IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 814/07

In the matter between:

GERARD MARNEWECK APPLICANT

AND

SEESA LIMITED RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] **1**The applicant claims that he was unfairly dismissed by the Respondent due to operational reasons. He is seeking compensation equivalent of 12 (twelve) month's salary.

[2] The Respondent contends that the Applicant was not dismissed for operational reasons but for absconding.

Background facts

[3] The Applicant was employed by the Respondent since 2003, in various capacities and at the time of his dismissal he was employed as a manager in one of the Respondent's marketing teams which I will in this judgment refer to as "A" and the other which fell under Mr Pretorius (Pretorius), the director, as "B".

[4] The average remuneration that he received during the last 13 (thirteen) weeks prior to his dismissal, amounted to R17 403,50. The applicant received a basic salary of R7500,00 per month as well as the commission earned on the performance of himself and his sales team.

[5] The Respondent is involved in the field of labour relations and represents several employers in various labour dispute resolution bodies. The Applicant and other marketing managers were responsible for marketing the services of the Respondent and recruiting employees to join the Respondent as members at a fee.

[6] The facts that gave rise to this disputes dates back to 2006 when the Respondent advised the Applicant that his position would become redundant should his work performance not improve and should he and his team not reach the target of R150 000-00 in membership fees.

[7] On the 9th of October 2006, Pretorius informed the employee in writing that the target of R 150 000-00 (one hundred and fifty thousand rand) per month had to be maintained by any marketing team to justify the existence of the position of a manager. The employee was further informed that if he and the team failed to meet the target, the members of his team would be incorporated into the B team and this would result in the redundancy of his position. In his response the employee indicated that he was aware that the other marketing teams did not reach the R 150 000-00 (one hundred and fifty thousand rand) target.

[8] Pretorius responded to the employee's contention that the other teams were not meeting the target and stated that he was willing to postpone his consideration

regarding the redundancy of the manager's position for a period of 4 (four) months which would have been until the end of February 2007. The postponement was subject to certain conditions. A further response was sent to Pretorius by the Applicant on the 25th October 2006, in which he made certain proposals. Pretorius contacted the Applicant on 6 November 2006 and expressed his unhappiness about this response. He informed him that if he did not receive a satisfactory response he would declare his position redundant.

[9] On the 24th January 2007, during the management meeting in Cape Town the employee was introduced to a newly appointed manager, Mr. Japie Vermeulen ("Vermeulen") who was appointed to manage the B team.

[10] On the 2nd of March 2007, Pretorius informed the employee that the redundancy of his position is postponed for the last time to the end of April 2007. The employee was further informed that should there be an improvement on the turnover of his team the Third Respondent would not proceed with the redundancy process.

[11] The employee was again contacted by Pretorius on 2nd May 2007 and informed that should his team not maintain R 150 000-00 (one hundred and fifty thousand rand) turnover per month his position would be declared redundant.

[12] On the 4th of June 2007, the employee address an email to Pretorius enquiring about the development regarding his position. Pretorius contacted him and during the telephone conversation the Applicant requested him to put in writing the issue of the amalgamation of his team into team B and the redundancy of his position. Pretorius advised the employee to direct his request to Mr. Gideon

Gerber ("Gerber") the CEO of the Respondent. Gerber responded to the employee's request in a letter dated 5th of June 2007 and indicated therein that his post was declared redundant but that he would receive his salary until the end of June 2007. The letter reads as follows:

> *"1. Bestuur het in 2006 'n besluit geneem dat bemarkingspanne wat nie konstant R 150 000 (een honderd en vyftig duisend rand) per maand kan handhaaf nie, uiffaseer moet word.*
>
> *2. Jou bemarkingspan is derhalwe vanaf 1 Junie 2007 met Japie Vermeulen se span infaseer.*
>
> *3. Jou pos is derhalwe oorbodig, maar jy sal steeds to einde Junie 2007 jou basiese salaris as bestuurder ontvang.*
>
> *4. Jy word die keuse gebied om aan to bly as bemarker op die maatskappy se huidige kornmissiestruktuur wat aan jou bekend is."*

[13] Following the above letter and on the 6th June 2007, the Applicant requested Pretorius to confirm whether or not he was dismissed as from 31st May 2007 and whether he still had a permanent position with the Respondent. Pretorius responded by stating that the employee was not dismissed and that he could stay on as a consultant with the respondent. The employee was further invited to make suggestions. The response reads as follows:

> "*Jy is nie ontslaan nie. Die inhoud van Gideon (Geber) se brief is tog duidelik. Jy kan aanbly as 'n konsultant en jy kan met voorsestell kom."*

[14] In response the employee indicated in writing on 7th June 2007, that he did not agree that he was not dismissed and that it was evident from the letter of Gerber that his position was made redundant. The response reads as follows:

> *"Dries (Pretorius) ek stem nie saam met jou stelling dat ek nie ontslaan nie. Dit is duidelik in Gideon se brief dat my pos oorbodig verklaar is."*

[15] As indicated above the employee referred an unfair dismissal dispute to the CCMA on the 27th June 2007, concerning an alleged dismissal for operational reasons. The dispute was set down for a con/arb process on 26th July 2007. The Respondent objected to the con/arb process.

