

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case no: JA51/97

In the matter between

THE BANK OF LISBON INTERNATIONAL

Appellant

and

LUIS HENRIQUE das NEVES de BARROS PINHEIRO

Respondent

JUDGMENT

- 1] The respondent was employed by the appellant as assistant general manager. At the time of his retrenchment in mid-1995 he had forty years experience in the banking industry, eighteen years of which were spent in the service of the appellant. The respondent was 62 years old, three years away from retirement.
- 2] By late 1994 the appellant was in serious financial trouble and faced the prospect of losing its banking licence. In April 1995, Mercantile Bank Holdings Limited ("Mercantile Bank"), concluded an agreement with the appellant's shareholders in terms of which it acquired the entire shareholding in the

appellant. In April 1995 Mercantile Bank assumed control of the appellant. In terms of the restructuring of the appellant by Mercantile Bank the post of regional manager was created and that of assistant general manager was abolished. On 18 April the general manager, Mr Taylor, and shortly afterwards, an assistant general manager, Mr Mendes, were retrenched.

- 3] On 25 April a meeting took place between Dr Saude, an executive director of the appellant, Mr Prentice, the human resources manager of Mercantile Bank, and the respondent. The respondent was informed of the appellant's financial problems and that his post had become redundant in terms of the proposed restructuring of the appellant. A document was handed to him containing a proposed retrenchment package. The respondent was upset by his treatment, reacted by saying that he was not willing to negotiate with Prentice, and left.
- 4] The factual dispute between the parties was whether, as contended by Prentice, the respondent was expressly told that alternatives to retrenchment would be considered, or, as contended by the respondent, he was told by Prentice that his retrenchment was with immediate effect, and that all that remained for future discussion was the amount of the retrenchment package.
- 5] On returning to his office, the respondent wrote a letter to Mrs White, the human resources manager of the appellant, in which he recorded his version of what had transpired in the meeting.

- 6] At the end of that day, 25 April, the respondent left his office, never to return, except to participate in the retrenchment exercise, and he did not thereafter again work for the appellant.
- 7] On 2 May the respondent received a letter from the appellant signed by Saude in which it was denied that the respondent's services had been terminated with immediate effect on 25 April. The appellant's anxiety to consult "on possible alternatives to possible retrenchment" was conveyed to the respondent. On 5 May the respondent replied to the letter of 28 April by reiterating his version of the meeting of 25 April, stated that he was available for consultations, and tendered his services.
- 8] On 9 May the respondent addressed a letter to Saude in which he sought particulars about what impact his retrenchment would have on his pension. Throughout the subsequent meetings which took place a major concern of the respondent was whether he could be retrenched on the basis that he would retire with a full pension.
- 9] On the following day the respondent received a letter signed by Mrs White, dated 4 May, on behalf of the appellant, in which she set out the respondent's retrenchment package (in a total sum of R121 602, 71). The letter stated that the retrenchment would be effective from 31 May. The respondent was

thanked for his past services. The respondent immediately rejected the offer and stated that he was awaiting “the holding of proper discussions”. On the same day Saude wrote a letter to the respondent in which he repeated the appellant’s version of the meeting of 25 April and invited discussions on “any alternatives to the proposed retrenchment”.

- 10] On 11 May the respondent reiterated that on 25 April he had been confronted “with the fait accompli that [he] had become redundant” and agreed to hold constructive consultations. In an undated letter which was probably written on 12 May Prentice repudiated Mrs White’s letter of 4 May on the ground that she had assumed that the respondent was a member of the South African Society of Bank Officials (“SASBO”), the trade union with which Prentice had negotiated a retrenchment package for SASBO members employed by the appellant. Prentice recorded that at the meeting of 25 April the respondent had indicated that he “would not be prepared to have any further discussions in the Bank of Lisbon’s Head Office”.
- 11] On 12 May the respondent responded that he would like “to hold the proposed discussions”.
- 12] On 17 May a meeting took place between Prentice, the respondent and the daughter of the respondent, Mrs Goodman, an attorney. Mrs Goodman handed Prentice a typed counter offer. The terms of the retrenchment

package were discussed in detail.

- 13] The factual dispute between the parties is whether Mrs Goodman reserved the respondent's rights in general terms, as contended for by Prentice or, as Mrs Goodman contended, specifically in relation to alternatives to retrenchment. Mrs Goodman testified that she made a note during the meeting in these terms: "We reserve our rights to discuss alternatives".
- 14] On 19 May a further meeting was held between Prentice, respondent and Mrs Goodman to discuss the retrenchment package. Prentice handed a letter to Mrs Goodman in which certain counter proposals were made.
- 15] The factual dispute is whether Mrs Goodman again reserved the respondent's "rights re discussion of alternatives" and recorded such a reservation in her handwriting on the copy of the letter which Prentice had handed to her.
- 16] For reasons which follow later, it is not necessary to resolve those factual disputes.
- 17] On 23 May another meeting was held between Prentice, the respondent and Mrs Goodman. The retrenchment package was again discussed, but no progress was made.

