

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO. J 4240/99

In the matter between:

ENGELBRECHT, R

Applicant

and

artin Jonker Motors

Respondent

JUDGMENT

TIP AJ

1. The applicant has been retrenched by the respondent. He contends that it is unfair and challenges both the substantive and procedural grounds. The respondent resists both of those contentions. At one stage the respondent was a duly registered company. It is common cause that it has since been deregistered and that at all times material hereto it traded as a division of Imperial Group (Pty) Ltd.

2. Changes in the economic environment have necessitated an ongoing program of restructuring within the respondent, dating back to 1997. That has from time to time involved retrenchments, in regard to which it has had the services of the National Association of Private Employers (“NAPE”), of which it is a member.
3. In early 1999 it became apparent that further operational changes would have to be effected. This resulted from notification received from Nissan that it would no longer require the respondent’s services in certain areas. That was confirmed in a letter of 4 May 1999, which identified the following operations: “*fitment centre activities, export activities and wash-bay activities.*”
4. It is common cause that one of the immediately affected operations of the respondent was its PD Centre, which carried out pre-delivery work on Nissan vehicles before their onward sales distribution. Without the Nissan contract, that Centre could no longer continue its work.
5. On 21 May 1999 the respondent issued a notice to affected employees, advising them *inter alia* that the PD Centre activities were to be closed down and that some of the work would be transferred to what was referred to in these proceedings as the respondent’s head office in

Voortrekker Road. Employees were also advised that there would be a meeting on 25 May 1999 and set out an agenda, reflecting items typical of a retrenchment exercise.

6. It is the respondent's case that the applicant was one of the employees who worked at the PD Centre, that he was afforded a full opportunity to consult on all aspects of the retrenchment, that he elected not to participate, that he was ultimately selected on acceptable LIFO criteria and, consequently, that his retrenchment was substantively warranted and procedurally fair. The applicant alleges in essence that he had for some time been working at the workshop at the head office and not at the PD Centre and that he was therefore not within the zone of potential retrenches. He contends also that he had been singled out for retrenchment independently of the consultation process and that there was in any event no sound application of the principle of LIFO.

7. In support of its case the respondent called two witnesses: Mr Nel, its managing director, and Mr Malherbe, the president of NAPE, who directly conducted the retrenchment process.

8. Mr Nel testified in-chief that:

8.1. The applicant had been employed on 28 April 1998 as an admin

claims clerk at the PD Centre. He referred to the job description signed by the applicant on that day, which identifies the position as “*workshop administration clerk/costing clerk/claims*” and the department as “*PD Centre*”. According to him, the applicant was in the same position as at 30 June 1999, his last day of service, although he then worked physically at the head office. The PD Centre was about 1.5 km away.

- 8.2. With the closure of the PD Centre some of the staff there were retrenched and others moved to head office, where the last of the Centre’s functions were carried out.
- 8.3. The applicant was one of those who were moved to head office, where he sat in the workshop reception area. Mr Nel was unsure of the date on which this move took place.
- 8.4. The applicant never raised any complaint about the retrenchment process.
- 8.5. The need to retrench the applicant arose because he was part of the PD Centre. LIFO was applied and there was no other employee doing that work who had shorter service.

- 8.6. The applicant was notified of his retrenchment by letter on 9 June 1999. He elected to work to 30 June 1999. He raised no grievance at the time.
- 8.7. The applicant applied unsuccessfully for other positions at the respondent. He was not suitably qualified.
- 8.8. In time, all the employees who worked at the PD Centre were retrenched but, as at June 1999, the applicant was the only one.
9. In the course of cross-examination, Mr Nel reconfirmed that the applicant was retrenched because he had been employed at the PD Centre; when the PD Centre went, the applicant's post went too.
10. He testified also that the decision that the applicant would have to be retrenched had been taken at a management meeting shortly after receipt of the letter from Nissan on 4 May 1999. One of the members of the management team at the time was Mr Jimmy Ward, the after-sales director. It was put to Mr Nel that the applicant had been told that he would be retrenched by Mr Ward on 1 June 1999. Mr Nel was not in a position to deny that and could say no more than that he was not aware of it. In re-examination he added that Mr Ward had not been authorized to convey anything to the staff; NAPE had been employed to do that. Mr

Ward had since left the respondent.

