

SOUTH AFRICA / JUDGMENT

Raftopulos v Van De Venter

Mojapelo Inc Attorneys (J 1433/09)

[2015] ZALCJHB 123 (15 April 2015)

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COURT

Labour Court Johannesburg

BEFORE

R Lagrange

CASE / FILE NUMBER

J 1433/09

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REPUBLIC OF SOUTH
AFRICA
THE LABOUR COURT OF
SOUTH AFRICA,
IN JOHANNESBURG
CASE NO: J 1433/09
DATE:15 APRIL 2015
Not Reportable

In the matter between:

LAUREEN
RAFTOPULOS.....Applicant
And
VAN DE VENTER MOJAPELO INC
ATTORNEYS.....Respondent
Delivered: 15 April 2015
Summary: (Trial – alleged
unfair retrenchment – s 189 – alleged mala fides by
employer in relation to consultation process
– retrenchment
allegedly predetermined – employee resigned to retrenchment as
inevitable – engagement by both
parties not constructive –
employee raising matters in trial which should have been raised in
consultations - not clear
that employer established there were no
viable alternatives for applicant or why applicant could not have
been considered for one
or other of two recently available posts –
not clear that the respondent itself attempted to try and avoid the

applicant's
retrenchment – disciplinary proceedings
initiated against applicant shortly after she declined to agree to
voluntary severance
seemingly excessive reaction to complaint and
possibly pursued with a view to pressurising the applicant to agree
to voluntary
termination – general need to retrench established
– fair and objective reasons for Raftopolous's selection
not
established – employer approaching consultation with a view
to finalising Raftopolous's retrenchment not with a view
to
avoiding it if feasible – employee's failure to be more
proactive in consultation process only partly justified
by employer's
initial approach).

JUDGMENT

LAGRANGE, J

Introduction

- [1] In this matter, the applicant, Ms L Raftopolous ('Raftopolous') claims that she was substantively and procedurally unfairly retrenched by the respondent, a firm of attorneys ('VVM'). In short, the applicant claims that the consultation process in terms of section 189 of the Labour Relations Act, 66 of 1995 (the LRA) was a sham because the decision to retrench her had been decided in advance. Not only was it a sham, but the respondent's minutes of the consultation meetings were fabricated to create the impression that the process was bona fide and above board. The applicant also contended that VVM had also sought to undermine the consultation process by dismissing her for misconduct while the process was under way, but delaying the outcome of the appeal to pressurise her to conclude a voluntary severance agreement. On the question of substantive unfairness, the applicant accepted that in general, there was a need for retrenchment, but believes that she was unfairly refused alternative employment even though she expressed an interest in doing certain other work and even though that would have entailed a wage cut. The applicant also claimed that the respondent had seized on pending disciplinary proceedings as a means of pressurising her to accept voluntary retrenchment.
- [2] The respondent defended its conduct of the consultation process and maintained that it had clearly applied LIFO as a selection criteria to all staff working on the project known as the City Council of Pretoria project ('CCP Project'), which was one of the respondent's biggest clients. This contract came to an end when the respondent's bid to secure a renewal of the contract failed. The applicant had been the project manager of the CCP Project. The

respondent also maintained that it had offered her a suitable alternative position, as it had done with other staff, but she had refused the alternative. It further denied that the applicant had the necessary skills to fill the position of either of two other employees, whom she believed she could have replaced namely, Ms S Basson ('Basson') and Mr A van der Walt ('van der Walt').

- [3] The trial proceedings took place on 27, 28, 29 February and 10 and 11 June 2013. The trial was due to start on 18 March 2013 but owing to the notice of set down having been sent to the applicant's attorney's previous address, it had to be postponed on that occasion. Difficulties were experienced in locating the record for initial proceedings which regrettably delayed this judgment. Ms L Pretorius (née Roos) and Ms T Henwood (née Van der Walt), a labour consultant from Labournet and HR Manager of the respondent respectively, gave evidence for the respondent. Raftopolous testified on her own behalf.

The sequence of events and material evidence

- [4] What is set out below does not purport to be a comprehensive summary of all the testimony. The sequence of events is by and large common cause. It must be said that the parties' respective efforts at narrowing the issues in dispute in the pre-trial minute was perfunctory and did not reflect the diligence to be expected from the professionals representing them.
- [5] The applicant originally rendered services to the respondent from September 2007 to May 2008. There is some dispute about whether she was an employee at this stage or an hourly paid consultant. Be that as it may, she was employed as a Project Manager and Data Analysis (sic) from 1 May 2008 on a monthly salary of R 41,700. The key responsibilities and job outputs were described in her contract of employment as: (a) analysing data; (b) mapping out new process of clients; (c) implementing the processes;
- (d) liaising with clients, and (e) reporting. Essentially, this work related to the IT design and management of the clients' debtor's books. Approximately 28 people were affected when the firm was unsuccessful in re-tendering for the CCP project when the initial contract expired. Other functions affected by this were staff working on emoluments attachments, tracing, data processing and Raftopolous.

Preliminary interactions between Henwood and Raftopolous

- [6] Between 6 and 16 October 2008, Raftopolous was issued with a notice of "Contemplated Retrenchments/Redundancy" by Pretorius. Henwood testified that staff was given the option of following the consultation process or entering into a voluntary retrenchment agreement from the commencement. Labournet was appointed to manage the process.

