

SOUTH AFRICA / JUDGMENT

# Janynarayan and Others v Fugro Survey Africa (Pty) Ltd (C567/2020) [2023] ZALCCT 61 (10 November 2023) [2023] ZALCCT 61

COURT  
Labour Court Cape Town

BEFORE  
Lagrange

CASE / FILE NUMBER  
C567/2020

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THE  
LABOUR COURT OF SOUTH AFRICA,  
HELD  
AT CAPE TOWN

Case: C567/2020  
Of  
interest to other judges  
In

the matter between: VISHAL  
JANYNARAYAN  
First Applicant  
VINORJOHANNESAN  
PILLAY  
Second Applicant  
HENDRIKUS  
HERBST  
Third Applicant  
and  
FUGRO  
SURVEY AFRICA (PTY) LTD  
Respondent  
Date  
of Hearing: 19 – 21 April and 14 June 2022  
Date  
of Judgment: This judgment was  
handed down electronically by circulation to the parties' legal  
representatives by email, publication on  
the Labour Court website and

release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 10 November 2023

**Summary:**

(Retrenchment – Downturn in business in the wake of Covid epidemic – Option of unpaid leave inadequately dealt with in consultation – Unpaid leave similar to a layoff – Employer ought to have agreed on a period of unpaid leave before retrenching employees given uncertainty of new projects proceeding in the near future – Limited compensation for substantive and procedural fairness of retrenchment – Notice pay)

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**JUDGMENT**

LAGRANGE J

**Background**

- [1] This is a case of alleged unfair retrenchment of three engineers employed by the respondent. They seek compensation for what they allege was their substantively and procedurally unfair dismissal, and one month's notice pay.
- [2] There were also condonation applications brought by both parties relating to the later referral of the applicants' statement of claim and the respondent's late filing of its answering statement. Neither of the applications were opposed at the hearing. In the circumstances, there was no reason not to grant both applications.

The nature of the employer's business and the positions held by the applicants

- [3] Mr J Stemmet (Stemmet), managing director of the respondent ('Fugro SA') testified that: Fugro SA is part of a multinational Fugro NV, a company listed in the Netherlands ('Fugro'), employing 10,000 employees in 63 countries either directly or in its subsidiaries. Its four main lines of work are organised in a matrix. In terms of that matrix, one company within the group in a particular geographical region will specialize in providing one or more of those

lines of work. Each company within the group submits quarterly reports and is responsible for its own profit and loss. Whichever

subsidiary provides the service is responsible for the accounts connected therewith. In Fugro SA's case it specialises in

providing marine site characterisation services (MSC), to obtain data on the properties of the sea bed. Fugro SA had increasingly focused on MSC work since 2016, so that by 2020 this was the only type of service it offered.

[4] MSC work (sometimes referred to as ‘geophysical survey work’) entails a geophysical survey of the seabed of an area for a client. The survey will look at the depth of the seabed, the earth forming the seabed, magnetic variations other features, current and water temperature in the area. Almost all (95%) of Fugro SA’s projects are done for oil and gas corporations contemplating marine installations such as pipelines. The survey is critical to determine the capital requirements of a project and the risk factors it entails. The basic data in an MSC survey is gathered using seabed sonar equipment operated from a moving vessel. Data processors and geophysicists look at the data. The personnel on the vessel are data processors, geophysicists, survey engineers and the marine crew. In certain areas of operation security staff must also be accommodated on a vessel on account of piracy threats.

[5] The applicants were employed as qualified survey engineers in terms of contracts of employment with the respondent. The first applicant, Mr V Jaynarayan (‘Jaynarayan’) was employed from 1 October 2005, the second applicant, Mr V Pillay (‘Pillay’) from 1 May 2001 and the third applicant Mr H Herbst (‘Herbst’) from 1 August 2006. The applicants were seconded to render services to Fugro Survey BV, the Netherlands subsidiary of Fugro NV (‘FSBV’),

for 12, 15 and 12 years, respectively. They provided services to FSBV clients as survey engineers.

[6] Since 2013 and 2014 the applicants had been seconded to work for FSBV in marine asset integrity work (MAI). MAI work entails the placement, maintenance and repair of offshore installations to keep them in working order. Within the region where Fugro SA operated, MAI work is managed and operated from the Netherlands and Aberdeen, by FSBV.

[7] Mr J Stemmet (‘Stemmet’), Fugro SA’s country manager, Ms R Davids (‘Davids’), and the Resource and Operations Support manager, Mr D Hunter (‘Hunter’), testified for Fugro SA. Pillay and Ms G Johannes (‘Johannes’), the operations co-ordinator for Fugro SA, testified for the applicants.

#### General chronology of events leading to the retrenchments

[8] For the most part, there was little disagreement about the sequence of events leading to the retrenchment.

[9] In June 2020, the applicants’ secondment to FSBV was cancelled as a result of the ramifications of the Covid pandemic. Stemmet testified that, in April 2020, there was talk of a work shortage developing. A lot of business stopped and was cancelled as countries closed their borders. Staff had to be repatriated. The MAI division operated from the Netherlands lost 50% of its work and 65% of its revenue due to contract cancellations. In order to adjust to the new situation FSBV right sized its operation by cutting its staff by 50%. The decision

taken by the Fugro board in the Netherlands was that the capacity of the company had to be aligned with the work that was available, meaning that the headcount had to be reduced. It should be mentioned that this was not specifically mentioned in the s 189 notice initiating retrenchment consultations. Because of the decline in oil prices, the company was very exposed in the area of oil and gas related work. This necessitated reducing the staff complement in the Fugro SA office based in Cape Town. It was envisaged that the staff complement would be reduced by about 10%, amounting to 8 staff, and each department was looked at separately. When asked how this numerical goal was determined, Stemmet explained that it was based on the work at hand at the time and was a figure that might have to be revisited subsequently. It was difficult to put a precise figure on the saving required because of the uncertainty at the time. The fact that MAI work had dropped by 65% was conveyed to the applicants. Correspondingly, FSBV forecast a 70% loss of revenue. The Facebook project was the only remaining project run by Fugro SA at the time.

[10] On 24 June 2020, the applicants received an email from Ms. R Ianoschi, the manager: resources and operations support of FSBV, informing them that their secondment to that company would terminate with effect from 1 July 2020. This was preceded by a telephonic discussion held between her and the applicants. The email stated, amongst other things, that:

*“As mentioned, the impact on our business and FSBV specifically, as a result of the drop in oil price combined with the COVID 19 crisis, has unfortunately been major. Current travel restrictions and border closures lead to project cancellations or in definite postponements, further translating into significantly reduced forecasting revenues for the Africa sub-region.”*

[11] On 2 July 2020, Fugro SA served the applicants with letters titled 'Contemplated retrenchment notice in terms of Section 189 Labour Relations Act 66 of 1995'. The letter informed the applicants, amongst other things, that:

11.1 Fugro SA was considering retrenchments due to poor economic conditions driven by the impact of the COVID-19 virus, which had led to a loss of clients. As a result, Fugro was not fully operational and had to consider reducing staff numbers globally.

