REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 75/10

In the matter between:

JANINE LOMBARD **Applicant**

and

ABC RESOURCES (PTY) LTD **Respondent**

Heard: **20, 22 and 23 August 2012**

Delivered: **20 December 2012**

Summary: Dismissal for operational reasons – failure to comply with section 189 of the LRA – dismissal substantively fair but procedurally unfair – applicant tacitly agreeing to new contract – not entitled to difference in salary but entitled to payment for accrued leave and notice pay.

JUDGMENT

BOQWANA, AJ

Introduction

[1] There are two issues before this Court. One is about fairness of the dismissal for operational reasons and the other relates to contractual claims for outstanding salary, leave and notice pay.

[2] In regard to the unfair dismissal claim, the applicant alleges that the respondent's failure to follow the procedure laid down in section 189 of the Labour Relations Act[1] ('the LRA') in the retrenchment process was so gross so as to indicate that there could be no reason for the retrenchment and accordingly this failure by the respondent rendered the applicant's dismissal substantively unfair.

[3] Contractual claims are brought under the provisions of section 77(3) of the Basic Conditions of Employment Act[2] ('the BCEA') and they are outstanding remuneration for the months of August, September and October 2009, notice pay and payment of accrued leave.

[4] In respect of the first claim, the applicant seeks maximum compensation or such compensation as is reasonable in the circumstances whilst various payments are sought in respect of the contractual claims together with interest at 15.5% temporae *morae* until date of final payment.

[5] Parties led extensive evidence that lasted for a period of three days. I will only focus on the salient facts as detailed evidence is on record.

[6] The respondent called only one witness, Jorge Basilio ('Basilio'), whilst the applicant was the only one who testified in her case.

Facts

[7] The applicant was employed by the respondent until her dismissal in November 2009. The respondent is a recruitment company that provided recruitment services in the information technology industry.

[1] Act No.66 of 1995
[2] Act No. 75 of 1997

[8] It was affiliated to ABC IT Solutions (Pty) Ltd ('ABC IT Solutions'), a sister company to the respondent, with both companies managed and owned by Basilio.

[9] During 2007, ABC IT Solutions identified an opportunity where corporate banks required personnel on an ongoing basis. ABC IT Solutions approached a number of recruitment companies who had a labour broking profile and experience so as to take advantage of this opportunity. Professional Empowerment Solutions CC ('Empowerment Solutions'), which was owned by the applicant, was one of the entities doing business in the recruitment industry and it provided ABC IT Solutions with placement services.

[10] On 10 December 2008 ABC IT Solutions and Empowerment Solutions, represented by Basilio and the applicant respectively, entered into a joint venture agreement to form ABC Resources (Pty) Ltd, the respondent.

[11] The respondent would source personnel for ABC IT Solutions and its clients mainly within the banking industry. It was envisaged that Empowerment Solutions would bring along its own and existing client base. The respondent would then invoice ABC IT Solutions and its other clients.

[12] The applicant was tasked with the formalities such as registration of the company and directors with CIPRO. It was decided that both Basilio and the applicant would be registered as directors. The applicant, however, would not get shareholding from the beginning since the joint venture would initially be funded by Basilio and/or ABC IT Solutions at the beginning stages. It was envisaged that with time she would become a shareholder on merit as the business grew.

[13] Basilio and the applicant drew up a business plan, which they sought to present to the big corporate banks in order to secure placement business with those banks. Basilio alleges that the applicant was a signatory on all their bank accounts, and that the objective was that the respondent would look to particularly the Standard Bank and the ABSA Bank as clients (i.e. would source employment particularly for these clients).

[14] They also tried to secure funding from various institutions which proved to be a challenge. The respondent managed to secure a contract with ABSA. Shortly thereafter an economic downturn hit the industry with banks deciding to freeze placement contracts. This made things difficult for the respondent..

[15] At the same time the applicant was employed by the respondent as a general manager as per letter of appointment dated 19 May 2009. The effective date of this contract of employment although not in the letter was to be 1 June 2009.

[16] What is key from this letter of appointment, amongst others, is the following paragraph:

> 'We have pleasure in offering you a position as General Manager, for ABC resourcing with the intention of an appointment as Director within the 1st three months; June, July and August 2009.'

[17] What is also important to note is that the applicant's total remuneration was R26 650, with the basic salary being R15 250.00 and the balance was allocated for laptop, internet card, accommodation rental, vehicle rental, petrol allowance.