11. Mr Nel was similarly not able to deny another proposition put to him by Ms Moyses on behalf of the applicant. To his credit, Mr Nel did not attempt to give direct evidence about matters that were not within his personal knowledge. The proposition is one that is central to the issues in this case. It is that the applicant moved from the PD Centre to the head office within a matter of some three months after his employment with the respondent began. This move coincided with the assumption by Mr Shane van Niekerk of the position of workshop manager. Previously, Mr Van Niekerk had been the workshop costing clerk. That work was thereafter done by the applicant, who was after that paid out of the workshop budget and not through the PD Centre. Mr Nel observed that he had not been aware that this would be placed in issue, but that the correct position would be reflected in the respondent's records, which were in its possession. By the conclusion of the evidence, no relevant documentation had been produced. It was however confirmed by Mr Nel that Mr Van Niekerk had been appointed as workshop manager on 1 August 1998.
12. As to the conduct of the retrenchment process itself, Mr Nel explained that he had left that to Mr Malherbe and NAPE. The respondent had

engaged them for the specific purpose of ensuring that the process would be carried out correctly.

13. Ultimately, Mr Nel accepted that, if it were shown that the applicant had been transferred to the workshop in the course of July or August 1998, there would have been no reason to retrench him.
14. In his evidence, Mr Malherbe described the meetings that he had convened in relation to the retrenchment process. He made it clear that he did not have personal knowledge of the work history of the applicant, but had necessarily depended upon the management of the respondent for information of that sort.
15. In his view, a thorough and fair retrenchment exercise had been conducted. Its principal shortcoming was an apparent lack of interest and participation in the consultation opportunities on the part of employees. Despite several attempts by him to elicit proposals and comments from the employees, none had been forthcoming. The applicant was one of those who for all practical purposes ignored the process. He had raised no complaints.
16. At the heart of the process was a set of three meetings. The first was held on 25 May 1999. It was held pursuant to the notice of 21 May

1999, which had been drawn up by Mr Ward with the assistance of Mr Malherbe. The meeting was attended by a number of employees from, in the main, the workshop and the PD or fitment centre. The applicant did not attend that meeting, nor any other.

17. At the meeting of 25 May 1999, as minuted, employees were given a bundle of documents outlining the problems facing the respondent, including the need to close down the PD Centre. Employees were invited to take them away for perusal and then to request any additional information that they might require. I will deal more fully below with this documentation. Employees were also invited to present any relevant information or proposals to eradicate the losses being suffered by the respondent. They were to do so at the next meeting, scheduled for 1 June 1999.
18. The meeting of 1 June was attended by only two employees. According to the respondent, these employees were there in a representative capacity, a proposition that is not common cause. One of the two employees was Mrs Tania van Staden, from the workshop. No feedback or proposals were presented to Mr Malherbe. He was very disappointed in this lack of response.

19. It was explained by Mr Malherbe that at the next meeting, which was scheduled for 8 June 1999, all the information about the retrenchment would be known, such as who would be affected, what the package was, and when the retrenchment would take place.
20. Again, no feedback was received during the intervening week. In consequence, according to Mr Malherbe, there was a meeting with management on 7 June 1999 at which decisions were taken as to what had to be closed down and who would have to be retrenched. Two people were identified, one of them being the applicant.
21. These decisions were conveyed at the meeting of 8 June 1999. No concerns were expressed.
22. Mr Malherbe denied that there had been a decision to retrench the applicant before the conclusion of the consultation process. He added that, had there been anything of the sort conveyed to the applicant, he should have come forward to enquire or complain.
23. The applicant's case was opened with the evidence of Mr Shane van Niekerk. He had worked as a service advisor for some 2 ½ years and then became the costing clerk in the workshop, which position he held for about one year, until July/August 1998. At that time he became the

workshop manager and the applicant took over his position as the costing clerk, as well as some duties in reception and as a service advisor. Until his retrenchment, the applicant worked directly him, in the workshop. He was paid out of the workshop budget.