11.2 Fugro SA had considered alternatives to retrenchment in the form of early retirement and voluntary retrenchment.

11.3 Fugro SA intended to apply redundancy of position, skills, experience and the LIFO principle as its selection criteria.

11.4 Fugro SA employed 81 employees at the time and was contemplating retrenching 8 of them.

11.5 A facilitator would be appointed to assist with the consultation process.

[12] Stemmet testified that with six to eight months' training the applicants might have worked as engineers on this project, but Fugro SA already had qualified MSC staff working on its current MSC projects it had to utilise. When contracts were concluded, clients received lists

of the professional staff who could be utilised and could stipulate, for example, that they needed personnel with five years' specialised MSC experience. The firm had been turned down on a number of occasions when it could not provide the staff needed. It was important to be able to offer experienced staff for projects or risk losing a potential contract.

- [13] The price of oil had dropped below the break-even production price of \$40 a barrel. The only MSC operations in the region serviced by Fugro SA which continued was MSC work relating to renewable energy in the North Sea and a coastal survey for Facebook in preparation for laying an undersea cable. Stemmet denied that the applicants could have simply been engaged on those projects because they would have required six to eight months training and the company had to use its engineers who were skilled in MSC work. Clients got a list of the professional staff that would be used on a project and if the professionals did not have the requisite expertise, the contract would not be concluded. Even though the applicants had longer service with Fugro SA, the existing MSC professionals had longer experience in MSC work.
- [14] On 8 July 2020, a first consultation was held, during which the applicants raised concerns relating to their secondment and the legal consequences of that on their possible retrenchment. At the end of this meeting, it was agreed that the applicants would consult their legal representatives.
- [15] On 14 July 2020, a second consultation was held, in which there was a discussion relating to alternatives to retrenchment. Among the issues which were discussed were: the rationale for the termination of their secondment; the limited prospect of them being considered for any upcoming projects by FSBV; the possibility of working on a freelance basis rather than as employees of Fugro SA, and the feasibility of going on indefinite unpaid leave. No consensus was reached on any alternatives to retrenchment at that meeting.
- [16] As set out in the minutes of the second consultation meeting, it had been explained that FSBV was implementing a 50% staff reduction and was required to first terminate the services of foreign staff in terms of Netherlands labour law, which is why the secondments of the applicants had been terminated. Although they were under consideration for upcoming Fugro projects, those projects were not confirmed by FSBV and it would have to prioritise employment of their own staff in any event.
- [17] On 20 July 2020, Davids gave a detailed written response to proposals on alternatives to retrenchment raised by the applicants. These concerned the termination of the applicants' secondment to FSBV, upcoming projects they were considered for, freelance work and unpaid leave. In the email Fugro SA set out its reasons why it did not consider any of the applicants' alternatives to retrenchment were viable. In the company's view none of these options presented workable alternatives.
- [18] On 21 July 2020, a third consultation was held, during which the applicants continued to raise the alternatives already mentioned. They also proposed they should be used on MSC work, in place of the geophysical survey engineers who had shorter service with Fugro SA.

None of the proposals found favour with the respondent. Although the respondent did offer to facilitate registration of the applicants with an independent agency placing freelance workers in the industry, this was not acceptable to the applicants. Although Pillay did not dispute that Fugro SA had approached an agency which indicated that there were good prospects of them to work for the agency's clients, Pillay explained that the difficulty with the freelance option was that it did not assure them of any work as they had been trained to use Fugro software and were not familiar with software used by other companies. He noted that Fugro SA had implied that if they rejected this as an alternative to retrenchment, they would not be eligible for severance pay. The applicants did not consider freelance work to be a valid or reasonable alternative to retrenchment.

[19] On 28 July 2020, in anticipation of the fourth consultation later that day, the applicants, represented by Jaynarayan, sent Stemmet a letter in which they set out in greater detail their alternatives. Pillay testified that they had come up with more options because the company had told them they did not consider that they were sufficiently equipped to perform geophysical survey work. In the letter, Jaynarayan accused the company of not attempting to find realistic and achievable alternatives, such as those proposed by the applicants, which they contended would avoid retrenchment and result in additional income for the firm. The letter set out a number of alternative proposals, which may be summarised thus:

19.1 Option 1: Retention of the applicants but engaged in MSC work, which would allow the firm to retain their MAI skills when demand for that work picked up as the pandemic receded.

19.2 Option 2: To achieve the cost reduction equivalent to retrenching 10% of the staff, and across-the-board salary cut should be implemented.

19.3 Option 3: Unpaid leave for all or selected categories of staff.

19.4 Option 4: Reducing the applicants' salaries by 50%, thereby sharing the burden of the cost reduction between them and the firm.

19.5 Option 5: Unpaid leave for the applicants of two weeks per month, but was retention of benefits.

19.6 Option 6: Applicants to be placed on continuous unpaid leave, with retention of benefits, except when deployments were possible.

19.7 Option 7: Applicants to be placed on continuous unpaid leave, without retention of benefits, except when deployments were possible.

19.8 Option 8: Allow applicants to work on a freelance basis and market their availability to all operating companies within the Fugro group and other third-party clients.

[20] At the fourth consultation meeting the applicants again referred to the various options they had proposed and Fugro SA's responses thereto, which they considered unsatisfactory. No agreement was reached between the parties.

- [21] On 30 July 2020, Davids sent the applicants an email indicating that the respondent had been unable to find alternatives to their retrenchment and offered them the option of concluding a retrenchment agreement. It also advised them that their notice period would run from 1 August 2020 to 31 August 2020. The applicants' sought legal advice on whether to accept the respondent's offer or not. Ultimately, they declined to sign the proposed retrenchment agreement.
- [22] On 6 August a formal notice of their retrenchment at the end of the month was issued to the applicants, in view of them failing to accept the proposed agreement. As of 31 August 2020, the applicants' services were terminated based on Fugro SA's operational requirements.
- [23] Davids denied that alternatives raised by the applicants had not been considered. She referred to her written response on 20 July 2020, following the second consultation meeting, in which she addressed: the reasons for the termination of their FSBV secondments; the unavailability of other Fugro work they had been considered for (owing to the other Fugro entities engaged in that work being compelled to reduce their own staff compliments); the prospect of freelance work opportunities being greater because the company engaging them would not have to carry the costs of them being permanent staff, and that unpaid leave would not be considered because the length of such leave was indeterminate at that stage.
- [24] Hunter testified that he had approached a freelance agency, AGRI, which gave a strong indication it would be able to place with non-Fugro firms and they could expect to be engaged for a period of 180 days. Hunter was confident they would get work, particularly if recommended by Fugro. Davids explained that, even without paying benefits, placing the applicants on unpaid leave would have run counter to the need to reduce permanent staff headcount in line with other Fugro entities. Davids testified that the firm also could not foresee any opportunities emerging in MAI work at that time. She mentioned that the firm had applied for UIF TERS benefits, but a system error prevented them from lodging a claim and eventually they abandoned it.
- [25] The discussion of ways of retaining the applicants on Fugro SA's staff revolved around the following issues, most of which were related:
- 25.1 Whether or not it was feasible for the applicants to simply be allocated to existing MSC work and retrenching MSC engineers with less service in their stead.
- 25.2 If they required more training to perform that work, whether it was feasible to provide it.
- 25.3 The existence of other assignments in the Fugro group they could be engaged in or the feasibility of doing freelance work sourced through Fugro SA or independently.
- 25.4 Placing them on unpaid leave.
- [26] The evidence advanced on each of these possibilities is discussed below.

