

COURT OF SOUTH AFRICA

CASE NO: DA1/2001

ROLAND VANCOILLIE

APPELLANT

AND

SANLAM LIFE INSURANCE LIMITED

RESPONDENT

JUDGEMENT

ZONDO JP

INTRODUCTION

- [1] The appellant was employed by the respondent, Sanlam Life Insurance Limited, as a branch manager for its Port Shepstone branch from 1990 until the 30th September 1998 on which latter date he was dismissed. A dispute arose between the two parties about whether dismissal was fair and, if it was, what relief the appellant was

entitled to. He then referred to it the Commission for Conciliation Mediation and Arbitration (~~Athe~~ **CCMA**) for conciliation. When conciliation failed to produce a resolution of the dispute, he referred the dispute to the Labour Court for adjudication. In the Labour Court he sought compensation and severance pay of a higher amount than the severance pay that the respondent had indicated it would pay him. The Labour Court , per Ngcamu AJ, found that the dismissal was fair both substantively and procedurally and, accordingly, dismissed his unfair dismissal claim as well as the claim for the payment of a higher amount of severance pay. With the leave of the Court a quo, the appellant now appeals to this Court against that order.

The Factual Background

- [2] About April 1997 the respondent caused certain research and other initiatives to be undertaken in order to place itself in a position to make certain important decisions about the improvement of the quality of its service and its competitiveness. As a result of such research and initiatives, certain proposals were made to the respondent. These included a proposal that the respondent should undergo a process of restructuring.
- [3] On the 16th March 1998 the respondent addressed a letter

to, among others, branch managers and regional managers. The appellant, as one of the branch managers, also received the letter. Because this letter is one of the critical letters in this appeal, it is appropriate that its contents be quoted in full. It reads thus:-

**PROPOSED RE - STRUCTURING OF SANLAM
LIFE AND SANLAM MARKETING:**

Sanlam Life and Sanlam Marketing started various renewal initiatives namely Finpro (Savings Products), Call Centres and New Dawn to achieve certain goals - set out in Annexures 1 and 2 (as attached). A major part of the research and planning is now coming to a stage where we need to communicate these proposed changes to you in order for us to get your input and comments. The projects (Finpro (Savings Products), Call Centres and New Dawn) propose re - structuring of Sanlam Life and Sanlam Marketing to become more competitive in the following respective areas:

Sanlam Life: There exists two focus areas namely Savings Products and Call Centres (For a summary of the proposals of the projects see Annexure 1).

Sanlam Marketing: New Dawn envisages a migration towards a client oriented, profitable Sanlam distribution. (For a summary of the proposal see Annexure 2).

The proposals as set out above were presented to Exco, and have been approved on a preliminary basis subject to further consultation .This does not complete the roles of Finpro (Savings Products), Call Centres and New Dawn, which will continue to envisage the full implications of these proposals and its impact on all the employees in Sanlam Life and Sanlam Marketing.

We are presently consulting with General and Senior Management in both Sanlam Life and Sanlam Marketing on the impact of these proposals. At this stage, we cannot give a definite indication of what impact these proposals will have on you. However, rest assured that when we do have clarity on this and any impact on your job, you will be consulted. Further information will be distributed to you via roadshows, pamphlets and various other media. Sanlam Life and Sanlam Marketing have however decided on one integrated communication channel to you in order to prevent duplication of the information provided.

To assist (Finpro Savings Product), Call Centres and New Dawn in our research we will appreciate any comments or feedback on the proposals as out in the Annexures attached, on or before 25 March 1998. Any of the communication channels indicated below can be used for these purposes≡. The annexures are not reproduced

in this judgement.