[18] Other important clauses for the present purposes are leave and termination of employment clauses. The provision dealing with leave states as follows:

> 'Employee will be entitled to <u>15 working days</u> per annum paid leave.' (own underline)

[19] The termination of employment clause states as follows:

> 'The Employee's employment with the company may be terminated by him or by company..., after the first month no less than <u>1 calendar month's notice</u> will be accepted' (own underline)

[20] This agreement was signed by both parties. The letter of employment and the interpretation of its content are quite crucial as it shall become clear during the course of this judgment. It is this agreement that the applicant basis her

contractual claim on. She claims that this agreement was in force until her dismissal whilst the respondent alleges that the contract of employment, and in particular clauses dealing with her position and the remuneration were changed by agreement between the parties.

[21] Due to the loss of the placement contracts with ABSA and Standard Bank by the respondent, resources that were placed with those banks were retrenched. These retrenchments occurred roughly between June and August 2009. The only income that the respondent derived came from ABC IT Solutions and that was unsustainable. The only other engagement that the respondent managed to get came from ABSA in October 2009 but that did not cover operational costs in full.

[22] In September 2009, Basilio approached the applicant with a new contract of employment. This contract would change the position of the applicant from that of a general manager to a sales manager. According to Basilio, this was done in order for the applicant to focus more on sales and the sales model and to make sure that it was affordable for the company. This contract restructured the applicant's remuneration in that her total remuneration would now be R20 200 with her basic salary being R10 000. Everything else remained the same except the introduction of a telephone allowance and an exclusion of rental accommodation which previously was paid at R4950. Another change was the removal of the 10% profit share payable to the manager on declared profits and an introduction of a 20% of net sale commission paid to the sales manager monthly based on sales achieved. Apart from those changes everything else remained the same.

[23] This agreement was not signed by any of the parties.

[24] According to Basilio, the applicant was not worse off instead she stood to earn more if sales were achieved. According to him this deal was for both the benefit of the respondent and that of the applicant as there was no business coming. Further, the applicant needed to be out there to sell and close deals so as to alleviate overheads of the company and in turn she was to be compensated with double commission.

[25] What is crucial though is Basilio's allegation that this new arrangement was agreed to between the parties. The applicant disputes this. Basilio alleges that the applicant tacitly agreed to this restructured agreement based on her conduct.

[26] First, the applicant wrote various emails to Basilio which he took to mean that the applicant understood the new arrangement and was in agreement with it. Reference is made to an email that read as follows:

> 'Hi Jorge
>
> And the car R3500 as I still don't have a hire car but will be getting one this week/next week, then the first deduction for the car will come off my salary at the end of October.
>
> Total therefore to be added to my basic of R10 000 is R7700 (petrol, cell, data bundles, medical, car),
>
> Thank you
>
> Kind regards.'

[27] Basilio contends that no dissatisfaction was raised on any email by the applicant instead emails from the applicant gave an impression that all was well and accepted. He also states that the applicant invoiced ABC IT Solutions based on the new remuneration structure.

[28] Something else occurred during the period of September 2009. The applicant was requested to assist with the Human Resources function ('HR') together with three other people due to the absence of the HR Manager, one David Zannella ('Zannella'), being given the responsibility of handling another project elsewhere. The applicant claims that, that work took most of her time and she could not go out and sell so as to get business for the respondent. She however admits that no business was forthcoming. It seems that this HR work gave her something to do.

[29] The applicant alleges that Basilio was a verbally abusive and a dismissive person who would not listen to her. She claims that she raised her dissatisfaction with Basilio hence the new contract was not signed. She asserts that she only invoiced ABC IT Solutions using the new remuneration structure because she was told what her new salary would be and she obliged. She claims that she had no choice but to invoice using the new amount as she needed the money. She referred to an email sent by Basilio to her two days before she was advised of her retrenchment with Basilio apologising for unprofessional and bad behaviour. This according to her served as an example of how Basilio treated her.

[30] The applicant alleges that her salary was continuously being paid late and when she enquired of when it would be paid Basilio would be abusive and shout at her.

[31] According to Basilio the applicant had always known that things were not going well with the respondent's business. She knew that there was no significant business coming, she was also exposed to the finances of the respondent as a general manager and she conducted and assisted with the retrenchments that had taken place because of lack of business from the banks.

[32] On 29 October 2009 Basilio claims that he advised the applicant that the respondent could not continue as no business was forthcoming and that there was no funding. The applicant disputes this version. She alleges that she had no idea before this date that Basilio was going to retrench with her.

