

SOUTH AFRICA / JUDGMENT

Swanepoel v Road Laboratories (Pty) Ltd (C54/2020) [2023] ZALCCT 32 (14 June 2023) [2023] ZALCCT 32

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C54/2020

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THE LABOUR COURT OF
SOUTH AFRICA,
HELD AT CAPE TOWN

Case: C54/2020

Of interest to other
judges

In the matter between:

ALEX
SWANEPOEL
Applicant
And
ROAD
LABORATORIES (PTY) LTD
First
Respondent
Date
of Hearing: 14-15 October 2021, 30
November 2021, 16 March 2022
Date
of Judgment: 14 June 2023

Summary: (Dismissal for operational reasons – Consultation process not meaningful – canvassing of matters in evidence that should have been discussed in consultation cannot remedy defective consultation process. Dismissal procedurally unfair – Failure to ‘bump’ another employee not obviously operationally feasible alternative to retrenching applicant – dismissal substantively fair – criteria for evaluating a failure to adopt an alternative considered)

JUDGMENT

LAGRANGE J

Introduction

[1] The case concerns an unfair dismissal dispute for operational requirements. Swanepoel, Swanepoel (‘Swanepoel’) claims

his retrenchment on 25 September 2019 by the respondent, Roadlab Laboratories (Pty) Ltd (‘Roadlab’), was procedurally and substantively unfair in terms of s 189(3) of the Labour Relations Act, 66 of 1995 (the LRA).

[2] Ms S Donlin (Group HR Manager), Mr H Range (Western Cape regional manager) and Mr P De Wet (Quality Manager) gave evidence for Roadlab.

Swanepoel testified on his own behalf.

Background

[3] Roadlab is a company which conducts business in the civil engineering industry. As a technical civil engineering business It performs

material testing and geotechnical services for various clients engaged in civil construction work. The results of tests it performs

are then compared with the specifications clients are required to achieve in projects they are engaged in. It was not disputed that Roadlab has the equipment and the methodology for a vast range of materials testing, whether it be water, soil, concrete, agricultural goods or asphalt. The testing services it provides must accord with standards determined by the South African National Accreditation System (SANAS), a statutory body responsible for accrediting such testing capability. Accreditation of Roadlab by SANAS means that their clients can be confident the testing is being properly conducted, the quality of tests were guaranteed and results would be accurate. In terms of the accreditation system, only persons whom SANAS deemed competent can be a certified signatory for any particular test methodology.

- [4] Swanepoel commenced his employment at Roadlab as a Site Laboratory Manager in February 2013. He was responsible for running the Bellville branch laboratory and ensuring that testers were using the correct methodologies. Prior to his promotion in March, Swanepoel had tendered his resignation, but after consultation with Roadlab, he was instead promoted to the position of Acting Operations Manager, a post specifically created for him, which was not previously part of the firm's organisational structure. The position came with significant additional benefits and remuneration.

Issues in dispute

- [5] In relation to procedural fairness factual issues in dispute are whether:

5.1 Roadlab had followed a 'tick-box' approach to the consultation process rather than engaging in a joint, meaningful, consensus-seeking one having already decided his post was redundant, and consequently his retrenchment was a *fait accompli*;

5.2 the time given to Swanepoel between the issuing of the s 189(3) notice on 26 August 2019 and the content of the notice gave him insufficient opportunity and information to enable him to understand Roadlab's rationale for the proposed retrenchments, which materially prejudiced his ability to prepare for the first consultation which took place the next day;

5.3 the notice explained what alternatives to retrenchment Roadlab had considered and why those were not feasible, even if it did not

identify measures to avoid retrenchments still to be considered, and whether

5.4 Roadlab's responses to the questions and communications conveyed to it by Swanepoel between 5 and 12 September were sufficient to satisfy the requirement of a joint, meaningful consensus-seeking consultation process.

- [6] By the time the matter was argued, the thrust of Swanepoel's claim of procedural unfairness primarily focussed on whether the consultation process was a genuine one and whether he had been given adequate information to engage in it.

- [7] Substantively, the disputed issues relate to whether:

7.1 Roadlab made adequate attempts to find reasonable alternative positions for him to avoid his retrenchment, and whether

7.2 he was competent to have filled the post of Bellville Quality Manager, which was occupied by a Mr P de Wet, who had been recently employed by Roadlab to replace Ms A Stemmers, who had left.

Brief chronology of events prior to Swanepoel's retrenchment

- [8] It was not contested during the trial that in late 2018, early 2019, Roadlab experience a significant loss of sales of about R 3million

representing a drop of 11%. Between 2018 and 2019 profits had dropped from R 4.4 million to about R 400,000. By 2020, Roadlab experienced a loss of around R 2 million. At the time of the trial, the company was still struggling financially. Swanepoel testified that the first time he heard about these figures was at the trial.

[9] The situation prompted Roadlab to embark on a retrenchment programme based on what it characterised as a proportional rationalisation

restructuring of the company operations. Roadlab sought to cut costs and optimise personnel. The exercise entailed cost-cutting through retrenchments to reduce labour costs. In the first phase the firm sought to reduce staff where there were more staff than required, such as tool technicians. Afterwards, the focus shifted to other positions, including Swanepoel's post of operations manager.

[10] Donlin began working for Roadlab in January 2019, the same month that Swanepoel had tendered his resignation. Her first task at the company was to deal with the issue of retrenchments prompted by the decline in business in the last quarter of 2018. The retrenchment exercise was conducted across the group. Each branch constituted a cost centre and the company looked at how costs could be cut drastically to save each branch.

Swanepoel's appointment as operations manager in the Bellville branch

[11] On 15 February 2019 a letter was issued by Mr Deon Juckers in his capacity as Operations Director of Roadlab to Swanepoel. It stated that, after the candid discussion and the telephonic discussion with Swanepoel, Roadlab had made a new job proposal to Swanepoel, which he accepted. Donlin and Range explained that the post had been created with a view to relieving pressure on Range, so that he could devote himself to more strategic tasks and focus on obtaining larger contracts and generating more income.

[12] In summary it entailed the following:

12.1 Swanepoel would move to the position of Acting Operations Manager in Bellville, reporting to Mr. H Range. The cash component of his salary would rise to R33 500,00 (an increase in excess of 45%), but he would not be eligible for an annual increase in 2019.

12.2 He would be given the use of cellphone and a petrol card.

12.3 The appointment was subject to a probationary period and on successful completion the appointment would be made permanent provided he met or exceeded, certain targets by the end of May and SANAS accreditation later.