18] On 26 May the appellant made a “without prejudice” offer to the respondent in which the appellant agreed to pay him the sum of R174 383,15, made up as follows:

*	One month’s salary in lieu of notice until	
	End of June, 1995	R12 440,00
*	pro-rated bonus calculated until 30 June 1995	R 6 220,00
*	outstanding leave paid until 30 June 1995 (80.5 days)	R38 516,15
*	8 month’s severance pay in recognition of	
	total length of service	R99 520,00
*	Housing subsidy of 8 x R915.80 per month	R 7 326,40
*	Additional payment to liquidate outstanding bond	R10 360.60
	Total	R174 383.15

19] The effective date of the retrenchment was moved to 30 June.

20] On 14 June a final meeting took place at which the parties were represented by their respective attorneys in order to attempt to settle the matter. Settlement was not achieved.

21] During July the appellant paid the respondent a retrenchment package of R 161 943,15 made up as follows:

Pro-rata bonus calculated until 30 June 1995 R 6 220,00

Outstanding leave pay	R 38 516,15
Eight month's severance pay	R 99 520,00
Additional payment to liquidate outstanding bond	R 10 360,60

22] It is common cause that at no time during the period 25 April to 14 June 1995 did the parties ever discuss alternatives to retrenchments.

23] The respondent instituted proceedings against the appellant at first in terms of s 43 and subsequently in terms of s 46(9) of the Labour Relations Act, 28 of 1956 ("the Act").

24] In its plea in the s 46(9) proceedings the appellant took the point in limine that the respondent had compromised any claim which he might have had against the appellant. Three court days, interspersed over a period of about seven months, were devoted to the point in limine. On the first day of the trial the industrial court disposed of the point by finding that the issue of the alleged compromise should be heard with the evidence on the merits. Presumably as a result of a concession made by Prentice in evidence that the dispute had not in fact been compromised by the respondent, the appellant did not rely on the compromise either in the industrial court or on appeal.

25] At the trial the respondent, Mrs Goodman, Prentice and Mr van Deventer, an executive director of Mercantile Bank, gave evidence. Before the conclusion of the case the parties reached an agreement that the patrimonial loss

suffered by the respondent as a consequence of his dismissal was R420 000.

26] The industrial court found that

- the retrenchment was procedurally unfair in that consultations on alternatives to retrenchment had not been held;
 - both parties were equally to blame for the failure to hold proper consultations;
 - the respondent was entitled to payment of the sum of R280 000, being two thirds of the agreed loss of the amount of R420 000.
- No order as to costs was made.

27] The appellant filed a notice of appeal in which it conceded that the retrenchment had been procedurally unfair and tendered to pay the respondent an amount equal to six months salary(R 80 134,80). The appellant conceded that:

- (a) “it ought to have given the respondent reasonable notice prior to 25 April 1995 of its intention to held consultations about its proposed retrenchment of the respondent”; and
- (b) the industrial court “correctly held that the appellant was under a duty to initiate consultations as to alternative positions which were available to the respondent and that its failure to do so amounted to a procedural irregularity.” The appellant submitted further that, “having regard to the senior position occupied by the respondent, the above failure ought not to be construed as a major procedural irregularity, especially having regard to the fact that the respondent was not suited to the positions of regional manager and/or branch manager.”

28] The respondent filed a notice of cross-appeal on the basis that he should have been awarded the sum of R420 000 and costs, including the costs incurred in dealing with the point in limine.

- 29] The appellant's case in the industrial court was that at the meeting of 25 April 1995 Prentice offered to discuss alternatives to retrenchment in future discussions, that that offer was subsequently repeated in writing, and that the failure to consult was due to the fault of the respondent, who refused to cooperate.
- 30] The probabilities are that at the meeting of 25 April, Prentice did not offer to discuss alternatives to retrenchments; the appellant's subsequent offers to consult in that regard were not genuine; the appellant did not intend to retain the respondent on its payroll in any capacity; all that the appellant was open to discuss was the quantum of the respondent's retrenchment package; and the respondent, in the belief that consultations on alternatives to retrenchments would be fruitless, was not prepared to discuss alternatives.
- 31] One begins the inquiry into the probabilities by asking what alternatives to retrenchment the appellant would have discussed. The only alternative was to employ the respondent in another capacity. Prentice did not say what alternative employment the respondent would have been offered. The evidence-in-chief of van Deventer was that appellant was considered for the two new posts of regional manager but the appellant did not consider him experienced enough. Two outsiders, one from Standard Bank and the other from Santam Bank, were appointed instead. The other position which was considered was branch manager, but once again, the respondent was found

wanting. Van Deventer did say in cross-examination that had the respondent cooperated and had consultations been held, other positions, such as that of internal auditor, could have been discussed. That evidence, if true, renders the appellant's failure to offer the respondent an alternative position even more reprehensible.