Redeploying the applicants to work on Fugro SA's current MSC contracts

- [27] One of the applicants' proposals was that they should be added to the MSC pool of contractors and should be preferred over engineers with shorter service in that pool. Fugro SA did not consider this feasible because it would not enable it to right size the workforce and maintain the level of expertise, which the MSC service required. Stemmet conceded that the applicants were more senior in terms of their length of service with Fugro SA, but it would have been risky to replace a survey engineer of nine years' experience with someone not qualified in that work.
- [28] Hunter claimed that Jaynarayan's CV showed that almost all the assignments he had done, fell predominantly within the scope of MAI work and did not entail MSC work. If his CV had been submitted to a client to work on a MSC project, he would not have been eligible for appointment. Similarly, Pillay's work history all related to MAI work and the equipment he used was not used in MSC functions. As in Jaynarayan's case, he would not have been able to get an assignment on MSC work, with his CV. He conceded that Herbst had some geophysical experience, which might have given him a slightly better chance of obtaining MSC work, but Fugro SA received no response for MSC work when it circulated his CV.
- [29] More specifically, concerning Pillay, Stemmet testified that when Jaynarayan had worked as a senior survey engineer for two months in 2016 on an Angolan project, he was assisting a team with the use of software. Similarly, for four months in 2010 he worked on a construction support vessel designated as a surveyor, but performing an MAI function. He conceded that, during two weeks in November 2011, Jaynarayan had performed work as a surveyor. During 2010 and 2011, when he was designated as a surveyor, he was performing work on a construction support vessel and the work he was doing was not the same as MSC work. MSC work required the engineer to operate equipment, adjust settings on the equipment and fix equipment when problems arose. Pillay had acted as an online surveyor, but that was not the same as performing the work of a geophysical surveyor, which was more demanding. Herbst had done a few months' work in 2007 and 2008 on a geophysical survey but, as in Pillay's case his work was online and he was not involved in the installation of equipment at sea.
- [30] Stemmet acknowledged that Pillay had been part of a team on vessel in Angola where he had been assisting in the use of certain software, but he queried if he was indeed working as a geophysical surveyor. The vessel was a construction support vessel, so the survey work entailed was not MSC work. Survey work done by Pillay was only online work and the demands placed on a geophysical surveyor onsite were greater. The same applied to Herbst who had performed a two-month online survey in 2018. Online surveying did not require any knowledge of survey equipment installation and required a knowledge of machine setting and being able to fix operational issues. Hunter also testified that most of the work Pillay had performed in the past was in fact MAI related and not MSC work. Some of the technology he had experience in was also obsolete and he claimed that if his work record was submitted in support of a placement on an MSC project, he would not be appointed for that. His appraisal of Pillay's ability to perform MSC work was not challenged directly in

cross-examination, though Pillay did testify as to his MSC experience.

- [31] Stemmet agreed that it was possible for staff to move between MSC and MAI lines of work, but it was preferable to be a specialist in one field than to be a 'jack-of-all trades'. He emphasised that in MSC work it was particularly important that the surveyor knew how to repair and operate the geophysical equipment on board. If equipment broke whilst at sea it had to be fixed at sea because returning to port for repairs was extremely expensive. All the applicants started as marine engineers but as they became more experienced in an MAI role it became more difficult to switch to an MSC role.
- [32] Stemmet testified that with six to eight months' training the applicants might have worked as engineers on existing projects, but Fugro SA had qualified MSC staff working on them already, whom it had to utilise. According to Hunter, the MSC Facebook project which was still operating at the time did not involve the use of an Fugro vessel or Fugro software, so the applicants' familiarity with Fugro software would not have assisted them anyway, because they would have to have learnt how to work with the new software.
- [33] When contracts with clients were concluded, the clients received lists of the professional staff who could be utilised and could, for example, stipulate they needed personnel with five years' specialised experience. The firm had been turned down on a number of occasions when it could not provide the staff needed. Clients received a list of the professional staff that would be used on a project and if the professionals did not have the requisite expertise, the contract would not be concluded. Hence, it was important to be able to offer experienced staff for projects to reduce the risk of losing a contract.
- [34] The price of oil had dropped below the breakeven production price of \$40 a barrel. The only operations which continued was MSC work relating to renewable energy in the North Sea and a coastal survey for Facebook in preparation for laying an undersea cable. Stemmet denied that the applicants could have simply been engaged in this work because they would have required six to eight months training and the company had to use its engineers who was skilled in MSC work. Even though the applicants had long service, the existing MSC professionals had more expertise in that specialization.
- [35] Davids also emphasised that placing the applicants in a pool together with Fugro SA MSC engineers would be difficult. The existing pool comprised a group of dedicated MSC engineers with longer experience in that type of work, whereas the applicants had not been doing that kind of work for a long time and would require re-training, which was not viable in the desperate situation facing the firm. Fugro SA struggled to place staff in the field because borders were closed, and staff had to be repatriated. It could not place the applicants when FSBV terminated their secondment. It could not place them because their specialization was MAI work provided by FSBV and Fugro SA only contracted for MSC work. Even in the MSC line of work there

were limited opportunities available as Fugro SA lost a lot of work and only had a coastal survey project for Facebook, which had been reduced to a skeleton staff complement. MSC work in Nigeria and Angola was being curtailed as those projects were entering the MAI phase necessitating the retrenchment of MSC staff who had been working there.

The possibility of retraining the applicants for MSC work

- [36] Pillay claimed that the software and equipment used on the surface and below the surface was the same in both types of survey. They could have been enrolled with an online course in the academy and would have been able to acquire experience on the equipment in the workshop using a simulator. Moreover, he never received formal training when he started working and had to rely on the equipment manuals. Training was only provided at a later stage.
- [37] Pillay also testified that he had worked as the base engineer in Angola for three and a half years during which time he had performed different roles, including upgrading test equipment and familiarising himself with Fugro documentation. They also had to train new recruits. He claimed that MAI engineers used the same Fugro software as MSC surveyors, but used different instrumentation in their respective work, though there was some overlap. He was responsible for repairing all equipment whether it was geophysical, or construction orientated.
- [38] In response to the suggestion that the applicants could have received training for MSC work, Stemmet said that the difficulty was that training could only be done on an existing MSC project and the project client would not pay for this. Fugro SA had been able to do this previously with one geophysical engineer because there was work available. At the time of the retrenchments there was only one project running and there was no opportunity to assign additional staff to it. He estimated that the necessary training would take six months to complete. Training the applicants at the academy was not possible at the time because of pandemic restrictions, which meant that the academy was closed. It only resumed doing online training at a much later stage. He also stated they could not have acquired skills in Fugro SA's workshop as it did not have survey equipment. Hunter pointed out that in June and July 2020 everyone was working remotely, so even if there had been MSC equipment in the workshop, they could not have done any work or training there. Hunter claimed that the equipment in question would have been in Angola at

the time of the retrenchments. Stemmet also testified that it would not have been possible to train the applicants in geophysical work in the firm's own workshop because the specialist equipment used in those surveys was not available in the workshop. There was also no workshop work to perform in the absence of projects. At the time no other staff were working there, and those who could work online were doing so from home. Accordingly, there was neither work nor equipment available for the applicants. Pillay conceded he could not be sure if there was equipment they could have used in the workshop, at that time.

