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

Not reportable
Case Number: D35/2008

In the matter between:

LES WALLIS Applicant

and

SCHMIDT INDUSTRIALS (PTY) LTD Respondent

Date of Hearing: 21 – 23 and 29 March 2011

Date of Judgment: 20 October 2011

JUDGMENT

GUSH J

1. The applicant who was employed by the respondent as a manager of the respondent's RELI-ON product department was retrenched by the respondent on 30 September 2007.

2. The applicant, averring that the respondent did not comply with the provisions of section 189 of the Labour Relations of Act of 1995 (LRA)[1] applies to be reinstated retrospectively alternatively compensated which compensation was to include six months notice pay.

[1] 66 of 1995.

3. The relevant background to the matter is as follows:

3.1. In October 2003, the applicant was appointed by the respondent to project manage the construction of an additional factory for the respondent. This position was initially a part time position (two weeks per month).

3.2. When the factory project was completed, the applicant was permanently employed as the manager of the RELI-ON factory which was responsible essentially for the manufacture of garden tools. The respondent in addition to the RELI-ON factory operated a second factory which was largely involved in the manufacture of toolboxes.

3.3. The respondent company had been established by a Mr. H W Schmidt who had died on 25th February 2007. The founder's son Mr W Schmidt who was also the manager of the toolbox factory succeeded his father as Managing director of the respondent.

3.4. On 23rd April 2007, the respondent's financial director Mr. Graham Dow approached the applicant informally advising him that the respondent was looking to cut costs and that his cost to company was one of the issues the respondent which was the subject of consideration. There was some dispute between the applicant and Dow regarding the actual words used during this exchange. The applicant averred that he had made a contemporaneous note regarding this conversation which he included in his bundle of documents which recorded that he had been told by Dow that his [the applicant's] cost was too high and that basically he "needed to go". I shall return to this issue below. Suffice to

say that the applicant indicated to Dow that he would respond in writing which he did by letter on 4th May 2007.

3.5. On 30th May 2007, W Schmidt addressed a formal letter to the applicant headed **CONSULTATION IN TERMS OF SECTION 189 OF THE LABOUR RELATIONS ACT 1995.** This letter advised the applicant that the respondent was experiencing considerable financial difficulties, explained what efforts had been made to reduce costs and pointed out that the respondent was concerned about the staff costs and the performance of the RELI-ON factory. The letter went on to indicate that the respondent was particularly concerned at the cost of employing a qualified engineer [the applicant] at a cost of approximately 43% of the RELI-ON departments salary/wage bill.. W It further contained an invitation to the applicant to consult regarding the possible retrenchment of the applicant.

3.6. This letter set in motion a consultation process which included a number of consultations and the exchange of correspondence and submissions.

3.7. The first meeting took place on 1st June 2007 followed by further meetings on 6th June 2007, 20th August 2007 and 22nd August 2007. The applicant recorded these meetings with the respondent's consent and transcribed the record of each meeting which formed part of his bundle of documents.

3.8. The exchange of correspondence and documents relevant to the consultation process included the applicants letters and submissions of 30th May 2007, 6th June 2007, 21st August 2007, 23rd August 2007 and

24th August 2007; the respondents replies of 3rd August 2007, 24th August 2007 and 31st August 2007.

3.9. The matter was finalised in the respondent's second letter of 31st August 2007 in which letter the respondent gave the applicant notice of the termination of his employment with effect from 30th September 2007.

4. In his statement of claim, the applicant avers that the respondent "failed to consult with him in terms of the provisions of section 189 of the Labour Relations of Act of 1995 and labour relations norm (sic) and that the applicants dismissal for (sic) the respondent operational requirements was substantively unfair" and as a result seeks reinstatement alternatively compensation "which is to include six months notice".

5. The parties concluded a pre-trial minute which minute *inter alia* listed the facts which were common cause, the facts which were in dispute and recorded the agreement that the respondent would start. The pre-trial minute records that the issue to be decided by the court was whether the termination of the applicant's employment by the respondent was procedurally and/or substantively unfair.

6. The respondent having agreed to start commenced by leading evidence of Mr Graham Dow, followed by Mr Wolfgang Schmidt. The applicant gave evidence himself and called no other witnesses.

7. Mr Dow in his evidence explained the history of the respondent and the events leading up to the decision to engage the applicant in consultation over his

possible retrenchment. Dow explained with reference to financial statements and other supporting documentation that the respondent had serious financial problems and the steps it had and was taking to reduce its costs. His evidence was that the applicant's salary constituted 43% of the employee costs of RELI-ON and he detailed the extent of the production and the number of employees in that section. He, with reference to the bundles of documents, explained the respondent's financial predicament and what the operational requirements were that necessitated the retrenchment of the applicant.