24. Mr Van Niekerk was the person who handed the applicant the retrenchment letter of 9 June 1999. However, he said, it had by that time been common knowledge for some time that the applicant had been selected for retrenchment.
25. About a month before the applicant's departure, Ms Belinda Janse van Rensburg was introduced into the workshop personnel. She had not previously been a member of staff of the respondent. She had to be trained to take over the work of the applicant. After he left, she remained on for a month or so and then also left.
26. Mrs Van Staden gave evidence and confirmed salient features of this account of the events. She was employed at the respondent's head office as a claims clerk. The applicant worked, initially, at the PD Centre but would come from time to time to the head office with claims documents. At that time Shane van Niekerk was the costing clerk. In about July or August 1998, he became the workshop manager and the

applicant moved permanently to head office as his replacement.

27. The recollection by Mrs Van Staden of the applicant has good reason to be clear. At first, they worked together in a 'hokkie' in the corner of the workshop. They were thereafter moved, together, to the front area. She recalls equally clearly that the applicant assisted in the mornings and afternoons as a service advisor.
28. Mrs Van Staden was certain also that when the applicant was moved from the PD Centre to the head office, he was alone. It was not part of a general move.
29. At the time of the meetings held in June 1999 by Mr Malherbe, it was already common knowledge that the PD Centre would definitely be closed. It was also known that the applicant was one of the two people to be retrenched. This was known before the announcement on 8 June 1999. It was not thought that the meetings could make any difference and, at the meeting of 1 June, she said as much, recorded in the minute as: *"Daar word beweer dat dit tog nie sal saak maak nie."*
30. The work that Mrs Van Staden did at the workshop was the same as that of the applicant, once he came to the workshop. She had started at the respondent a few months after the applicant. Mrs Van Staden confirmed

also that Belinda van Rensburg had worked with the applicant immediately before his retrenchment. She had not previously worked at the respondent. After the applicant had left, she continued for a few months to do his work as a costing clerk; she then also left.

31. In cross-examination it was put to Mrs Van Staden that the applicant's job description was different from the work that she had said he performed. She answered that her case was no different: the work that she did had been changed, but her contract had not been amended accordingly.

32. The second person who was retrenched together with the applicant was Mr Du Preez. Although she did not know all his details, she was certain that he had always worked in the workshop; he had not been moved there from the PD Centre.

33. The third witness called in support of the applicant was the applicant himself. His evidence was to the following effect:

33.1. When first engaged by the respondent, he worked at the PD Centre. After 1 August 1998 he took over Shane van Niekerk's position as costing clerk at the workshop, when the latter became the workshop manager. He performed some duties also as

service advisor. From then on, he was paid against the workshop code.

33.2. Shortly before his retrenchment, a new employee was introduced, being Belinda van Rensburg, whom he trained in the duties of a costing clerk.

33.3. The applicant was aware of the meetings arranged by Mr Malherbe. He felt no need to attend the first meeting on 25 May 1999 as the employees in the workshop were of the view that they were not directly affected. (The notice of 21 May 1999 had not included the workshop as part of the immediately threatened operations).

33.4. On the morning of 1 June 1999 Mr Ward told him that a decision had been taken that he was to be discharged. The applicant had by then already heard some rumours to that effect.

33.5. After this he saw no point in attending any of the further meetings. He likewise did not believe that there was any point in lodging an objection with Mr Malherbe, once the after-sales director of his employer had told him that he was to go.

33.6. The applicant had applied for a vacant position as service advisor. This was to do precisely the same work as he had already been assisting with. The interview was perfunctory and he was unsuccessful.