- [39] By contrast, the applicants claimed only three to four weeks training was needed, as their training was up to date on many types of equipment and contended that the same multi-beam software was used in MAI work as in MSC work. Hunter agreed with this but said that this equipment was only one of twenty types of equipment used in MSC work. However, he conceded that perhaps 30% of the equipment used in the two different lines of work was similar, and the applicants could have learnt how to use the MSC equipment if it had been possible to train them in a workshop or on a job, but neither of these possibilities existed at the time. He could not comment on Pillay's claim that it was not unusual to do work without being familiar with the software. Even though he did not doubt their ability to learn, Hunter disputed their claim that it would have only taken them three to four weeks to get them up to speed on MSC skills, because the machinery used at that time was complex. In any event, in order to train them at that time they firm would have needed a 'pay slot' on a vessel, which it could allocate them too. On-board training would also have necessitated the applicants completing at least two on-board rotations of five to ten weeks at a time.
- [40] In addition, Hunter testified there was no spare bunk space on either of the vessels that were currently operating in 2020. Hunter was not specifically challenged on this claim. Pillay conceded that to some extent the applicants geophysical experience was outdated but argued that they could have been put on one of the MSC vessels because they were Fugro SA vessels and was common practice to take on trainees and to inform clients that it was doing this. Johannes was responsible for arranging the manning of confirmed projects for all Fugro SA staff. She also testified that it was possible to place staff on vessels for training purposes provided there was sufficient bunk space and if the client was willing to allow it. She conceded that on some vessels spare bunk space was even more limited because ships had to accommodate security personnel owing to piracy threats.
- [41] Stemmet did agree that, on a previous occasion, another engineer, Mr P Maramba ('Maramba'), had been transferred from MAI work to MSC work, but that had taken place in a different work environment, in circumstances where they had paid work for him. Hunter said this occurred in 2018 when Mr Maramba's prior secondment had ended. There had been retrenchment discussions, but under the market conditions prevailing at the time it was feasible for him to be retrained. It was not possible to do the same for the applicants because the firm was required to look at confirmed projects only and had to right size staff in relation to existing projects. Further, Maramba had been able to practice testing equipment on shore in the workshop before being deployed in an active paid role, rather than a training one. Johannes testified that Maramba had migrated from MAI work in 2018 but only started MSC work in 2020 as a second engineer on a German vessel, after completing simulator training during June to August 2020. The same applied to another MAI engineer, whom they were keen to retain and were able to retrain.

Existence of alternative assignments in the Fugro group or other agencies

[42] In the covering email dated 29 July 2020, to which FSBV's response was attached, Davids summarised the prospect of alternative employment with FSBV, which the applicants were already aware of:

*"Raluca Ianoschi, Manager Resources & Operations Support for FSBV, confirmed that upcoming work is at the moment extremely uncertain (no confirmed work with no clear timelines), sporadic and an evenly spread across the year. This makes it impossible for them to*

guarantee any work to anybody except the people currently under direct employment with FSB, for whom they also expect to struggle

meeting their utilisation targets throughout 2021. This therefore means that at the moment FSBV do not foresee any additions to the reduced pool of offshore staff.

This is the confirmed position of the EUAF Region, which is the region that we operate in. We regret that you may have received incorrect information previously, but as we have repeatedly said, all regions are reducing staff based on this information, it is not feasible to keep you on the Fugro SAPL staff as it does not seem likely that we will be able to provide work for you."

[43] At the beginning of August there was a possible opening for employment in Saudi Arabia but by that stage the applicants had already been retrenched. The FSBV operations coordinator, who had requested applicants' CV's for the project, asked the local office if it could retain them as employees rather than them being engaged as freelancers. Stemmet, through Johannes, pointed out that the applicants had already been retrenched but he could ensure that if they were recruited through a freelance agency, FSBV would not be charged more than the intercompany rate Fugro SA would have charged if they had remained on its books. This was conveyed to FSBV in an email from Johannes on 3 August 2020. Stemmet also confirmed that he had requested that the applicants be engaged for a year if the projects actually materialised.

[44] Hunter testified that by the end of the consultations, the limited prospects for future work remained unchanged. The firm apologised for the impression that might have been created that work was available elsewhere in the Fugro group, which was caused by the forward planning department identifying potential work opportunities, but these were not materialising in practice. In mid-June 2020, Jaynarayan and Herbst had been identified as candidates for a construction project starting in mid-July 2020 in Abu Dhabi and Saudi Arabia, which was subject to confirmation by the client and travel restrictions. Hunter claimed that travel restrictions meant no Fugro SA staff could take up those. Initially, Stemmet could not say whether that project went ahead. He was asked why the retrenchment had to proceed if those work prospects were available. His response was that the retrenchment process had begun in April and could not be delayed indefinitely pending projects which might not materialise. Moreover, the Fugro group expected Fugro SA to right size as other entities in the group had done. Fugro SA had to look at the staff structure it could support. Later in his testimony, Stemmet said that the project had not gone ahead. Accordingly, he argued, their decision to retrench the applicants at the end of August was

correct, albeit with the benefit of hindsight.

- [45] Pillay claimed that the applicants also could have done work they had learnt of at the end of July, which was to become available in Saudi Arabia and Qatar. Hunter agreed that the applicants would have been eligible to work for two months on FSBV's Middle East project, but he also claimed staff could not yet travel. Johannes testified that Hunter would have been aware at the end of July 2020 that Middle East work was available, but on 3 August she was asked not to pursue that prospective work for the applicants in their capacity as Fugro SA employees, because they had already been retrenched. However, they might still have been given the work in a freelance capacity. Johannes explained that the applicants might have got better pay as freelancers but as employees they had a greater prospect of being used during a 180-day cycle and would also have received medical aid and provident fund benefits.
- [46] Pillay cited an email from Johannes dated 29 July 2020, which described eight short-term secondments available in August in the UK, USA and Scotland. However, they were then told that those positions were no longer available. Stemmet testified that the applicants could only have filled such positions if they were able to fly to the project sites. As he understood it, those projects did not proceed.
- [47] There was also evidence of work in Equatorial Guinea in mid-September 2020 and in the Netherlands from mid-August, and a WhatsApp conversation on 22 July 2020 implied that the consulates were opening and travel was permitted. Johannes claimed this was the case at the time.
- [48] He claimed that all the personnel, including MSC engineers, whom they had proposed for available engagements offered by Fugro were not engaged.
- [49] Stemmet claimed that other openings within the global Fugro group were explored, amongst which were the possible opportunities in the Middle East, but those simply did not materialize. Hunter nonetheless conceded that there were potential opportunities of Fugro work in the pipeline around the time of the retrenchments, but said he spoke to the relevant regional entities and was advised that they were unlikely to materialise. Stemmet conceded that perhaps they had not managed expectations well in the sense that hopes might have been created that opportunities existed when in fact they were still tentative and unconfirmed. It was in the nature of such prospective work that it was often uncertain up to the very last minute if a project would actually go ahead. Thus, even though Pillay had been approached in mid-June 2020 to find out if he was available and able to work in the Caribbean in September and to work on a two-week Virgin Island assignment following that, the enquiry about his availability was provisional and entirely contingent on the envisaged projects actually going ahead. Stemmet conceded Jaynarayan had been selected for the planned FSBV Caribbean short projects, but the enquiry from FSBV about his availability in June 2020 was at a stage where it could not be known it was going to materialise. Pillay stated that the work in Trinidad had materialised in October 2020, but one

Ms K Linde, who was based in Europe, had been engaged on that. Pillay met persons coming off that job in October 2020. The same month he had travelled to Guyana on a commercial flight.

