IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CASE NO: D202/2002

In the matter between:

NEIL ANTHONY ROBINSON	1ST APPLICANT
PENELOPE LOUISE THORN	2ND APPLICANT
FATIMA CARRIM	3RD APPLICANT
AND	
PRICEWATERHOUSECOOPERS	RESPONDENT

JUDGMENT

REVELAS,J:

[1] This matter concerns a dispute about an alleged unfair retrenchment, where the three applicants seek reinstatement and costs against their former employer, the respondent.

[2] The applicants were employed by the respondent in its tax/accounting department at its Pietermaritzburg branch. The first applicant (Mr Robinson) was the manager of that department when his services were terminated. Ms Thorn and Ms Carrim (the second and third applicants) were appointed as accountants. The three applicants also had the longest service records in the department, being 23 years, 19 years and 15 years respectively. Mr Robinson earned R16 300,00 per month. Ms Thorn and Ms Carrim respectively earned R7 700,00 and R6 700,00 per month when their services were terminated.

[3] The situation which gave rise to the termination of the applicant's services, and ultimately to the referral of their dismissal dispute, commenced on 18 September 2001, when the respondent announced its decision to restructure its accounting/tax division.

[4] For a proper understanding of the issues in this matter, it is necessary to describe briefly how the respondent's national corporate structure works. This evidence was obtained from Mr Neville Thomas. On a national level, the partners of every office (and there are many countrywide) manage their own offices and are responsible to find clients, employ staff without interference

from its national office. Partners share profits nationally and therefore an annual budget is required by the national office from each regional office. When an office does not perform to task, the national office will take action.

[5] The respondent's Pietermartitzburg office mainly gives advice to entrepreneurs and is comprised of an audit department and a tax/accounting department. The audit department has a staff compliment of twenty, some of whom are under training contracts. Trainees are recruited annually at the rate of five, for a period of three years, at the end of which , one will be retained.

[6] The tax/accounting department (where the three applicants were employed) consisted of a manager, an assistant manager, six senior accountants and three junior accountants. Whereas the audit function required chartered accountants to perform audits, the accounting (bookkeeping) function and tax advice function required different skills. Trainees would perform duties in both departments. One such example was Mr Grant Smith, who replaced the first applicant. He was a trainee who remained with the respondent after he had written his exams. He had qualified as a chartered accountant, whereas the first applicant did not have a university degree. He earned less than the first applicant and therefore the first applicant, as opposed to Mr Smith, was retrenched. The second and third applicants were singled out for retrenchment in preference to bookkeepers who earned less than them, and who serviced partners who had not left the respondent. Mr Leisegang and Mr Wimble left the respondent and according to the respondent, the second and third applicants had worked with their clients.

[7] I now return to 18 September 2001, when a meeting was held with all the employees in the accounting/tax department to advise them that certain employees may be retrenched as the tax/accounting department would be restructured, following the departure of the Pietermaritzburg partners, who would not be replaced. The economic rationale explained at this departmental meeting, held in the morning, was that the department in question was not generating enough revenue for the respondent. In evidence, the respondent presented a capacity and fee analysis (Exhibits B54 and B55) which showed that salaries paid were not in all instances commensurate with the fees brought in.

[8] On the same day, after the departmental meeting was held the three applicants (who were present at the morning meeting) were called to individual meetings and each given a similarly worded letter, wherein reasons for the restructuring was set out and their last day of employment identified as 28 September 2001.The applicants viewed these letters as dismissal letters. Obviously following legal advice (from someone not representing them at the trial) the applicants wrote similarly worded letters to the respondent on 26 September 2001, indicating that since they were faced with a *fait accompli* they will not be participating in the consultation process, i.e. they would not put forward alternatives to dismissal. The applicant's interpretation of the letters that they had received on 18 September, was that they could do nothing to alter their

position, as the respondent had already indicated through its earlier meeting, its subsequent conduct in the individual meetings with them, and in the letters presented to them, that they were the three employees that were to be retrenched.

[9] During the afternoon of 18 September 2001, another meeting was held with all the staff, after the individual meetings. The applicants were not present at this meeting.

[10] On 27 September 2001, the applicants received letters terminating their employment, since the respondent believed that it had no other choice but to dismiss them as they had withdrawn from the consultation process. The letters are of importance and I shall therefore quote the relevant portions thereof.

