IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Reportable
Case Number: C945/2009

In the matter between:

WERNER WEBER Applicant

and

ORDERTALK S A (PTY) LTD Respondent

Date of Hearing: 2 August 2011

Date of Judgment: September 2011

JUDGMENT

GUSH J

1. The applicant in this matter seeks an order declaring his dismissal by the respondent to have been substantively and procedurally unfair and accordingly that the respondent be ordered to compensate him in an amount equivalent to 12 months compensation and costs.

2. The respondent is a software service provider which, at the time of the applicant's dismissal, developed and provided software services to an associated company based in the USA viz. orderTalk Incorporated (USA). On 1st August 2008, the applicant was employed as "senior NET developer" responsible for the development and enhancement of the respondent's core product and at the end

of September 2008, the applicant was appointed to "head up" the development department of the respondent. On 1st September 2009, the applicant was given notice of his dismissal which was to take effect on 30th September 2009. At the time of his dismissal, the applicant was earning an amount of R61,500 per month.

3. A Mr. Andrew Meeding, the then respondent's chief financial and operating officer, gave evidence on behalf of the respondent. He explained that as a result of a decision made by "the board of directors" of orderTalk Incorporated (USA) "to close the South African development aspect", the applicant's position with the respondent became redundant. On 27th August 2009, the head of technology of orderTalk Incorporated (USA), a Mr John Hempe, had phoned the applicant to advise him of the intention to retrench him.

4. Later, the same day, Meeding had called the applicant to his office to speak to him. His evidence was that he told the applicant he was to be made redundant and handed him a letter headed "Operational requirements – possible termination of services"[1] which purported to be "in compliance with the Labour Relations Act and the Code of Good Practice". The letter stated *inter alia* that the respondent was required to consult with the applicant regarding the possible termination of his services and invited him to make written submissions by 31st August 2009 and to "revert by 12 noon on 31st August 2009 to the Chief Operating Officer **whether you require a further consultation**".(my emphasis). The final paragraph of the letter recorded that the applicant was "required" not only to consult the respondent but also "make any representations about any issues you wish to discuss."

1 Page 29 of the paginated pleadings.

5. Meeding confirmed that the applicant accepted the invitation and duly complied and had made written representations. A Mr. P J Eldon, the respondent's chief executive officer, had replied to the applicant's representations in a letter dated 1st September 2009.

6. Neither Meeding nor Eldon consulted any further with the applicant. Meeding handed the reply by Eldon and the letter headed "Notice of termination of employment" to the applicant on 1st September 2009. The respondent according to Meeding didn't see any option other than to cut costs and retrench the applicant.

7. The applicant's evidence was that he had been phoned by Hempe on 27th August 2009, a Thursday, and had been told in a short conversation that he, the applicant, was to be retrenched as the company intended moving the development function back to the USA. The applicant had requested a short break to gather his thoughts and phoned Hempe back. The latter conversation was recorded by the applicant, a recording which he later transcribed and which was annexed to his statement of claim. [2]

8. During the telephone conversation, Hempe advised the applicant that two or three days previously, the board had decided to retrench the applicant. The reason according to Hempe was "the board ... has decided that moving the development to the US was a good thing."[3]

2 Transcript: pages 17 to 20 of the paginated pleadings. The respondent had initially pleaded in limine that the recordings of the conversations with Hempe and Meeding were unlawful and accordingly that they should be struck out. At the commencement of the trial the respondent withdrew the point in limine and did not object to the transcripts of these conversations which were accordingly dealt with in the same manner as the other documents.
3 Transcript: page 18 of the paginated pleadings.