- [50] Hunter agreed, given the correspondence about work opportunities, that there did seem to be a possibility of work available, but after discussing the situation with the regional entities involved, he was advised that the projects were unlikely to materialise. They looked at all opportunities which came up and whenever there was a hope of something concrete, he would try and escalate it. Hunter confirmed the existence of a prospective work opportunity in the Middle East but at the time they could not send staff there because of local and middle eastern travel restrictions. Johannes corroborated this, though she claimed that planners would not have asked her to keep the applicants on board if they had anticipated travel difficulties. Future planned work in the Fugro group was circulated from May 2020 onwards but despite offering the services of Fugro SA staff including MSC engineers none of them were engaged. Hunter had testified that, despite the possibilities of work in the Middle East in 2020, no Fugro SA staff had been assigned to work there by 2022. Although it was not put directly to Hunter when he testified, Pillay claimed in his own evidence that there were two Fugro SA staff engaged in the Middle East work during or after the consultations.
- [51] Johannes was present during the consultation process. She confirmed that she had been specifically tasked with looking for work opportunities for persons identified for retrenchment. She had approached all the Fugro planners and had the perception that in the Netherlands office they had lots of projects lined up but did not have people with the necessary skills. Towards the end of July there was a job available working in Equatorial Guinea from mid-September, which Pillay could have done. There was an Equatorial Guinea consulate in Cape Town and the applicants would have qualified as essential service workers. She said the project had gone ahead but Fugro SA had not provided any personnel. Although she maintained that planners did not request staff unless a project was going to proceed, she agreed that Stemmet was better placed to know if projects were actually implemented and would know that before she did.
- [52] Johannes agreed that an increasing number of projects were put on hold in 2020 and it was more difficult to get projects going during that time. She concurred that planners would look at projects stretching over forthcoming twelve months. She also agreed that the Fugro project in Trinidad, for which Jaynarayan had been flagged had been staffed by Fugro European staff because they were prioritised by law. When work became available for FSBV they could not utilise South African personnel. FSBV also advised Fugro SA of certain short-term secondment requests for personnel it had received at the end of July

2020. Stemmet testified that the only one which would have been feasible at the time was one engineering assignment in Scotland. He doubted that FSBV would have offered any of that work to the applicants because BV had retrenched its own staff a couple of days before the applicants' secondment had ended. The applicants also received all these communications from FSBV. Altogether 980 staff of the group's workforce of 10,000, including the Cape Town director, had been retrenched.
- [53] Competitors made more use of freelance staff than Fugro did. Freelance staff received a higher daily rate but received no income when they were not working, unlike the Fugro staff. Usually, Fugro SA staff were engaged on contracts with a 200-day duration, and because medical aid and provident fund contributions were paid whether or not they were on duty, the firm had an interest in using them as much as possible. The greater portion of the applicants' earnings came from the daily allowance received when they were performing assigned work. A couple of potential short-term freelance assignments which were advertised in August 2020 but Stemmet could not say if these ever materialised. In his view, the applicants could have applied for those postings as freelancers. In Fugro worldwide there was a freeze on new recruitment. In the foreseeable future it was necessary to right size the organisation. If things changed in the long-term the situation could be reconsidered.
- [54] In early July 2020, in response to an enquiry from FNVB, Stemmet had advised that Herbst was booked on a project from mid-July to mid-August in the Congo and Jaynarayan was booked on a long stint until the end of August. Accordingly, they were not available. Stemmet testified that the Congo project did not materialise but could not shed any light on Jaynarayan's assignment which had emanated from JSBV.

#### Unpaid leave alternative

- [55] The last item in the applicants list of proposals for work placements was that they be permitted to operate on a freelance basis and that the company would market their availability within the Fugro group and to third parties. Although they had mentioned this, it was clear from Pillay's testimony that this was not attractive to the applicants. Stemmet agreed that if the applicants managed to obtain freelance work, it would not have constituted an alternative to retrenchment but would have only been a mitigating factor. As Davids testified, Fugro SA nonetheless did approach various agencies which supplied them with freelance staff and asked those firms if they could try and place their staff. They also lifted the company bar on being employed by Fugro if one had worked on a freelance basis for the Fugro group in the previous 12 months. This made it possible for agencies to also look for any freelance openings that might come up in the Fugro group itself. The company believed that its reputation would make it easier for freelance agencies to place its staff if openings arose. Hunter testified that, as far as he knew, the firm had notified all institutions requiring engineers of the applicants' availability but, to his knowledge, there had been

no response. At the time, he believed that they might succeed in getting work as freelancers. He did not agree that they would have struggled to get work outside of the Fugro group because of their experience with Fugro software. This was because the software was only a small part of their MAI expertise.

[56] The unpaid leave proposals encapsulated in options six and seven of Jaynarayan's letter, were not feasible from the company's point of view because they were instructed to reduce headcount as a method of keeping afloat during the crisis. Further, Stemmet said the absence of the prospect of any MAI work in which the applicants could be placed made the unpaid leave option unfeasible from the company's perspective and Fugro SA had to focus on its core business, namely MSC work. In relation the availability of MAI work, another consideration was that FSBV had retrenched 50 % of its MAI staff and was obliged to prefer its own personnel to offshore staff when providing staff when work did become available.

[57] Davids was pressed to explain why unpaid leave did not make sense if there was a possibility of positions on the horizon, such as an advertised position for a four to five week assignment in August 2020 for a survey engineer in the Netherlands, which was advertised by a third party. She explained that Fugro SA's difficulty with the proposal was how long unpaid leave might have lasted for. She did not dispute that the question of the duration of the proposed unpaid leave was not discussed in the consultations and that Fugro SA had adopted the view that it would not be in the applicants' own interest to be in such an indeterminate position. Asked why the company would not accept applicants' unpaid leave proposals, which they had been willing to subject themselves to, her response was that what was critical was to reduce the headcount. She agreed that the only difference between the effect of reducing the headcount and placing them on unpaid leave was that, if they were retrenched, they would not be employees of Fugro SA. Hunter said that personnel identified for retrenchment were selected according to the essential

resources Fugro SA needed and whether staff were being fully utilised. Stemmet also said they could not retain unutilised employees.