- [7] Raftopolous claimed that it was during the first occasion that Henwood spoke to her about retrenchment on 10 October 2008 that she explained the two alternative processes available: either to take a voluntary severance package, which meant she would not have to work notice, or to follow the consultation process for a month and then be retrenched. Raftopolous claimed that she had been called to Henwood's office and asked if she knew about the retrenchments and was told that she had been earmarked for retrenchment.
- [8] According to Raftopolous, she had gone back to speak to Henwood at Henwood's request on 13 October 2008. Raftopolous asked her to explain both 'options' again. When she asked what would happen next, Henwood issued her with the voluntary severance agreement and told her that if she signed it she would be paid out that day. Raftopolous did not understand why the agreement said voluntary termination rather than voluntary retrenchment and needed to think about it which is why she went back to Henwood a second time. Henwood did not specifically deny that this meeting had taken place and mentioned that she only gave Raftopolous a copy of the draft voluntary retrenchment agreement when she asked for one.
- [9] It was the applicant's interaction with Henwood on 10 and 13 October 2008 which led her to believe that her retrenchment was a pre-determined issue and that anything which followed that would merely amount to going through the motions. Formal consultation meetings took place on 16 October and 12, 15 and 19 December 2008.

Meetings on 16 October 2008

- [10] At an initial consultation meeting on 16 October, the meeting simply traversed the contents of the notice and invited employees to reflect on it. According to Henwood, employees were invited to provide written proposals of alternatives to retrenchment. It was envisaged that management would respond in writing on the viability of such proposals and a further meeting would be scheduled. The other employee present in the meeting was one 'Oscar' who fell out of the consultation process subsequently after he agreed to voluntary severance. Raftopolous's transcript of the meeting makes no reference to a written proposals being exchanged. The facilitator, Mr Kabelo Heisi ('Heisi') of Labournet, seems to have accepted that Raftopolous was willing to be redeployed within the company and she wanted to consider that option once she got a clearer picture of positions and how it would affect her conditions of employment. He also anticipated that the employees would meet with Henwood and Michelle and discuss with them the terms and conditions which might apply to other available positions.
- [11] Henwood said she also had a separate discussion with Raftopolous and the firm's recruitment manager, Michelle on the same day. Michelle referred to Raftopolous to her previous employer at a recruitment agency, because she believed he might be able to help her find a position in view of her vast IT experience. He was looking for someone with project management and IT experience. Henwood denied that this suggestion had been made to encourage Raftopolous to take up work outside the company or to discourage her from looking for work inside the business. Henwood also claimed that the suggestion had

come from Michelle and not the company. The purpose of the meeting had been to discuss the prospect raised by Michelle and not to consult Raftopolous about other alternatives. It was also suggested to Henwood that when she said to Raftopolous in the same discussion that, even if she was receiving a salary of R 23,500-00 she was not made to be a debt collector that was an attempt to discourage her from considering that as an alternative. Later under cross-examination, Raftopolous sought to imply that she would have considered the position if it was offered and had not paid attention to the prospect of a debt collecting position in the call centre because she was still “trying to fathom” the external position being proposed by Michelle and would not have heard Henwood talking about this. She would not have lightly brushed aside an offer of R 23,500-00 for that kind of work. Henwood argued that if Raftopolous was interested, nothing prevented her from raising a call centre agent’s post as a possibility. She further denied that there was a legal position available at that stage carrying a salary of R 23,500-00.

- [12] Raftopolous did not have any difficulties with the suggestion made by Heisi at the meeting about discussing alternative posts at the firm, but she did not believe her discussion with Henwood and Michelle accorded with what he had intended. The subsequent discussion was not supposed to be confined to trying to place outside the company but was supposed to look at available positions within the company. Moreover Henwood had expressly said that the subsequent meeting had nothing to do with what Heisi had directed.
- [13] An unusual aspect of the case is that Raftopolous approached Henwood shortly before the consultation meeting took place on 16 October 2008 and clandestinely recorded their conversation. She approached Henwood on the basis that she was thinking of signing the voluntary severance letter but wanted clarity about the process. Henwood outlined the process and Raftopolous’s transcript of the recording of what followed reads thus:

“Laureen: Now what would be the point of this if, I am already, I mean I know I am already retrenched you told me that correct, just explain the first one again the voluntary.”

Tabetha: Ok the first one means that we are not going to meet with you every week ok. You are just do not assign the voluntary retrenchment and we and pay you out the immediately and you do not need to work in the notice period in ok. But what we officially doing here is you basically a working like and notice period in and we pay you out after the fourth consultation. The reason we have to do that is that is because according to labour brought? There are only two ways to do it, either the individual takes a voluntary retrenchment normally followed the four-week consultation process. So it is basically we are just rained the procedure. Understand what I am saying. We have to do it that way. There are only two ways. Either the individual takes the voluntary recall we follow the four weeks and terminate after the consultation.

Laureen: Right but I mean either way I am retrenched.

Tabetha: Yes.

Tabetha: the only other alternative is to go into the Call Centre which is the only available positions we have currently in an obviously the same sort of position becomes available again you know, business picks up, then obviously we will invite you first for an interview before we invite anyone else for an interview.

Laureen: I still do not see why I should go through the process when

Tabetha: because we have to go through the process according to law, we don't have a choice, that is what we as a company have to do, we don't have a choice, we cannot not do that.

