 23 November 2004 that she wanted a retrenchment package. She had discussed with other employees the retrenchment proposal but not with him. She did not recall when he had given her the retrenchment agreement and had not said to an employee that he hated her. She had already in October 2004 applied for leave in December 2004. After she was handed the retrenchment letter she was traumatised and saw a doctor to calm her down. She had much leave and added the two weeks to it and was still left with a few days. He had already offered her a retrenchment package and had asked him if he was not going to offer her the marketing position and he said no. He told her at first that she could apply for it but did not offer her the position. He seemed to have objected that she was talking to her advocate. The applicant said that she heard Hinze saying that he could not find her CV. He told her this after he had given her the retrenchment agreement of 18 November 2004. They had another discussion. She had told that she did many duties referred in the job description and that she worked for a German company in the marketing department. She told him that she had a CV and he said that he would look for it. At a later stage, he told her that it was not in her file. He did not ask her for it. By that time she had the retrenchment agreement and did not pursue the CV. She did not know what she had to respond to as referred to in the letter of 26 November 2004. She did not speak to him about the letter. He had refused to offer her the position of marketing assistant.

[18]

During cross examination the applicant said that after 18 November 2004 she had asked Hinze several times whether he could not offer her the position of marketing assistant and he said no. It was put to her that this version was not put to him when he had testified. She said that she had asked him twice about it in one conversation and she wanted to make sure that he would offer her this post. It was twice but not several times. This happened on 9 November 2004 when he discussed the letter. On that day she had asked for that position and later on 18 November 2004 asked him at least twice whether he did not want to offer her that position. On 9 November 2004 Hinze raised the marketing position. She then wanted to know if she could not do it. She asked him if he could not offer her that position. They spoke with each other in German. When he brought up the position of marketing assistant, he told her that her job was no longer needed and that the respondent had a marketing position. She then asked whether she could not do it or that it should be offered to her. He said no. She did not recall anything else but was under shock when she got that information.

She was asked whether he did not say to her that she could apply for it. She was uncertain whether he had said on that day that she should apply for it. He told her after he had given her the job description that she could apply for it. She did not remember whether he told her on 9 November 2004 to apply for it or after a few days. It could have been on the same day. He gave her the job description a

day or two thereafter. She was asked why she did not apply for the position when she received the job description. She said that she had no diploma and did not speak Afrikaans and would not apply for a position that she could not fulfil. It said that she had to have a diploma. She was asked why she did not apply since there was nothing in the job description that showed that she was disqualified. She said that she had asked him if he was offering it to her and he had already said no. She then wanted to know what was in the job description and then saw that the salary was less and she had no diploma or spoke Afrikaans. She was asked why she did not tell him that she could do the duties with some training and that they should talk about the requirements. She replied that he did not tell her that the requirements were negotiable. She had looked at the job description to see if she had met the requirements. It would not have mattered to have applied. She was asked that if she was shocked and that she might be retrenched why she did not apply or take any steps. She said that she would not have known what to do since this was the first time that this happened to her. The reason she did not apply was that she did not meet the requirements. She agreed that she did not tell him that she was disqualified or that the requirements were too high. The issue of the marketing position came up again at meeting of 18 November 2004. She agreed that it came up again on 25 November 2004 when they met. She did not remember how the issue of the marketing assistant came up again.

However, she said that she could do it and had worked in a marketing company in Germany. He told her that he did not know and she told him that she had a CV. On 25 November she expressed no interest in applying for the marketing position. She told him about her position in Germany because she wanted him to offer her that position. She always wanted it but did not want to apply for it. She wanted him to offer it to her because her position was made redundant.

[19]

The applicant said that Hinze told her that he did not see her CV. She told him that it should be in the file. Her file was with Hinze and she could have asked for her file. She was worried that she would lose her job. She did not recall when he had told her that he could not find her CV. She did not look for her CV. She had another copy at her home. She did not bring it to him because there were only two days left. If he had asked her for a copy, she would have given it to him. It was put to her that due to her unwillingness to participate especially in relation to her CV that she was content to sit back and let the whole process pass her. She said that she was afraid of saying something more. It would have got worse if she had said more. She was afraid of losing her job. It was put to her that she did not address all these issues with Hinze personally about her concerns. She said that she was shocked and even now so. She received a letter and had to think about it. Her state of mind was that she was worried. She saw retrenchment and thought about whether she would be needed. It was only after she had received the offer that she thought that he had made up his mind. It was put to her that she was aware that she was not legally required to sign it. She said that it was given to her and she was expected to sign it. She did not recall him telling her to sign it. It was put to her that the retrenchment agreement was given to her on the basis of rumours that he heard that she wanted a package.