[33] According to the applicant, when she had not heard anything about payment of her salary on the afternoon of Friday 30 October 2009, she approached Basilio, although it was difficult to do so, to ask him whether she could expect payment on Friday or Saturday. Basilio flew into a blinding rage and began to scream at the top of his lungs telling her that she was not performing her duties well as an HR Manager and that he was retrenching her and would pay her one week's pay. The applicant was so shocked as did not know from where that came from. At no point before this time was she ever told that she

was being retrenched. Basilio denies that he shouted at the applicant. He also alleges that on this day he advised the applicant about the respondent having to close down for lack of funding, which was not sustainable.

[34] Later on that day, the applicant alleges that she received a telephone call from Basilio asking them to meet the following day, Saturday 31 October 2009 to discuss this retrenchment.

[35] On 31 October 2009 a meeting took place at a coffee shop. Basilio alleges that he discussed details of how the operations would close down with the applicant and as the last person standing she would be retrenched. He claims that an option of the applicant going back to Empowerment Solutions was also discussed, and if possible, Empowerment Solutions would invoice ABC IT Solutions as it used to. According to Basilio, this was all done amicably and a settlement was reached. He also relies on an email dated 1 November 2009, where the applicant requested details of the meeting held on Saturday, 31 October 2009, to be put in writing as a basis for this agreement.

[36] The applicant's version is that, Basilio advised her that he needed to retrench her based on operational restructuring and that he was going to shelve the company. He told her that she would get a month's notice and would be paid all leave due to her, that she would receive formal notification about the retrenchment over the weekend and that on Monday, 02 November 2009, she coulddo the handover to other staff members.

[37] On 03 November 2009, the applicant received a letter of termination of her services from Basilio but the letter was dated 01 November 2009. The letter advised, inter alia, that her services would be terminated. These two paragraphs from that letter are worth noting:

> 'Due to the economic situation we are faced with, a collective business decision was made to make your position as Sales Manager redundant. ABC resourcing is left with no choice but to restructure the current company structure whereby current MD will head sales further continue with the outsource of service (HR, Finance, Sales) to ABC IT Solutions.

> As per your contract, ABC Resourcing gives you one month's notice. You will be paid out your full salary, further should any leave be due, you will be given an opportunity to take it during your notice period. Should there be severance due, all payouts will take place on or before the 30 November 2009.'

<u>Analysis</u>

<u>Claim 1</u>

[38] A dismissal for operational requirements must both be substantively and procedurally fair.

[39] In *BDM Knitting Mills (Pty) Ltd v SACTWU*,[3] Davis AJA held that the starting point is whether there is a commercial rationale for the decision to retrench. The court is not to take the employer's justification at face value, and is entitled to examine whether the particular decision has been taken in a manner that is fair to the employee who stands to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the inquiry is not directed to whether the reasons offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.

[40] In the *NEHAWU v The Agricultural Research Council*,[4] the court went further to say that the purpose is 'not merely to determine whether the requirements for a proper consultation process have been followed and whether the decision to retrench was commercially justifiable' (but) 'whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances'. In *Keil v Foodgro (A division of Leisurenet)*[5] and many other decisions of this court, it has been held that there is an

[3] (2001) 22 ILJ 2264 (LAC) at para 19.
[4] (2000) 9 BLLR 1081 (LC).
[5] (1999) 4 BLLR 345 (LC) at para 10.

integral connection that exists between procedural and substantive fairness.

[41] The applicant contends that her dismissal was substantively and procedurally unfair. She submits that in as much as the respondent has conceded that section 189 of the LRA was not followed to the letter of the law, its conduct amounts to substantive unfairness in many respects, one being, that it was fully aware at least in May 2009 that the business had hit a slump but yet went ahead to appoint the applicant as a general manager on the same month at a salary of R26 500. This was accordingly inconsistent with its submission that there was a need to retrench the applicant. Secondly, the applicant had offered to help the business by resuscitating clients from her old business in the legal and secretarial industries but Basilio referred to those as small fish and did not seem to be interested in them. Thirdly, the applicant did not have time to perform a sales function, as she was busy with HR related functions. Fourthly, the manner in which the retrenchment happened shows that there was no contemplation at all. The real reason was unhappiness with her ‘performance in not generating sales and the fact that she raised queries about her reduced salary or non payment of her salary.