Laureen: But I mean you already decided, have you not. You have decided.

Tabetha: Well at the moment.

Laureen: you decided last week you already decided that's it I'm retrenched.

Tabetha: Well the thing is according to this thing, obviously we are speaking about possible retrenchment. In the next four weeks if something miraculously happens, what I am saying to you is in the next four weeks I, I cannot predict what will happen in the next four weeks, but as far as it stands at the moment there is no other option at the moment."

[14] Henwood could not really dispute the contents of this conversation but disagreed that it meant that Raftopolous's retrenchment was predetermined because the conversation had to be understood in the context. On four or five occasions in the conversation, Raftopolous had pushed her to say something because she knew the conversation was being taped. Henwood contended that the conversation was just a 'general' one and it did not mean that no alternatives might arise, but just that there were none at that stage. Had Raftopolous raised alternatives with them the firm would have looked at those. Furthermore, she would not have offered voluntary retrenchment if Raftopolous had not asked about it. From that point onward, Raftopolous was the only person who had not accepted a voluntary severance agreement.

Disciplinary and Appeal Proceedings

[15] About a week later, a report was received that Raftopolous had phoned another recently employed employee of the company, Basson, and told her that the company was no good and she had made a mistake joining it. Management took this very seriously and immediately suspended Raftopolous. Raftopolous claimed that all she did was to tell Basson that the company was retrenching staff after Basson had repeatedly asked her if she had made a mistake joining it. In her evidence in chief, Raftopolous said that she had personally asked Basson why she had left her previous company and she told Basson she should not have.

- [16] Henwood did not deny that she did not ask Raftopolous about her version before suspending her. In Henwood's view that was what the enquiry was supposed to determine. Raftopolous was understandably aggrieved that the word of an employee who had just joined the company a fortnight earlier was accepted at face value without making any preliminary enquiries with her about the allegation.
- [17] Between the first consultation meeting in October and the subsequent ones in December, the applicant was subjected to a disciplinary enquiry for an alleged breach of contract and bringing the company's name into disrepute by allegedly discussing her opinion of management with Basson. Raftopolous believed that the timing of the complaint was odd because she had spoken to Basson on 10 October 2008 but Basson had only laid the complaint after the consultation meeting with Heisi on 16 October 2008 in which the applicant had expressed an interest in the position that Basson had been employed in. Raftopolous also felt that the company had not brought the disciplinary charges in good faith as Henwood had admitted that Basson had lied, though it must be said that Henwood was never tested about why she did not raise this if that is what she believed, and the transcript of that conversation suggested that she was not wholeheartedly agreeing with Raftopolous.
- [18] The disciplinary hearing was conducted by Heisi, who had initially managed the retrenchment consultations with Raftopolous. He found that Raftopolous had pleaded guilty to the first charge and found her guilty of the second. He recommended her dismissal. Raftopolous lodged an appeal. A controversial issue was whether his recommended sanction had been altered from a final written warning to dismissal. Henwood claimed that the outcome she had received recommended dismissal and she was very upset when the confusion over the correct recommendation became apparent at the appeal hearing. This caused her to lodge a complaint with Labournet.
- [19] The enquiry was concluded on the 3 November 2008. Before the outcome was made available to the firm, Henwood approached Raftopolous and again offered her the option of voluntary retrenchment. The first approach was on 5 November 2008 when Henwood spoke to Raftopolous on the phone. Raftopolous said that she had sent an SMS to Henwood after the call declining the offer. The following day she went to see Henwood and during the course of that discussion, which was also recorded by Raftopolous, Henwood encouraged her to accept the voluntary severance agreement on the basis that if the outcome of the disciplinary enquiry was dismissal then she would only be paid up to the date of the outcome, whereas if she accepted voluntary retrenchment, she would be paid a month's salary and her termination of service would not be recorded as a dismissal. Henwood also warned that if the sanction came back as a first and final written warning then she would continue with the retrenchment process.
- [20] Henwood was cross-examined extensively on this conversation and it was suggested to her that she was attempting to pressurise the applicant to accept voluntary severance by raising the prospect of her dismissal as a worse alternative. Henwood said that she simply wanted to give the applicant the option of receiving more money which she would have forfeited if she

was dismissed. At that stage she simply did not know what the outcome of the enquiry would be. She admitted asking Raftopolous if she intended to go to the CCMA in the event she was dismissed, but denied that the purpose of testing her willingness to accept voluntary severance was to see if CCMA proceedings could be avoided. In keeping with what she was recorded by Raftopolous as saying at that meeting, Henwood said that she had only raised this issue because she had found the whole process very stressful herself and wanted to prepare herself for possible CCMA proceedings. It was the first retrenchment process she had been involved in.