8. It was clear from Dow's evidence that he was acutely aware of the respondent's financial difficulties and that he had introduced a number of measures to cut costs and he explained in detail why and on what basis he believed it was necessary to have retrenched the applicant and why he believed that the alternatives suggested by the applicant were not feasible.

9. Dow, in particular, explained that he had considered the submissions the applicant had made during the consultation process regarding alternatives to his retrenchment and that he was of the opinion that the applicant had not "come up with anything that constituted a viable alternative" to the applicant's retrenchment. Dow also confirmed that the other directors of the respondent (viz: W Schmidt and a Ms Meirelles) had also considered all the submissions and proposals made by the applicant before they decided to terminate his services.

10. Dow was patently an honest witness. There are a number of issues which demonstrated Dow's honesty in contrast with that of the applicant. An example of this was the dispute regarding what Dow had allegedly said to the applicant on the

23rd April 2007. There was no suggestion that Dow in any way was prejudiced against the applicant or that he was not honest in his evidence. He explained that he had grown up and gone to school with the applicant and had originally recommended the applicant for employment. Dowconfirmed that he had met with the applicant on 23rd April 2007 to advise him informally of the possibility of the applicant retrenchment. This he explained was to warn him so that he could prepare himself.

11. The applicant in both his pleadings and his evidence made much of Dow's apparent statement to him that "basically he should go" which he supposedly recorded at the time[2]. As set out above, Dow's version and the applicant's version of what was said differ. What is clear however is that, according to the note, the applicant indicated that he would respond in writing to Dow. This he did on 4th May 2007. Nowhere in the letter of 4th May is there any mention of Dow having told the applicant that he should go[3]. It is inconceivable that in the circumstances the applicant would not have mentioned this in his response dated 4th May to the meeting with Dow on 23rd April 2007.

12. In his evidence Dow explained, in respect of the applicant's remuneration exactly what the applicant was and had been paid during and at the date of termination of his employment. Despite this it was specifically put to Dow that the applicant had received the remuneration as set out in his pleadings. As it transpired the applicant admitted during his evidence that he had never received the amounts referred to in his pleadings and that they were merely "an expectation" I deal with this issue in more detail below.

[2] Bundle of Documents A Page 5.
[3] Bundle of Documents A Page 6.

13. W Schmidt was the respondent's second witness. He is the son of the founder of the respondent and was the managing director at the time of the applicant's retrenchment. Schmidt in his evidence explained what had transpired during the consultation process. The meetings that Schmidt had had with the applicant had as explained above been recorded and transcribed. Schmidt's evidence supported the evidence given by Dow and in particular that the decision to retrench the applicant was made by the directors together. He conceded that he had sought legal advice prior to proceeding with the retrenchment and consultation process and that he did not like the applicant. His evidence however clearly established that the consultation process was conducted in good faith and that the applicant was given every opportunity to make representations regarding alternatives to his retrenchment Schmidt was undoubtedly however an honest witness.

14. Unfortunately, the same cannot be said of the applicant. During his evidence, he repeatedly sought to misinterpret or obfuscate the facts in the furtherance of his case and during cross-examination was repeatedly evasive and disingenuous in his answers. What was abundantly clear from his evidence and the documents was that the applicant tried his best to derail or delay the process. This is perhaps understandable when an employee is placed in the position the applicant found himself. The LRA however enjoins **both** parties to engage in meaningful joint consensus seeking process.

15. Of particular concern was the relief regarding his remuneration sought by the applicant in his pleadings, repeated in the pre-trial minute and his evidence in this

regard.. The relief claimed by the applicant was retrospective reinstatement. In the pleadings and the pre-trial minute, the applicant specifically records his annual remuneration as at the date of the termination of his employment as being R912,055.34 made up as follows: a salary of R588,000, a 13th cheque of R49,000, a company car valued at R120,000, medical aid valued at R83,604 and pension contributions in the sum of R71,151.34. In addition, the applicant claimed an amount equal to 6 months remuneration in lieu of notice pay which he claimed to have been a term and condition of his employment.

16. This version of his income was put to the respondent's witnesses. The documentation however which the applicant himself put up suggests something completely different. The applicant maintained that he had reached an agreement with Mr H W Schmidt the then managing director of the respondent. Mr Schmidt who fortuitously for the applicant had died had according to the applicant agreed to pay the applicant in addition to his salary the benefits set out above. Unfortunately for the applicant, this version falls to be considered in light of the following:

16.1. The applicant attached a copy of a note he wrote to H W Schmidt on 22nd June 2005 when Schmidt supposedly agreed to pay him the benefits in addition to his salary. The note reads: "following the discussion the other day concerning future employment, **I would be happy to come to an acceptable arrangement. I would like to discuss this matter further** regards"[4]. (my emphasis) The applicant's evidence under cross-examination was that this constituted acceptance of the benefits he now claimed. This was despite the uncontradicted

[4] Bundle A page 1.

earlier evidence of Dow that the applicant's total remuneration at the time of his dismissal was R49,000 per month and that he had never received any of the benefits he claimed.