9. Later the same day he had met with Meeding. With Meeding's consent the applicant also recorded this conversation and subsequently transcribed it. The transcript, the accuracy of which was not disputed by the respondent, reflects *inter alia* the following exchange:

> "Andrew [Meeding]: Ya look all I got is a letter informing you of effectively in official terms it is the proposal for your retrenchment"
> Werner [applicant]: "But the decision has been made already so it, the way John [Hempe] put is that I've been retrenched, we're just going through the motions."
> Andrew: "The Company has decided that we want to, yes. That is the decision."
> Werner: "Ok"
> Andrew: You know HR people will cloud it all different of words, the decision has been made by senior members of the company that this is what they want to do. It's not fait accompli because HR process is the HR process which they have to follow."[4]

10. At the conclusion of the meeting, Meeding handed the applicant the "Operational requirements – possible termination of services" letter and confirmed that the applicant was to make his submissions by 31st August 2009, the following Monday. This letter records *inter alia*:

> "... **we** are moving the whole development function to the US and will no longer be running it from South Africa. As you are aware an IT head has been employed for this function and John Hempe will be managing the function from the US into the future."(my emphasis)

4 Transcript: page 24 paginated pleadings

11. The applicant prepared and submitted lengthy representations in response to the invitation to consult and in the covering letter to his submissions recorded the following:

> "Please find with this letter my written submission as per the labour relations act of 1995. I have taken great care and time putting my thoughts into these submissions in an attempt to engage in a meaningful joint consensus seeking process to either avoid the dismissals, change the timing of the dismissal or mitigate the adverse effects on me personally due to the dismissal.
>
> I firmly believe that there are alternative solutions and these are detailed in my submission. I am eager to consult further with Ordertalk and the board on these matters at your earliest convenience."

12. The respondent's reply, which was handed to the applicant together with his letter of termination, rejects the applicant's submissions essentially on the grounds that the respondent company and the USA company are two separate entities. The respondent specifically records in the document that:

    12.1. "There is no contractual or employer/employee relationship between you and the US company"; and

    12.2. "The issue of the development in the US vs. South Africa is again not related to the employment relationship between you and orderTalk South Africa but is a decision for orderTalk Inc to make."

13. Whilst the letter does not specifically deal with the applicant's request to consult

further nor expressly refuse his request for documentation it is abundantly clear from the letter that the respondent had no intention whatsoever of providing the applicant with any of the information he requested or engage him in consultation despite the respondents express invitation. This much is obvious, if only, in that the reply to the applicant's submissions was accompanied by the notice of termination of his employment.

14. What was clear from the evidence was that the need to retrench the applicant arose as a result of the decision to move the development function performed by the applicant in South Africa to the USA. The respondent's case according to their witness Meeding was that the decision was simply foisted upon the respondent and that the respondent was simply reacting to a decision over which they had no control. The documentary evidence however does not support Meeding's version. For example the unchallenged transcript of the telephone conversation the applicant had with Hempe reflects that the board only decided that "moving the development function to the US was a **good thing** ... last week" and that the decision was made to retrench the applicant "... like Monday or so" and the so-called section 189(3) letter states "**we** are moving the whole development function to the US and will no longer be running it from South Africa." (my emphasis)

15. Suffice to say that what is clear is that a decision was made by the respondent and its associated company to move the development function to the USA and therefore the respondent decided that it was necessary to dismiss the applicant. as a consequence thereof in the guise of a retrenchment. Having so decided the respondent then set about dismissing the applicant for operational reasons. The

futile, if not somewhat contemptuous attempts at fairly complying with the requisite procedures as set out in the Labour Relations Act were neither fair nor compliant.

16. It was suggested that the primary operational requirement which necessitated the retrenchment was financial. It may well have been, but the respondent certainly made no attempt whatsoever to provide any proof or detail at all justifying the decision. Most alarming however was the respondent's indecent haste in dismissing the applicant and its inexplicable ignoring of its own invitation to the applicant to consult on the decision to dismiss him.

17. All these matters simply confirm that a decision was made to move the whole development function to the US and as a consequence dismiss the person responsible for the development employed in South Africa, viz the applicant and that having so decided that is what happened.

18. Section 188(1) of the Labour Relations Act[5] prescribes that a dismissal will be unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the employer's operational requirements and that it was affected in accordance with a fair procedure.