The relevant part of the letters received by the applicants on 18 September reads as follows:

> "Proposed Restructuring of the Monthly/Annual Accounting Department **of the Pietermartizburg Office**

We refer to the meeting held on 18 September 2001 where we informed staff of the proposed restructuring of the Monthly/Annual Department of the Pietermaritzburg office.

We regret to inform you that this restructuring could potentially effect your position, which could become redundant. The factors for this being:

- **Retirement of one partner on 20 June 2001.**
- **Retirement of one Senior Employee and former partner on 20 June 2001.**
- **Loss of work normally performed by the department.**
- **Economic Recession being experienced by the Business Community.**
- **Non viability of the Department in its current structure.**
- **The following positions are proposed to be retained to run the Monthly/Accounting Department in the office:**
  -1 Senior Accountant

-2 Trainee Accountants
-4 Senior Bookkeepers

- **The proposed method used to select the employees to be dismissed or placed elsewhere within the firm, is the preservation of skills or the identified required skills, cost of employment and 'LIFO', last in first out. The firms Natonal Employment Equity Plan had also being taken into consideration.**
- **The proposed timing of the above will be effective as at 30 September 2001 with 31 October 2001 being the one months notice period.**
- **Included in you severance pay schedule is an additional one**

month's salary being your notice pay which is to compensate you for your proposed last working day being 28 September 2001.

- **The attachment will detail your severance pay. E pay, Provident Fund per the firms National Policy.**
- **The firm will apply for tax directives from SARS on your behalf. The first R30 000 of all severance packages could be exempt from PAYE in the hands of the Employee.**
- **As a big employer you may approach us for future employment if there is an opening.**
- **Any references for purposes of obtaining further employment could be obtained from the HR partner or myself.**

It is with regret that we have had to take this course of action. We now await your contra proposals in writing, which must be lodged within five working days of this letter being the 26 September 2001.

Any enquiries or clarification of the contents of this letter can be taken up with the writer."

The relevant part of the identical letters written by the applicants in response reads as follows:

> "**It is with dismay and regret that I took note of the contents of your letter dated 18 September 2001 as well as of what was said during the subsequent meeting between myself, Neville Thomas, Des Fourie, and Trish Dees on the same date.**

Due to the fact that I was clearly told that I am to be dismissed and that the meeting specifically confirmed that my last working day will be 28 September 2001, without consulting me in any way about this dismissal, it is clear to me that any suggestion from me will serve no purpose at all.

In addition I believe that any suggestion from me, or referral to as a "contra proposal" in your letter dated 18 September 2001, will only serve as "window dressing" and as a "smoke screen" for purposes of the procedure to be followed in a retrenchment exercise, with specific reference to clause 9 of the company policy and procedure regarding retrenchments, which PricewaterhouseCoopers in my opinion has not followed at all."

[11] The respondent relied on the decision in Alpha Plant and Services (Pty) Ltd v Simmonds and others (2001) 22 ILJ 359 LAC (in particular paragraphs 29-30) in support of its assertion that the applicants, and not the respondent, was responsible for the fact that the purpose of section 189 of the Labour Relations Act, 66 of 1995, as amended ("the Act") was not reached. The purpose referred to, is of course the one of jointly seeking consensus. The respondent contended that the applicant's deliberate, express and written election to withdraw from the process, obviated the need to embark on a process of consultation so as to avoid dismissal, as they themselves frustrated the process. According to the respondent, it had every intention to consult with the

three applicants and to consider any suggestions they may have had, as to how their dismissals could be avoided.

[12] In determining the question of the fairness of the dismissals in question, I have to consider to what extent the applicants and the respondent respectively, were entitled to infer from the letters written and received (on both sides), what they alleged they inferred. Here I must point out that it is observed in this court, that letters such as the ones in question, are often drafts, kept on the computers of labour consultants and attorneys for the needs of their different clients as they may arise. Far too frequently, these letters are printed out and sent without being adapted to suit the very particular circumstances of the case in question. Usually these letters are the first words spoken by either the employer (or the employee) on the question of retrenchment or the employee's reaction thereto. These letters will naturally raise alarm and concern (if received by an employee) and should therefore be carefully worded. Equally, a draft response thereto by an employee should also be carefully worded because it has consequences for the employee and the retrenchment process as a whole. This type of correspondence must of course always be evaluated in the particular matrix of facts which preceded and followed it.

