

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT CAPE TOWN.**

CASE NO. C312/98

APPEAL CASE NO. 10/2000

In the matter between:

**THE SOUTH AFRICAN MUTUAL LIFE
ASSURANCE SOCIETY**

Appellant

and

**INSURANCE AND BANKING STAFF ASSOCIATION
HEATHER PAULSEN
NICHOLAS DAMANE**

**1st Respondent
2nd Respondent
3rd Respondent
4th**

**PENNY CLARKE
Respondent**

**CHANTAL STANDER
Respondent**

5th

JUDGMENT DELIVERED ON 29 JUNE 2001

DAVIS AJ.A

INTRODUCTION.

[1] Second to fifth respondents ('the individual respondents') were employed by appellant as recruitment consultants in its employment services department ('the department'). They were retrenched with effect from 30 May 1998 after being advised on 13 March 1998 that their services were no longer required. They brought an action in the Labour Court which found that their dismissals were not effected for a fair reason and ordered appellant to pay compensation equal to

twelve months' remuneration together with costs.

BACKGROUND.

[2] The primary function of the department was to ascertain appellant's staff recruitment needs, to effect the necessary advertising and to select and recommend suitable candidates to fill vacancies. As from the beginning of 1998 concerns had been expressed by members of appellant as to the quality of service rendered by the employment services department.. The concerns expressed related primarily to the fact that the department did not add value to the selection process of new staff, that its role was confined to receiving and forwarding resumés of potential clients without providing any input or screening and that it was unable to determine the needs or to assess the requirements of the particular 'client department'. Accordingly, several of the other divisions of appellant had resorted to the employment of outside agencies to meet their recruitment needs.

[3] In a letter of 24 February 1998 Ms Bridget Griffiths, the manager of the department, wrote to a senior member of the department, Mr Ben Botha, in **inter alia**, the following terms:

"I also need to reiterate the seriousness of the issue in that should employment services not fundamentally change the service that it provides and the way that it operates the viability of the whole unit is at stake and

this could mean the closure of the department.”

[4] According to the testimony of Ms Griffiths and of her predecessor, Mr Paul Alexander, training and skills development of existing staff in the department would not have achieved the desired result. A total departmental redesign was required in order to ensure that appellant’s recruitment objectives could be fulfilled. Ms Griffiths testified that to this end a business case study had been drawn up, that numerous meetings had been held with the individual respondents at which issues pertaining to the restructuring of the department had been canvassed. The competencies of staff required in the proposed department had been carefully defined and a panel consisting of three well qualified human resources practitioners had been constituted to conduct interviews and assess each employee in terms of their competencies for the new positions in the restructured department.

[5] In essence the evidence given by Ms Griffiths and Mr Alexander showed that a series of meetings had been held throughout February and March 1998 with a view to the implementation of the proposed restructuring of the department. On 10 April 1998 a deadline had been set for reapplying for ‘new jobs’ in the restructured department. Interviews had been held on 11, 12 March and 13 March with members of the department. The individual respondents declined to apply for positions. They were then informed that their services were no longer required and, accordingly, that they must remove their personal effects. Their access to the work premises was then barred.

[6] It was clear that the individual respondents were reluctant to engage in an application process for new posts within the restructured department. They insisted that the parties should continue to consult and attempt to reach a

consensus. On 6 March 1998 Ms Griffiths telefaxed Mr Botha extending the deadline for a contribution to the selection process to 16h00 on the same day. On Wednesday 11 March she advised the third respondent that, if he did not apply for a position in the restructured department, he would forfeit the opportunity of redeployment and that he would then have to resign. When, on 13 March 1998 the individual respondents had not replied, Ms Griffiths advised them that they had therefore automatically opted for retrenchment, and that they would receive a severance package. They were then handed retrenchment letters and were informed that they were not required to return to work on Monday 16 March 1998. On the same day, 13 March their access cards were confiscated. The individual respondents subsequently challenged the fairness of their dismissal in the Court **a quo**.

[7] In his judgment **Jajbhay AJ** held that the ‘old’ and ‘new’ structures as set out in the restructuring process document were essentially the same and accordingly no new jobs had been created. Rather jobs had been renamed within the same department. **Jajbhay AJ** found that, of the eight incumbents who applied for positions in the ‘new structure’, all were reappointed. Accordingly he concluded: “on a proper consideration between “old” and the “new” jobs it appeared that they were doing essentially the same work after the restructuring as they had been prior to 13 February 1998”.

[8] For this reason **Jajbhay AJ** held that appellant “had attempted to disguise a classic retrenchment exercise as a reorganisation or restructuring based on the non delivery of services in the department”. The business strategy adopted by the appellant in order to achieve the desired effect did not accord with a commercial rationale. As the learned judge said “It is correct that the dismissal of individual applicants was not actuated by malice, or some hidden motive, on the part of respondents management. However the fundamental job content did not change, it was the manner in which the individuals began performing that was now different. Here the ultimate decision arrived at by the Respondent is neither commercially, nor operationally justifiable on rational grounds based on fairness”.

APPELLANT'S CASE.

[9] On appeal, the essence of appellant's case was that, in terms of s 188(1), of the Labour Relations Act 66 of 1995 as amended ('the Act') it had proved that the reason for the dismissal was a fair reason based on the employer's operational requirements. Mr Oosthuizen, who appeared on behalf of appellant, placed considerable emphasis on the test for evaluating the fairness of a dismissal based on operational requirements as laid down by **Froneman DJP in Sactwu and Others v Discreto (A Division of Trump and Springbok Holdings)** (1998) 12 BLLR 1228 (LAC) at 1230 G where he said:- "For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinizing the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, genuinely not qualified to pronounce upon, but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation

process have been followed, and if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process."