19. Dealing first with the requirements that the reason must be a fair reason, it is so that whilst the definition of operational requirements viz. "requirements based on the economic technological structural or similar needs of an employer" is extremely wide, the onus rests firmly on the shoulders of the employer to prove that the dismissal was for a fair reason. In *CWIU v Algorax (Pty) Ltd,*[6] the court

5 Act number 66 of 1995.
6 (2003) 24 ILJ 1917 (LAC).

considered the proposition that a court should not criticise an employer's reasoning behind the decision, or need, to retrench. The court, however, concluded that the proposition is not absolute.[7] In *BMD Knitting Mills (Pty) Ltd v SACTWU*[8] the test to determine the substantive fairness of a dismissal for operational requirements was enunciated as follows

> "The starting-point is whether there is a commercial rationale for the decision. But rather that take such justification at face value, **a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party**, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer ... Fairness not correctness is the mandated test"[9] (my emphasis)

20. Accordingly, in determining whether there was a fair reason, the respondent bears the onus of proving not only that there was a fair reason, based on its operational requirements to dismiss the applicant but that the manner in which the decision is made is fair. That requires more than simply stating that a decision has been made which made the applicant redundant and/or that it was necessary to cut costs. Prove means to establish or demonstrate that there was a fair reason by leading evidence.

7 Ibid at page 1939 F-G para 69.
8 (2001) 22 ILJ 2264 (LAC).
9 Ibid at At pages 2269 and 2270 I-B para 19.

21. When faced with a challenge to the substantive fairness of a retrenchment dismissal, the employer is obliged to establish not only that there was a fair reason, based on its operational requirements for the dismissal but that the reason existed **at the time of the dismissal.**[10]

22. It is for that very reason that the LRA requires an employer not only to engage the employees who are likely to be affected in consultation but to disclose sufficient information to the employee to enable the employee to participate "meaningfully" in the process.[11] The consultation, which should be a "meaningful joint consensus-seeking process",[12] is designed to allow the affected employees an opportunity to consult with the employer and to make proposals to avoid the dismissal. Where, as is the case in this matter, the respondent simply failed to provide sufficient information or dismissed the applicant's request for information and ignored the applicant's request to consult, the applicant was then rendered helpless in the process. As the applicant was not in possession of the information he required nor was he allowed to properly consult at the time he was retrenched, it cannot be said that the dismissal was substantively fair in that is not possible to assess the fairness of the applicant's reason to dismiss at the time the decision was made.

23. The respondent elected to call only Meeding to give evidence to establish that the reason for the dismissal was a fair reason. His evidence however was of little assistance. In so far as the reason for the dismissal was financial, Meeding conceded in his evidence that the respondent was sound "moneywise but not

10 *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at paragraph 32.
11 Section 189(3) of the LRA.
12 Section 189(2) of the LRA.

cash-wise". Conspicuous by its absence was any documentary evidence justifying the decision made to justify the cost savings or the detail of the supposed restructuring and or savings.

24. In addition to the supposed financial reasons, Meeding's evidence was that it was the USA company that had decided to close the South African "development aspect" and that therefore the respondent couldn't afford the applicant. The pleadings too, suggested that the decision was foisted upon the respondent as a result of a decision made by a separate USA entity. The transcript of the conversations the applicant had with Hempe and Meeding and the so-called letter section 189 letter, however, tell a different story. The reason for the redundancy according to Hempe was that the ubiquitous "Board" as he referred to it, or "we", as Meeding described it in the letter, had decided to move the development function to the USA from South Africa. The record of the Hempe conversation begs the question that if he was employed by a separate entity why was he tasked with advising the applicant of his retrenchment.

25. The reasons given in the letter to the applicant at the time he was invited to consult were that the respondent was restructuring as sales had not grown as expected and that it was necessary to cut costs.