[13] The applicants alleged that apart from the fact that their dismissal was announced as a *fait accompli* in the one letter of 18 September 2001, all subsequent procedures that followed it and preceded it were unfair and moreover, the fact they, the employees with the longest service, were elected as retrenchees, rendered their dismissals substantively unfair.

[14] The applicants also placed the economic rationale behind the retrenchments in dispute. This, the respondent argued, was added as an afterthought to the main complaint of unfairness, which gave rise to costly and protracted litigation that could not be sustained on their own version on the witness stand. It is indeed so that the matter was previously postponed, *inter alia* for the production of documents to dispute the economic rationale, which was then conceded to in the presentation of the applicants case. In the circumstances, I accept that there was an economic rationale to restructure. However, that exercise was not a waste of time, because, part from leading to the applicant's eventual concession, the documents contained valuable information which enabled the determination of other issues, such as the one of selection criteria and the possibility of bumping, as a viable alternative.

[15] <u>The meetings</u>

All three of the applicants alleged that at the first meeting on 18 September, when the fees and capacity analysis was explained by Mr Thomas, (the respondents overall partner in charge) on an overhead projector, that the employees present were told that no discussions were allowed. It was argued that the applicants had lied in this regard. The respondent contended that this allegation is of importance as it sustains the applicant's case in supporting the first applicant's evidence that the retrenchment procedure was started "three

quarters of the way through", in answer as to why short time was not discussed. He said discussions was not permitted. The respondent argued that due to the applicants' insistence on documentation relating to the respondent's economic rationale to restructure, time had lapsed and its witness had therefore imperfect recall of what was said at the meetings should not be criticised for it.

It argued further, that it was highly improbable that Mr Thomas would have disallowed questions from employees in a meeting where he presented the analysis exhibited in B54 and B55. That argument is not sustainable on the evidence. Firstly, the recall of the respondent's witnesses was on their own version, weak (even if it was due to the lapse of time). Secondly, Mr Thomas conceded that staff were possibly told at that (that first meeting) on 18 September, that there were not to be any questions, but that individual staff (identified) would be called to a meeting. It is common cause that four members of staff (three being the applicants in this case) were thereafter called to individual meetings with Mr Thomas, Mr Fourie (the partner in charge of personnel) and Ms Trish Dees (the human resources functionary from the Durban office). At the meeting Mr Fourie read out the letter to them, which was regarded by them as a dismissal letter. On the applicant's version they were told that they need not attend the next meeting. The second applicant was told she could get time off to look for another position. The third respondent said she would revert to the respondent yet she was given her letter of dismissal. Mr Thomas and Mr Fourie once again could not recall whether this was said. As opposed to the respondent's witnesses who could recall very little about the meeting, the applicants could recall the meetings and their version had the ring of truth about it. The attempt by the respondent to dissect their explanations as to why they saw their situation as a *fait accompli,* did not change the fact that they were pre-selected in contravention of the provisions of the Act and the respondent's own policy. The absence of a retrenchment process impacted on the substantive fairness of the dismissal, because it excluded a process where the operational need to pre-select the applicants, could have been discussed and perhaps changed their lot.

[16] The letter written to the applicants may very well contain words such as "possible" and "potentially", which tend to dispel signs of finality. The facts however, suggest an entirely different picture. The letters were drafted prior to the meeting. Trish Dees came from the Durban office for the meetings and that is probably where they were drafted. At the first meeting with staff, employees were advised that there may be some retrenchments. Only hours thereafter the highest earners were handed a letter, of which the greater part is dedicated to events which would occur if they could not be accommodated. The invitation to put forward alternatives at the end of the letter, had a rather hollow ring to it. If one considers the fact that the decision to restructure was taken some three months prior to the meetings, and the only selection criteria seems to be to cut costs (by retrenching those who earned the most, being the applicants) these letters given to the applicants were a finality.

[17] Even if some criticism may be levelled at the applicants for withdrawing from the process, the respondent could have avoided it, if the wording of its own letter had a different tone and it did not have a prior meeting with the staff telling them that "unfortunately" there would have to be possible retrenchment and then, on the same day, call in the pre-selected employees and hand them the letter.

[18] The applicants were not advised that they could, in terms of section 189, negotiate on the need to retrench them, or on alternatives, severance pay and selection criteria. They were never made aware of, or could have been aware, of how to negotiate themselves out of the *fait accompli*.