32] The probabilities, however, are that the appellant, as managed by Mercantile Bank from April 1995, had no intention to retain the respondent as its employee.

33] The new broom, Mercantile Bank, intended to sweep clean: a general manager and two assistant general managers of the appellant were retrenched within days of the take-over.

34] That explains why Prentice never raised alternatives to retrenchment at the meetings of 17, 19 and 23 May. By the time the meeting of 17 May took place, contrary to his attitude at the meeting of 25 April, the respondent had gone on record a number of times to indicate his willingness to consult on alternatives to retrenchment. Prentice testified that he intended to raise alternative employment "in the Bank of Lisbon or maybe even Mercantile Bank" at the meeting of 17 May, yet no such discussion took place. The reality was that all the appellant was willing to discuss was the quantum of the retrenchment package.

35] The time to discuss alternatives to retrenchment was at the meeting of 25 April. The respondent was a senior employee, close to retirement. Logically, alternatives to retrenchment should have been discussed before the terms of a retrenchment package. A package is discussed only if there are no alternatives to retrenchment. Prentice did not, however, raise any alternatives to retrenchment. Instead he handed the respondent a document, which he had prepared prior to the meeting, containing details of a package based on what Prentice had agreed with SASBO. Prentice moved directly from redundancy to compensation, without the necessary intervening step of attempting to avoid dismissal.

36] After the meeting of 25 April both parties conducted themselves as if the respondent's services had been terminated, even though he remained on the appellant's payroll pending resolution of the dispute relating to the retrenchment package. After the meeting, Saude telephoned the respondent, apologised for what had happened in the meeting, and told the respondent to give his work in progress to his, Saude's, secretary. The respondent packed his personal belongings, informed the branch managers who had reported to him that he had been dismissed, and bade farewell to his colleagues in head office. At the end of that working day the respondent removed his belongings, packed them in the boot of his car, and left the building. Saude, who saw the respondent loading his belongings in his car, did not stop him, nor did Saude

or anyone else employed by the appellant require the respondent to work. Rather, the respondent did not again work for the appellant, despite being paid for the period 25 April to 30 June. As early as 2 May, Mr O'Dwyer, one of the newly appointed regional managers, occupied the respondent's office.

37] The respondent, not surprisingly, placed great emphasis on Mrs White's letter of 4 May, in which it was indicated that the respondent had been retrenched by that date. Mrs White was not called to explain her letter. Prentice in his undated letter speculated that Mrs White must have assumed that the respondent was a member of SASBO and that he had been retrenched as part of the retrenchment of the SASBO members. In the absence of Mrs White, who did not testify, not much value should be attached to that explanation. Perhaps as result of a Freudian slip, Mrs White reflected the true intention of the appellant.

38] The appellant's failure to consult with the respondent on alternatives on retrenchment, was a serious one, particularly if one has regard to the respondent's long service, his age, and the obvious advantage to him to remain in the employ of the appellant until retirement.

39] If the appellant, as testified to by Van Deventer, had alternative positions to offer the respondent, the consultation process might have concluded on the basis that the respondent remained in the appellant's employ, albeit in

another capacity at a lower salary. If the appellant did not intend to offer the respondent another position, it should have made its position clear to the respondent, provided a justification for its stance, and given the respondent the opportunity to persuade the appellant nevertheless to retain his services in some capacity or another.

40] The industrial court found that the respondent was partly to blame for the failure to consult because the respondent “stubbornly refused to accept the repeated assurances by [the appellant] that his services had in fact not been terminated”, that respondent did not raise alternatives to retrenchment at any of the meetings, and that his conduct demonstrated that he was not willing to consult. The reasoning of the industrial court is partly based on the premise that the respondent’s services had not been terminated on 25 April. The truth is that the appellant had terminated the respondent’s services on 25 April in the sense that he was no longer required to work for the appellant.