[13] Certain measurable performance targets were set for Swanepoel in the new post, namely:

13.1 He had to be accredited as a technical signatory in all methods by the end of 2019. The next SANAS assessment date was 4 of August 2019 which gave him a grace period for any minor amendments to take place.

13.2 He had to structure and manage the respective departments at the Bellville offices to ensure output was optimised and that the results presented to Roadlabs clients are accurate, valid and presented within specified timeframes.

13.3 He had to build and expand on relationships with the personnel in the respective departments, motivate and professionally manage them on a constant basis.

13.4 He was expected to acquaint himself with all the relevant test methods and procedures used in these departments.

13.5 He was to retain, maintain and build on existing client relationships Roadlab and secure new ones.

13.6 His scope as a technical signatory had to expand to include All Methods (T507), and he would have to apply for SANAS evaluation and certification during the next SANAS audit which was scheduled for the third quarter of 2019. Achievement of this target would be determined by his certification by SANAS.

13.7 Lastly, he would be required to perform various tasks determined on an ad hoc basis by senior management.

[14] The targets set out above, were in addition to other required tasks he had to perform as a laboratory manager in terms of the ISO 17025- laboratory management system, a standard adopted by SANAS for accreditation purposes.

[15] Swanepoel started in the new position on 1 March 2019. It was common cause that, in addition to his regular duties as Acting Operations Manager, Swanepoel also assumed the duties of the Asphalt Manager Mr F de Vries, after the latter's demotion as well as those of the Soil Manager, Mr G Pollman, whilst the latter was on study leave.

First phase of retrenchments and Swanepoel's role as operations manager

[16] Donlin and Range testified that the first phase of retrenchments started in May 2019 and Swanepoel was involved in that exercise. It affected mainly technicians and the number of staff having no work to do. Donlin averred that Swanepoel was involved in this phase and had gone through the names of affected personnel and those who were being retrenched could approach him in relation to 'administrative' matters. However, Swanepoel denied being party to any consultation process and said his role had been confined to providing names of union members and 'troublemakers' to be retrenched and critical personnel who were to be retained. Range did say that Swanepoel had assisted the HR department 'with the unions', but did not remember ever asking him to provide names of unionists or troublemakers. He claimed LIFO had been the criteria used. Nonetheless, Range ultimately conceded that he could not dispute that Swanepoel did not have access to any financial information relating to the retrenchments during the first phase.

- [17] On 28 June 2019 a meeting unrelated to the retrenchments took place between Donlin, Range and Swanepoel. The meeting focused on Swanepoel's performance in his new position. A letter from Roadlab to Swanepoel sent on the same day identified alleged shortcomings in his achievement of the KPI's recorded in his letter of appointment. Certain aspects of his work were described as "severely lacking" and it was stated that he was focusing too much attention on other areas of work such as HR, job descriptions and IT. Donlin said it was only during the discussion why he was not meeting his KPI's that it became apparent he was doing the other work mentioned. It was recorded that Swanepoel had been asked to recalibrate his role and what was expected of him, which he agreed to do. Despite the criticisms in the letter, the company expressed its faith in him and that he had the ability to fulfil the role and deliver what was expected of him. Nonetheless, the letter concluded that if further complaints arose and his performance failed to improve his position within the company would have to be reconsidered. Although it was not part of the documents presented in evidence, Donlin agreed that Swanepoel did the role recalibration document, setting out his understanding of what was expected of him, though she claimed it did not entail anything significantly different, though his role was narrowed to make him more effective.

The second phase of retrenchments and the redundancy of the operations manager post

- [18] For reasons which were not explained, it was only on 1 August 2019 that Swanepoel responded in writing to the company's letter of 28 June 2019. He conceded he had not satisfied initial targets but that he had been performing well above expected in other business areas during the period since his appointment. He complained that Range had redirected him to more pressing and pertinent activities, which he detailed in the letter. He also expressed his unhappiness with the notification that his performance was unsatisfactory and complained that despite working in the same premises as Range, he had received no feedback from him about his performance during that time. Donlin said she was unaware of this and could not understand why Swanepoel had not raised it when they met at the end of June if it was already a problem then. Swanepoel also claimed that he had been promised an opportunity to undergo management learnership training which commenced on 9 May but he was deregistered by Donlin on 30 May before he had completed it. In her evidence, Donlin agreed she had curtailed his course, but said this was because the course was below his level of expertise. Swanepoel expressed his willingness to accept guidance and make improvements. He also rejected allegations made in the company's letter that he had been "bad mouthing" Range. He noted that Range had not raised this with him directly and he attributed the allegation to malicious attempts by other employees to jeopardise his relationship with the business. He appealed to Range to address the issue directly with him.
- [19] Prior to Swanepoel's 1 August letter, a further meeting had taken place on 22 July. Swanepoel dealt with this meeting in another letter dated 5 August. He described the subject matter of the meeting as an exploration of options to leverage his talent to the business's advantage. In it he expressed his unhappiness about his apparent probationary status which should have

ended on 31 May and repeated his earlier complaint about the lack of any feedback or evaluation. He also disagreed with the company's view that he had not demonstrated he could manage the position as envisaged, and reiterated that he had the skills, knowledge and ability to fulfil the role. He recorded that he had submitted his role clarification to Range and asserted that he believed he had met the targets he was required to meet, but no evaluation had been done by Range. Nonetheless he expressed his satisfaction with the "new focus areas" he had been given and committed himself to fully cooperate in meeting requirements and engaging in meaningful activities of the business.

[20] Donlin stated that Swanepoel's position was not under consideration during the first phase in May 2019, but only came under consideration in July, during the second phase. The second phase had been prompted by the worsening financial position during the first quarter of 2019. Range said that, in this latter phase a few specific positions, were under consideration within the group as a whole. Donlin also testified that the focus moved to the laboratories in the second phase. By the end of August 2019, 26 employees had been retrenched across the group.

[21] According to Range and Donlin, the particular reason Swanepoel's position came up for consideration was because it was a new one and it had not had the intended result. Range still spent most of his time in the branch, rather than seeing clients. Donlin sought to emphasise that it was the post which was identified as superfluous, not Swanepoel personally. It was Roadlab's directors who decided his position was redundant sometime after the meeting on 28 June 2019. She conceded that the decision to make his position redundant was made without obtaining Swanepoel's input. The directors had advised her of the need to flatten the firm's structure. The post of operations manager only existed in the Bellville branch and was an anomaly. Swanepoel disputed this characterisation, claiming the post had always existed but was previously designated as an assistant branch manager. He argued that it was merely renamed when he was offered it.