- [4] Certain points contained in the letter need to be emphasised. One is that it is clear from paragraph 1 of the letter that at that stage the respondent was talking about **Aproposed changes**≡. This means that no final decision had been made by the respondent on whether those proposals on changes would be accepted by it. Indeed, in the fourth paragraph of the letter it was expressly stated that the approval which Exco had given was on a preliminary basis and was subject to further consultation. These proposals, it must be pointed out, were made to the respondent by its consultants. The second point contained in the first paragraph was that the respondent=s purpose in communicating the proposals to, among others, branch managers was **At to get your input and comments**≡. In the fifth paragraph it was stated that at that stage the

respondent could not **Agive you a definite indication of what impact these proposals will have on you≡.** However, continued the letter, **Arest assured that when we do have clarity on this and any impact on your job, you will be consulted≡.** In the last paragraph of the letter it was stated: **APlease be specific in your requests. Your input is vital to the success of any restructuring≡.**

- [5] It is common cause that the appellant did not give the respondent any input or comment in response to the letter. On the 8th June 1998 the respondent issued a letter to, among others, branch managers including the appellant. As this is also a very important letter in this matter, it is appropriate to quote its contents as a whole. The letter reads thus:-

Dear

Re: **INPUT REGARDING FINALISATION OF STRUCTURE, SELECTION CRITERIA (JOB CONTENT) AND METHOD OF SELECTION FOR POSITION OF COMMISSIONED SALES MANAGERS**

1. **As you know, the New Dawn project=s recommendations on structures in the marketing environment have been**

approved. Staffing of the positions of Individual Business= channel heads and Provincial Managers has been finalised and the process of staffing the positions of Regional Managers (Sales Centre Managers) has commenced.

- 2. The aspects mentioned in the heading now have to be finalised and consequently, in terms of the proposals, we are considering in principle to abolish your post and to implement the proposed new structure.**
- 3. To a large extent you have been part of the preliminary process, but we require your input during the remaining process and in respect of all aspects mentioned below. This applies in particular to the proposed structure with regard to the above - mentioned positions, the proposed job content and the method of selection. The proposed job content and method of selection are explained in annexure A and B respectively. During the consultation process we would like to reach an**

agreement with you as far as possible.

- 4. In order to make the process as transparent as possible, a branch managers= meeting will be held at which the matter can be discussed and input obtained. You may also submit your input in writing before. If you require any further information to give your input, please advise Schalk Cronje at x2539.**

- 5. If the restructuring continues unchanged and if you cannot be accommodated in the new structure, we will try to redeploy you elsewhere. We will do our best to accommodate you, and your input in this regard will be taken into consideration in full.** The annexures to the latter

are not reproduced in this judgement.

- [6] It will have been seen from the contents of the letter that, between the letter of the 16th March and that of the 8th June, the respondent had approved the New Dawn proposals. It did this after having given the appellant and other branch managers an opportunity to comment on them. It will also have been seen in the letter that the

respondent was contemplating abolishing the post of branch manager for the Port Shepstone branch and to implement the new structure that had been proposed. In par 8 of the letter the respondent stated that the proposed job content would serve as **Atthe primary selection criteria**≡ (sic). The respondent emphasised the importance of the managers giving their **Afinal input regarding the structure as well as the job content**≡ at a meeting that the respondent was going to be convening as part of the consultation process. The letter also said that, if the proposed structure was implemented and the appellant was not accommodated in the new structure, and no alternative could be found, he could be retrenched in which event severance benefits would be paid to him.

- [7] On the 9th June 1998 a meeting was held that was attended by branch managers including the appellant and representatives of senior management. At this meeting the letter of the 8th June was distributed to the branch managers including the appellant. The importance of this meeting lies partly in the fact that the continued employment of employees at management level including branch managers was no longer guaranteed but they had an opportunity to give their input. The positions that would have to be filled were those of the channel heads,

provincial managers and branch managers. The purpose of the meeting of the 9th June was to consult on the various issues raised in the letter of the 8th June. Furthermore, according to the evidence of Mr H.A. Smit in the Court a quo, at that meeting it was stated that there was time until the 22nd June for any one to make an input on those issues if they wanted to. No particular decision was taken at that meeting.