[16] Subsequent to the objection to the con/arb process the Respondent charged the employee with:

> *"1. Desertion alternatively*
>
> *2. Absenteeism without leave-for the period since your failure to report for duty until the date of your return and;*
>
> *3. Failing to notify your employer of your absence and expected date of return."*

[17] The employee was dismissed pursuant to a disciplinary enquiry which was held in his absence. In the notice of dismissal the employee was informed that the reason for dismissal was due to desertion and was effective the 13th July 2007.

Issues for determination

[18] The issues for determination is set out in the pre-trial minutes as follows:

> *"3.1 Whether the Applicant was dismissed for reasons of misconduct or due to the Respondent's operational requirements.*

3.2 The date of the Applicant's dismissal.

3.3 In the event that the Honourable Court rules that the Applicant was retrenched, whether the retrenchment of the Applicant was procedurally as well as substantively fair or not."

[19] The Applicant in his testimony testified that he believed that he was dismissed despite being told he was not, because his post was made redundant. He further stated that he rejected the proposal that he should stay on as a consultant because that was not a permanent post and he would no longer be a salaried employee but would have to rely on commission.

[20] The Applicant testified as having indicated to Geber that he was willing to have his team amalgamated into the B team, for him to manage the consultants and for Vermeulen to manage telemarketers.

[21] He further testified that he reported for duty on the 7th June 2007, but spent most of his time packing and cleaning his office. He handed the keys to one of the employees of the Respondent before leaving. He left at about lunch time.

[22] Geber, gave evidence for the Respondent and testified that the target of R150 000-00 as a minimum for marketing teams was established around 2003 / 2004 by actuaries of the Respondent. In order to achieve that target, marketing teams were restructured towards the middle of 2006 and were given new products in order to assist them in reaching the target. This target was, according to him, known at all times by everyone and people were reminded about it during marketing conferences.

[23] He further testified that he was aware of the consultation process which was conducted by Pretorius during the middle of 2006 with the Applicant. He also indicated that the letter dated 5th June 2007, written by him emanated from a discussion that took place on 4 June between him and the Applicant.

[24] According Gerber, the Applicant was not happy with the phasing out of his team. One of the points that the Applicant raised with him concerned his doubt about the performance target as set by the Respondent. The second issue which he raised concerned failure to offer him the position that had become available earlier during the year in the B team. He testified having informed the Applicant that it would be impracticable to appoint him in that position. Another matter discussed during this meeting concerned the building business that the Applicant was running on the sideline. The other possibility which Geber raised during this meeting was that of the Applicant going as a consultant to the Black Economic Empowerment (BEE) team which at that stage was doing very well because all the consultants involved there were *"earning decent commissions."* He also raised the possibility of the Applicant becoming a trainer for the marketers which he declined. The meeting ended with Geber undertaking to put in writing what they had discussed.

[25] As concerning the issue of absconding, Geber testified that, Pretorius phoned him and informed him that he could not find the Applicant. He also tried him on his phone but there was no answer. He was then told by staff members that the Applicant was away in Durban. And when this was raised with him during the meeting the Applicant, according to Geber, said that he was with a client in

Durban. He testified that he tried to reach the Applicant on his cell phone to no avail. He could however, not remember whether or not the Applicant's cell phone was off on those occasions that he tried to contact him neither could he say why he did not sent him an SMS.

[26] Geber further testified that it was never the intention of the Respondent to dismiss the Applicant because he was one of the best performing employees and that a better proposition would have been made had he stayed. In this respect he gave an example of one other manager on that same date when team B was phased out, Mr Wynand Strachen who opted for another position in the company. According to him Strachen, increased his income by three fold the following month after agreeing to take the same position that the Applicant declined, namely being a consultant.

Analysis

Was the Applicant dismissed?

[27] Mr Beaton argued that in determining whether the Applicant was dismissed regard should be had to the provisions of section 186 of the Labour Relations Act 66 of 1995 (the LRA). In terms of this section an employer terminates a contract of employment with or without notice. The Applicant has therefore to prove that the Respondent terminated his contract of employment with or without notice for operational reasons in June.