Outline of consultation process

[22] The consultation process with Swanepoel was initiated in an email sent to him in the morning of 26 August 2019. Swanepoel claimed he heard of De Wet's appointment as the quality manager couple of days before he received the retrenchment notice. The first consultation meeting took place on 27 August.

[23] The letter, which took the form of a s 189(3) notice, indicated that Roadlab's reasons for proposing retrenchment was that it wanted to rationalise and restructure its operations, which could lead to some positions being redundant and the employees in those posts being rendered superfluous. It also wanted to revisit labour costs. The letter outlined the topics for consultation as set out in section 189 (3). Some topics were sketched in an open ended way without indicating that the company had already taken the view on them.

[24] More specifically, the notice did state that approximately 10 employees might be affected and that selection would take place on the basis of positions that were redundant with consideration being given to LIFO and skill retention as well as voluntary retrenchments. No particular redundant positions were identified. The notice also anticipated that any termination would take place on 27 September

2019. It also provided that positions with associated companies and clients could be considered as a measure to ameliorate retrenchment.

27 August consultation

[25] A brief virtual consultation meeting was held on 27 August using Skype. Donlin and Swanepoel were the only participants. Donlin explained the consultation to Swanepoel. On 3 September, Donlin asked Swanepoel if he wanted to have a further consultation and they agreed to hold another meeting on 5 September.

5 September consultation

[26] At the 5 September meeting, Swanepoel presented a number of questions he had prepared in relation to the various points made in the s189(3) notice. Both he and Donlin kept written notes of that meeting, which they alluded to in their evidence. In the brief discussion lasting just over quarter of an hour, Donlin explained that, apart from other positions such as data capturers and technicians, his position of operations manager was identified because it was recently created and it was possible to operate again without it. The only alternative position suggested by management were three sampler positions, which carried a monthly salary of R 4,500 compared with his existing salary of approximately R 35,000. There was a possibility of a position of a mini site laboratory Manager in North-West province, the availability of which was subject to Roadlab's successfully tendering for the contract. The remuneration for that post once all cost to company elements were included would have been close to the remuneration he was receiving as the operations manager. Ultimately, Roadlab was unsuccessful in obtaining the North West contract.

[27] Donlin stated that most of the small tenders which were won after Swanepoel's retrenchment were for much smaller sites that would not have permitted the creation of a post been comparable to the contemplated North-West laboratory one. Apart from the posts mentioned, Donlin told Swanepoel there was no other job available suitable for someone with his capabilities. Under cross-examination, Donlin eventually conceded that the sampler jobs were not reasonable alternatives to retrenchment for Swanepoel.

[28] De Jager told her that Swanepoel could not replace personnel on existing sites, because clients had concluded contracts on the basis of the specific Roadlab personnel who would be performing the services. Roadlab could not simply swop personnel as it would disrupt clients. Donlin did not dispute that this reason for rejecting his suggestion was not explained to him nor was it put in writing.

- [29] In the consultation on 5 September 2019, Swanepoel requested a range of financial information including a breakdown of income and expenditure to demonstrate what financial difficulties it was experiencing. His reason for making the requests was that if the costs were made available to him, he could have compared the company's current costs and profitability with the projected cost saving that would result from the retrenchments and evaluate that against Roadlab's rationale that retrenchments were necessary. He could also evaluate the impact of alternative proposals he made. Donlin's response was that this was not relevant to the consultation process. Range claimed that he was unaware of Swanepoel's request at the time.
- [30] Donlin and Range testified that Swanepoel would have been well aware of the financial situation from the graphs posted in every branch which displayed the extent to which targets were being met and what was required for each branch to break even, but she conceded that the graphs did not contain monetary values or reflect company costs. Donlin also agreed that the information conveyed in the graphs did not show if a branch was profitable or not. Swanepoel testified that the financials graphs displayed in the branch seemed to reflect cumulative unit sales for each test service provided by the branch compared with target sales as well aggregate unit sales of previous years. The first time he had heard about the monetary figures mentioned by Range and Donlin was in court.
- [31] Donlin stated she had conveyed Swanepoel's information request to the directors and they responded that the figures were contained in packs which were sent out monthly. However, she failed to relay this to Swanepoel. She testified that, based on what the directors told her, she believed he already had the information at hand. Range was convinced that Swanepoel would have had access to the monthly financial packs even though he was not a branch manager, but Range could not positively confirm the packs were provided to him. Donlin was reluctant to agree that the lack of this financial information made it difficult for Swanepoel to consult meaningfully as to whether it was necessary to eliminate his position to save costs. In her view, it was self-evident that the sound rationale provided for declaring his post redundant would obviously entail a cost savings.
- [32] Range contended that Swanepoel would have known from time sheets of personnel in his section what the personnel costs were and did not need financial information to look at cost-cutting measures. He did concede though that Swanepoel would not have had knowledge of items like rubble removal costs. He also sought to suggest Swanepoel would have had sight of financial figures because he attended a management review meeting held in Kwa-Zulu Natal, but he could not dispute Swanepoel's claim that the meeting took place in 2018.

[33] Notwithstanding the failure to provide financial information during the consultations, Swanepoel also did not seriously question the veracity of the financial figures mentioned testimony of Range. Swanepoel had seen the monthly invoices, which were indicative of the state of gross revenue even if he did not have expenditure details. He also conceded that when Donlin put the proposition to him that Roadlab is in financial trouble, it necessitated retrenchment, he did not dispute this in general terms.

11 September consultation

[34] The next virtual consultation session took place on 11 September 2019. It was similarly brief, lasting approximately twenty minutes. As in the previous meeting, Swanepoel posed various questions to Donlin. He was told that his post had been designated as redundant, because Roadlab was reverting back to the structure before the post of operations manager had been created. In answer to his question, when this had been decided, Donlin replied that it had been under discussion for some time. He was advised that Roadlab's labour costs amounted to 60% of its costs, and that the savings achieved from the retrenchments equated directly to the direct labour costs saved, without putting a monetary figure to it.