- [8] After the meeting of the 9th June the appellant did not make any comment or input to the respondent in response to the invitation extended in the letter of the respondent dated the 8th June and at the meeting of the 9th June. However, he did apply for appointment to the post of branch manager for the respondent's branch in Port Shepstone. Although he and other managers had been urged to apply for more than one post and to indicate their order of preference, the appellant did not apply for any post other than that of branch manager for Port Shepstone. In court the reasons he gave for not applying for other posts were that he was confident that he was **qualified** for that post of branch manager for Port Sheptone and he did not want to move to another area because his daughter was going to do matric and two of his sons were going to senior school.

- [9] After branch managers had made applications for

appointment to various posts, there had to be assessments to determine those suitable for appointment to the various posts in the new structure. The assessments were conducted in Cape Town. As already stated earlier, according to par 8 of the letter of the 8th June the job content was going to serve as the primary selection criterion in determining who would be appointed to which post. The appellant was unsuccessful in his application. In fact the post remained unfilled for about nine months thereafter. It was ultimately filled by a person who had a Higher Diploma in Tax and financial planning.

[10] That the appellant had been unsuccessful in his application was conveyed to him by a letter dated the 3rd September 1998 which apparently followed a telephone conversation that Mr Beukes, the appellant=s regional manager, had with the appellant. In that letter the respondent gave the appellant various options available to him in the light of the fact that he had not been placed in the new structure. These included an adviser=s contract as a first alternative. He was also informed that, if there was any other position he was interested in within the respondent, he could apply for it. Another option given in the letter was that the appellant could apply for voluntary retrenchment with a severance pay.

[11] It was stated in the letter of the 3rd September that, if retrenchment occurred, severance pay would be paid. The

letter stated that severance pay would be calculated as a lump sum of two weeks= remuneration for every uninterrupted year of service up to a maximum of 24 years subject to it meeting the minimum laid down by law. The remuneration was going to be based on 67% of the total remuneration over the previous 12 months at the time of termination. The total remuneration was said to represent all fixed and incentive remuneration as well as company contributions to medical and pension fund. Commission on own business was excluded.

- [12] The appellant was unhappy with the basis of the calculation of severance pay. He suggested to the respondent that a different basis be used in his case. He contended that, as he had done very badly during the previous 12 months, the use of that basis would operate unfairly on him. Using the basis of calculation used for everyone else, the appellant's severance pay was about R13 000,00 or just over that figure. The basis of calculation that the appellant suggested should be used in his case was one that would have ensured that his severance pay jumped from about R13 000,00 to over R80 000,00. The respondent rejected this proposal and maintained that the basis for the calculation of the severance pay would be the same for everybody. When no agreement was reached to treat him differently on this issue, the appellant instituted legal proceedings claiming that he had been unfairly

dismissed.

[13] In his statement of claim the appellant attacked the fairness of his dismissal on the following grounds that he claimed related to the substantive fairness thereof:-

13.1 the respondent failed to allow reasonable and fair contribution to be made by the appellant in the substantive decision making process. The appellant was not sufficiently consulted in establishing whether substantive grounds of dismissal were present.

13.2 the proposals for restructuring adopted by the respondent were a charade used by the respondent to get rid of unwanted employees.

13.3 the respondent failed to offer the appellant alternative positions **Awhich would have been far more suited for employees such as the appellant.**

13.4 the respondent failed to adequately take into account the individual requirements of the appellants which the appellant claimed were of a unique nature.

[14] The Labour Court found that the appellant had been dismissed fairly and was not entitled to more severance pay. It accordingly dismissed his claim with costs. On appeal Counsel for the appellant did not pursue any of the above grounds of alleged unfairness in relation to the substantive fairness of the dismissal. In not pursuing them,

she was correct. Not a single one of them has merit. Indeed, they have no factual basis. Nothing more needs to be said about them. The point that Counsel for the appellant sought to pursue on appeal in relation to the substantive fairness of the dismissal was a different one. It was that the appellant had met the selection criteria that had been announced as the criteria that the respondent was going to use to make appointments into the new structure and that, for that reason, it was unfair that, despite this, the appellant had been selected for dismissal. It is this contention that I now turn to consider.