[58] According to Stemmet, a fundamental problem facing the respondent was that nobody knew how things were going to turn out as they had never previously had to deal with a situation like the one created by the Covid pandemic. In particular, nobody had any idea how long the situation would last. Both Stemmet and Hunter testified that they had been regular communications within the group to try and accommodate personnel during that period. Stemmet agreed that Pillay had last worked on a rig in Gabon. That work was managed by FSBV and it made sense to bring in staff from South Africa as no visa was required for South Africans in some African countries.

[59] The uncertainty about the future impacted on the respondent's view on the feasibility of staff taking unpaid leave. Initially, Fugro SA itself had envisaged unpaid leave as a possible way of avoiding retrenchment by the company once staff had utilised their paid leave and if the company could reduce working hours and make use of the special UIF benefits

introduced during the pandemic. However, after the second consultation meeting, the firm decided it could not place staff in a position under which they would be indefinitely on unpaid leave. The company would also have to maintain payments like medical aid payments and provident fund contributions without a corresponding contribution to revenue, even if staff were not being paid their salaries. Furthermore, Stemmet testified that the applicants would only have been re-engaged in work if MAI work had materialised, which only happened much later in the business cycle. Hunter conceded that Herbst had previously taken two or three months unpaid leave as a sabbatical and that there was also an oceanographer who took unpaid leave for some months in 2016 or 2017. However, Stemmet explained that the business had a work backlog at that time and the oceanographer was a scarce resource whom they needed to retain.

- [60] Stemmet acknowledged that it had even been suggested that Fugro SA could retain the applicants but without paying them provident fund and medical aid benefits but allowing them to perform freelance work. However, Fugro SA simply had no MAI work for the applicants because only FSBV bid for that type of work. Stemmet said Fugro SA simply could not utilise the applicants in the absence of MAI work being available. Their employment prospects depended on FSBV work recovering. It was the absence of the prospect of such work which rendered the unpaid leave option unworkable in the firm's view. FSBV was compelled to retrench 50% of its own staff. Stemmet was adamant that they could not agree to indefinite unpaid leave, which is what it would have amounted to had they embarked on it. He rejected the contention that the company had unreasonably rejected unpaid leave as a feasible option, because the only work Fugro SA had was geophysical survey work and there was no timeline when MAI work performed by FVB might resume. Hunter did not recall any discussion about trying unpaid leave for a fixed trial period of three to six months, after which it could be revisited. Pillay confirmed that Fugro SA did not engage them on the length of a period of unpaid leave. He claims the applicants would have accepted a three- or six-month period. He also claimed they had initially proposed a three-month period, which could be revisited if necessary, but this claim was not canvassed with the company witnesses.

## Evaluation

- [61] The applicants allege that their retrenchments were both substantively and procedurally unfair. As far as substantive fairness is concerned, the applicants deny that there was a need to retrench them in that they presented alternatives to dismissal which, if properly considered, provided reasonable alternatives to dismissal. In respect of procedural fairness, the applicants claim that the respondent failed to engage in a genuine joint consensus-seeking process in light of the alternatives, which they had identified. The crux of the case is concerned not so much with whether Fugro SA was facing a general need to restructure but whether that operational need necessitated the retrenchment of the applicants. Nonetheless, it is important to identify the nature of the operational issue facing Fugro SA, which prompted it to embark on a retrenchment exercise.

### Existence of an operational reason

[62] The Covid 19 pandemic and the restrictions on the movement of people and work which were imposed as countermeasures were external events over which Fugro had no control. It had to deal with the impact of those developments on its business. The principal negative consequences for the group and its individual affiliates, such as Fugro SA were two-fold. The ability to freely assign staff to project sites around the globe was severely restricted and there was little movement possible, though it seems travel became a little easier from around October 2020, subject to satisfying essential service work criteria and the availability of flights. Secondly, the world oil price plummeted, leading to a moratorium on new petroleum exploration. The immediate consequence of these developments was that planned projects were cancelled or postponed indefinitely and existing operations were restricted by the limitations on the free movement of staff. This effectively meant a loss of clients. Consequently, existing staff compliments exceeded the number of personnel needed for available work.

[63] The impact on FSBVBV's MAI work was dramatic, as reflected in drops of 50% of its work and 65% of its revenue. It cut its workforce proportionately to the amount of available work. Casualties of that measure included the applicants, whose secondments were terminated. A further consequence was that FSBVVB, which ran all the MAI projects in the region where Fugro SA operated, was compelled by law to first shed staff who were not protected by European labour law. This also meant that any of the limited new work opportunities that might have arisen in MAI work would first be offered to onshore staff, severely restricting the possibility of the Fugro SA employees being assigned to such work. This meant that Fugro SA had to deal with the problem of staff, whom it had always seconded to work on FSBV projects, who were now without MAI projects to work on. In addition, the Fugro

group decided that all affiliates must align their staff compliment with the existing work available and aim to achieve a reduction in staff numbers of 10 %. This figure was not identified as one of the reasons for possible retrenchment appearing in the s 189 notice, though it was repeatedly mentioned by the employer's witnesses as if it was an end in itself. Essentially, the operational need was to align the workforce with the remaining income generating work, which was still available. The term 'right sizing' was a more accurate description of the true objective.

### Alternatives to retrenchment

[64] The applicants proposed alternatives, which they plainly believed would alleviate or eliminate the financial burden of paying their salaries, thereby trying to achieve the same end of reducing the salary bill, but without retrenching them.

[65] The method with the least negative consequences for the firm and other employees, which they proposed was to find alternative new work opportunities for them, which would have effectively meant that their continued employment would be financed by new sources of income. A different approach was to simply retrench other MSC engineers with less service in their stead and to replace them with the applicants, on the basis that such a substitution

would be relatively easy to achieve. The third approach was to minimise or eliminate their impact on the wage bill for an indeterminate period by placing them on some form of unpaid leave, until such time as fresh work opportunities arose. The specific variations on this them, ranged from a partial reduction in their salaries, to increasingly longer periods of unpaid leave, with or without medical aid and provident fund benefits.

- [66] In relation to obtaining new work opportunities or replacing existing MSC engineers, Fugro SA raised practical difficulties to implementing such proposals. On the question of retaining them as employees but not paying them full salaries or benefits by means of some kind of unpaid leave arrangement, the main objection raised by the company was that any remuneration it paid the applicants, would not be covered by revenue generated by them. As to the option of unpaid leave without benefits, the company simply judged this to be too indeterminate and not in the applicants' interest. The parties differed over whether any these alternatives were feasible or not and whether Fugro SA had unreasonably rejected alternatives to retrenchment. Each of these alternatives is dealt with below.