33.7. Since his retrenchment the applicant has earned a living with delivery work. Until about 13 or 14 months ago, the income was about R2000 per month below his salary level at the respondent, which was R5 648,41 gross. He now earns more, but still has no benefits like a pension, medical aid or a company vehicle, which he enjoyed whilst employed by the respondent.

34. The applicant and his two corroborating witnesses presented their evidence in a clear and satisfactory manner. On the central issue of where the applicant had worked, their evidence is direct and consistent, to the effect that he had been transferred from the PD Centre to the workshop about nine months before the retrenchment exercise began.

35. No equivalent countervailing testimony was led on behalf of the respondent. As already indicated, neither Mr Nel nor Mr Malherbe was in a position to give positive evidence to gainsay this account of the applicant's work situation at the time of the retrenchment.

36. There is no need to examine this aspect of the case in greater detail. Mr Nel accepted, fairly so, that there would have been no reason to retrench the applicant if he did not work in the PD Centre. On a balance of probabilities, it is plain that the respondent has not demonstrated that such factual underpinning was indeed the case. To the contrary, it is in my view clear that the applicant was and had for some time been working in the workshop as a costing clerk. That the original job description provides a different indication is of limited weight. It is a formal document which had been overtaken by *de facto* changes.
37. Accordingly, it is my finding that the respondent has not been successful in establishing an underlying *causa* for the retrenchment of the applicant. The applicant's claim of substantive unfairness must therefore be upheld.
38. Once the factual version of the applicant is to be favoured, it follows also that the LIFO principle was not correctly applied. Mrs Van Staden ought to have been selected for retrenchment before the applicant if that were the selection criterion.
39. I turn to a consideration of procedural issues. On the unrefuted evidence of the applicant, he was informed by Mr Ward that he was to

be retrenched, in the course of the morning before the meeting of 1 June 1999. At that stage there had been only the preliminary meeting of 25 May 1999. Mr Nel has testified that Mr Ward had not been authorized to make such communication. Accepting that to be the position, it nevertheless constitutes a strong indication that there was on the part of management a settled view as to the fate of the applicant and that this view was in place before a meeting at which proposals were requested.

40. There is however no need to rest my finding on this aspect of the case on the evidence concerning Mr Ward's communication. On the respondent's own evidence, I am far from persuaded that the requirements of procedural fairness were met.

41. The notice to employees was issued on 21 May 1999. By then, it appears, the respondent had been aware for a while that its relationship with Nissan was to be drastically changed. In a letter dated 28 April 1999, the respondent sought from Nissan that it should set out in writing the dates on which services were to terminate. The respondent indicated that it required this information in order to finalise its planning for the new financial year. It recorded also that the respondent's directorate had discussed the washing machine at the Rosslyn washbay and had decided that they would sell it to Nissan for R48 900. For all

practical purposes the fate of at least the washbay was by then already determined.

42. The notice of 21 May 1999 correspondingly announced that: "*The PD Centre and Rosslyn activities will be closed down and some of the work will be transferred to Martin Jonker Motors Voortrekkers Road*". The notice went on to set out an agenda for the meeting of 25 May 1999. That agenda did not directly include an item on how employees were to be identified and selected for retrenchment. It also did not identify, as an express item, ways in which the retrenchment could be entirely avoided.
43. I have already referred to the evidence of the applicant that this notice did not convey to him that his position was in jeopardy. In my view, that evidence fairly reflects the content of the notice, given that the applicant had not for some time worked anywhere but at the workshop. In any event, section 189(3) of the Labour Relations Act 66 Of 1995 ("LRA") requires *inter alia* that there should be a written notice with relevant information dealing with: "(c) *the number of employees likely to be affected and the job categories in which they are employed; (d) the proposed method for selecting which employees to dismiss.*". Plainly, the notice of 21 May 1999 contained no such information.

