IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JS272/05

In the matter between:

ANDRIES HENDRIK JANSE VAN RENSBURG **APPLICANT**

And

SUPER GROUP TRADING (PTY) LIMITED **RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant who was dismissed for operational reasons challenged the dismissal as being both substantively and procedurally unfair. The issues which this court have to determine are set out later in this judgment.

Background facts

[2] The first witness of the respondent Mr Bruce Chaplin was prior to his departure during March 2007, employed as the financial manager and reported directly to the chief executive officer (CEO) Mr John Diviani.

[3] In his testimony, he started firstly by explaining the relationship between general cargo and the perishable division of the respondent's business. He also testified that prior to the retrenchment of the applicant the respondent was faced with difficult financial and business circumstances. The respondent was according to him faced with the general decline in business and the situation that the respondent faced was made worse by the fact that it lost most of its business to its former employees in the Cape Town area. One of the employees in Cape Town resigned and took with him some clients and employees.

[4] The performance of the respondent and the financial challenge it faced are reflected in the operations review for the month of July 2004, wherein it is indicated that the month's revenue was 9% up during June but 45% down on budget. The cause of this was attributed to the fall in revenue in all areas of business except for the Zimbabwe hunting trophy market. This resulted in the operating loss for the month of June in the tune of R422 000.00 and a cumulative loss of R1.9million.

[5] The operational review was according to Mr Chaplain, discussed at the Exco meeting held on the 2nd August 2004, where after discussing the fact that the business revenues were down it was agreed that there was a need to increase the volumes including the need to change the strategy and the business models. It was further agreed that Diviani would in conjunction with Mr Konrad Peter, develop and produce a business plan by the 6th August 2004.

[6] The issue of low bussiness volumes was discussed again at the meeting of the 24th August 2004; where it was agreed that, a strategy would be made to identify impact that "MMA" had on the market and review "*right sizing"* strategy.

[7] Mr Chaplin further testified that a high level business plan which set out a number of options was developed and circulated to all members of Exco. This business plan was not produced during these proceedings.

[8] As concerning the power point presentation, Mr Chaplin testified that it was proposed therein that:

(a) The business of Cosmotrans be collapsed into micro and specific clients to be target,

(b) An agreement be concluded with MMA which constituted the former employees in Cape Town,

(c) Peter was to have a discussion with AMI wholesalers in London to handle South African volumes,

(d) The respondent was to restructure.

[9] The right sizing of the respondent commenced on the 3rd August 2004, after the meeting with the general staff which was addressed by Mr Peter.

[10] The second witness of the respondent, Mr Senekal, the general manager for the respondent and human resource manager for all the associated businesses of the respondent was tasked with the responsibility of consulting with the applicant as regarding the proposed right sizing of the respondent.

[11] Mr Senekal testified that he was aware of the difficulties that the respondent faced in relation to its financial affairs. He acquired the knowledge regarding the financial situation of the respondent from the contact he had with Mr Chaplin and other executive members of the respondent. He could not however state what was the role played by the applicant in the right sizing process.

[12]As stated earlier Mr Senekal was mandated by the respondent to engage in the consultation process with the applicant. According to him the applicant was already identified by the respondent as a candidate for retrenchment by the time he (Mr Senekal) commenced the consultation process.

[13]The envisaged process according to Mr Senekal was that he would issue notices in terms of s189 (3) of the Act and to finalise the process of consultation by the end of September 2004. The retrenchment was to be concluded by the end of October 2004.

[14]The letter notifying the applicant of the intended consultation process was drafted by Mr Senekal and signed by Mr Diviani. In this letter the applicant was advised that the reason for the approach adopted was because of the recent decline in volumes and the overall financial performance of the business. The applicant was further informed in this letter that:

- The alternatives considered did not prove to be viable options**,**
- Because of the down trend in the business there was a need for the realignment within the bigger group; environment,

- The number of employees to be affected by the retrenchment could include the position of the applicant,
- The selection criteria was deemed not to be relevant because the respondent no longer required a dedicated senior manager's position, and
- In the event that no available alternatives were found, the proposed effective date of termination would be the 30th September 2004.