#### Other work opportunities in the Fugro group or third parties

- [67] Much evidence was led by both parties on whether other work opportunities existed. The applicants placed a great deal of reliance on emails of anticipated projects for which the applicants as engineers with primarily MAI experience would be suited for. Work of this kind which seemed might become available around the time of their retrenchment were some short-term secondments mainly in the UK. However, there was no evidence that these materialised. This is hardly surprising as Fugro's European entities would have been compelled to use their own staff.
- [68] Other potential prospects of Fugro work around the time of their retrenchments were in Saudi Arabia and Qatar Although Hunter and Stemmet were of the view it did not materialise, Hunter could not dispute that two of the applicants had been earmarked for the project and that Mr Maramba was scheduled to go but the only reason he didn't was because of his BMI reading, which disqualified him from travelling. Around the time of their retrenchment Herbst and Jaynarayan were identified by FSBV as potential candidates to perform the latter work and a request was made to retain them on Fugro SA's staff pending FSBV hiring them. Fugro SA's response to this suggestion of retaining them until they were hired was that, notwithstanding their retrenchment, they could still be engaged to perform the work as freelancers, at the intercompany rate.
- [69] On a balance of the evidence, it seems that the Equatorial Guinea project could have accommodated the applicants in mid-September, even though it might not have been absolutely certain in mid-July 2020, when it was first announced.
- [70] It is true that Pillay adduced a few advertisements of work which he claimed were circulating at the time of the consultations, but there was no evidence these were raised in the consultations by the applicants as alternatives to retrenchment. Two positions were with a competitor of Fugro. One Fugro post was in Germany and the other a land surveyor project

in the USA. In the circumstances prevailing in Europe, it seems highly unlikely any of the applicants would have been considered for the German posting and it is far from clear that they would have been experienced enough to work on a land survey. I am mindful that the court should be wary of second guessing the consultation process based on issues not canvassed in the course of the consultations.

- [71] Notwithstanding the above, it was not unreasonable of Fugro SA to be unsure of whether any of these projects would actually materialise, and it cannot be said that at the time these were guaranteed alternative assignments for the applicants, which would definitely have allowed them to be engaged in work, generating revenue to pay their remuneration. On the other hand, it was only with hindsight that the company finally knew which projects had not materialised.

‘Bumping’ existing MSC staff with less service than the applicants coupled with training of the applicants

- [72] Pillay conceded that the applicants’ prior MSC expertise was to some extent outdated and would need refreshing before they could be assigned to MSC work. The parties differed significantly on how long this would take. There was some overlap in the technical equipment and software used in the MAI and MSC fields, but the evidence that the extent of that overlap was limited was not seriously contested. It is true that Pillay testified that he had previously learnt on the job using technical manuals. Even if less training was required than Fugro SA claimed, two problems remained. Firstly, was it feasible to undertake training in the prevailing conditions and, secondly, would it be possible to simply substitute the applicants for MSC staff currently engaged on the one, or at most two projects still underway at the time.

- [73] The feasibility of undergoing training was also a matter of factual controversy. Essentially, two forms of hands-on training with equipment could be conducted. Firstly, training could be done using equipment in Fugro SA’s workshop. Secondly, it could be done on a vessel engaged in a project. On balance it seems that there was no suitable MSC equipment for practical training at the workshop at the time and no work was being undertaken there. It was common cause that in the ordinary course of business, training could take place on a ship utilised in an MSC project, provided the client was agreeable to the additional crew on the ship and if there was enough bunk space available to accommodate the staff being trained. There was evidence of a former MAI engineer being retrained partly at the workshop and partly on board a ship, but he had occupied a “pay slot” when on the vessel. Fugro SA acknowledged that personnel had been trained on vessels engaged in current projects when the personnel were not necessarily being paid as part of the team, but that had been possible under different economic circumstances when work was more plentiful.

- [74] In the case of the applicants' the only realistic training option would have been if they could be trained on board one of the vessels. Even if there had been bunk room on one of the vessels, they would not occupy pay slots, so their salary would have been for Fugro SA's account. Such an arrangement would run counter to the need to align staff with available work.
- [75] Apart from the difficulties of retraining, if it did so and retrenched existing MSC staff replacing them with the applicants, Fugro SA would have to deal with two other problems. Firstly, it would have to persuade existing clients to accept the staff substitutions despite having awarded the contract on the basis of the CV's of the existing MSC personnel, which it supplied clients with. Secondly, it would have to take a risk of possibly not obtaining future MSC work because of the applicants' less extensive MSC work track records. Given these obstacles and risks, it does not seem unreasonable of Fugro SA to reject this alternative to retrenchment.
- [76] For the sake of completeness, the question of online training through the academy must be addressed. Firstly, while such training might have enhanced the applicants' MSC expertise, it was never suggested that such training would have sufficed to enable them to replace existing MSC personnel. Secondly, there was no evidence to gainsay the evidence that the academy had not re-opened.

#### Unpaid leave

- [77] In the original notice of possible retrenchment, Fugro SA had identified unpaid leave as a possible alternative to retrenchment. However, when the applicants proposed a variety of forms of unpaid leave, the firm declined to entertain any of them. The proposals varied from what, in practice, would have amounted to short time work, to a lay-off. At one end of this spectrum of possibilities the applicants would still be remunerated according to the time they were on duty. At the other end, they would not be receiving any form of remuneration including provident fund and medical benefits. The company's reasons for rejecting this alternative also varied according to the nature of the unpaid leave under consideration. Provided the leave arrangement entailed any payment of remuneration or benefits, the company was not prepared to entertain it because the outlays would not be covered by additional

revenue. In terms of the revenue squeeze Fugro was experiencing, it is understandable why this was unpalatable to it. It should be mentioned in this regard that the Provident fund and medical aid benefits alone could amount to approximately R 7,000 per individual per month.

[78] However, Fugro SA's reason for rejecting unpaid leave without even having to maintain benefit payments was that it could not foresee how long that would last and felt that it would be prejudicial to the applicants. There was no evidence that this was conveyed to the applicants at the time, nor that it sought their own views before drawing this conclusion on their behalf. It also did not

even engage them on the question of how long they envisaged such an arrangement might endure. It is noteworthy that Stemmet did not see a problem with a period of three to six months unpaid leave but was not prepared to entertain it for an indefinite period. Fugro SA's witnesses indicated that they could not foresee how the applicants could cope for any number of months without income. Pillay maintained that the applicants would have been willing to accept an initial three-month period of unpaid leave, which could be revisited when it ended. As things turned out Fugro SA rejected any unpaid leave without benefits, simply because it did not know how long it might last and because it decided it was not in the applicants' interests.

Be that as it may, a lay-off without pay or benefits would have cost Fugro SA nothing and would have staunched the flow of any unfunded remuneration costs immediately, albeit temporarily. It would have given both parties more time to explore pending work opportunities and see if they materialised.

[79] In the circumstances, it is odd that Fugro SA did not seize on this option at least on a trial basis. I accept that the situation confronting it was unprecedented, but there were potential work opportunities shortly in the offing which might have come to fruition, and it was not as if the firm needed to find a vast number of viable openings to accommodate the three applicants. I also accept that the prospect of openings ultimately materialising might have seemed slim, and the company's pessimism at the time cannot be judged with the benefit of hindsight. However, there were projects, which were imminent at the time. Whether or not they actually eventuated would have been known within a relatively short period of time. It is difficult to understand why the Fugro SA did not adopt the unpaid leave proposal while waiting for confirmation of the pending Middle East work. It could have engaged the applicants to agree on a time limit on how long it would wait for pending work to be confirmed. There is no demonstrable prejudice such an arrangement would have caused it. It seems that Fugro SA's decision was influenced by the pressure it was feeling from the Fugro group to be shown to have reduced its headcount in line with existing projects, irrespective of what arose in consultations. This is the only plausible explanation for its insistence on not prolonging the applicants' employment even on the basis of implementing a lay-off for a limited period of time.