[35] At the meeting, Swanepoel also made detailed alternative proposals to retrenchment, including replacing De Wet, the newly appointed quality manager who had started on 1 September 2019. On 12 September, in a follow up on the meeting, he forwarded a letter to Donlin containing very detailed submissions, most of which he had conveyed orally at the meeting. The proposals included, amongst others, the following:

35.1 He proposed changing the timing of retrenchment to February 2020 to allow him to find alternative employment at a similar salary because he had just purchased a house and had not expected to be affected by the retrenchments in view of his recent promotion;

35.2 He could be placed in one of a number of alternative positions, namely:

35.2.1 Branch manager of the Bellville branch: Range could be retrenched, because he occupied a dual position of regional and branch manager, of which only the latter was required and which Swanepoel could fill based on having the most experience as a laboratory manager in the branch and on the basis of LIFO; experience.

35.2.2 Hou Hoek Site laboratory manager: The contract was due to end in October 2019 and he had longer service than the current incumbent.

35.2.3 Malmesbury site laboratory manager: this contract was also due to end in November 2019 and Swanepoel had longer service than the incumbent.

35.2.4 Robertson site laboratory manager: the contract was also due to end in a few months and the incumbent had less service than Swanepoel.

35.2.5 Replacing one of the current incumbents in the posts of HR administrator, sales order clerk, and quality controller, on the basis of LIFO.

35.3 To save costs Swanepoel also suggested that a lot of existing outsourced and subcontracted work could be eliminated, such as rubble removal, external supplies purchasing and rentals and repair services.

35.4 Swanepoel also advised that he was willing to take up alternative positions, namely:

35.4.1 to simultaneously fill the position of concrete and asphalt managers, which were currently frozen, or alternatively

35.4.2 that of the newly appointed quality manager, de Wet.

In support of the last proposal, Swanepoel said he had completed the SANAS ISO 17025: 2005 Laboratory Systems Management Course, SANAS ISO 17025:2013 Laboratory Systems Management Course and SANAS 17025:2005 laboratory auditing course, and he had experience in four SANAS audits. As the most experienced laboratory manager in the Bellville branch and on the basis of LIFO he ought to be preferred for retention in that position.

35.5 Lastly, he proposed various fractional salary alternatives, that would guarantee him seven days' work a month, but would have allowed him to find other work to supplement his reduced income.

[36] In an unrelated incident on 13 September 2019, Range issued Swanepoel with a warning for allegedly signing off test results for a client as a technical signatory on 10 September, whereas he was not accredited for those tests, after instructing that the report should be issued in his name. Swanepoel denied signing off as a technical signatory. He said he signed off as the site manager.

[37] On 16 September, Roadlab responded to Swanepoel's communication of 12 September. Donlin testified that this communication dealt with the issues she was unable to respond to during the last consultation. In summary, the main points raised in Roadlab's response were:

37.1 It acknowledged that the company was aware that any retrenchment situation is difficult for affected employees, but that the measure was necessary to safeguard the ongoing operations of the Company in a time of financial deficit, loss of business due to newly opened direct competition, construction industry closures and business rescues.

37.2 Roadlab was required to look carefully at the operational structure of the business and had to take measures to reduce costs and overheads whilst maintaining client satisfaction. In this regard client fickleness and the need to minimise disruption of their operations was important to retain business and Roadlabs could not make changes solely to suit itself. This somewhat vague statement

was supposed to be a response to Swanepoel's suggestion that he could replace other laboratory site managers on projects that were still incomplete.

37.3 Swanepoel's cost saving suggestions of eliminating subcontracting were noted but those operations were not part of Roadlab's core business and given the staff reductions the company's key focus would need to be its income sources. Donlin testified it made no sense to give technicians the job of transporting rubble instead of working on income generating activities. In her evidence, Donlin elaborated, stating that the sub-contractors were preferred suppliers in the group and had to be maintained to satisfy some of the group's BEE requirements. The company had leasing arrangements for specialised equipment which would be difficult to replace in-house.

37.4 Swanepoel's post was a new one as he knew and in order to have leaner operational costs, all superfluous positions need to be cut.

37.5 Severance pay has been paid out on the same basis to everyone for the sake of consistency.

37.6 Lastly, Roadlab urged him to reconsider the vacancies offered to him which he had previously rejected on the basis the salaries were not reasonable. This was a reference to the sampling positions.

[38] Roadlab's response did not deal specifically with Swanepoel's proposal that he 'bump' de Wet from his very recently appointed post as Quality Manager for the branch. This issue became a point of major controversy during the trial.

[39] Donlin said she had responded that it made no sense to assign subcontractors' work to existing staff who were performing core Roadlab functions, which was to test samples in order for Roadlab to bill the client. Swanepoel believed that Roadlab staff could be retained if subcontractors' work was brought in-house because of the savings on contract payments that would result. Range stated that Roadlab had looked at the suggestion, but Roadlab had already engaged lower cost suppliers. It had also reduced its rental of light delivery vehicles. He also testified that the firm had ended certain leases and relocated work to its main laboratory to save rental costs.

[40] Donlin and Range stated that Swanepoel could not simply replace other laboratory managers because the roles they performed were linked to contracts with clients and they were specifically designated in the contracts to perform those roles. Donlin explained that Roadlab tenders included individual CV's for technical requirements and tenders were awarded on the basis of those personnel servicing the client. Accordingly, it was not a simple matter to replace such a designated person with Swanepoel, even if it would have saved costs. Swanepoel disputed that such a substitution would be difficult, but did not provide any examples of when this had been done before. In respect of his proposal to make him the branch manager at the Bellville branch, Range said that Swanepoel was not coping with his existing work as operations manager. Consequently, he could not assume branch manager responsibilities. Further, in relation his suggestion that Range's post be scrapped and his regional manager duties assigned to the operations director, Donlin pointed out that Range was a certified engineer and had special technical expertise in the drafting of tender documents, apart from being accredited as a technical signatory for all testing methods.

- [41] According to Donlin, the proposals to work for a fractional salary and to work partly from home were not viable because it would have financially burdened other departments with his salary and his presence on site would have been required.
- [42] In respect of the frozen positions of the Asphalt and Concrete Manager, which Swanepoel was partially performing the functions of whilst he was in the position of operations manager, Swanepoel said it was only two months after his retrenchment at the CCMA conciliation hearing about his dismissal, that he was made aware of the posts had been unfrozen. In fact, the newly appointed asphalt manager actually represented Roadlab in the CCMA conciliation meeting. Donlin confirmed that the two posts were unfrozen in December 2019 and that someone was seconded from Johannesburg to fill the asphalt post. During the consultations, the company had been unwilling to reactivate them, but by December 2019 a Johannesburg staff member was transferred to take up the asphalt manager's post because Roadlab had obtained some significant new asphalt contracts. As a result, the firm avoided having to retrench the Johannesburg staff member who was transferred to take up the position.
- [43] On Tuesday 24 September 2019, Range sent an email to Swanepoel giving him various work instructions, and to hand in all Roadlab property before he left on Friday (27 September 2019). The following day he was issued with a formal notice of his retrenchment, providing details of severance pay and the like. It also recorded that he had not responded to the offers of alternative employment and that consideration had been given to measures short of retrenchment.