44. An allied consideration is that section 189(1) of the LRA stipulates with whom consultation is to be conducted.

There is no suggestion that the applicant was a member of a trade union or that there was some other recognized forum. In terms of section 189(1)(d) the consultation was to be conducted with “*the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.*” The respondent sought to show that Mrs Van Staden was such a representative. It is however clear from the evidence as a whole that she was no more than a conduit for the distribution of documents and minutes. She could not be considered to have been in any meaningful way a representative of, particularly, the applicant.

45. The question arises how and when the applicant was alerted to the possibility that he was amongst the affected employees and that he might be selected for retrenchment, leaving aside for this purpose the evidence that Mr Ward told him:

45.1. The notice of 21 May 1999 did not contain the required information and set out no proposals by the respondent.

45.2. The further documents supplied on 25 May 1999 included the

letter of 4 May 1999 from Nissan, which would again have conveyed to employees that the fitment centre activities, export activities and wash-bay activities were affected. It cannot be construed as information in satisfaction of the requirements of section 189(3) that I have cited above.

45.3. The minute of the meeting of 25 May 1999 contains no such alert. Apart from tabling the documentation, it records Mr Malherbe in these terms: *“OK, die volgende vergadering sal op 1 Junie 1999 gehou word hier by Martin Jonker Motors, en die doel daarvan is vir julle om enige voorstelle te maak om die verlies uit te wis, of enige inligting wat julle benodig aan te vra, of enige voorstelle te maak.”* That prospective agenda did not span the matters required under section 189(3). There was nothing to alert the applicant that his place was at risk.

45.4. The relevant portion of the meeting of 1 June 1999, as minuted, is: *“Die volgende stap is die criteria en die persone wat geaffekteer word, dit sal ons dan bespreek op volgende Dinsdag se vergadering die 8 ste Junie om 14:00.”* That posited an agenda item; it did not in any way amount to information concerning who was affected and the relevant criteria.

45.5. The limited import of this was reinforced through a concluding observation made by Mr Malherbe at the 1 June meeting: *“Goed, as julle dan net vir my daai goed kan uitgee en vir die ouens laat weet dat die volgende vergadering gehou sal word op Dinsdag 8 Junie 1999 om 14:00, selde plek, dan kom ons weer bymekaar en dan sal ons weet wie geaffekteer word, wat die pakkette is, wanneer die retrenchment moet plaasvind, die hele lot sal ons dan volgende week vir u kan sê. OK”*.

45.6. That statement did not amount to information about who was affected and how the selection was to be made. It was an announcement that the position would be declared on 8 June 1999. The respondent's refrain that proposals were invited must be construed in that light. As far as the applicant was concerned, the meeting of 1 June 1999 did not place him in the threatened zone.

45.7. On the respondent's own version, the applicant's position was determined on the day before the meeting of 8 June 1999.

46. Having regard to this flow of events and the communications made in the course thereof, it is my conclusion that the quoted requirements of

section 189 of the LRA were not in any significant way met by the respondent. On the versions of both parties, the respondent has failed to demonstrate procedural fairness.

47. It follows that the dismissal of the applicant for operational requirements was both substantively and procedurally unfair.

48. The applicant does not seek reinstatement but only compensation. In terms of sections 194(1) and 194(2) of the LRA, as they then read, the applicant is awarded compensation in an amount equivalent to 12 months salary.

49. I make the following order:-

1 The dismissal of the applicant by the respondent with effect from 30 June 1999 is found to have been both substantively and procedurally unfair.

2 The respondent is ordered to pay the applicant compensation in the sum of R67 780.92.

3 The respondent is to pay the applicant's costs of this action.

K S TIP

Acting Judge of the Labour Court

51. Dates of Hearing : 50. 24, 25 and 29 April 2003

Date of Judgment : 7 May 2003

For the Applicant : Adv M Moyses

Instructed by Tim du Toit & Co Inc

For the respondent : Mr B van Niekerk

NAPE