[15]The first consultation meeting was convened on the 14th September 2004, and was attended by Mr Senekal and the applicant. The minutes of this meeting which were confirmed as accurate by Mr Senekal reveals the applicant having required clarity on the 4 (four) issues being:

"1. Alternatives considered.

2. How many people are affected, as originally it was mentioned by management that 28 (twenty eight) staff members will be affected and how it seems that only 18 (eighteen) would be?

3. Why his position specifically was identified as potentially affected by the restructuring.

4. Severance pay and conditions attached thereto."

[16] Mr Senekal responded to the above at the meeting of the 14th September 2004, the essence of the which as set out in the minutes was that the respondent had considered all alternatives before deciding on the restructuring and that the reason for the restructuring was due to the declining financial results. The response further indicated that the respondent's structure did not have a sales team and appointing such a team would increase overheads without guaranteeing the incoming of new business. The option of shorter working hours was ruled out as an alternative because it would not meet the clients' needs including those of Cosmotrans. The reason for the difference between the initial 28 (twenty eight) employees to be retrenched and the 18 (eighteen) mentioned later was at that stage due to the resignation and earlier retrenchments. Attached to the minutes was a draft settlement agreement.

[17]The above minutes together with the draft agreement was according to Mr Senekal presented to the applicant on the 16th September 2004. He explained that the reason for presenting the draft agreement was to provide the applicant with the draft to consider because he had asked for details concerning severance pay. The other reason for the draft

agreement was that it was intended to form a basis for a further consultation.

[18]Senekal testified that he was surprised to receive the email dated 20 September 2004, from the applicant wherein he raised a number of issues. He prepared the answer to the issues raised in this email after consulting with Mr Peter, Mr Chaplin and Mr Deviani.

[19]The response to the above email is contained in the letter dated the 23rd September 2004. The first part of this letter summarises the events that had taken place since the 5th July 2004, and thereafter proceeds to state that:

> "*The announcement to staff on the 3rd September as referred to in your email, would not have prejudice any person potentially affected, as identified staff would be consulted with on the propose/ contemplated cause of action, and further alternatives to preventing such action, explored*.
>
> **Alternatives considered**
>
> *1. The group considered to recapitalise.*
>
> *2. Honourously since were reviewed and adjusted.*
>
> *3. Honourous rental were identified and reviewed.*
>
> *4. Access were housed/ office space sublet.*

5. *Negotiations were entered into with MNA with a view of buying back business debt in the past was allowed to be taken.*

6. *A sales drive was embarked on".*

[20]Mr Senekal testified also about the criteria used to select the applicant. When asked during cross examination why Mr Diviani was considered above the applicant in the selection process, Mr Senekal stated that it was because, the applicant was rude aggressive and had poor relations with customers.

The applicant's case

[21]The applicant's responsibility as a senior manager within the employ of the respondent was to run the warehouse and manage employees employed in that division. The applicant testified that Cosmotrans had financial difficulties due to reduction in business volumes. The cost of the reduction in volumes was according to him due to the resignation of one of the staff members in Cape Town who upon resignation took with him other staff members and clients of the respondent. In the Johannesburg area the respondent relied on the perishable goods that came from Zimbabwe.

[22]The applicant testified that he did not attend the Exco meeting on the 24th August 2004, as he was away attending to problems in Cape Town. He conceded to having seen the documents wherein clients were advised that the respondent had decided to embark on the "right sizing" exercise. He also testified that he was not aware of the right sizing strategy or what it entailed.

[23]According to the applicant, Mr Peter came into his office on 3rd September 2004 and told him that 28 (twenty eight) staff members would be retrenched and required him to convene a meeting of all staff members. Once the members of staff were assembled Mr Peter told them that the respondent would be embarking on a retrenchment exercise and that Mr Senekal would be in contact with those selected for the retrenchment. It was also at this meeting that Mr Peter informed the applicant that he would also be retrenched. Subsequent to this meeting and on the 7th September 2004, the applicant received the letter inviting him to a consultation process. This letter dealt with a number of issues and more importantly the selection criteria.