Evaluation

Procedural fairness

Was the decision to retrench the applicant a *fait accompli*?

- [44] It was contended that the decision to make the post of operations manager redundant rendered Swanepoel's retrenchment a *fait accompli*. There can be no doubt that deciding to do away with the post was a fundamental factor affecting the prospect of his continued employment, but as such was not tantamount to a decision to dismiss him. In *Sayles v Tartan Steel CC* (1999) 20 ILJ 647 (LC), Malambo J (as he was), explained:

"[6] A reading of this introduction to the Code of Good Practice on operational requirements dismissals reveals that one of the factors

that could lead to a dismissal for operational requirements is redundancy. Viewed differently, the duty to consult in s 189 arises

once an employer has realized that, as a consequence of, for example redundancy, certain employees may have to be dismissed. In this sense redundancy means that a position occupied by an employee has become surplus to the employer's requirements and it would have no economic rationale to maintain it. Simply put it means that the job or position has fallen away.

[7] Certain consequences follow once a job or position has become redundant. One of such consequences is that the employee occupying that position might have to be dismissed as a result of the redundancy of the position. However dismissal is not the only option open to the employer, for instance if properly consulted the employee might be able to prevail on the employer not to dismiss him but redeploy him elsewhere. It is clear therefore that if a redundancy has been identified it does not follow that the mere fact of such redundancy means that those whose positions are redundant are effectively dismissed. The mere fact that a position has become redundant does not automatically mean that the employees' services are terminated.

[8] It is clear therefore that redundancy is distinct from a dismissal based thereon. Dismissal is one of the steps that could result from a redundancy."

However, it does not mean that the question of the post's redundancy could not have been questioned or debated in the course of the consultation process, if the need for the redundancy as an original trigger of the retrenchment proposal had been interrogated. However, during the consultation process, the scrapping of the post, as such, was not challenged. The challenges raised by Swanepoel were primarily focussed on suggesting alternatives to retrenching him by placing him in other positions, rather than perpetuating his incumbency as operations manager.

Was Swanepoel provided with sufficient financial information to consult properly?

[45] It is common cause that Swanepoel was not specifically supplied with financial information either during the first phase of the retrenchments, which did not directly involve him, nor during his own retrenchment consultations. He had requested a breakdown of income and expenditure firstly in order to satisfy himself of the financial difficulties the company was facing, and secondly to understand the financial impact that alternative proposals to retrenchment might have. As mentioned, the company did not believe this information was relevant. From the discussion above, it should be evident that the efforts of Donlin and Range to persuade

the court that Swanepoel had all the financial information he reasonably needed at his fingertips were not very convincing. It

might be so that it was self-evident that if he was retrenched, the cost of his salary would be saved, but that fact could not enable him to make any assessment whether equivalent costs savings in other areas could match it, nor would the scale of the firm's

financial problem or the prospect of any improvement have been readily apparent.

[46] Despite not receiving the information he requested, Swanepoel did make extensive alternative proposals to save costs, even if he did not know the financial effect of those proposals. It was possible to make those suggestions without financial information because they were essentially proposals to retrench someone else and place him in their position. In respect of other proposals such as reducing reliance on outside contractors and using Roadlab staff to fulfil those functions it would obviously have been difficult for Swanepoel to

gauge the potential cost saving effect of adopting such measures without the necessary financial information. Similarly, he had no way of knowing leasing costs and the like.

[47] Roadlab did not dispute the viability of these proposals strictly on the basis of their financial unfeasibility, but rejected them for operational reasons relating to the need to utilise the reduced staff it retained to generate income for the core business. Third party contractual arrangements had been entered into because the services they provided were not part of Roadlab's core business, and it made no sense to use higher paid Roadlab staff to perform non-core functions such as rubble removal using Roadlab's vehicles. Others were lessors of specialised equipment which Roadlab would have to acquire if their services were dispensed with. At the trial, Range testified on the measures adopted by the company to save costs on rentals and contractors. While this evidence was not disputed, none of these explanations were relayed to Swanepoel during the consultation process in response to his proposals on these matters.

[48] Given these reasons why Swanepoel's proposals in this regard were rejected, even if he had been given the financial information requested to back up his submissions, it is unlikely his proposals would have been viewed differently by Roadlab. Nonetheless, in the absence of explaining why the financial information he requested was not the key consideration for Roadlab and therefore not relevant, it should have provided him with it. He was unable to even gauge the cost effectiveness of his proposals without that information and the failure to provide it was a major shortcoming in the consultation process. Understandably, the firm's reluctance to be more open in this regard, could only have fed Swanepoel's concerns that he was not being dealt with fairly.

Whether the consultations amounted to a meaningful joint consensus-seeking process

[49] Reaffirming the principle enunciated in other Labour Appeal Court decisions, the LAC in *TWK Agri (Pty) Ltd v Wagner & others*

(2018) 39 ILJ 797 (LAC) reiterated that:

[21] Section 189(2) of the Labour Relations Act 66 of 1995 (the LRA) requires that when retrenchments are contemplated the ensuing

consultation process is to take the form of a 'meaningful joint consensus-seeking process', inter alia, to avoid dismissal, or to seek alternatives to it, where these are available. To be meaningful, the consultation must be genuine and not be a sham. The purpose of seeking alternatives to dismissal being to avoid dismissal if reasonably possible."

(footnote omitted)

[50] In assessing whether the consultation process in this case was in accordance with the principle quoted, it is important to bear in mind that evidence adduced by an employer at trial in support of its rationale for a retrenchment, cannot retrospectively plug gaps in the consultation process. Thus, the detailed justification provided for not bumping De Wet in

the course of the firm's evidence, might well support the firm's rationale for retrenching Swanepoel, but also serves to highlight what was not canvassed in the consultation process when Roadlab rejected his proposal. It is remarkable that Roadlab's written response to Swanepoel's

detailed proposals did not even refer to this particular proposal, which was contrary to its obligations under s 189(6)(b) of the

LRA[1].

