THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: CA 04/2024

In the matter between:

VISHAL JANYNARAYAN	**First Appellant**
VINORJOHANNESAN PILLAY	**Second Appellant**
HENDRIKUS HERBST	**Third Appellant**

and

FUGRO SURVEY AFRICA (PTY) LTD	**Respondent**

Heard: 20 February 2025

Delivered: 6 March 2025

Coram: Savage AJP, Waglay and Davis AJJA

JUDGMENT

DAVIS, AJA

Introduction

[1] This is an appeal against an award by the court *a quo* in which compensation was awarded to the appellants on the basis that their retrenchment had been both substantially and procedurally unfair. The court *a quo* found in their favour holding that respondent's conduct was substantially and procedurally unfair.

[2] Briefly the facts, the essence of which were uncontested, are that the respondent is a South African based company which is part of an international group of companies. The respondent's core business is geophysical survey work. It has a counterpart in the Netherlands which undertakes construction work.

[3] It appears that the appellants, who are construction survey engineers, had been seconded to the Netherlands entity but when Covid-19 occurred much of this work terminated and their secondment was cancelled.

[4] The respondent, which had no construction work in South Africa, was thus unable to utilise the services of the appellants. It thus embarked on a process of consultations prior to their ultimate dismissal for operational requirements.

[5] In his judgment Lagrange J found that the macro-economic conditions confronting the respondent were such that '*the immediate consequences (thereof) was that planned projects were cancelled or postponed indefinitely and existing operations were restricted by the limitations and free movement of staff. This effectively meant a loss of clients. Consequently existing staff compliments exceeded the number of personnel needed for available work.*'[1] The court *a quo* observed further that the impact on the respondent's business was dramatic as reflected in a reduction of 50% of its

[1] Judgement of the court *a quo* at p. 62.

work and 65% of its operational revenue. Thus, it was compelled to cut its work force proportionately to the amount of available work.

[6] On the basis of these business conditions, the court *a quo* found that the only options available to the parties were to consider alternatives to retrenchment. After an exhaustively careful analysis of the evidence in relation to alternatives to retrenchment, the court *a quo* came to the conclusion that the only viable option, insofar as softening the blow of retrenchment was concerned, turned on what was referred to as the unpaid leave alternative. In essence, this involved a proposal that the appellants be permitted to work on a freelance basis and that the respondent would market the appellants' availability within the group as well as to third parties. This proposal, included a series of alternatives which were raised in discussions, all of which were designed to minimise or eliminate the impact on the wage bill upon the respondent for an indeterminate period. The essence however of the proposal was that the appellants be placed on some form of unpaid leave until such time as fresh work opportunities arose. This could have constituted either a partial reduction in their salaries, increasingly longer periods of unpaid leave with or without provision of the costs of medical aid and provident fund benefits.

[7] It was this proposal, in the view of the court *a quo*, which constituted the only viable option. As Lagrange J stated, this proposal '*would have cost Fugro SA nothing and would have staunched the flow of any unfunded remuneration costs immediately, albeit temporarily. It would have given both parties more time to explore pending work opportunities and see if they materialised. In the circumstances it is odd that Fugro SA did not seize on this option at least on a trial basis.'* [2]

[8] For this reason, the court *a quo* found that there had been a failure to implement a viable alternative to retrenching the appellants in that this proposal held the potential of prolonging the paid employment of the appellants which would have been to the benefit of all parties. To the extent that this particular proposal was not considered

[2] Judgement of the court *a quo* at para 78.

favourably by the respondent, it, in the view of the court *a quo*, justified the conclusion that the retrenchments were substantively and procedurally unfair.

The appeal

[9] The essence of the appeal against the order of the court *a quo* is that it failed to exercise its discretion judicially. In particular, it was contended that there was a failure to consider the appellants' length of service and the hurt caused to them. Further the justification offered by the court *a quo* was '*terse'* and hence constituted a failure to provide proper reasons.

[10] It is important to emphasise that the decision to award compensation in a case, such as the present one, is a discretionary one to be taken by the court *a quo*. An appellate court has a limited basis to interfere. As this Court said in *Zeda Car Lensing (Pty) Ltd* t/a *Avis Fleet v Van Dyk* 2020 (6) BCLR 549 (LAC):

> 'It is impossible, and undesirable to attempt to arrive at a formula of how much compensation should be awarded for any specific type of unfairness, and as such there is not much value in comparing compensation awarded in other cases with what was awarded in this instance.

This court held that:

> Awards of compensation, like awards of damages in civil matters, are by their nature matters of estimation and discretion, and hence appellate courts should hesitate to interfere with such awards which are necessarily "somewhat rough and ready". An appellate court should not simply substitute its own award for that of the trail court. However, an appellate court will interfere where there has been an irregularity or misdirection such as considering irrelevant facts or ignoring relevant ones; or where the decision was based on totally inadequate facts resulting in there being no sound or reasonable basis for the award. Where there

is a substantial variation or a striking disparity between the award made by the trial court and the award that the appeal court considers ought to have been made on its own assessment, the award will be unreasonably and the appeal court is entitled and obliged to interfere.'[3]

[11] As noted, Lagrange J provided detailed and a carefully constructed analysis of the various proposals raised to present retrenchments. There is simply no plausible, let alone justifiable basis, to interfere with his findings to the effect that the leave proposal was the viable one and there had been inadequate engagement from the respondent in this connection; hence the finding of substantive and procedural unfairness; with the consequence of the award of compensation. As the leave pay option was, at best, a very limited form of relief, limited compensation was clearly a justifiable decision.

[12] Hence within the context, of the facts of this case, the award made is unassailable on appeal. Indeed the only troubling question is why leave to appeal was granted.

[13] Accordingly, the following order is made

Order

1. The appeal is dismissed with no order as to costs.

D. Davis
Acting Judge of the Labour Appeal Court

Savage AJP and Waglay AJA agree.

APPEARANCES:

[3] At para 31.

FOR THE APPELLANT: Adv CS Bosch
Instructed by Herold Gie Attorneys

FOR THE RESPONDENT: Adv L Myburgh
Instructed by Greenberg & Associates