[24]The first and last consultation meeting between Mr Senekal and the applicant was held on the 14th September 2004.

[25]On the 20th September 2004, the applicant addressed an email to Mr Senekal wherein he raised a number of issues concerning matters discussed and recorded in the minutes of the meeting of the 14th September.

[26]As concerning the issue of alternatives prior to proposing the restructuring the applicant enquired with whom were alternatives discussed with because he as the Chief Operating Officer (COO) was never consulted regarding these issues. He also raised the change in the number of people to be retrenched. He contended that the number was indicated as 18 (eighteen) whereas he was initially advised of 28 (twenty) people. He also requested a number of documents from the respondent.

[27]On the 1st October 2004, the respondent's attorney's addressed a letter to the applicant's attorneys informing them that it had been brought to their client's attention that the applicant was alleged to have been making disparaging and injurious remarks about Cosmotrans and the respondent including various individuals engaged by, or associated with the respondent and Cosmotrans. This letter further advised of the intention of the respondent to conduct an

investigation about these allegations. The letter further informed the applicant's attorney that a decision was taken to suspend the applicant with immediate effect but with full pay. The suspension which was effected in terms of this letter was communicated to the applicant in another letter handed to him by Mr Senekal on the same day.

[28]On the 27th September 2004, Ms Liezette Smith of the respondent addressed an email to all staff members inviting them to a farewell function of the applicant which was to be on Tuesday the 28th September 2004 at 17H30. This email was sent at 08H45 am, but withdrawn on the same day at about 09H33 am.

[29]As concerning the selection criteria the applicant testified that he should have been retained and not Mr Diviani. He had been with the respondent for a period of over 19 (nineteen) years and helped most of the respondent's clients including the airlines. He however conceded during cross examination that accounting was not his strong hold and that he could not step into the shoes of Mr Diviani immediately.

Issues for determination

[30]The issues to be determined in this case as indicated earlier relates to both the substantive and procedural fairness of the dismissal of the

applicant. The other issue to be determined if it is found that the dismissal was unfair is the compensation to be awarded in terms of s194 of the Act.

The legal principles

[31]In terms of item 2(4) of Schedule 8 of the Code of Good Practice: Dismissal, in cases, where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that or fails to show that the dismissal was effected through a fair procedure then the dismissal is unfair.

[32]It has been held that the selection criteria could, depending on the circumstances of the case, impact on both the substantive or procedural fairness or otherwise of the dismissal for operational reasons. In **Kotze v rebel Discount Liquor Group (PTY) 1999 JOL 5773,at paragraph 37,** Mogoeng AJA as then was held that:

> "*The failure to consult the appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It only affects his selection. The selection of an employee for*

retrenchment does not only impact on procedural purpose of consultation but also its substantive purpose. This is so because failure to consult on known alternatives leaves open the possibility that the affected employee might, contrary to the employer's belief, have accepted the undisclosed alternative to his or her retrenchment. If he or she would have, then it follows that he or she would not have been retrenched and the decision to retrench him or her would therefore be both procedurally and substantively unfair notwithstanding the existence of a genuine business rational. therefore."

[33]It was further held in the **Kotze's** case (supra) that:

"A fair retrenchment process imposes an obligation on the employer to disclose to the employee all relevant information and that obligation has since been codified in the terms set out in section 189(3) of the Relations Act 66 of 1995 (the Act) ...the duty to engage in meaningful and genuine consultation is owed to all employees from the lowest to the executive level ... the process's fairness to the employee finds expression in the recognition of its prerogative to make the final decision to retrench ..the final

decision must be informed by what transpired during consultation. This is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but is also has a substantive purpose. That purpose is ensuring that such a decision is properly and genuinely justifiable by the operational requirements or by commercial or business rationale."

[34]The employer bears the burden of proving that a dismissal for operational reasons was substantively and procedurally fair in terms of s188 of the Act. Substantive fairness entails the employer having to show that the dismissal for reasons related to either its economic, technological, structural or similar needs.