[80] To this extent Fugro SA did not attempt to implement a feasible alternative to retrenching the applicants, which had the potential of prolonging their paid employment by Fugro SA, which would have been to the benefit of both parties. Accordingly, it acted prematurely in deciding to proceed with their retrenchment at the end of July 2020. In the circumstances, it did not resort to dismissal as a last recourse, in keeping with the obligation not to dismiss an employee if it can be avoided without imposing an undue burden on the employer[1]. As

such, the applicants' retrenchments were substantively unfair.

- [81] That said, the gravity of Fugro SA's omission must be qualified with the understanding that at the time it could not be said with certainty that such a measure would necessarily have eliminated the possibility of retrenchment in the reasonably near future. The failure to resort to a layoff in the form of unpaid leave merely meant that a feasible alternative measure to the applicants' retrenchment, which at the time could reasonably be expected to have resulted in the continuation of their permanent paid employment if the imminent projects materialised, was not adopted.
- [82] In this regard, it is noteworthy that Fugro SA was specifically asked by FSBV at the time of their retrenchment to retain the applicants in employment so that could be hired by FSBV for the Middle East project, but Fugro SA's attitude was that they could do this work as freelancers if it materialised. It showed no interest in exploring the opportunity of retaining them as employees, by means of a relatively short unpaid leave arrangement pending an imminent decision on that work. It had said in consultations that it could envisage a period of unpaid leave until October 2020 but only if new work was certain at that stage. However, no reason was advanced why that could not be done just because the prospect of work was imminent but not confirmed. In either scenario the company would not have been financially disadvantaged by agreeing to a layoff for that time, if it was on the basis of no remuneration or benefits.
- [83] Moreover, Fugro SA's goal of aligning staff with available work would only have been temporarily postponed. If the applicants had ultimately obtained the work, then the staff would have been aligned with available work. Moreover, the underlying justification for the alignment objective was plainly to ensure that paid employment was directly linked with work revenue streams. A limited period of unpaid employment with a view to obtaining new a new revenue stream, which would directly fund paid employees generating that revenue stream would hardly have compromised the alignment objective. I note that in *SA Commercial Catering & Allied Workers Union on behalf of Mvuyana & others v Oyster Box Hotel (Pty) Ltd*, the Labour Court held that where a hotel was closed for a period of two years while it was being refurbished, the employer failed to comply with its obligation to engage in a meaningful joint consensus seeking process with a view to agreeing on an appropriate

alternatives or mitigating measures under s 189(2) by not considering an unpaid layoff of employees during that period as an alternative to retrenchment[2].

#### Procedural fairness

- [84] Procedurally, the main complaint of the applicants was that they contended that Fugro SA did not genuinely consult with them with a view to avoiding or minimising the retrenchments.

- [85] It cannot be said that Fugro SA did not engage with the applicants. Key issues concerning the reason for the termination of their secondment, the existence of alternative employment opportunities, freelance work and unpaid leave were canvassed. It is also common cause it did look for work opportunities for them. By the second meeting, Fugro SA had dismissed unpaid leave as an alternative measure, even though it had itself originally envisaged it as one. Its stated reason was that putting staff on unpaid leave would not assist with the alignment process and it was uncertain how long it would last. It said it would be a good idea if it had certainty that business would improve in October but in the absence of certainty it could not consider it. Yet, on the other hand, Stemmet did not foresee a problem if it was for a fixed period of three to six months.
- [86] Inexplicably, it did not convey this option to the applicants in response to their suggestions of various unpaid leave options. Had it done so, there is every reason to believe the applicants would have agreed to it and the possibility of their continued gainful employment in the Fugro group in projects that were imminent at the time of retrenchment would have been reopened. To the extent that Fugro SA did not indicate its willingness to accept a finite period of unpaid leave or explore this option with the applicants, it failed to consult with a view to trying to reach consensus on a way to avoid the applicants' dismissal[3]. It is important not to lose sight of the principle that, unlike in cases of dismissal for incapacity or misconduct, in a 'no-fault' dismissal, the employer must endeavour to adopt alternatives to avoid dismissal, which might include deferring a final decision to retrench if that is feasible. In this respect it did not follow a fair process and it cannot be said this was a negligible omission in the specific circumstances of the case even if it might not have ultimately led to a resumption of paid employment of the applicants.

## Relief

- [87] The applicants seek compensation and payment of notice pay, as it was only on 6 August 2020 that they received notice of the termination of their services at the end of that month. Having found that the applicants' retrenchment was substantively and procedurally unfair, but also noting that there is no certainty that the permanent paid employment of the applicants would have resumed after a couple of months and that the consultation process was not woefully inadequate, two months' remuneration would be appropriate in this case.
- [88] On the question of notice pay, the applicants were entitled to one calendar month notice in terms of their contracts of employment. Accordingly, the letters of termination should have been issued by 30 September 2020 if Fugro SA wanted to terminate their employment at the end of August. Consequently, the firm owes them one month's notice pay each. There was no dispute over the amount of severance pay due to the applicants, and accordingly the applicable rate of remuneration used in that payment should be used to calculate all payments based on remuneration in the order below.

## Costs

[89] It was submitted by the applicants that they should be awarded their costs if successful. They have been partially successful and in the case of unfair dismissal cases, where the respondent party has acted in good faith in opposing the matter and its conduct of its defence has not been vexatious or unduly obstructive, it is unusual to make a cost award. No unusual circumstances have been advanced that would warrant a cost award taking account of considerations of law and fairness.

#### Order

- [1] The late filing of the Applicant's statement of claim and late filing of the Respondent's answering statement are condoned.
- [2] The retrenchment of the Applicants by the Respondent on 31 August 2020 was substantively and procedurally unfair.
- [3] Within fifteen (15) days of the date of this judgment, the Respondent must pay each of the Applicants the following amounts:

3.1 two months' remuneration as compensation for their unfair dismissals, and

3.2 one month's notice pay.

- [4] The rate of remuneration used to calculate the payments in paragraph
- [3] of this order must be calculated on same basis as the rate of remuneration the Respondent used to calculate their severance pay.
- [5] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives For the Applicant Adv. C Bosch instructed by Herold Gie Attorneys.  
For the Respondents Adv. L Myburgh instructed by Greenberg & Associates

- [1] See *Oosthuizen v Telkom SA Ltd*  
(2007) 28 ILJ 2531 (LAC) at paragraphs [4] and [5].
- [2]  
(2018) 39 ILJ 2337 (LC) at paragraphs [15],[16] and [22].
- [3] See *Reeflords Property Development (Pty) Ltd v De Almeida*  
(2022) 43 ILJ 1648 (LAC) at paragraph [15] and the cases referred to therein.

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