16.2. In his letter dated 4 May 2007 addressed to Dow, the applicant recorded the following "during those discussions, Mr Schmidt said that in determining a salary package that included benefits, he needed to take into consideration the packages of other senior employees with long service. He said that this needed his close attention but that he was in dispute with Gedore and was very busy with preparations, as intended disposing of the Gedore shares. We agreed that I would be employed and he asked if it would be acceptable if we **finalise the benefits package** once the Gedore matter had been settled"(my emphasis).

16.3. In his statement of claim the applicant records under the heading statement of facts that will be relied upon that his annual remuneration was R912,055.34 and that he was subject to a notice period of six calendar months. In the pre-trial minute, the applicant accordance that the annual remuneration at the date of his termination was as set out in paragraph 14 above.

16.4. Somewhat startlingly given the above the applicant conceded during his evidence not only that he had never received the income he claimed to have received in his pleadings but that he had never agreed that he would receive such benefits. He stated that he merely had an expectation to receive the benefits

17. As far as the facts in dispute are concerned as recorded in the pre-trial minute, they can be divided into two basic issues namely:

17.1. Firstly: a dispute concerning the consultation process and whether the termination was for valid and substantial reasons based on valid and substantial grounds.

17.2. Secondly: a dispute over the period during which the applicant was employed, the capacity in which he was employed; the terms and conditions of his employment and his remuneration at the time of his retrenchment.

I have carefully considered and taken into account the record of the consultation process and the evidence of Dow and W Schmidt. I have no doubt that the procedure adopted by the respondent was fair and reasonable. There is no evidence to suggest that the directors of the respondent who conducted the process did not act properly and honestly in their dealings with the applicant. Despite the applicant's persistent argument that the respondent hadn't taken into account his submissions during this evidence Schmidt handed in two emails, dated 23rd August and 27th August 2007 (admitted by consent), that clearly demonstrated that the respondent's directors had in fact read and considered all the applicant's submissions. . The evidence clearly establishes that the applicant was given a number of opportunities to make submissions which he did. The evidence established that the respondent gave due consideration to the proposals before deciding to terminate the applicant's employment for operational reasons..

I am satisfied that the procedure adopted by the applicant was fair and complied with the provisions of section 189 of the LRA.

18. This leads to the enquiry as to whether termination was for valid and substantive reasons based on valid and substantive grounds. I have to a large extent dealt with the substantive reasons why the respondent dismissed the applicant above. It is clear from the evidence that the applicant was not convinced that it was necessary to retrench him and that measures could have been taken to avoid his retrenchment without jeopardising the continued operation of the respondent.

19. Operational requirements are defined in the LRA as "requirements based on the economic technological structural or similar needs of an employer"[5]. Whilst the onus rests firmly on the shoulders of the employer to prove that the dismissal was for a fair reason, the court has held that it should not lightly second guess an employer's reasoning behind its decision, or need, to retrench. In *CWIU v Algorax (Pty) Ltd,*[6] the court considered this proposition and accepted the proposition concluded that it is not absolute.[7] In *BMD Knitting Mills (Pty) Ltd v SACTWU,*[8] the test to determine the substantive fairness of a dismissal for operational requirements was enunciated as follows

> "The starting-point is whether there is a commercial rationale for the decision. But rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a

[5] Section 189.
[6] (2003) 24 ILJ 1917 (LAC).
[7] Ibid at page 1939 F-G para 69.
[8] (2001) 22 ILJ 2264 (LAC).

> manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements 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 ... Fairness not correctness is the mandated test"[9]

20. Accordingly, in determining whether there was a fair reason, it is necessary to consider the respondent's reasons and the manner in which the decision was made and not simply defer to the employer's explanation.. I am satisfied that the respondent has explained and established a reasonable basis for its decision , and that its reasons why it found it necessary to retrench the applicant were fair and reasonable.

I am in therefore satisfied that the applicant's dismissal was both substantively and procedurally fair.

21. That being so it is unnecessary to deal with the second dispute referred to in paragraph 16.2 above.

22. As regarding costs, I can find no reason in fairness why costs should not follow the result.

23. In the circumstances, I make the following order:

23.1. The applicant's claim is dismissed with costs.

[9] Ibid at pages 2269 and 2270 I-B paras 19.

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Gush J

Appearances:

For the Applicant:	Adv M B Pitman instructed by A J prior of Prior and Prior Attorneys.
For the Respondent:	Adv L C A Winchester SC instructed by G Cummings of JH Nicolson Stiller and Geshen Attorneys.