- [10] On the basis of this **dictum** Mr Oosthuizen submitted that it was not the role of courts to 'second guess' appellant's decision to engage in a restructuring exercise. He contended that the evidence revealed a widespread degree of serious dissatisfaction among other divisions of the appellant concerning the services rendered by the department. For this reason a restructuring exercise was mandated if a department was to survive in any form whatsoever. The decisions taken by appellant were all designed to ensure that an operationally more effective department would emerge which would be commercially viable. For this reason the court **a quo** had erred in that it had sought to interfere with appellant's decision to restructure on commercially justifiable grounds, such interference being predicated on an adverse approach taken by the court **a quo** to the particular restructuring programme which had been chosen by appellant. According to Mr Oosthuizen, appellant had considered other alternatives including the upgrading

of skill levels of existing staff. However, appellant had finally chosen the particular strategy which was the subject of this particular dispute.

EVALUATION.

[11] Mr Bozalek, who appeared on behalf of the respondents, submitted that a key document justifying the restructuring process for the employment services division observed “For some time now employment services has received negative feedback regarding the service that it provides”. To this, the report stated: “This feedback is directly attributed to the inadequate skill development and qualification of several of Recruitment Consultants and the capability of recruitment consultants to deliver what is expected.” A further factor noted in the document was the provision of inadequate administration support.”

[12] Accordingly Mr Bozalek submitted that the very documentation upon which appellant had relied to justify the restructuring of the department indicated that much of the problem with the department lay in the ‘inadequate skill level and qualifications of several of the recruitment consultants’. During the consultation period second to fifth respondents had taken the approach that, with improved training and skills development, many of the difficulties which the department had encountered could be resolved. Accordingly Mr Bozalek submitted that the decision to restructure the department represented a guise under which appellant sought to address problems of perceived non performance or incapacity of the individual respondents which on its own documentation was caused by a skill

shortage.

[13] Mr Bozalek further submitted that, when the new structure was analysed, the various tasks which previously had to be performed by the incumbents were similar to the new posts which comprised the old structure. Posts had merely been renamed rather than been restructured. Of the eight existing incumbents who applied for new posts all were accepted with one being appointed to the position for which he was not qualified in terms of the new published job competencies. Under cross examination Ms Griffiths was asked whether the restructuring exercise amounted to no more than a different way of interacting with clients, ‘a different way of service delivery She replied: “The delivery still is recruitment selection yes, how it is delivered to the client is different”.

[14] When the restructuring of the department is examined within this factual context it appears that it represented a means of dismissal of the individual respondents based upon incapacity and poor work performance. Mr Paul West, appellant’s human resources manager, conceded as much in answer to the question: “So was your problem actually with the performance of individuals and not with employment services as a whole? He replied: “[T]he problem with Employment Services as a whole, obviously there were some individuals who were meeting the high level standards of what the businesses were asking for and others not. And we had to find a fair way of determining who those were without just saying well,

its so and so, because some people were in the more difficult environment than others. And by doing a selection battery we could say let's see if we could shift people around and just say for example move someone out of an IT area into a clerical area or a new management area or **vice versa**, to see who was most suitable. And then as some folk didn't have any of the competency required then obviously then we would have to look at whether the job – whether they could stay in the job that they had”.

[15] Under cross-examination Ms Griffiths was unable to point to any substantial differences between the posts which had existed in the old department and those which were established in the new department. Furthermore, when asked as to how the incumbents of the old department were expected to perform successfully in their new posts, Ms Griffiths was constrained to answer that they were assessed according to the required level of competence for the new jobs and that they had received further training, the very point on which second to fifth respondent had sought to negotiate. This candid assessment of the problem had been articulated in the business case study in which it was stated that the ‘negative feedback’ about the performance of the department was ‘directly attributed to the inadequate skill level and qualifications of several of the Recruitment Consultants to deliver what was expected’.

[16] Ms Griffiths’ evasiveness as a witness can probably be partly explained by her

inability (and indeed that of the other witnesses who testified on behalf of appellant) to provide any clear evidence which could indicate a substantive difference between the old and new structure. When the evidence is evaluated holistically, a clear picture emerges of appellant being dissatisfied with the performance of certain members within the department, and choosing not to initiate proper disciplinary enquiries in relation to performance and incapacity. Rather appellant sought to restructure the department as a means of dismissing those employees with whom it was dissatisfied, namely the individual respondents.

- [17] In the circumstances, appellant was not able to discharge the onus of establishing that second to fifth respondent were retrenched because their jobs had become redundant pursuant to a process of restructuring the department. It was also not able to show that the individual respondents would not have been able to perform to the acceptable level of competence in the restructured department. Even applying the test advocated by Mr Oosthuizen as set out by **Froneman DJP** in the **Clothing and Textile Workers Union, supra**, the evidence presented to the court fails to provide a rational justification for the decision to dismiss in terms of the appellant's operational requirements. The ultimate decision to change the department was predicated upon appellant's manifest dissatisfaction with the performance of certain personnel in the department rather than on the grounds of operational requirements, namely requirements based on the economic

technological, structural or similar needs of the employer. (s 213 of the Act).

[18] On the basis of the finding to which I have come, it is unnecessary to deal with the further issue as to whether the retrenchments were procedurally unfair. The appeal is dismissed with costs.

DAVIS AJA

I agree

ZONDO J P

I agree

DU PLESSIS AJA