[42] The applicant submits further that because of Basilio’s dismissive nature it was very difficult for her to offer any suggestions nor have any meaningful discussions with him about the business. Even during her retrenchment period, she only had two days with Basilio where she was told that she was being retrenched as the business was being shelved and she would be paid a month’s notice. It is common cause that no letter inviting her to consult on a contemplated retrenchment was issued to her. She submits that had she been given an opportunity to make representations she would have offered to sell her database from her previous placements in legal and secretarial and secondly, she would have suggested that she takes on more HR functions as an avoidance measure.

[43] The respondent contends that the rationale for the retrenchment is simple. There was no business generated in the joint venture and that is mainly due to the banks freezing projects requiring staff. It submits that this was well known to the applicant as she was in charge of the invoicing and had knowledge of the financial situation and was involved in previous retrenchments.

[44] The respondent conceded, at the outset, that the procedure as required by section 189 of the LRA was not followed to the letter of the law and it would have been a farce to have gone through a mechanistic procedure to retrench somebody when they were the last person standing after having been involved in other retrenchments beforehand. Everybody had left and she knew that there was only one outcome, and that was that the respondent was going to have to retrench her too. Secondly, the applicant had actually met with Basilio on 29 October 2009, and they reached settlement on 30 October 2009.

[45] Both parties referred to the Labour Appeal Court's judgment of *SACTWU and Another v Discreto*[6] *w*here the court held as follows:

> 'Every person has the constitutional right to fair labour practices (s. 27(1) of the Interim Constitution; s. 23(1) of the Final Constitution). As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not (cf. the *Atlantis Diesel* case at 1252H (ILJ); 28I (SA)). 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 scrutinising 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, generally, not qualified to pronounce

[6] 1998 (12) BLLR 1228 (LAC) at para 8

> 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 has 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 employer's 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.'

[46] This judgment seems to suggest that whilst the court is not there to second guess the commercial or business efficacy of the employer's ultimate decision, the court will scrutinise the commercial justifiability of the ultimate decision based on what transpires at the consultation process.

[47] Further, consultation must be a meaningful joint consensus seeking consultation process and not merely a mechanical checklist approach. In *Chetty v Scotts Select A Shoe*[7] Landman J observed that: 'the legislature intended that the procedure regarding dismissal for operational requirements should be governed by law rather than by guidelines' which means that the duty to follow the procedure for operational reasons is higher than in other reasons (misconduct and incapacity).

[48] I align myself with the learned Judge's reasoning. It did not matter, in my view, that the applicant was involved in previous retrenchments and was aware of the financial situation of the respondent, consultation process had value, as Grogan AJ puts it 'even if the fate of the employee is apparently sealed.'[8] It was imperative for the respondent to meaningfully engage with the applicant and not simply advise her of the decision that

[7] (1998) 19 ILJ 1465 (LC) at para 24.
[8] See *Whall v BrandAdd Marketing (Pty) Ltd* (1999) 6 BLLR 626 (LC) at para 24.

he had made. It is common cause that at those two meetings no financials were looked at, nor were there any meaningful discussions on avoidance measures and not just measures to avoid retrenchment but to save the business. Even if the outcome was known in Basilio's mind, the applicant should have been invited to consult and make whatever representations she might have had, even if those would have been rejected by the respondent at the end. Further, she would be entitled to be furnished with the reasons why those had been rejected. None of that happened here. It must be borne in mind that this was a start up business that was formed a few months earlier, with the applicant being hired by the respondent in the midst of an economic downturn.

[49] The applicant conceded that she knew that there was no business was being generated by the respondent, after business from the banks fell through and she ended up doing some HR work. Whilst that is so, she was entitled to a fair consultation process, where all issues would be canvassed and a joint outcome including termination of service could be reached.

[50] It is common cause that the applicant was an employee, and although there was a joint venture agreement she was not a shareholder nor did the ultimate decision making in the respondent rest with her. She may have had some knowledge of the financial situation but she took instructions clearly from Basilio and depended on Basilio's leadership. She therefore was entitled to a fair process. I must say, even if she was a director, she would still be protected by section 189 of the LRA, by virtue of her employment relationship with the respondent. Whilst she may have been the last person standing, it cannot be suggested that a meeting at a coffee shop advising her of the retrenchment is enough to satisfy the requirements of section 189 of the LRA for employees at that level.