She said she did not say that and it was not a possibility. She told him that she was not prepared to sign it. He had asked her why she did not want to sign it and she told him that she first wanted to discuss it with her partner. He allowed her to do so.

[20]

The applicant was asked how the respondent could consult with her when she was not there on 29 November 2004. She said that he had already given her the retrenchment letter and he could have told her not to take earlier leave. She admitted that she had applied for early leave and did not know what Hinze was supposed to do. They would not discuss anything further after 29 November 2004. She was traumatised and applied for early leave. She was aware that the consultation process was conducted and that letters were written at that stage. She admitted that she told Hinze to talk to advocate Hiemstra. She did so after she had received the retrenchment agreement and she did not want to say anything wrong. She admitted that she received the letter dated 26 November 2004 but did not respond to it because she did not know what was expected of her to do in writing. She admitted that the letter of 5 November 2004 did not say that she would be retrenched. She later gave this letter to her attorney. There was no response to the agenda items. When she received the letter, she did not participate in it or know what to say. She was then presented with a retrenchment package. She did not respond and did not want to do anything wrong. She asked about the other position. She agreed that if she gave him her CV it might have influenced the outcome of the matter. She did not return to the respondent and found new employment on 2 January 2005. She is employed by Degura Africa. After she had received the retrenchment letter, she consulted a German agency and told them that she was looking for employment again. The retrenchment letter was the one dated 29 November 2004. She started looking for work after 29 November 2004. She was earning R13 000 per month which with extras came to R15 627,40 per month. At the respondent she was earning R12 900,00 per month. She is currently working for the same company and is earning R17 514,00 per month. She received a retrenchment package comprising of one week salary for every completed year of service, one month's notice pay and an additional month's salary. She was still contactable after 29 November 2004.

The issues to be decided

[21]

This Court is required to decide the following issues:

21.1

Whether there existed operational reasons for the retrenchment of the applicant;

21.2

Whether the respondent had engaged the applicant, alternatively made bona fide attempts to engage the applicant in a meaningful consensus seeking process regarding the termination of her services for alleged operational reasons;

21.3

Whether the respondent had complied with the provisions of section 189 of the Labour Relations Act 66 of 1995 (the Act), alternatively made bona fide attempts to comply with section 189 of the Act.

21.4

Whether the applicant is entitled to compensation for unfair dismissal, and if so, the amount of such compensation.

Was there a need to retrench the applicant?

[22]

The applicant does not in the pre-trial minute admit that there was a general need to retrench her. She alleges that the respondent had at no stage alleged that there had been financial pressure on the respondent necessitating her retrenchment. The alleged restructuring of the respondent did not necessitate her retrenchment as the respondent replaced her with a person with a different title, namely that of marketing assistant at a lower salary. She could do all the tasks envisaged for the marketing assistant. The requirements for the post of marketer had deliberately been determined in such a manner that she would not qualify for the job.

[23]

The respondent alleges in the pre trial minute that it possessed a bona fide operational justification for declaring the applicant's position redundant.

[24]

I accept that an employer has a prerogative to restructure its business operations. Where however it may lead to job losses, an employer is required to consult and must attend the meeting with an open mind. Financial pressures or hardships are not always the only reasons for restructuring or retrenchment. This much is clear from the provisions of section 213 of the Act which defines operational requirements to mean requirements based on the economic, technological, structural or similar needs of an employer. The facts before this case shows the contrary.

[25]

It is clear from the evidence led that the reasons given for the restructuring were not based on the respondent suffering financial losses but it was more to make it more competitive in the marketplace and the need to increase their sales and market share in the industry. The applicant was previously employed as a personal assistant. This position was changed to that of a general secretary after Hinze took over. Later according to Hinze there was not a real need for a general secretary. The applicant was handed a letter dated 5 November 2004 and was invited to attend a meeting with him on 9 November 2004. Hinze conceded during cross examination that there was nothing profoundly in the two paragraphs of the letter. It basically dealt with the restructuring process that had taken place in the last few months, the reason for the restructuring that had taken place, the meeting between Hinze and Molyneux and his intention to meet with the applicant on 9 November 2004 to discuss the restructuring process and the goals of the respondent. The agenda items which are issues contained in

section 189(3) of the Act are also set out in the letter.