[51] Instead of dealing with the proposal to displace De Wet as quality manager, Roadlab simply did not engage with the issue at all. Instead, it urged Swanepoel to seriously reconsider sampler posts which would have yielded an income equivalent to 14 % of his existing salary. In Donlin's letter of response the firm notes his view that these salaries were unreasonable and urged him to reconsider his stance. It was rightly conceded in the trial that indeed the sampler posts were not in fact reasonable alternatives and that Swanepoel was quite correct in characterising them so.

[52] The firm's failure to deal seriously with the bumping proposals, which the evidence at trial revealed was one that needed proper engagement and evaluation, and directing him instead to reconsider patently inappropriate alternatives shows that the company did not take the consultation process as seriously as it should have. It effectively foreclosed the prospect of entertaining this proposal because it had effectively adopted the attitude that it would only consider existing unfilled positions as alternatives.

Moreover, no explanation whatsoever was provided why the quality manager's position could not be considered. Donlin's

response to being asked why nothing was said about the quality manager position, was that if Swanepoel felt it was an issue he

wanted to pursue, it was up to him to raise it again with the company, even though he had done so both in writing and in the consultation. It was only during the trial that the issue of De Wet's greater experience in quality management and the question of being

accredited for all methods was tabled by Roadlab as the explanation why Swanepoel's proposal was not acceptable to it. Had the firm had sincerely engaged in the consultation process with genuine commitment to see if there were feasible alternatives to retrenching Swanepoel, these issues would have been properly canvassed and examined at a time when they might still have altered the final outcome of the consultations.

[53] What is apparent is that its engagement with Swanepoel's detailed and considered proposals, in important respects, was either non-existent, partial or perfunctory. Apart from not responding at all on the quality manager position or the frozen asphalt and concrete manager posts, this was also true of the case in relation to his proposals to replace other site lab managers, replacing sub-contractors and cutting down on leases. There is little evidence

it made much effort to see if it could retain Swanepoel once it had decided that his existing post could not be financially justified at the time, and failed to appreciate that in contemplating a no fault dismissal it should have explored options to retain him and that it owed it to Swanepoel to set out clearly why his suggestions were not feasible. It may be that its commitment to the process was coloured by a slight souring of the relationship between Range and Swanepoel, but whether that was the reason for Roadlabs' attitude towards the consultations is neither here nor there.

[54] It appears that using Donlin as the sole employer representative in the consultation process also curtailed the level of engagement to a significant extent. On several issues she had to get a response from operational management or the directors and the responses provided were terse and, in some instances, rather opaque. That was not her fault. Being relatively recently employed, Donlin simply was not knowledgeable enough yet about Roadlab's operational side and could only convey what she was instructed to convey. On some issues she could only relay responses, which the directors did not even fully explain to her. If an operational manager had been part of the discussions much of what only became clearer at the trial is more likely to have been properly canvassed at the time and the consultation engagement would have been more meaningful.

[55] In the circumstances, I am not persuaded that Roadlab engaged in a meaningful, joint-consensus seeking process with Swanepoel to try to avoid his retrenchment or seek alternatives to it if feasible. Consequently, his retrenchment was procedurally unfair.

Substantive fairness

[56] In determining if a retrenchment is substantively unfair, the failure to avoid a dismissal that could have been avoided without a fair reason, will mean the retrenchment was also substantively unfair. The LAC expressed the principle thus in *Oosthuizen v Telkom SA Ltd*

(2007) 28 ILJ 2531 (LAC):

"[8] In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirement. It is in accordance with this obligation of the employer that in the General Foods[2] case referred to above this court found the dismissal of the employees unfair. In that case while the employer was retrenching

some employees, it was busy recruiting new employees for work which the employees being retrenched could perform. As already stated, this court found the dismissal substantively unfair for this reason. In such a case the dismissal is a dismissal that could have been avoided. A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason."

[57] In the course of the consultation the consideration of feasible alternatives was not properly traversed. The question remains is whether the evidence led in the trial supports Roadlab's version that there was a sound operational reason for retrenching Swanepoel and that the alternatives to retrenchment were not feasible.

Was there a need for Swanepoel's retrenchment?

[58] Even though Swanepoel was not provided with the financial information he asked for during the retrenchment consultations, when the evidence of the firm's overall position was led at the trial, he did not dispute the overall decline in profitability that Roadlab was facing from 2018 to 2019 nor that it was still deteriorating in 2020. He also did not dispute that one way of tackling the situation was to reduce staff costs.

[59] Roadlab's essential justification for Swanepoel's own retrenchment was that in the context of trying to reduce its labour costs and restructuring the staff complement, scrapping redundant posts was one means of doing so. His post was viewed as superfluous, as it was an experimental one that had not achieved the results intended. Although Swanepoel had disputed that the operations manager post was redundant it was more on the basis that he was not idle than whether it was necessary to retain the

position which had not previously existed. On balance it cannot be said that Roadlab did not have a justifiable operational reason for scrapping the post. Roadlab accepted that scrapping the post was not sufficient reason to retrench Swanepoel. The crux of the dispute about the substantive fairness of Swanepoel's retrenchment turns rather on whether it was fair to select him for retrenchment as a result of the post's redundancy instead of accommodating him in another role in the firm instead, which might have entailed someone else being retrenched. This is dealt with below.

Was the failure to bump other staff to retain Swanepoel unfair?

[60] In its s 189(3) notice, Roadlab had stated its proposed selection criteria, somewhat cryptically as:

"6. THE BASIS OF SELECTION

6.1 Position that has become redundant;

6.2 To examine LIFO with retention of skills;

6.3 Voluntary retrenchments;"

[61] As mentioned, among Swanepoel's proposals, was that he could replace other laboratory site managers. A few of these were on contracts which were about to end in a few months. Although Swanepoel disputed that staff engaged on a specific contract could not be replaced with other qualified personnel, he did not dispute that the personnel assigned to a site were individually identified in the contract and the client would have to agree to a substitution, so it was not up to Roadlab to swap around staff on these sites at will. As mentioned he also did

not cite an example where a client had agreed to swop staff around, and it seems a little improbable that a client who had been working with a particular Roadlab team would happily accept a change in the team

leadership unless it was unavoidable. It was undisputed that none of these positions would have been available for more than a few months, so even if it was hypothetically possible to transfer him to one of those sites and the person he replaced was retrenched in his stead, it would at best being a temporary stop gap of a couple of months. Given all these considerations, I think that Roadlab was entitled to regard these alternatives as unfeasible.