[51] It was suggested by Basilio that at the meeting of 30 October 2009 an alternative of the applicant going back to Employment Solutions and

invoicing the respondent was discussed as the viable option. Apart from this being disputed by the applicant, she was advised of this option after having been informed that she was being retrenched. In any event, it does not make sense that the applicant would be receiving work from ABC IT Solutions at her Employment Solutions business whilst it was alleged that no work existed whilst she was within the respondent. Ms Lancaster, argued further that this alternative was not raised anywhere in the papers of the respondent and only cropped up for the first time in Basilio's evidence. The events of the two alleged 'consultation' meetings clearly show that Basilio made a decision to retrench the applicant before discussing with her.

[52] Although both parties knew that the business was undergoing financial constraints, Basilio testified that the respondent was initially funded by him but that arrangement was unsustainable. Both Basilio and the applicant were hopeful that business would be forthcoming. Basilio was also hopeful that the respondent would obtain funding from other financial institutions. There was also a loan account from ABC IT Solutions towards the funding of the respondent. The idea was that the applicant would be made an owner overtime. It seems to me the applicant never anticipated before 29 October 2009 that she would be retrenched on 30 October 2009 with effect to 30 November 2009. She was caught by surprise. Even when she was finally told about the retrenchment, there is no evidence to suggest that the process was meaningful as contemplated in section 189 of the LRA.

[53] The respondent relies on an email dated 01 November 2009, from the applicant, requesting discussions held 'on Saturday' to suggest that there was an agreement that the applicant would be retrenched. This email clearly does not record any agreement between the parties that the applicant should be retrenched.

[54] It is also worth reflecting on the termination of service letter. This letter talks about the sales manager position being made redundant and the MD to head

sales and further continue with outsource of services. This is not consistent with shelving of the company that the applicant was advised about. The letter also advises that any leave can be taken during the notice period. This is not consistent with the provisions of the BCEA as no leave could be taken during the notice period. Further this letter does not see severance pay as a statutory payment that the employer is obliged to pay. All this paints a picture of an employer who was clearly avoiding its legal obligations.

[55] Having said that I am satisfied that there was a need to retrench. It is common cause that in the five to six months that the applicant was employed no business or very little of it came. The funding of the business by ABC IT Solutions was not sustainable. Although the applicant's appointment was confirmed during the time that the banks froze placement contracts, both Basilio and the applicant were hopeful of a turn around, although it did not happen. ABC IT Solutions or Basilio could not be excepted to fund the business endlessly. The fact that the applicant ended up assisting in HR just before her retrenchment points to genuine operational reasons. It must be remembered that the applicant was employed by the respondent and not by ABC IT Solutions.

[56] Although there was a commercial rationale that could indicate that at some point the respondent may need to retrench, Basilio did not demonstrate that he had planned to retrench the applicant at the time the respondent did. There was no need to be abrupt to the point of totally disregarding the requirements of the law. The applicant deserved to be treated with respect and was entitled to a fair process.

[57] I therefore have no alternative but to find that the dismissal of the applicant was substantively fair but procedurally unfair.

[58] Turning to the appropriate relief, the applicant has asked for compensation. In the judgment of *Alpha Plant and Services (Pty) Ltd*,[9] the court held that, in exercising discretion, regard must be had on factors such as the employer's

[9] (2001) 3 BLLR 261 (LAC) at paras 124-128.

departure from the requirements of a fair procedure, the employee’s conduct and the employee’s length of service. The discretion on whether to award compensation is a narrow one, to be exercised judicially after proper consideration of the relevant circumstances.

[59] Having taken into account that there was no compliance with the provisions of section 189 at all and the applicant’s length of service which was six months, I am of the view that four months compensation would be fair in the circumstances.

Claim 2

Remuneration claim

[60] The applicant contends that the unsigned contract dated 6 September 2009 is unenforceable. It was unilaterally imposed as she never agreed to it. Accordingly, the remuneration contained in the signed contract of 19 May 2009 stands. She alleges that she was short paid for the months of August, September and October 2009.

[61] The opening paragraph of the May 2009 contract stated the applicant was appointed as general manager with effect with the intention to appoint her as a director within the first three months of June, July and August 2009. Whatever adjustments that would be made in that contract would have to be by agreement between the parties. The respondent does not seem to dispute that but what Basilio says is that the applicant’s conduct pointed towards an agreement.

[62] I agree with the respondent’s contention. The applicant’s conduct pointed to a tacit agreement that she was in agreement with the restructured contract based on the fact that she invoiced the respondent using the new remuneration structure. She also did not raise her unhappiness in any correspondence nor take the issue following any legal process. Instead her emails confirmed the new arrangement and she seemed to be going along with it.