[26]

There is not a material dispute about the contents of the meeting of 9 November 2004. What is in dispute is whether the applicant was standing or seated during the said meeting. Nothing turns much about this. It is clear from the evidence led that the meeting was brief. The agenda items were not discussed. The applicant was informed about the restructuring exercise that had taken place. Her position was declared redundant. The content of the letter was read to her. She was told about the marketing assistant position and she enquired whether the position was offered to her. She was told that it was not and that she could apply for it. She then enquired about the job description and was told that this would be given to her. She informed Hinze that she had worked for a marketing company in Germany and that her CV was on file. The applicant then enquired about what would happen if the restructuring process failed and she was told that there could be a retrenchment. It was at this point that she requested permission to consult another person and the request was granted to her.

[27]

It is clear from the letter of 5 November 2004 that there is no suggestion that the applicant's position of general secretary was going to be declared redundant. The letter did not inform her that her position was going to be affected by the restructuring. The applicant testified that when she received the letter she was naturally shocked about it. The first meeting took place on 9 November 2004. She was presented with an affidavit that her position as general secretary had been declared redundant.

[28]

It is further common cause that the applicant was earning R12 900,00 per month at the time of her retrenchment. It is further common cause that a few days after the meeting of 9 November 2004 she was handed a job description for the marketing assistant position. The requirements for the position are that she had to have a diploma or degree in marketing, two to three years experience in the Industrial sector as a marketer and be able to converse both in English and Afrikaans. The duties of a marketing assistant are set out in the job description. I do not deem it necessary to repeat those. The package offered was between R7 000 and R9 000 per month depending on experience, 21 days leave, after three months medical aid and pension and three months probation period.

[29]

I do not understand why the applicant was required to apply for the position of marketing assistant in the first place if the said position was an alternative to her retrenchment. She was the only person whose position had been made redundant. She was at the time earning R12 900,00 per month yet the position was advertised for R7 000 to R9 000. The restructuring exercise was not on the basis that the respondent could not afford to employ the applicant at the same salary but was for the reasons referred to in paragraph [25] above. If it were an alternative to a retrenchment, she should have been offered the position without having had to apply for it. What is disturbing is that the requirements were pegged so that she could not qualify for the position. It was a non starter from

the onset. The salary that she was offered was far lower than what she was earning. She would only qualify for medical aid and pension after three months and would be on probation for three months. The applicant was correct in asking Hinze whether she was offered the position. She was therefore well within her rights not to have applied for the position at a lower scale and did not meet the educational requirements for the position. The applicant was a German citizen and had communicated with Hinze in German. The requirement that she had to be able also to converse in Afrikaans, leads to one conclusion that she was not earmarked for the position. To make it worse a few months after the applicant had been retrenched, Howden was employed as a marketing coordinator at R12 900,00 per month which was the same salary that the applicant was earning at the time of her retrenchment. She had also not met all the requirements for the position.

[30]

It is still unclear to me why the applicant was retrenched. It is not clear from the evidence led when the respondent contemplated that the applicant could be retrenched. It was clearly not on 5 November 2004 since she was not informed in the letter that she would be retrenched. It was clearly also not on 9 November 2004 when the parties met with the intention to discuss the agenda items.

[31]

I am satisfied that the respondent has failed to prove on a balance of probabilities that there was a genuine need to declare the applicant's position as redundant and a need to retrench her. The applicant's retrenchment is substantively unfair.

Was the retrenchment procedurally fair?

[32]

The applicant contended in the pre-trial minute that her dismissal was procedurally unfair in that the respondent did not disclose to her in writing the matters prescribed in section 189(3) of the Act; the respondent did not indicate what alternatives to retrenchment had been considered and the consultation process was a sham, since the respondent had no intention to seriously consider any alternative positions for the applicant. In particular, the respondent never considered offering the applicant the position of marketing assistant and deliberately determined the requirements for the position in such a manner that the applicant would not qualify.

[33]

The respondent contended that it had attempted to consult with the applicant in accordance with the provisions of section 189 of the Act, but that the applicant had refused to participate in such discussions.

[34]

Section 189(1) of the Act requires an employer who is contemplating dismissing an employee for reasons based on the employer's operational requirements to consult with the employee who is likely to be affected by the proposed dismissal. In terms of section 189(2) of the Act the consulting parties must in the envisaged consultation engage in a meaningful joint consensus-seeking

process and attempt to reach consensus on appropriate measures to avoid the dismissal; to minimise the number of dismissals; to change the timing of the dismissals and to mitigate the adverse effects of the dismissals. In terms of section 189(3) of the Act the employer must issue a notice inviting the other consulting party to consult with it and disclose in writing all relevant information including, but not limited to the reasons for the proposed dismissals; the alternatives that the employer considered proposing the dismissals, and the reasons for rejecting each of the alternatives; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss; the time when, or period during which, the dismissals are likely to take effect; the severance pay proposed; any assistance that the employer proposes to offer the employees likely to be dismissed; the possibility of the future re-employment of the employees who are dismissed; the number of employees employed by the employer; and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

[35]

The applicant was handed a letter on 5 November 2004 inviting her to attend a meeting on 9 November 2004 to consult and discuss, consider possible alternative ways to avoid any potential retrenchments; the number of employees likely to be affected and job categories; criteria for selection of employees to be retrenched, if retrenchments have to take place; a timetable of the potential measures which may have to be taken; if retrenchments are unavoidable, to discuss what benefits and assistance/severance pay can be provided by the company to the effected employees; assistance in the process; possible re-employment or other alternatives and any other relevant matter for discussion between the parties.