The Selection Criteria

[19] In essence, the reasoning behind the retrenchment of the applicants, was that retrenching them was worth a cost saving of R340 000,00 per annum. Evidence was presented that as at 11 May 2001, the first applicant (Robinson), as manager, was called to task to generate more fees, in that he was to procure more new work worth R100 000,00. He was given from 1 July 2001 to 30 June 2002 (the following year). This evidence, together with a concession from the respondent's witnesses that the decision to restructure with the possibility of retrenchment was taken as early as June 2001, raised the question why Robinson was not given that opportunity, before retrenchment. He must have been targeted as early as June 2001.

[20] Mr Gareth Smith (Smith) was to take over the duties of Robinson as manager. The respondent reasoned that he earned less then Robinson, was more versatile in that he had qualified as a chartered accountant and could be used in both the audit department and the tax/accounting department. Furthermore, he had contacts in the farming community and could attract more tax advice work to farmers for the tax/accounting department. However, it was shown that Mr Smith had spent only 13%, 5.5% and 12% respectively in the 2002, 2003 and 2004 financial years. Fourie conceded that Smith's extra skills was mostly an "agriculture interest". In Robinson's current position (where he earns much less) he still performs tax computations for farmers. I am unconvinced that he was the right person to retrench.

[21] According to the respondent, the second applicant (Thorn) was selected for retrenchment because she serviced the clients of Mr Wimble (Wimble), a partner who had left, taking his clients with him. She was also not mobile to visit clients in the rural areas. Another employee, Noel, did estate work in addition to accounting work and earned less than Thorn. Therefore she retained her position in preference to Thorn. It was pointed out that Thomas had said that Wimble took with him "the rubbish clients" (those who did not bring in high fees), therefore his loss was not substantial. Thorn retained R294 000,00 worth of clients, where as Noel serviced R194 000,00 worth of clients. Thorn earned R50,00 less than an employee (accountant) called Sewraam who sat on a productivity level of 45% whereas Thorn had an average of 76,94%. Noel's level was 55%.

[22] According to Thomas, Thorn's retrenchment would benefit the respondent's affirmative action policy. Affirmative action is not, and never has been legitimate ground for retrenchment. That argument also flies in the fact of the third respondent's retrenchment. She is an Indian woman.

[23] The evidence of Thomas was that the third respondent (Carrim) was selected for retrenchment because the partner who had left, had three bookkeepers. Carrim was selected for retrenchment before Sewraam because the latter was Fourie's bookkeeper. Rajpal was Thomas' bookkeeper although Rajpal had resigned in September 2001. Greeff, the other bookkeeper, was allegedly better at computer programmes in that she was also adept at a programme called "Solution 6".

[24] It would appear that, as in the case of Thorn, the "chain of command" was the chosen selection criteria in the case of Carrim. Since neither Fourie nor Thomas was leaving, the "chain of command" criteria seems illogical and unfair. Furthermore, it was common cause that Carrim, and all other staff were trained in operating "Solution 6" programmes. It was also common cause that certain clients had left because Carrim was retrenched. Client retention was therefore not a fair criterion in her case. In any event the respondent could not prove how many clients were lost due to the departure of Leisegang which was one of the main alleged reasons for retrenching accountants.

Bumping

[25] Thomas conceded that the applicants could have been bumped to the respondent's Durban office, but gave an explanation as to why this option was impractical. He also stated that bumping was not part of the respondent's policy. However, if there was a proper consultation process, this could have been discussed.

Conclusion

[26] In all the circumstances, the selection criteria appear to be unfair, in that cost saving was the only real criteria considered, as pointed out before. That was also the starting point on 18 September 2001. If fair selection criteria were applied, the applicants who have all been willing to return to work, may still have been retained.

[27] In the circumstances, the three applicants should be reinstated but with limited retrospective effect (18 months) into their former positions. The retrospectivity of the reinstatement is limited, because to do otherwise, would be unnecessarily onerous for the respondent and the applicants were not in a position where they had no income at all. Furthermore, the long period of time which had lapsed between dismissal and the final hearing was to an extent, attributable to the applicants.

[28] The respondent is to pay the cost of the application.

E.REVELAS
JUDGE OF THE LABOUR COURT
OF SOUTH AFRICA

On behalf of the Applicants:	Adv. Charmaine A. Nel
Instructed by:	
On behalf of the Respondent:	Adv. Francois Wilke
Instructed by:	
Date of trial:	6 June 2005
Date of judgment:	1 December 2005
Reportable	