- [21] A first appeal hearing was heard by Mr. D Malatsi ('Malatsi'), also of Labournet, on 20 November 2008. A second appeal hearing was chaired by Pretorius. The appeal process was finalised when the appeal was upheld on 26 November 2008. According to Pretorius, the reason for holding a second appeal hearing was because of errors which had taken place in the enquiry process, namely that the chairperson had relied on hearsay evidence and erroneously recorded that Raftopolous had pleaded guilty to the first charge. A controversy arose at the start of the first appeal proceedings before Malatsi, when it became apparent that, according to the outcome of the hearing obtained by Malatsi, Heisi had recommended a sanction of a final written warning, whereas the recommendation made to Henwood was dismissal. Malatsi said he was advised by Heisi that he could find the outcome on his desk and that was how he obtained his version of the document. Because Malatsi was unable to obtain clarity from Heisi about which document was correct, the hearing was abandoned until matters could be clarified. Subsequently, a fresh appeal hearing was then convened with Pretorius as the chairperson. Pretorius denied that the recommended sanction had been changed from a final written warning to dismissal in order to pressurise the applicant. Henwood likewise denied that the outcome had been changed at the behest of the respondent to one of dismissal.
- [22] Pretorius denied that the object of the disciplinary process had been to pressurise Raftopolous because she had been the only employee who refused to sign a voluntary severance agreement. Pretorius contended that Raftopolous had never suggested there was an ulterior motive for the disciplinary proceedings. Further, not all staff had signed voluntary severance agreements as some had accepted alternative placements. At the time Raftopolous had also never contended that her suspension was also a device to pressurise her. Further, if it had been the case that the disciplinary process was initiated for ulterior reasons she would not have upheld Raftopolous's appeal. Pretorius also claimed that at the time she chaired the appeal hearing she was unaware of the retrenchment process.
- [23] Henwood was the complainant in the disciplinary proceedings and represented VVM in the appeal proceedings as well. As far as she was concerned, the disciplinary process merely interrupted the consultation process. When it was over the operational and financial situation of the company had not improved. Consequently, the retrenchment process resumed.

[24] From the time she was notified of the disciplinary charges until the conclusion of the appeal proceedings, Raftopolous was suspended. According to Raftopolous, she was only recalled from suspension when the retrenchment consultation process recommenced in December even though her appeal had been upheld in November. Henwood said that it was not the case that Raftopolous was not allowed back, but there was simply no other work for her to do. She also denied that she had been escorted to the car and had not been given an opportunity to collect her belongings when she was suspended, but did not have personal knowledge of what transpired. Although the disciplinary process ultimately ended with the applicant being 'vindicated', she said she found it difficult to take the resumption of the consultation process seriously.

Before VVM made use of the services of Labournet, the initial interaction retrenchment with Pretorius was conducted in-house by Henwood. Pretorius had no knowledge of what transpired in the meetings before she became involved in the retrenchment consultations in December 2008. Meeting of 12 December 2008

[25] According to Pretorius's notes of the consultation meeting on 12 December 2008, which reconstituted the retrenchment process following the disciplinary proceedings, the applicant had said that she did not have any alternatives to propose. Pretorius was challenged on her recording of this, but the suggestion made to her that there was no reflection of Raftopolous having said this in Raftopolous's more comprehensive transcript of those discussions was misleading as it does appear in that transcript that Raftopolous did agree that if no new clients had been signed on that she would have no work to do as one of her jobs was processing new clients on the debtor database system.

[26] In defending the respondent's stance that it had no alternative positions for Raftopolous, Pretorius testified that Raftopolous had been the only Project Manager in her department and she was not qualified for other positions given her experience in data and IT, whereas the other available senior positions required call centre and auditing experience. The two positions in question were those occupied by Basson and van der Walt who had been employed after Raftopolous in the call centre operation.

[27] Henwood testified that Basson had been employed as a book manager with the responsibilities of: (a) analysing books; (b) daily reporting to be sent by 10 H00, and (c) checking campaigns SMS letters etcetera. Henwood testified that Basson had debt collection experience and van der Walt had auditing skills.

[28] Towards the end of the meeting there was a discussion about the redundancy of Raftopolous's position. Henwood explained that her position had become redundant because the firm was not getting new clients and having closed down the sales centre there was only one call centre left. In the absence of new projects, there was little work for her to do. Raftopolous then said she believed that the company wanted to get rid of her because she was one of the highest paid staff in the data department. Thereafter there was a lengthy discussion about the impact of the closure of the sales department which had led to losses

that necessitated the cutting of overheads. Raftopolous acknowledged this though she would not agree that, what she herself described as “the huge loss in sales” and the associated loss in the call centre of R 500,000 per month meant that there was a downturn in the business as well. It seemed anomalous to her that that they employed other staff such as Basson while retrenching. It became apparent that

Raftopolous was not aware Basson that she had been employed as an analyst because the previous incumbent had resigned. Eventually,

Raftopolous said that she “understood” the company’s reasons for retrenchment and the discussion moved on to alternatives she could propose.

[29] It was at this juncture that Raftopolous said “If there are no new clients coming in, then what work would I do?” She was then asked by Pretorius if she had other experience or whether there was any other position or function she could not perform in the company, to which she responded that all her experience in the last 30 years was in IT and she had joined the company to help them develop call centre data bases into a system, but that did not materialise so she ended up doing business analysis and business process modelling which is not what she had been employed to do. Pretorius then asked: “So you basically did business analysis and business processing. Is there not any other position within the company that you think you could do and obviously your position would become redundant?” Raftopolous’s response was: “If so they would have to create a position,

which they do not currently have. I could help Lior with municipalities.” A discussion then ensued about ‘Lior’,

a director, who also managed municipal debt collections. Henwood rejected this proposal on the basis that Lior’s workload had been reduced by the closure of some of the departments and that the management of municipal debt was on a trial basis. Consequently,

there was no need for someone to assist him.