- [15] As already stated earlier the respondent had stated prior to the assessment of candidates for the various positions that the primary selection criterion was going to be the job content. The reason why the appellant was not appointed to the position of branch manager for the respondent's branch in Port Shepstone was that he was not considered suitable for appointment to that position in Port Shepstone. This did not mean that he could not have been appointed to another post of branch manager elsewhere if he had applied and was found suitable for the post of branch manager of the particular branch. However, as he had not applied for any other posts except the post of branch manager for the Port Shepstone branch, he could not be considered for other posts elsewhere.

[16] The evidence given by Mr H.A. Smit, the respondent's provincial manager in Kwa - Zulu Natal, was that the candidate that the respondent wanted to appoint as the branch manager of the Port Shepstone branch had to fit a certain profile. Mr Smit testified under cross - examination that, after the restructuring, the job content for the post of branch manager was not the same as the job content thereof before the restructuring. In this regard he said that, after the restructuring, there was **Amuch focus put on a target market approach**. He explained that during the early 1995 leading upto the New Dawn project, there had been a **Aproduction push** but under the New Dawn project and after the restructuring, the idea was to put the client **Ain the centre of everything which was a different approach to what [the respondent] was used to as far as strategy was concerned up to that point in time.**

[17] Mr Smit's evidence was also to the effect that, as far as the post of branch manager for Port Shepstone was concerned, the correct profile was somebody with a sound knowledge of the target market, a sound knowledge of tax, tax implications, estate planning and financial planning. He emphasised that he could add more and more to that list including networking. During the cross-examination of Mr Smit, Counsel for the appellant sought to suggest that

the work profile that Mr Smit said guided the respondent in determining a suitable candidate should not have been used because such work profile was different from the work profile that had been given in the documentation issued to the managers as the workprofile that would be used. She put it to Mr Smit that there was nothing in the work profile that was contained in the documentation that required knowledge of estate planning, financial planning or tax implications.

- [18] Mr Smit disagreed and testified that the work profile contained in the documentation entailed **the output that is expected of the manager and the competence and the knowledge that is needed**. In this regard he also testified that he saw the requirement of knowledge of financial services and product knowledge as related to the target market that the manager would operate in. He said that knowledge of financial services and product knowledge implied the ability to give advice to clients regarding their financial needs and basically doing financial needs analysis for a client and making recommendations about the sort of product that such client needs.

- [19] Counsel for the appellant suggested that such information should have been specifically stated in the profile. Mr Smit's evidence in this regard was that he had informed

the meeting of the 9th June about the fact that in the Kwa Zulu Natal province in which the Port Shepstone branch fell the respondent would continue with a market focus. He had also emphasised that, after the restructuring, there was to be a shift in focus to the senior market. He described the senior market as comprising the farming market, the small business market and the top income group in the salaried market.

- [20] Counsel for the appellant referred to the fact that the appellant's achievements in 1991 included a qualification for a senior adviser's course and had he been trained in succession, advice on taxation, business insurance, retirement planning, advice on investment and estate planning. She suggested that through such training the appellant had what the respondent was looking for. Mr Smit rejected this suggestion and said that, not only had a lot changed between 1991 and 1998, but, also, that the respondent was looking for somebody who could move into that environment and do what the respondent wanted him to do right from the beginning. In this regard Mr Smit highlighted the fact that the person who was ultimately appointed to the post had a Higher Diploma in Tax and was a certified financial planner. He said that the training that the appellant had had did not come anywhere near that of a certified financial planner.

[21] Counsel for the appellant sought to suggest to Mr Smit under cross - examination that the appellant had been dealing with the senior market and therefore met the requirement for a focus on the senior market. Mr Smit answered this by testifying that the percentage of the senior market of the Port Sheptone branch upto about May 1998 under the appellant was about 23% which, he said, meant that the Port Shepstone branch was **At the worst branch that was doing in the senior market, the lower percentage**. He said **If 23% is dealing with the senior market, then that=s not what I would regard as really dealing with the senior market**.