[35]In the present instance the respondent contended that in assessing the rational for retrenchment there are two issues to consider. The first relates to why it was necessary to retrench and the second why having come to the conclusion that there was a need to retrench was it necessary to retrench the applicant. The reason to retrench according to the respondent arose from the financial difficulties it faced during 2004. The respondent contended further that the applicant was aware of this difficult since approximately 2002. Because of this and the fact

that 18 (eighteen) other people were retrenched, the rational for the retrenchment of the applicant could not be disputed.

[36]The applicant on the other hand contended in his statement of case that his dismissal was substantively unfair for the reasons that:

> "*2.1.1 The Applicant was informed on 23 September 2004 that he was to be retrenched pursuant to the intended "right-sizing" of the Respondent prior to any consultations between the Applicant and the Respondent.*
>
> *2.1.2 The proposed joint consensus-seeking process contemplated by the provisions Section 1989 of the LRA was nothing more than a charade, to justify, ex post facto, a decision already taken to dismiss the Applicant;*
>
> *2.1.3 The Respondent and its representatives failed to responds adequately to representations made by the Applicant on possible ways and means of avoiding retrenchment;*
>
> *2.1.4 The Respondent and its representatives failed to responds adequately consider alternative measures proposed by the Applicant in order to avoid his dismissal.*
>
> *2.1.5 The dismissal of the Applicant was premised on the Applicant's alleged misconduct and in circumstances where the Applicant was never afforded an opportunity of responding to the allegations of misconduct;*
>
> *2.1.6 The Applicant's dismissal on the purported grounds of the Respondent operational requirements was disingenuous. In the result,*

the Applicant was not dismissed for reasons based upon the Respondent's operational requirements.

2.1.7 The Respondent, in identifying the Applicant for retrenchment, did not apply selection criteria which were either fair or objective. The decision to retrench the Applicant as opposed to Mr. John Diviane was both pre-determined and unfair.

2.1.8 The decision of the Respondent to retrench the Applicant constituted au fait accompli;.

2.1.9 The Respondent during the purported consultation process, embarked upon an abusive verbal assault against the Applicant which effectively closed the door on any meaningful consultation between the Applicant and the Respondent."

[37]Whilst it cannot be denied, from the evidence presented, that the applicant was indeed faced with serious business challenges which necessitated restructuring, it can also not be denied that the underlying reason for the termination of the applicant's employment was influenced by the following:

- The fact that business associates and various airways and customers had expressed serious reservations about continuing to do business with the respondent because of the applicant's rude, aggressive and confrontational attitude of the applicant.
- Lack of interpersonal skill on the part of the applicant.

- The allegation that a number of employees of Cosmotrans had resigned because of the general demeanour, conduct and the approach of the applicant,
- The applicant's poor disciplinary
- The investigation which the respondent was conducting an incident of assault on the part of the applicant which had an element of racism in it.

[38]It is apparent from the above that the underlying reason for terminating of the employ of the applicant was unfair. He was never given an opportunity for that matter to respond to these allegations before the decision to terminate his employment was taken. In any case these are issues best dealt with through a disciplinary or incapacity hearing and not the retrenchment process.

[39]The other issue that impacted unfairly and in a substantive manner on the applicant's termination is the selection criteria. In this regard Mr Walters testified that both the applicant and a Mr Diviane were considered for retrenchment. Even on the respondent's own version the decision to retain Mr Diviane and retrench the applicant was made before the consultation process which was led by Mr Senekal and commenced on 3 September 2004.

[40]The version of the respondent regarding the selection criteria was that the Mr Diviane was chosen above the applicant because he had better experience then the applicant. However, during cross examination Mr Walters testified that the information he had about the applicant was anecdotal and that this information had been furnished to him by Mr Peter. It is however common cause that Peter had met the applicant on no more than two occasions. Senekal on the other hand testified during evidence in chief that he did not deem the selection criteria to be a relevant issue because the volumes in the business did not require the position of a COO.

[41]As concerning procedural fairness it is common cause that the only meeting convened for this purpose was on the 14 September 2004. This meeting took place subsequent to the respondent announcing to all its clients that it was embarking on right-sizing exercise.