[30] Raftopolous’s own transcription of the discussions in the meeting ends at that point, but evidently there was some further discussion about other alternative positions during which the applicant said she could not move to a call centre position because of the huge drop in salary that would entail. According to the notes taken by Pretorius, Raftopolous also indicated that she did not have the skill qualifications to ‘bump’ someone out of their existing position in the company. In her evidence in chief, Raftopolous denied that she had ever said this and implied that such a statement would have been implausible that time because alternative positions had not been discussed. However, it was never put to either of the employer’s witnesses that she had never made the statement.

Meeting of 15 December 2008

- [31] During the meeting on 15 December 2008, Raftopolous was asked whether she would consider positions if they entailed a drop in salary. Raftopolous said she would have to think about that and discuss it at the next meeting. Under cross-examination, Raftopolous claimed to have said that if there was a definite offer she would consider it, but this was not tested with either of the respondents' witnesses. She also enquired about whether VVM intended to continue to develop the so-called "front end" of the business, which is what she had been employed to do. On this issue VVM was not in a position to respond on that question.
- [32] On the question of selection criteria, the consultation notice had indicated that at that stage in the data department, the firm was contemplating that Raftopolous's position and those of two data analysts would be affected and that it proposed to use LIFO as the selection criteria if the positions were made redundant. It was suggested that the applicant did not understand the implication of LIFO being used as a retrenchment criterion, but Pretorius contended that Raftopolous would not have made alternative proposals if she did not understand the principle.
- [33] Pretorius denied that Raftopolous had again complained during this consultation that Henwood had told she would be retrenched.

Meeting on 19 December 2008

- [34] In this meeting, Raftopolous initiated the discussion repeating her claim that the process had been predetermined, that the significant losses incurred in the call centre department were no longer an issue because staff had been moved to work in the debtors department and that the firm had actually grown both in terms of staff numbers and projects since she was employed. The employer's response was that she had not been the only person retrenched and therefore she could not say the company simply wants to get rid of her. Further, the financial position was such that the company had not paid bonuses and there was no guarantee that current projects would be renewed. It had not yet recovered from the losses it had incurred.
- [35] Under cross-examination, Pretorius was tackled on the question of why she had not delved into the applicant's contention that the process was predetermined. She believed that it was for Raftopolous to provide the basis of her contention and not for her to extract it from her. Henwood's response to the same question was that Pretorius had dealt with it in the course of guiding the company through the retrenchment, though she could not point to any specific response given to Raftopolous's challenge.
- [36] Further discussion then ensued about the possible alternative positions and the skills required for those positions. As regards the development of the C3 mapping program which Raftopolous developed, there was no new developmental work required except by way of enhancements. According to Pretorius's notes, Raftopolous agreed she did not have the skills required for the other two positions occupied by van der Walt and Basson and that the explanation about the C3 program made it clear that there would be no further development work for her in that area. The C3 program was a suite of programs developed for the call

centre operation.

- [37] Under cross-examination, it was suggested to Pretorius that Raftopolous believed that the additional skills and experience which the company had relied upon to justify the retention of van der Walt and Basson were not in fact part of the job requirements of the two positions in question. Pretorius, who admitted to have limited knowledge of the specifics of the two posts in question, disputed this. She emphasised that the book manager of the debtors call centre was required to analyse statistics and make recommendations on how costs could be saved based on his auditing experience. The other post of call centre manager called for someone who had direct experience of call centre management and debt collection.
- [38] Pretorius's notes reflect that after the discussion of these positions, Raftopolous was asked if she had other proposals to make. Pretorius denied that the discussion of the two posts had been superficial and pointed out that it was only when Raftopolous agreed she did not have the necessary skills of those positions that she was asked what other proposals she might have to make. If Raftopolous had claimed she did have the necessary skills, then it would have warranted delving deeper into the issue. In her evidence in chief, Raftopolous agreed she did not have an auditing background on past experience in call centers, but she was never asked if she thought she could do either of those jobs. She believed that they had evaluated her based on the particular selection criteria they had used when employing van der Walt and Basson and had not considered what she could do.
- [39] When Raftopolous commented in the consultation process to the effect that even if she had alternatives they would be turned down in any event, the employer's response was that it would not turn down any alternatives without a valid reason and reiterated that the process was not predetermined; that other staff had been retrenched including people in senior positions, and that everyone had been given the opportunity of agreeing to voluntary severance or following through with the consultation process.
- [40] It was also suggested that the discussion of severance pay had been superficial. Pretorius's response was that Raftopolous had asked if the amount proposed was the norm. Raftopolous had expressed a view that what the law prescribed was not necessarily fair but had made no alternative proposal on severance pay other than to say that she thought that one week's pay was too little. If the company had wished to convey that the amount was set in stone it would not have asked her to make an alternative proposal. Raftopolous was emphatic that she had never been said to her that she had for more. She also denied saying that the law was unfair, but this was never put to Pretorius.
- [41] Raftopolous claimed that she only signed the letters of the meetings because Pretorius said that it was not to confirm that they were in fact correct, but just so the written minutes could not be altered. Though not much turns on this, this was never put to the employer's witnesses.

[42] On the question of engaging on the timing of the retrenchment, Pretorius testified that Raftopolous had agreed at that meeting that she agreed it should be finalised on that date as it dragged on long enough and was predetermined anyway.