[62] The other potential positions Swanepoel identified were the vacant asphalt and concrete manager posts, which had been frozen. In cross examination, Roadlab was criticised for not engaging with Swanepoel at the time as to why he could not be placed in such positions and why the company had not offered him the prospect of preferential employment if something came up in a defined period after his retrenchment. The prospect of re-employment was something that ought to have been the subject of consultations, but at the time it was not an issue which Swanepoel had raised for discussion and he did not plead that the failure to consult on this

or the failure to offer preferential employment rendered his retrenchment unfair. I accept that at the time of the retrenchment

discussion, there was no evidence to suggest Roadlab had any inkling of asphalt work in the pipeline.

[63] SANAS conducted a five day company audit sometime after May 2019 and issued a number of NCRs which are findings of non-compliance with SANAS standards. The audit was a general one conducted by SANAS every 18 months. The evidence was somewhat vague about when SANAS issued its initial findings listing shortcomings in Roadlab's procedures. Range claims the audit result was known sometime in July or August, but before any of the NCRs could be rectified, the existing quality manager resigned. According to Range, this created something of a crisis for the firm, and it was critical to employ someone with experience who could ensure the NCRs could be cleared within the four to six week period SANAS had allowed for this. De Wet testified that the deadline for doing so was 11 November, and it was in November that SANAS accepted that the NCRs had been cleared. To achieve this all the quality deficiencies identified in the audit had to be rectified, failing which the company could have its accreditation suspended.

[64] Both Donlin and Range testified that De Wet's appointment with effect from 1 September was necessary to achieve that objective. Range conceded that Roadlab had obtained an extension of time to finalise the NCRs and agreed that it was not a legal requirement to have SANAS accreditation to offer services. However, his evidence that in the highly competitive market Roadlab operated in, lack of SANAS accreditation could be a factor resulting in loss of work opportunities was not disputed. Range said De Wet was appointed because of his experience in quality assurance in a commercial laboratory since 2015 and that he was

accredited for all methods. He also contended that De Wet's experience in a commercial laboratory rather than in one dedicated to a particular

client's site with a narrower remit was an advantage.

[65] It was common cause that at the time of De Wet's appointment Swanepoel was not yet accredited by SANAS for all methods. It was also accepted that De Wet had been accredited for all methods in his previous employment by Soilab, and that this accreditation could be transferred with him to Roadlab, but the transfer process took about two months, so that at the time he started working in September 2019, he could not yet rely on his former accredited status to sign off as a technical signatory for Roadlab, even if he had the expertise to rectify the NCRs.

[66] Swanepoel testified that he had been provisionally accredited for all methods during the year, but his accreditation could only be confirmed once the SANAS 2019 audit NCRs had been cleared. Donlin was unaware of any such document confirming his provisional status. Even though Swanepoel claimed that he had filed the provisional accreditation document in the training and accreditation file, no application to discover it before trial was made by Swanepoel. Donlin was also not asked about the filing of the document. Under cross-examination Swanepoel claimed he had not mentioned his provisional accreditation on his CV completed in September 2019, even though it was important, because he was focussing on recording information that was more related to his trajectory in the business and did not think it necessary to include it. Range also did not remember seeing Swanepoel's provisional status or that his final assessments had been done. He also did not recall an alleged discussion in his office with Swanepoel during August 2019, in which Swanepoel had pointed out that once the audit NCRs were cleared, he would be the only staff member in the Belville

branch with accreditation for all methods. It was only in his own evidence that Swanepoel claimed that the Ms N van der Westhuizen, the previous quality manager, was also present in this meeting and that she had the document confirming his provisional accreditation.

[67] Range did concede that Swanepoel ought to have been fully accredited by November or December 2019, but De Wet had already been accredited for all methods for a number of years. He denied that the choice of De Wet had anything to do with the operations manager position not having worked out. Swanepoel testified that he had been assessed by SANAS and that Range was aware of this, but this was not put to Range.

[68] Range agreed that Swanepoel could have possibly acquired his outstanding accreditations in all methods within six months. Indeed, it had been one of the targets Swanepoel was supposed to have achieved in terms of his letter of appointment as operations manager. Range also conceded Swanepoel would have had experience in quality management but not at the level of De Wet's dedicated quality management experience for a number of years. He did not dispute Swanepoel's claim that 50 to 70 percent of his duties entailed quality management work and that he had performed duties similar to those required in the quality manager position, such as clearing results for methods he was accredited for and liaising

with clients. However, Range claimed that the extent of De Wet's quality management experience vis-à-vis Swanepoel's experience and his all methods accreditation made him a more valuable candidate for the position from Roadlab's perspective. Although their jobs were on the same level in the staff organogram, the quality manager had to perform his function independently, without supervision. Range agreed that he could not say Swanepoel would not have been able to do the job, provided he was accredited, but they knew that De Wet definitely could. At the time of the pending SANAS audit finalisation it was critical to prefer De Wet for the post.

- [69] Swanepoel claimed he had already been instrumental to a significant degree in clearing the NCR's before De Wet arrived and reference was made to preparatory work he claimed he was performing on the audit in his letter of 1 August
2019. However, the letter appears to pre-date the audit and is not referring to working on clearing NCRs in the aftermath of the audit. Donlin could not dispute that Swanepoel had not been involved in such work. Range, though sceptical of Swanepoel's claim to have done such work, also could not dispute this or deny that he had assisted De Wet. He accepted that De Wet might have needed assistance in aligning the NCR's with Roadlab's quality management system, because he would not have been familiar with the latter.

De Wet claimed he only received emails from Swanepoel on aspects of quality, but could not dispute Swanepoel's claims to have been involved in a number of previous SANAS audits. When Swanepoel testified he claimed that most of the technical NCRs had already been cleared by the time De Wet started.

- [70] It was also argued that De Wet had more experience in quality management because of the positions he had held with his former employer, Soilab. Swanepoel argued that quality management was a major component of all the laboratory management positions he had held with Roadlab. While conceding that Swanepoel did have quality management experience within his sphere of work, Range felt he did not have experience of overall quality management and in preparing the analytical reports required on the quality management system of an entire branch. Swanepoel denied this.
- [71] It is fair to say that the very nature of Roadlab's work and in particular that of a laboratory manager is primarily concerned with ensuring that it can provide reliable material test results to its clients. It follows that maintaining the integrity and the quality of the testing process is fundamental to the work it does. It stands to reason that Swanepoel's experience of a number of years at various site laboratories where he had to ensure SANAS testing protocols were met, that instrumentation was properly calibrated and the like, gave him a significant degree of experience in quality management. On the other hand, he had not been employed in a position where he had sole responsibility for quality management or performed that function at a level higher than the laboratories he had managed. On the face of it, De Wet had some advantage experience wise over him. Even if that was not necessarily a decisive factor, the evidence that he was not in a position to sign off as an accredited

technical

signatory for all methods on all the audit NCRs. At best his accreditation might have been confirmed once the audit was finalised.