[28] He further argued that there is a difference between a post becoming redundant and a person becoming redundant. In this respect Mr Beaton relied on the decision of *Plaaslike Oorgangsraad van Bronkhorstspruit v Senekal* 2001 (22)

ILJ 602 (SCA). In my view whilst the above case does indeed deal with the meaning of redundancy their facts and circumstances are different to the present case when dealing with the issue of whether or not the dismissal did occur.

[29] In the matter of *Ouwehand v Hout Bay Fishing Industries 2004 8 BLLR 815 (LC),* the Court held, that some overt act by the employer comprising the proximate cause of the termination of employment is required to constitute a dismissal. In that case the applicant who had been the master of the respondent's fishing vessels claimed that he was dismissed after he was told that the ship for which he was the master was to be decommissioned due to the reduction in the respondent's fishing quota. The respondent claimed that the applicant left on his own volition. The court in that case accepted the version of the respondent's witness that all what the applicant was told was that consideration was given to the withdrawal of the vessel from the applicant's fleet.

[30] In *Ouwehand (supra)* (at para 15 & 16) Van Niekerk AJ dealing with this issue had this to say:

"[15] Prior to dealing with the parties' respective submissions I turn to consider the relevant legislative provisions. Section 194(1) of the Act requires the employee in any proceedings concerning a dismissal to establish the existence of the dismissal. The applicant accordingly bears the onus to satisfy the court that he was dismissed. Section 186(1) (a) of the Act defines a dismissal. For the purposes of these proceedings the parties agreed that the relevant provision is section 186(1)(a) which

defines dismissal to mean "an employer has terminated a contract of employment with or without notice". This formulation would appear to contemplate that the employer party to a contract of employment undertakes an action that leads to the termination of the contract. In other words, some initiative undertaken by the employer must be established, which has the consequence of terminating the contract, whether or not the employer has given notice of an intention to do so.

[16] It is accordingly incumbent upon an employee to establish on a balance of probabilities, where that employee claims to have been dismissed in terms of section 186(1)(a), some overt act by the employer that is the proximate cause of the termination of employment. A dismissal in this sense should be distinguished from a voluntary resignation (where the contract is terminated at the initiative of the employee) and the termination of a contract by mutual and voluntary agreement between the parties. The latter is not a dismissal for the purposes of section 186(1)(a). In this regard see CEPPWAWU & another v Glass & Aluminium 2000 CC [2002] 5 BLLR 399 (LAC)."

[31] I align myself with the view expressed by Van Niekerk AJ above and whish to add that the enquiry into whether or not there is a dismissal goes beyond investigating whether the employer used the word, "dismissal" in terminating the employment relationship with the employee. In other words it is not the label placed on the termination that determined whether or not there was a dismissal.

[32] Thus, as a matter of principle, an employment contract can be regarded as terminated based on the objective construction of the employer's conduct which unequivocally repudiates the contract.

[33] In the present instance the Applicant was told that his position was redundant because he and his team had failed to meet the performance target set by the Respondent. Failure to meet the target led to the amalgamation of team A, which the Applicant was responsible for, into team B. The Applicant was simply informed that team A has been amalgamated into team B. He was not included in the amalgamation process. His suggestion that he be incorporated into team B and be allowed to share the function with the manager of that team, was rejected by Geber without providing any reason. He was told it is impossible. It is apparent from the response of Geber during cross examination that placing the Applicant in that position would have entailed offering him a full time and salaried position. Geber indicates very clearly during cross examination that he did not offer the Applicant the position as a marketer but as a consultant.

[34] The Respondent is correct in its contention that there is no reference in the letter of the 5th June 2007, to the word "dismissal." However, what is important in this letter is that the Applicant was not only informed that his team has been amalgamated to another team but also that his position is redundant. The matter does not end with him being told that his post is redundant but goes further and more fundamentally with the Applicant being told that if he wished to stay with the Respondent he could do so only as a consultant. In other words having

terminated the employment relationship the Applicant is offered a totally different contract. This is further confirmed by the email of Pretorius when he sought to clarify what was told to the employee by Geber on the 4th June 2007. Pretorious states in that email that the Applicant has not been dismissed but he can stay as a consultant.

[35] Thereafter, the Respondent does nothing when the Applicant says to Pretorius that he believes he is dismissed which clearly indicates that the Respondent agreed with the interpretation of the Applicant. It seems reasonable to expect the Respondent to have reverted back to the Applicant and indicated to him that he is not dismissed and that he should immediately report for duty failing which he would be disciplined.

[36] The response of Geber during cross examination in my view put the issue of whether or not the Applicant was dismissed prior to the disciplinary hearing to rest. When asked about the suggestion that the Applicant should have been amalgamated into the other team, he said something to the effect that:

> *"I am in agreement with the applicant's testimony that there is no basic salary for a marketer, there is only a commission."*

[37] In my view, the Respondent by introducing a new contract that radically changed not only the terms and conditions of employment of the Applicant, but also the nature of the relationship from that of employment relationship to that of an independent contractor, repudiated the contract, which repudiation the Applicant accepted.