41] The industrial court, however, correctly took the respondent to task for not raising alternatives to retrenchment at any meetings. The respondent deliberately ignored the appellant’s written calls for suggestions for alternatives to retrenchment . He testified that at the meeting of 17 May he was not “open for consultation” because he “knew beforehand that there were no positions in the bank for [him] because the door was closed on 25 April”. While not raising alternatives to retrenchment - and he testified that he had

one in mind - the respondent and Mrs Goodman were careful to reserve his right to challenge the retrenchment if no settlement was reached. The respondent did not deal with the appellant in good faith.

42] The industrial court misdirected itself in not finding that had proper consultations been held, the respondent might have remained in the employ of the appellant until retirement age. The probabilities are that had the respondent continued in employment he would have earned less, possibly substantially less, than he did as assistant general manager. The true measure of his patrimonial loss is, therefore, not R420 000,00 but some lesser amount.

43] As the industrial court misdirected itself in the award of compensation, this Court is free to fix the amount of compensation. Section 46(9)(c) provides that the industrial court shall determine the unfair labour practice dispute “on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation”. The section gives no guidance on what principles should be applied to the award of compensation where there was a commercial rationale for the redundancy of an employee’s post, as in this case, but the employer did not adopt a fair procedure before deciding on retrenchment.

44] What makes the award of compensation more complicated in this matter is

that the respondent was compensated by the appellant for being retrenched. In addition to paying the respondent outstanding leave pay and a pro rata bonus, the appellant paid “eight months severance pay” in an amount of R99 520, 00, and the respondent’s bond in the sum of R10 360,00.

- 45] The retrenchment package paid to the respondent in July 1995 was about R40 000,00 more than the original offer. However, because the unfairness in the present case consisted of a failure to consult on possible alternatives and, consequently, the possibility exists that the respondent might have remained in the employ of the appellant in a lesser position, the adequacy of the retrenchment package is not the only, or even central, factor to be considered.
- 46] Other factors which should be taken into account are the appellant’s failure to give notice of its intention to retrench, the failure by the appellant to attempt to accommodate the respondent in the new structure, the respondent’s length of service and age, and the breach by the appellant in a material respect of its duty to consult prior to retrenchment, and the uncooperative and obstructive attitude adopted by the respondent during the consultation process.
- 47] Taking those factors into account, a reasonable amount of compensation is the amount of R150 000,00.
- 48] The industrial court should have awarded the respondent the costs of the s

46(9) proceedings, including the costs incurred in dealing with the point in limine. As subsequently conceded by the appellant, the dispute had not been settled and the dismissal was procedurally unfair. Had the appellant made those concessions initially the proceedings in the industrial court could have been avoided or substantially reduced.

49] The respondent sought the costs of the point in limine on the High Court scale as between attorney and client. The submission was that at the specific instance of the industrial court the appellant was asked to agree to a stated case by the respondent. The appellant, however, refused to agree to a stated case; the point in limine could never have been decided separately from the merits as that would have lead to a duplication of much of the evidence; and Prentice conceded in evidence that the matter had never been compromised.

50] If one has regard to the factors that there was no merit in the point in limine and that it was not a true point in limine in that it could never be decided separately from the merits of the dispute, one is driven to the conclusion that the point was taken in order to cause delay. In fact, by pursuing the point in limine, the appellant delayed the final adjudication of the dispute by a period of about seven months. Not only was the prosecution of the respondent's case delayed, but he was required to finance the appearance of counsel on those three occasions, when the appellant, to its knowledge, had no case. In all those circumstances, it seems to me to be appropriate that a special award

of costs should be made.

51] Both parties have achieved substantial success on appeal. It is accordingly in accordance with the requirements of the law and fairness that each party should pay its own costs on appeal.

52] The order which is made is the following:-

1. The appeal is upheld to the extent reflected in paragraph 3.2
2. The cross-appeal is upheld to the extent reflected in paragraph 3.3.
3. The order of the industrial court is altered to read:-
 - “1. The dismissal of the applicant by the respondent is declared to be an unfair labour practice.
2. The respondent is ordered to pay the applicant compensation in the sum of R150 000,00.
3. The respondent is ordered to pay the applicant the costs of the proceedings in terms of s 46(9) of the Labour Relations Act, 28 of 1956, on the High Court scale, including the costs relating to the point in limine taken by the respondent, which latter costs are to be paid on the High Court scale as between attorney and client.”
4. There is no order in respect of the costs of the appeal and the cross-appeal.

Myburgh JP

I concur

Froneman DJP

Kroon JA

Date of hearing: 4/2/98

Date of judgment: 11/2/98

Appearing for the appellant : Mr M.J. van As instructed by Mr A de Kock
of Hofmeyr Herbststein Gihwala & Cluver Inc

Appearing for the respondent : Mr N.F. Rautenbach

This judgment is available on the Internet at Website: www.law.wits.ac.za/labour crt.