Raftopolous's recording of conversations in meetings

[43] It was suggested to Raftopolous under cross-examination that her secret recording of conversations and some of the meetings was in bad faith and that she could hardly claim that the employer was acting in bad faith when that is how she conducted herself in the process. She claimed her motive was merely because she would not remember everything and could not take notes, but this did not explain why she did not disclose what she was doing. She denied that her intention was to use it at a later stage and that

by implication she had no intention of seriously engaging in the consultations herself. She repeated that it was Henwood who had told her she would be retrenched whichever route was followed. Raftopolous also denied that she had been advised to record the proceedings in the hope that someone would agree that the retrenchment was predetermined, or that she had made at least six attempts to get Henwood to say this during the first recorded meeting at Henwood's office on 16 October. She defended her attempt

pts to elicit answers from Henwood on the basis that she had never been through such a process for and could not see the point of it if she was going to be retrenched. Raftopolous claimed she wanted to know how the process was going to affect her personally. When Henwood said there might be an alternative she interpreted this as giving her mixed signals.

[44] Raftopolous also had no explanation why transcriptions had only been made available a week before the trial. It also appears that the transcript of the consultation on 12 December 2008 ended just before the company's minutes recorded Raftopolous as saying that she did not have other alternatives to propose and could not manage on a call centre salary, nor did she have the skills and qualifications to 'bump' an existing employee. She eventually reluctantly agreed that the company minutes of the meeting were not inaccurate.

The need for retrenchment

[45] It was only under cross-examination that Raftopolous mentioned for the first time that she had never worked in the CCP operation, but rather on two other projects, Educon and Mafuba. The document announcing the retrenchments only spoke about the sales call centre that had close down. Once the sales Department had been closed that loss had been curtailed so it was not an ongoing drain on the company according to her. Likewise, she was not working in the conveyancing or EAO department. Under cross-examination, she described her work as currently consisting of documenting the business processes in the call centre and conveyancing departments. She had never been attached to a particular department including IT. Consequently, she did not believe her own job to have been affected.

- [46] Under cross-examination, Raftopolous was tested on her claim not to have fallen within the IT department and it was suggested to her that the only reason she made the claim was to have a greater justification for being placed in Basson's job

The possibility of alternatives and the selection criteria

- [47] Henwood testified that Raftopolous was looking at the flow of information in departments and what employees were doing as well as the flow of correspondence within the department with the aim of streamlining it. Raftopolous had also analysed garnishee orders and debt collection specifically in relation to the CCP book. Raftopolous had been involved in mapping out the work of call centre staff. The analysis done by van der Walt was of a different kind and was with a view to working out strategies based on analysis of the results of campaigns such as SMS calls and the costing of campaigns. Henwood was insistent that van der Walt's work required financial qualifications, but could not easily explain why Raftopolous could not have performed the kind of analysis he did with limited additional training. Henwood defended the firm's stance on the basis that Raftopolous had herself said she was not skilled or qualified to 'bump' other staff out of their existing jobs. Henwood also conceded that if Raftopolous had designed the 3C program for the call centre, she would have known how to extract information from it, but insisted that mapping the process was not the same as using the system and denied that Raftopolous would have the skill to analyse the data. Similarly, she denied that merely because Raftopolous programmed financial aspects of the C3 system, she would be able to do the kind of analysis which van der Walt with his auditing experience would be able to perform. The nature of this analysis was described in broad terms and Henwood clearly had no personal expertise to enable her to comment on the actual content of the work.
- [48] Basson would implement strategies in the call centre using her prior call centre management experience. In a similar vein to her evidence on van der Walt's position, Henwood testified that call centre experience was needed for Basson's position as it was necessary to understand the different classes of debtors and the life cycle of debt collection. She said that Basson would sit with van der Walt and when all the data came into the C3 system (the SMSes and telephone calls) which could be put into a report and her function was to oversee the "collection part". Basson would also go to the manager at the call centre, identify forms and escalate issues based on the additional information she collected from the call centre floor. However, the call centre staff would not be aware of the campaign designed by the back office staff like Basson and van der Walt. Basson also accessed the C3 system. Hendwood disputed Raftopolous's contention that Basson had not previously run campaigns, which was all done by Lior. Henwood also denied that Basson was doing what Raftopolous had done. In particular Raftopolous had never consulted with call centre staff.
- [49] Henwood repeatedly sought to emphasise that Basson's prior management experience in debt collection of one year was an important factor which determined her suitability for the job. She was unable to dispute that the call centre function was only dealing with the very first stage of the debt collection process which was relatively simple, but she contended it

was not a simple matter of picking up the phone. However, Raftopolous claimed that she had worked on call centre SMSes when working on client's documentation as it was necessary to see if it fitted in with the call centre architecture. The wording of SMSes had been decided by Lior because of the sensitivity of such communications. According to her that responsibility would never have been given to Basson or van der Walt. If she had not had sufficient experience with debt collection she would not have been assigned to work for two years developing a database for the call centre operation. Moreover, van der Walt had no debt collection experience and Basson had no auditing experience, which meant that neither kinds of experience were pre-requisites for doing their work.