The evidence of his alleged provisional accreditation was not properly canvassed with Roadlab's witnesses and the failure to seek discovery of this document when it was clear from Roadlab's pleadings that it was relying partly on De Wet's accredited status as a reason why it did not employ Swanepoel as a quality manager is difficult to understand. If he had acquired accreditation or even the so-called provisional accreditation is also anomalous he did not mention that he had achieved either of those standards in his updated CV completed in or after September 2019. His explanation why he omitted it is not persuasive.

[72] Obviously Roadlab had a duty to avoid Swanepoel's retrenchment if it was feasible to do so. The learned author Professor R Le Roux trenchantly notes that on the one hand the courts have acknowledged the right of an employer to run its business in the way it seems fit, but on the other stress that retrenchment should be a last resort[3]. In trying to strike a balance between the two principles, the author comments that 'because of the link between substantive fairness and the presence/absence of alternatives, an important aspect of the employer's evidentiary package will be for it to show why retrenchments are the best option in the circumstances. She argues that the implications of this requirement are described in the following passage in the LAC decision in SA Chemical Workers Union & others v Afrox Ltd

(1999) 20 ILJ 1718 (LAC):

"[43] ... By making fairness of the dismissal a matter of proof (ss 188(1)(a) and 192(2)), the LRA has made the assessment of fairness dependent on the factors proved and canvassed in evidence in court. This imposes a discipline upon the parties to the dispute and the person hearing the case. If an employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it chose a particular course and not another. If an employee wishes to challenge the evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer's position, it will have a material effect in the final assessment of fairness. The presiding officer's assessment of the fairness or otherwise of the dismissal will also be dependent on the evidence presented before him or her. An assessment on 'moral' considerations not based on the evidence led at the trial will be impermissible. (All this is not new. It happens every day in all courts, in relation to all sorts of different kind of issues. It is the very stuff of litigation and adjudication.)"

(emphasis added)

[73] Lastly, Le Roux argues that even though the LAC in Chemical Workers Industrial Union & others v Algorax (Pty) Ltd

(2003) 24 ILJ 1917 (LAC) moderated the court's abstentionist approach in evaluating an employer's decision not to adopt an apparent

alternative, when credible evidence is adduced by the employer in support of its rejection of an alternative, the court should be wary of second-guessing whether that decision is justified or not. In *Algorax* the court was satisfied that the employer had not adopted the most obvious and natural way of dealing with the problem it was confronted

with, which would not have necessitated the introduction of a new shift system and the dismissal of employees who refused to work on it.[4] In *Algorax* the court asserted that while the court normally will not have the business knowledge or expertise of the employer, it should not

hesitate to deal with an issue where no special expertise, skills or knowledge is required, but only common sense, particularly where the employer has not suggested that any special expertise or knowledge is required.[5]

[74] In this instance, I am satisfied on the evidence that Roadlab did establish that it was not unfair of it to retain De Wet rather than replace him with Swanepoel as quality manager in the light of the following factors: Swanepoel might have been capable of obtaining accreditation for all testing methods and ought to have got it by the time the NCRs were cleared, but had yet not done so at the time Roadlab was trying to clear them; Swanepoel's provisional accreditation and its practical status was not established; De Wet already had the necessary accreditation and merely had to have it transferred to Roadlab so there was no doubt about his entitlement to continued accreditation even if it would only be transferred to Roadlab in early December 2019; employing someone already accredited in all methods was necessary to minimise the disadvantage of Roadlab not having SANAS accreditation when seeking new contracts, and even though Swanepoel had extensive experience in quality management at site laboratories, he had not yet occupied such a post dealing with management of all aspects of quality issues, whereas De Wet had a few years' experience in such a position. In these circumstances, it cannot be confidently said, that it was obviously operationally feasible for Roadlab to retrench De Wet and replace him with Swanepoel.

Relief

[75] As Swanepoel's retrenchment was procedurally unfair but substantively fair, the question of an appropriate award of compensation must be considered. In the analysis above, Roadlab's commitment to seriously engage in the consultation process was found to be significantly wanting. In particular, it did not do justice to Swanepoel's enquiries and proposals. Swanepoel's characterisation of the process as a 'tick box' approach was not an unfair one. The firm's abject failure to deal seriously with his proposal to bump De Wet was a particularly glaring deficiency. It was not a frivolous suggestion given Swanepoel's experience and anticipated accreditation. The company ought to have engaged with Swanepoel in a serious discussion on the feasibility of adopting it, even if it did not feel it was a realistic prospect.

- [76] It was disingenuous of Roadlab to suggest to Swanepoel that the low paid posts he was offered were reasonable alternatives to his retrenchment, and even more so when it was suggested to him that he might not qualify for severance pay if he rejected the offer. Swanepoel was entitled to expect a proper commitment from Roadlab in dealing with the retrenchment process, particularly in the light of his serious efforts to fully engage in it.
- [77] In the circumstances, I believe that a compensation award of six months' remuneration would be appropriate.
- [78] As both parties were partially successful, it would be inappropriate to make a cost award.

Order

- [1] The Applicant's retrenchment by the Respondent was procedurally unfair but substantively fair.
- [2] Within fifteen (15) days of the date of the judgment, the Respondent must pay the Applicant six (6) months' remuneration, calculated on the basis of his salary of R 33,500-00 at the time of his retrenchment, amounting to R 201,000-00 (two hundred and one thousand rands).
- [3] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives For the Applicant: G Stansfield of Mcaciso Stansfield Inc. For the Respondent: C Bosch Instructed by E Coleman Africa & Associates

- [1] Viz: Swanepoel89(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (b) If any representation is made in writing the employer must respond in writing.
- [1] Viz: Swanepoel89(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (b) If any representation is made in writing the employer must respond in writing.
- [2] General Food Industries Ltd t/a Blue Ribbon Bakeries v Food & Allied Workers Union & others

(2004) 25 ILJ 1655 (LAC)

- [3] R Le Roux, Retrenchment Law in South Africa, LexiNexis, 2016 at 192.
- [4] At paras [67] and [68].
- [5] At paras [69] and [70].

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