[36]

It is apparent from the letter that but for the applicant's name on it, it is not stated that the respondent was contemplating to retrench her. The letter refers to employees and retrenchments and there is nothing stating that her position has become redundant and what the reasons is for that. It is an extremely vague letter that does not even attempt to comply with the provisions of section 189 of the Act. No evidence was led about when the respondent had contemplated dismissing the applicant. No evidence was led about what possible alternatives were considered by the respondent to avoid the applicant's potential retrenchment.

[37]

It is common cause that the applicant was told that there was a position of marketing assistant. She enquired whether the position was being offered to her and was told no that she would have to apply for it. Alternatives to dismissal must be considered. I have some grave doubts whether the position of marketing assistant could be considered as an alternative to her retrenchment. I would have thought that where an employee who is the only person affected by a restructuring and is offered another position that such a position would be construed as an alternative. But where she is told to apply for the position and she can clearly not meet the requirement's for the position, can it really be said

that she was offered an alternative position? I do not think so. The position of marketing assistant was not offered to her as an alternative to her retrenchment. She was expected to apply for the position at a much lower salary scale. There was no consultation on future re-employment at all.

[38]

It is also clear from the letter of 5 November 2004 that the applicant was not informed that the respondent was contemplating retrenching her. When they met on 9 November 2004, she was told that her position was declared redundant. She asked about the marketing assistant position. She asked what would happen if the restructuring process failed and was told that it could lead to a retrenchment. It is not clear from the evidence led at what stage the respondent had contemplated to retrench the applicant. On 18 November 2004 they met and she was given the retrenchment agreement which was clearly not as beneficial as it was about the other retrenched employees. It also contained a full and final settlement clause which she correctly rejected. I find it strange that the applicant was provided with this when she had not yet applied for the marketing position. This again suggests that she was not earmarked for the position. The applicant did not apply for the marketing position and the respondent was duty bound to consult with her about the issues referred in section 189(3) of the Act. It has failed to do so. The respondent has complained that the applicant was refusing to consult with it and had referred to her attorneys. Her request was that should the respondent want to consult with her, it had to make fresh proposals. The respondent responded with the termination letter of 29 November 2004. It is clear from the evidence led that the respondent was not involved in genuine consultations at all. It wanted to consult on its terms.

[39]

I am therefore satisfied that the applicant's retrenchment was also procedurally unfair.

Relief

[40]

This brings me to the question of relief. The applicant did not seek reinstatement but twelve months compensation. It is common cause that she was retrenched on 31 December 2004. She was earning R12 900,00 per month. She was paid a month's notice pay, one week for every completed year of service and an additional month's salary. She found new employment on 2 January 2005 and was earning R15 627,60 per month. She is still employed by the same company and is earning R17 514,00 per month. The applicant has not suffered any patrimonial losses.

[41]

The test in deciding whether compensation should be granted is not whether she has suffered any patrimonial losses. That is a factor that a court may take into account. Other factors to be taken into account are how the applicant was treated, what steps the respondent has taken to comply with the provisions of the Act etc. The compensation that a court may award must be just and equitable in the circumstances. The applicant had marketing experience. She

had asked about the marketing assistant position and requested to be given the job description. This was given to her two days later. The requirements disqualified her for applying for the position and so too the salary scale. A person was employed two months later at the same salary that the applicant was earning at the time of her retrenchment. The consultation process was not genuine. The applicant had worked for the respondent for 3 years and 9 months.

[42]

I am of the view that it would be just and equitable to award the applicant five month's compensation in the circumstances.

[43]

There is no reason why costs should not follow the result.

[44]

In the circumstances I make the following order:

44.1

The applicant's dismissal by the respondent is found to be both substantively and procedurally unfair;

44.2

The respondent is to pay the applicant compensation in an amount of R64 500,00 which is the equivalent of five months remuneration payable within fourteen days of date of this order.

44.3

The respondent is to pay the costs of the application.

Date of judgment: 26 July 2007