- [50] According to Raftopolous, the whole emphasis of the respondent was on the qualifications required without ever discussing the job requirements as such, which she interpreted as a way of rationalising her unsuitability for either post. Once again, it was pointed out that this was something Raftopolous had not raised during the consultation meetings. She also agreed that even though her key performance outcomes compared to those of van der Walt and Basson did not overlap, her contract also did not mention the fact that she was involved in debt collection and processing departmental processing work.
- [51] Raftopolous insisted that her fifteen years of experience doing business analysis work at Wesbank, which entailed financial and commercial elements, was sufficient to compensate for a lack of Bcom degree when it came to managing debtors' books. When she was asked why she had not stressed her experience in commercial work related directly to IT, Raftopolous argued that Henwood should have been aware of her business experience, though this point had not been specifically raised with Henwood during her cross-examination.
- [52] Henwood also distinguished the position of a contractor who had analysed the sales department's profit and loss, Mr. L Hicks, from the position occupied by Basson, which was a new position. She could not dispute that Basson's post had been created shortly before Raftopolous was retrenched. When it was suggested to her that before appointing Basson to the post, Raftopolous should have been given a chance to prove herself, Henwood relied on Raftopolous's own statement that she did not have a skills to bump other staff out of their positions. She denied that the tenor of the consultations had been so demotivating that Raftopolous had been put off applying for positions. They did not give Raftopolous a trial run in the post because she had not made that suggestion and they would have considered it. She could not dispute that no specific offer of an alternative position had been made to Raftopolous.
- [53] When Raftopolous testified it was apparent that she felt that if LIFO had been applied either van der Walt or Basson would have been retrenched before she was. She also could not understand why the respondent had 'randomly' identified herself and two others for retrenchment if all jobs in the conveyancing, data, sales call centre and EAO were redundant. However, Raftopolous did not give any explanation why she had not challenged the identification of her post as redundant when she was told during the consultation on 15

December 2008 that there were not enough new instructions to keep the persons in the data positions busy. Nevertheless Raftopolous maintained she did not accept this rationale because new instructions were coming in from existing clients.

- [54] Raftopolous's testimony was that she would have taken a job in the legal Department at R 23,500 per month as she could not find another job at the time, she was a sole breadwinner and had lots of experience but no degree qualification. In fact she had also specifically made reference to Basson's job in the first consultation when she told Heisi that someone had just been brought in to do data statistical analysis and that could have been an option. Raftopolous said that she referred to the option in the past tense because she believed they had already made the decision to retrench her. Henwood showed no interest in pursuing this. Raftopolous believed she could have done Basson's job or possibly van der Walt's job with a little training. She

had worked in programming overseas for 17 years until she became a programmer analyst. Thereafter she had also done business analysis.

Raftopolous testified that she had done varied work at Wesbank where she had done document process modelling and had resolved problems

together with users. She was employed by VVM because she had spent two years building the call centre program. This had required her to document all processes performed by all personnel in the call centre from the time an instruction came in. She also made suggestions on improvements in the process. She disputed that auditing experience was necessary to determine what kind of SMS messages to send out. The analytical and comparative skills required for van der Walt's work did not include accounting or auditing the. She conceded that she had never designed an SMS campaign as such, but had done similar work.

- [55] As far as Raftopolous was concerned, she could just as easily have obtained the results Basson obtained from call centre staff interviews, which was relatively low level work compared to what she had been doing. Raftopolous also maintained that she had not closed her mind to a job in the call centre but simply wanted to know what the position and terms and conditions would entail. She did concede that she had never expressed an interest in a call centre agent's position as such.

- [56] Raftopolous was without work for two and a half years after her retrenchment until being employed at a school. As a result she was compelled to live with her sister.

- [57] Raftopolous was of the view that once she had been told at the start that her retrenchment was inevitable, it was difficult for her to believe that anything she said would be taken seriously. Her suggestion that she might have been able to do Basson's job and her suggestion that she could work with Lior were not taken up.

Evaluation

Was the applicant's dismissal pre-determined and was there consultation in good faith?

- [58] When the applicant was alerted to the prospect of retrenchment before the formal process was instituted, at best for the respondent, Henwood discounted the value of the consultation process as an alternative to simply accepting voluntary termination even if she did not say it was completely pointless. Although, the applicant was not able to induce Henwood to actually say that her dismissal was inevitable, Henwood held out little prospect that the result would be any different if the consultation process was concluded.
- [59] Moreover when the applicant did raise his suspicion that the result was predetermined, no attempt was made to engage with her concerns in that regard. It was merely denied. It is true that the company engaged labour consultants to manage the consultation process and that at a formal level the process did provide the applicant an opportunity to make inputs on the need for retrenchment, selection criteria, alternative positions and the timing of retrenchment. Nonetheless, it is difficult to escape the fact that all of this took place against the backdrop of the negative perspective of the consultation process which Henwood had depicted.
- [60] When it came to the discussion of alternatives to retrenchment, there was no evidence that the employer considered any possible means which might have averted the applicant's retrenchment before initiating the retrenchment process.
- [61] When it came to the discussion of alternative positions, no active encouragement was given to the applicant to apply for them even if an ordinary call centre operator's position might have been difficult for her to accept given the base salary paid to call centre operators. In relation to the positions of van der Walt and Basson, which the applicant clearly had expressed an interest in depending on the remuneration package applicable to those positions, the company did focus on the job descriptions for those two positions as a basis for excluding the applicant. It also seems that the applicant accepted at the time that she might not have the requisite skills for either post given the formal requirements.
- [62] In retrospect, it appears that the applicant may have too readily agreed that she was not equipped for either post. This was illustrated by the more exhaustive examination of the actual requirements for those positions during the course of the trial in which the respondent's witnesses, neither of whom were really qualified to understand the work involved, had some difficulty in explaining why the applicant could not have been considered for one of those posts. They could only rely on the experience and qualification attributes set out in the advertisements rather than explaining why the applicant's own extensive business analysis experience with Wesbank and her intimate knowledge of the call centre program from which information to be analysed would be extracted did not make her a serious contender for either of those positions.