[63] The fact that the contract is not signed is irrelevant as a contract does not need to be signed to be binding. Further, there was nothing in the old contract that stipulated that any amendment to the contract had to be signed.

[64] I therefore find that the respondent did not breach the contract by failing to pay in terms of the old contract.

<u>Notice pay</u>

[65] With regard to the notice pay. I find that the applicant was entitled to one calendar month's notice as per her contract of employment. The allegation is that since the applicant was given notice only on 03 November 2009, calendar month's notice expires on 31 December 2009. Accordingly, the applicant was contractually entitled to payment *in lieu* of notice until 31 December 2009.

[66] The respondent concedes that one calendar month's notice had to be given, but it submits the applicant was notified of her termination verbally before 01 November 2009 but that termination was confirmed in writing on 03 November 2009. The letter of appointment stipulates that notice must be given in writing. The respondent's argument must therefore fail.

[67] In the case of *South African Music Rights Organisation v Mphatsoe,*[10] Van Niekerk J held that: 'a calendar month does not necessarily begin on the first day of the month any more than a calendar year necessarily begins on 1 January. What is necessary is to ascertain the intention of the parties by way of interpretation, an exercise in which the language and nature of the contract is relevant. This approach avoid the mechanical and possibly arbitrary rules to the variety of circumstances that inevitably manifest themselves when employment is terminated, and enjoins a court to focus primarily on the terms of the contract between the parties.'

[68] The word '*month*' is used a number of times in the contract of employment. For instance clause 2.1 refers to '*basic monthly amount'*, clause 2.2 refers to remuneration being paid on '*25th of each month'*, and clause 2.3.1 refers to sales manager *'paid monthly'* sales achieved and also refers to 20% of net sale being *'calculated monthly'* and added to salary. It is only clause 7.1 that

[10] [2009] 7 BLLR 696 (LC); (2009) 30 ILJ 2482 (LC) at para 13.

deals with the notice period that mentions *one calendar months* notice. From this, it could be said that the parties attached some significance to the use of the word '*calendar*' in respect of the notice. Accordingly, there should be a distinction between '*month*' and *calendar month'*. Those instances where month is used will be consistent with the interpretation that parties did not intend the month to be run from the beginning of the month, but where calendar month is used then it meant that the intention was for a month to begin running from the first day of the month. It follows therefore that notice should have been given in writing from the first day of the month, therefore, the applicant is entitled to be paid in lieu of notice until 31 December 2009 at the restructured remuneration.

[69] The applicant conceded that she had already been paid for November 2009 and therefore amount owing is remuneration only for December 2009.

<u>Leave pay</u>

[70] With regards to calculation of her leave pay the applicant alleges that she is entitled to 15 working days leave per cycle (or period of 12 months) which equates to 21 consecutive days as per the BCEA. She alleges that leave, accrued to her is 1.75 days per month and not 1.25 as per the respondent's calculation. As she was employed for 6.5 months, at least 10.5 accrued leave days were due to her.

[71] Mr Graham did not seem to take issue with the applicant's contention that the calculation should be at 1.75 days but contended that the leave days should be calculated at 15 days x salary and not at 21 days x salary. The respondent in its letter of termination directed the applicant to take leave whilst serving her notice period. That cannot be done as it is contrary to the provisions of the BCEA. I find no basis for the respondent's refusal to pay accrued leave due to the applicant.

[72] The applicant is, therefore, entitled to payment of accrued leave from 1 June 2009 to 30 November 2009 (6 months) at the restructured remuneration (new

contract) being 15 working days accrued at 1.75 days per month; 6 months x 1.75 days equalling 10.5 days.

[73] In the circumstances, I make the following order:

1. The dismissal of the applicant was substantively fair but procedurally unfair;

2. The respondent must pay to the applicant compensation equivalent to *four months* remuneration calculated in terms of the new contract of employment dated 6 September 2009;

3. The contractual claim for salary for the period of August 2009, September 2009 and October 2009 is dismissed;

4. The respondent must make payment *in lieu* of notice to the applicant equivalent to *one month's* remuneration calculated in terms of the new contract of employment dated 6 September 2009;

5. The respondent must pay to the applicant outstanding leave days being 10.6 days accrued over a period of 6 months calculated at 15 working days at the rate of 1.75 days per month;

6. The orders in paragraphs 2,4 and 5 must be effected within 21 days of this judgement;

7. There is no order as to costs.

BOQWANA AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Ms S Lancaster of MacRobert Inc.

For the Respondent: Mr DG Graham of Donald Graham Attorneys