[42]After this meeting Mr Senekal provided the applicant with the minutes of the meeting together with a draft agreement. It is also common cause that Mr Senekal presented to the applicant the minutes of the meeting together with a draft settlement. This approach by the respondent brings into doubt the commitment of the respondent to engage in a joint solution seeking approach, geared towards avoiding

or minimising the effect of the retrenchment. This together with other evidence indicate on the balance of probabilities that the focus of the respondent was that of seeing the dismissal of the applicant as the immediate solution to whatever economic challenges it was facing rather than as a measure arising when all other efforts to avoid dismissal had failed. To this extent Mr Senekal failed to explain why no further consultation meetings were convened after the meeting of the 14 September 2004.

[43]It is also important to note that the version of the respondent in as far as the selection criteria was concerned was contradictory in that the version of Mr Senekal was that there was no need for a selection criteria because this was the only senior management position which was declared redundant. The second part of Mr Senekal's testimony was that Mr Diviane was never considered for retrenchment and also that the position of the CEO was not identified for redundancy. .

[44]Mr Senekal's evidence is in direct contrast to that of Mr Walters who testified that both the applicant and Mr Diviane were considered for retrenchment. And according to him the decision whether to retrench Mr Diviane or the applicant could only be taken by him and Mr Peter. It was further the testimony of Mr Walters that the decision to retain Mr Diviani and retrench the applicant was taken by Mr Peter.

[45]The question that then arises, is which criteria did Mr Peter use to retain Mr Diviani as opposed to the applicant. The contention of the respondent that the applicant conceded during cross examination that Mr Diviani was more experienced than him does not advance the case of the respondent. The question is whether the information regarding the comparable strengths of both Mr Diviane and the applicant was at the stage of taking the decision before those who took the decision. The answer is in the negative. Thus, for the reasons set out below, the conclusion has to be that the selection criterion was unfair.

[46]At the stage the information which Mr Walters had about the suitability of the applicant was anecdotal and was furnished to him by Mr Peter. Whilst Mr Peter had previously met with the applicant, the probabilities are such that his knowledge about his suitability was limited. Mr Peter met with the applicant on no more than two occasions. Mr Peter was never called testified regarding this issue and the allegation that he had held a number of one on one discussions with the applicant regarding the retrenchment process. The applicant was never afforded an opportunity to make any submission as to why Mr Diviane should not be preferred over him.

[47]The other important aspect of the testimony of Walters is that he was not aware of the allegations of misconduct on the part of the applicant. Senekal and Chaplain were also not aware of these allegations.

[48]Of significance importance is also the testimony of Walters is that the decision to retain Mr Diviani was reached by the respondent prior to Mr Senekal commencing with the consultation on the 3rd September 2004.

[49]In these circumstances one has to accept the contention of the applicant that the consultation was a sham and was in this regard not intended to achieve the objective as set out in the Act. This is even supported by the testimony of Mr Walters who conceded that the decision to retrench had been taken prior to the delivery of the notice in terms of s189 (3) of the Act. He further testified under cross-examination that the decision to right size Cosmotras was taken prior to commencement of consultation process.

[50]The some total of the above analysis and the totality of the evidence in this matter is that the applicant has failed to discharge its duty of showing that the dismissal of the applicant was for a fair reason and

was effected after following a fair process. Accordingly the dismissal of the applicant was both substantively and procedurally unfair.

[51]The facts and circumstances of this case dictates that the maximum compensation be awarded in favour of the applicant.

[52]I see no reason why the costs should not follow the result.

[53]In the premises the following order is made:

1. The dismissal of the applicant was both substantively and procedurally unfair.
2. The respondent is to compensate the applicant an equivalent or 12 (twelve) month's salary calculated on the basis of what he was earning on the date of is dismissal.
3. The respondent is to pay the costs of the applicant.

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Molahlehi J
Date of Hearing: 27 June 2008

Date of Judgement: 24 July 2008

APPEARANCES:

For the Applicant:	**T.E MILLS**
Instructed by:	**CLIFFE DEKKER ATTORNEYS**
For the Respondent:	**P.R JAMMY**
Instructed by:	**FLUXMANS INC**