[63] Be that as it may, the trial proceedings are not a substitute for the consultation process and the fact that the exploration of the real requirements of those jobs were not comprehensively explored is as much due to the applicant's perhaps unnecessary concession that she was not equipped for those jobs as it is to the respondent's failure to consider what she really was capable of.

[64] Nonetheless, what does emerge from the consultation process is that the employer itself showed little interest in exploring or offering alternatives of its own accord and attributed the primary responsibility for coming up with alternative suggestions to the applicant. This too was indicative of an absence of a serious intention to embark on meaningful consultation process. It is true that during these proceedings the applicant sought to engage with the issues the parties should have consulted on more vigorously than she did when the consultations were taking place. It is equally true that in the circumstances anyone in the applicant's

position might have taken a despondent view of what could be achieved, given the negative view of the process conveyed to her before it started.

[65] Added to this, was the employers of vigorous pursuit of disciplinary proceedings against her on the strength of reported remarks made to a new employee whose position she had expressed an interest in, without so much as enquiring about her version of events before removing her from the premises. Whatever the outcome of the disciplinary proceedings, it is entirely understandable that, having being excluded from the workplace from that time onwards on charges which hardly warranted finalisation before concluding retrenchment consultations, any person in the applicant's position would have had reason to doubt that the consultation process which ensued thereafter would entail a sincere effort by the employer to retain her employment if feasible. The defeated attitude which she displayed during her subsequent engagement in that process is hardly surprising. Thus, whether or not the applicant's retrenchment was definitely pre-ordained before the consultation process began, I am not satisfied that the process engaged in by the employer could be interpreted as a meaningful one given the prevailing environment it had created and its discouraging approach to the discussion of alternatives.

[66] Clearly, the firm's business had suffered a blow with the nonrenewal of the CCP project and a decline in other business. It was argued by the applicant that the losses emanating from those events were not continuing ones, but nonetheless she could not seriously dispute that the firm was entitled to improve its financial position, which could be achieved, amongst other means, by retrenching some staff. There was no real engagement during the consultation process or in these proceedings about the extent of the savings achieved by the retrenchment of the staff in question, what alternative methods could have been implemented to achieve the same result.

[67] Added to the decline in business, was the fact that the applicant's own position had become redundant to the firm's needs. She did not really dispute this. On a balance of probabilities, I am satisfied that on the available evidence the employer had established an operational need to reduce staff.

Selection criteria

[68] The real dispute over selection criteria concerned whether or not the persons should have been selected before the applicant on the basis of LIFO. The principal appears to have been applied to persons working within the CCP project. The essential contention is that it should have been more broadly applied across the firm, in which case Basson or van der Walt would have been retrenched instead of the applicant. As the evidence above shows, the employer's rationale for retaining both those staff was that they had been specifically employed in jobs for which the applicant was not suitably skilled. Whether that was actually true was not adequately explored during the consultation process and although much more attention was given to this issue in the course of these proceedings, in the absence of more detailed evidence of the specific tasks performed by both employees and why the applicant could not have performed them given her own experience, I am not satisfied the preponderance of evidence shows that the respondent justifiably declined to consider retrenching one of them in favour of the applicant applying the LIFO principle.

[69] Consequently, I am not persuaded that LIFO was fairly applied in the case of the applicant.

Conclusion

[70] In light of the above, the applicant's retrenchment was substantively and procedurally unfair.

Relief

[71] The applicant was only employed for a year before her retrenchment. In the general sense retrenchment was justified, but the respondent failed to prove she was fairly and objectively selected for retrenchment.

[72] A factor weighing against the applicant in determining fair and equitable compensation is that even though she had good reason to doubt the employer's sincerity in the consultation process, her secret recording of interactions with the firm in the course of the process, was also not bona fide. There was no need for secrecy if her sole purpose was to ensure she had an adequate record of what was said during the consultation process. There might have been some justification for it when she wanted to confirm utterances indicating bad faith on part of the firm before the process began, but not to secretly record the consultation process itself, despite her understandable misgivings about the employer's sincerity. It is true also that at least she did raise her complaint that the process was a sham during the consultation process itself.

[73] In the event, I have reduced the compensation of four month's remuneration I would have awarded by half on account of the underhand conduct of the applicant during the formal consultation process.

Order

[74] I find that:

74.1 The applicant's selection for retrenchment was not objectively fair.

74.2 The consultation process was not conducted in a bona fide manner and the applicant's retrenchment was procedurally unfair.

[75] The respondent must pay the applicant two months' remuneration as compensation, calculated at R 41, 700-00 per month amounting to R 83, 400-00, within 14 days of the date of this judgment.

[76] The respondent must pay the applicant's costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

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