[22] Although Mr Smit conceded under cross-examination that he had not discussed the requirements of the Port Shepstone branch specifically with the appellant, he testified that **We did discuss the principle in general that we will focus on target markets the way we used to do in this province and that was conveyed to them on numerous occasions and it was also mentioned on the 9th ...**.

[23] In the light of the above there can, in my view, be no doubt that the appellant did not have what the respondent was looking for in the person who was going to be appointed as the branch manager for the Port Shepstone branch. He

met some of the requirements but not all. The importance that the respondent attached to the need to only appointing a candidate who met its requirements was demonstrated by the fact that the respondent was prepared to leave the post of branch manager for Port Shepstone unfilled for about nine (9) months while it was looking for a candidate who would meet the requirements. The respondent would not lightly have allowed a branch to operate without a branch manager for such a long period if the appellant met the respondent's requirements.

[24] As to the contention that the appellant was not consulted with regard to the selection criteria that were used, the evidence that was led in the Court a quo is clear. It is that in the invitations that were extended to the appellant and others to make their input, they were asked to make whatever input they may have wished to make. The appellant did not take this invitation up. Mr Smit testified that at the meeting of the 9th he explained the basis of the selection to all who attended that meeting which included the appellant.

[25] The appellant was one of the managers who were consulted by the respondent at the meeting of the 9th where, according to Mr Smit he explained the matters that were later relied upon by the respondent in deciding not to

appoint him. The respondent did not have an obligation to consult the appellant individually. In these circumstances there can be no doubt that the respondent=s decision not to appoint the appellant to the post in Port Shepstone was fully justified. Indeed, it was not the appellant=s case that he was better qualified for appointment to that post than the candidate that the respondent ultimately appointed to it. In all probability the reason why the appellant found himself no longer employed by the respondent was that he chose not to apply for other posts. He may well have been appointed to one or other post had he applied. Having put all his eggs in one basket, the appellant cannot now complain. I therefore conclude that the appellant=s dismissal was substantively fair.

Procedural fairness

[26] The appellant=s Counsel submitted that the appellant=s dismissal was procedurally unfair on various grounds. The effect of the grounds advanced in Counsel=s heads of argument was that the respondent made the decision to restructure before it could consult the employees and that it provided the employees with information that was inadequate to enable them to engage in effective and meaningful consultation. None of these grounds of attack on the manner in which the respondent handled the consultation process is sustainable. A reading of both the

letters of the 16th March as well as that one of the 8th June - both of which have been quoted above - reveals beyond any doubt a very high degree of commitment to proper consultation on the respondent=s part. Those letters leave one in no doubt that, if there was anything that the employees sought to have clarified, they were free to raise it with the respondent and the respondent would have been more than willing to furnish the required clarification or information.

- [27] The submission that the respondent made certain final decisions prior to consultations is simply not supported by the evidence and should be rejected. The appellant was afforded an opportunity to engage in a meaningful consultation with the respondent which he elected not to use - probably because he took the attitude that he would get the Port Shepstone post and did not have to bother. There is simply no doubt that the appellant=s dismissal was procedurally fair.

Severance pay

- [28] There was also the contention by the appellant=s Counsel that the respondent ought to have calculated the appellant=s severance pay on a basis different to the basis on which other branch manager=s severance pay was calculated. It is unnecessary to go into details about this

contention. It simply has no merit and falls to be rejected. The basis on which the respondent sought to calculate severance pay was such that it could differentiate against an individual who had had a bad year. However, this would not render the way it was calculated unfair because it all would be based on the performance of each individual. The respondent was entitled to use the same calculation for all the employees affected. Its decision not to accede to the appellant's demand was not unfair.

Conclusion

[29] In all of those circumstances I am satisfied that the appeal falls to be dismissed. It is, in my view, in accordance with the requirements of law and fairness that the appellant be ordered to pay the costs of the appeal. In the premises the appeal is dismissed with costs.

RMM Zondo
Judge President

I agree.

C.R Nicholson
Judge of Appeal

I agree.

N.S Page
Acting Judge of Appeal

Date of Judgment: 29 March 2002