26. Given the paucity of evidence surrounding, and the clear contradiction regarding quite who was responsible, for the decision to move the development function and given the absence of any meaningful consultation, I am not satisfied that the respondent has established a fair reason for the dismissal of the applicant.

27. The second requirement is that the dismissal must be effected in accordance with

a fair procedure. Section 189 of the Act specifically prescribes the procedure to be followed. The employer, when it contemplates dismissing an employee for operational requirements it is obliged to consult with the employee likely to be affected. The Act further stipulates that these consultations must be meaningful joint consensus seeking process during which the parties must endeavour to reach consensus. Additional requirements are that the employer discloses all relevant information. Failure to do so on the part of the employer will inevitably result in the dismissal being procedurally unfair.[13]

28. It is abundantly clear that the respondent neither intended to nor did it engage the applicant in meaningful consensus seeking consultation. It invited the applicant to make representations and somewhat startlingly given its subsequent conduct advised the applicant that he was, by virtue of the provisions of the labour relations act "required to consult" with it. The applicant accepted the invitation not only to make representations but specifically and eagerly requested the opportunity to consult. All he received in return was a reply to his submissions and a letter of termination of his services delivered simultaneously. The respondent's attitude to compliance with the requirement to meaningfully consult is best described by Meeding when during his meeting with the applicant he conceded that the decision to retrench the applicant had been made but advised the applicant

> "You know HR people will cloud it all different of words, the decision has been made by senior members of the company that this is what they want to do. It's not fait accompli because HR process is the

13 See *Johnson and Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 LAC. This principle has been followed in numerous subsequent decisions.

HR process which they have to follow."

29. There can be no doubt whatsoever that the respondent's dismissal of the applicant was not in accordance with a fair procedure.

30. In circumstances where an employee is retrenched and the employer is unable to show that the dismissal was for a fair reason reinstatement is the appropriate remedy. The applicant did not seek reinstatement. The applicant seeks only compensation.

31. What remains therefore is to consider the amount of that compensation. The applicant seeks compensation in an amount equivalent to 12 months remuneration. The applicant's claim for compensation was based on his evidence was that he was unemployed for a period for a period of three months following his retrenchment whereafter whilst he had obtained other employment it was at a substantially reduced salary. This evidence was not challenged by the respondent.

32. The principle applicable to compensation was enunciated in *Ferodo (Pty) Ltd V De Ruiter* [14] where the court held

> "In my view the correct approach to be adopted is that to be found in English law, namely that the basic principle must be that an unfairly dismissed employee is to be compensated for the financial loss caused by the decision to dismiss him".[15]

33. This approach was endorsed in the matter of *Le Monde Luggage CC t/a*

14 (1993) 14 ILJ 974 (LAC).
15 Ibid at page 981 C.

Pakwells Petje v Dunn NO & Others where the court held as follows:

> The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer. See M S M Brassey *Commentary on the Labour Relations Act* A8-155; also *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC). In my view, an award of compensation of 12 months is not punitive but is clearly justifiable on the basis of the nature of the wrongful act committed by Mrs Petje which was the key event which gave rise to the unfair dismissal. As noted, an assault upon an employee is an egregiously wrongful act.[16]

34. In the circumstances, taking into the financial loss the applicant suffered as a result of his unfair dismissal, i am of the view that the appropriate compensation to which the applicant is entitled is an amount equivalent to nine month's salary.

35. As regards costs there is no reason in fairness why in this matter costs should not follow the result.

36. I therefore make the following order:

    36.1. The applicants dismissal by the respondent was substantively and procedurally unfair;

16 (2007) 28 ILJ 2238 (LAC) at paragraphs 30-31.

36.2. The respondent is ordered to pay the applicant compensation in an amount equivalent to nine months salary;

36.3. The respondent is to pay the applicant's costs.

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Gush J

Appearances:

For the Applicant: Adv R Kujawa instructed by Ward, Ward and Pienaar Attorneys.

For the Respondent: C J Geldenhuys of Geldenhuys CJ@Law Inc.