Was the Applicant dismissed for misconduct?

[38] The above discussion indicates very clearly that the Applicant was not dismissed for misconduct but for operational reasons. The dismissal arose pursuant to the restructuring which resulted in team A being amalgamated into team B and the management position of the Applicant becoming redundant and he be told he could remain with the Respondent but only if he accepted a new contract.

[39] Having declared the position of the Applicant redundant and having cancelled the employment relationship the Respondent then offered the Applicant to stay as a consultant and not as an employee. A different contract to that which the Applicant had with the Respondent was offered; the acceptance of which would have meant a new contract and a change in the nature of the relationship which the parties had.

[40] Thus the objective assessment of the facts and the circumstances of this case is that the Respondent declared the position of the Applicant redundant and at the same time or soon thereafter terminated his of employment without notice.

[41] I now turn to deal with the issue of the disciplinary hearing. In my view, the dismissal had already taken place at the time the Respondent instituted the disciplinary hearing on 13th July 2007. In this regard I agree with the Applicant that the disciplinary hearing was a sham and a smoke screen. This emerges very clearly from the version of Geber which is unreliable and improbable. He claims to have tried to contact the Applicant before the disciplinary hearing. His version reveals very clearly why the disciplinary hearing was instituted. The Respondent had the Applicant's e-mail address, and knew where he stayed. The

notice to attend the disciplinary hearing was delivered by the Respondent's messenger on 6th July 2007, at the Applicant' residential address. Geber could not explain the reason why he did not leave a message in the Applicant's cell phone nor could he remember whether or not the cell phone of the Applicant was off. The story about Geber meeting the Applicant's daughter in the corridor and asking her where her father was does not make sense. According to Geber when he asked her where her father was, she simply said that she did not "want to be involved".

[42] As stated above the motive for the disciplinary hearing is also highly questionable. The hearing was instituted after a number of days of receipt of the CCMA referral. The explanation for this is very strange and should be rejected. According to Geber the reason for this is that the Respondent has a policy not to take action during the course of the month when an employee absconds. The policy is to wait until the end of the month when the employee would be forced to come forward to ask for his or her salary.

Was the dismissal due operational reasons fair?

[43] The facts and the circumstance of this case indicate very clearly that the dismissal of the Applicant was for operational reasons. The Applicant was informed both verbally and in writing that his position had become redundant because he and his team had failed to meet the performance target set by the Respondent. As a result of failure to meet the performance target the Respondent embarked on a restructuring exercise in terms of which the Applicant's team was amalgamated into team B. During cross examination

Geber conceded that the Respondent did not apply the provisions of Section 189 of the LRA which should mean that there was no valid reason to dismiss the Applicant. There is further no evidence that the termination of the contract of the Applicant was the last resort after all other options had been considered. There is also no evidence as to what measures the Respondent took into account to avoid the dismissal.

[44] In *La Vita v Mooiman Clothers (Pty) Limited* (2001) 22 ILJ 454 (LC), Francis J held that the duty to consult also extends to situations where dismissal is not contemplated. In the present instance the Applicant was not consulted about the amalgamation of his team into team B which rendered his position redundant.

[45] In my view the meeting that the Respondent had with the Applicant falls short of a consultation as required by section 189(3) of the LRA. There is no evidence that the Respondent invited the Applicant to that meeting in writing nor was information relevant to consultation disclosed to the Applicant.

Conclusion

[46] In my view, the Respondent dismissed the Applicant and such dismissal took place on 31st May 2007. Having terminated the employment relationship, the Respondent undertook to pay the applicant's wages for June. The dismissal of the Applicant was accordingly both substantively and procedurally unfair. For the above reasons I see no reason why the Respondent should not be ordered to pay the Applicant the maximum compensation in particular having regard to the treatment received by the Applicant and the extent of deviation from the provisions of the law.

[47] In the circumstances I see no reason why in law and fairness costs should not follow the results.

[48] In the premises I make the following order:

(i) The dismissal of the Applicant is unfair.

(ii) The Respondent is ordered to pay the Applicant compensation of 12 (twelve) months remuneration calculated at the salary he received at the date of the dismissal.

(iii) The Respondent should pay the Applicant remuneration for the month of June 2007.

(iv) The Respondent is to pay the costs of the Applicant.

Molahlehi J

Date of Hearing : 25th August 2008

Date of Judgment : 17th March 2009

Appearances

For the Applicant : Adv W Bekker

Instructed by : Jana Beukes Attorneys

For the Respondent: Adv R G Beaton

Instructed by : Fred Vogel Attorneys