REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Not Reportable

Case No: JA50/09

In the matter between:

Super Group trading (Pty) Ltd **Appellant**

and

Andries Hendrik Janse van Rensburg **Respondent**

Heard: 9 November 2010

Delivered: 25 April 2012

CORAM: TLALETSI JA, LANDMAN AJA, MAILULA AJA

JUDGMENT

LANDMAN AJA:

Introduction

[1] Super Group Trading (Pty) Ltd (the appellant) retrenched Andries Hendrik Janse van Rensburg (the respondent). The Labour Court (Molahlehi J) found the dismissal to be procedurally and substantively unfair and awarded the respondent compensation equivalent to 12 months' remuneration. The appellant, with the leave of the court *a quo*, appeals against the decision.

Grounds of appeal

[2] The appellant relies on the following grounds of appeal:

2.1 The court erred in doubting that the appellant was committed to engaging joint consensus-seeking exercise. The appellant carefully weighed up all the suggestions made by the respondent. However, they were impractical in [the] light of the heavy financial losses being sustained by the appellant;

2.2 The court erred in finding that the decision to retain Diviane was made before the consultation process. The court overlooked the fact that an employer is entitled, in principle, to have strong views concerning issues surrounding any retrenchment. The purpose of the consultation process was to afford the respondent an opportunity to assist the appellant in its decision-making;

2.3 The court erred in finding that information regarding the comparative strengths of both Diviane and the respondent were not before those who took the decision to keep Diviane. Diviane was in a far better position to occupy the position of CEO and to take over the functions carried on by the respondent:

2.4 The above Honourable Court erred in finding that the respondent was not afforded an opportunity to make any submissions as to why Diviane should not be preferred over him. The appellant was prepared to consider the submissions and duly responded to them. The respondent was afforded an opportunity to convince the appellant that he should step into Diviane’s shoes. The evidence revealed that the respondent never seriously considered that he could perform Diviane’s functions.

2.5 The above Honourable Court erred in finding that there was not a fair reason for the dismissal. There was no evidence to suggest that the respondent would have been preferred above Diviane under any circumstances. There was never a suggestion, even a remote one, that it was unreasonable for the appellant to retain Diviane's services. It

was never seriously contended that the respondent (whose position had become redundant) should have bumped Diviane from his position. In this regard, the court erroneously second guessed the appellant's decision as to which person would be best suited to steer the ship through troubled waters;

2.6 The court erred in finding that the underlying reason for the selection of the respondent for retrenchment related to his conduct towards customers, staff and an alleged incident of assault. Instead, the reason for the respondent's selection was based on the fact that his position was no longer required and that Diviane was far better qualified to remain on to run the business;

2.7 The court erred in finding that the consultation process was a 'sham'. The respondent himself did not see the process as a sham and participated therein. In the light of the respondent's knowledge, involvement in the business, the consultations that were held in the information shared, the dismissal was in all the circumstances procedurally fair;

2.8 The court erred in awarding a punitive amount of compensation to the respondent. The court overlooked the appellant's financial position and the fact that fairness must be applied to employers and employees. Even if the dismissal was unfair, compensation not exceeding more than three months' salary should have been ordered. At the date of the trial, the appellant had closed down.

[3] These grounds can be grouped as follows: Grounds 2, and 7 are predicated upon the court a quo's finding that the redundancy or abolition of the post of COO was a *fait accompli*. Grounds 1, 3, 4, 5 and 6 broadly deal with the selection criteria and the possibility of bumping Diviane. Ground 8 relates to compensation.

COO post redundant: grounds 2 and 7

[4] The decision to abolish the post of the Chief Operating Officer (the COO) relates to the crux of the respondent's complaint. The court *a quo* correctly appreciated this. The purpose of consultation is to try and save a job or position. If this cannot be done the next aim is to avoid dismissal by placing the person, whose post has become redundant, elsewhere. And if avoidance is not possible consultation concerns the extent to which the consequences of the retrenchment can be mitigated.

[5] If the decision to make a post redundant is set in stone and not open to revision or discussion then the main aim of consultation has been thwarted before it has begun. If the decision to retrench a certain person has been pre-decided, consultation about whether this person should be chosen is a sham. What remains is consultation on the mitigation of retrenchment.

[6] The decision to down size the operations and abolish the post of COO, according to Walters, a member of the executive committee, was irreversible. At page 315 lines 2-3, Walters says: 'The decision to downsize the business was a *fait accompli*.' Not only this, but he and Peters, the Divisional Managing Director, decided that the respondent rather than Divani, the CEO, should be retrenched. Walters confirms that Peters had a discussion with the respondent on 3 September 2004. No one else was present at this discussion. The respondent says that Peters told him during this discussion that he was going to be retrenched. Page 339 lines 11-12 of the record: Peters did not give evidence.

[7] The finality of the decision to abolish the post of COO and retrench the respondent is confirmed by the evidence of Senekal. Senekal represented the HR Department and managed the 'consultative process'. Senekal said that once the post of COO was selected as redundant there was no room for discussing selection criteria.

The reason for dismissal

[8] Cosmotrans, a division operated by the appellant, was in deep financial trouble. It was not making a profit. It was beset by problems in the environment in which it operated and its expenses were mounting. The division was eventually closed down.

[9] I have no doubt that the appellant was justified in deciding that the dire financial situation faced by Cosmotrans required drastic action. This would necessitate the retrenchment of staff and the abolishment of the post of COO.

[10] The appellant's reliance on the complaints of misconduct and incapacity against the respondent in the context of a retrenchment was misplaced. There was nothing to show that, in the absence of the financial distress of Cosmotrans, the appellant would have dismissed the respondent. At the outset, the cause for the dismissal of the respondent was not the alleged conduct or actions of the respondent. But once the appellant was faced with a choice or the possibility that its choice of Diviane would be disturbed, it threw everything it had in the scale to bring it down in favour of Diviane.

[11] The appellant, in its over eagerness to retain Diviane, did not pause to consider whether the allegations were true or could be proven or what the effect of making detrimental allegations would be.

[12] The court *a quo* concluded that the dismissal of the respondent, although in the context of a retrenchment, was "influenced"; one could say heavily but appropriately, by the appellant's reliance on alleged misconduct and incapacity. It is, therefore, necessary to consider whether this finding was justified by the evidence. The allegations of misconduct and incapacity (set out in a letter by the appellant's attorneys dated 12 October 2004) are:

> '1. [T]he fact that business associates and, more particularly, various airways and customers have expressed serious reservations about continuing to do business with your client coupled with his often rude, aggressive and confrontational behaviour;
>
> 2. the lack of interpersonal skills on part of your client;

3. the lack of negotiating skills on the part of your client;

4. the fact that numerous key employees of Cosmotrans have resigned from its employ due to the general demeanour, conduct and approach of your client;

5. the poor relationship with which your client has with numerous employees of Cosmotrans; and

6. Your client's exceptionally poor disciplinary record.'

[13] The respondent admits that he was found guilty in a disciplinary inquiry of assault in the context of a strike and sanctioned. This conduct had no relevance to the problem facing the appellant at this moment.

[14] Chaplain, the financial manager, testified that he was unaware of these complaints. He mentioned that he would have known of them as he worked on the same level as the respondent. Chaplain also said he had heard complaints about the respondent from suppliers but that none of the complaints were discussed with the respondent. Senekal, the one person who should have known of the complaints, did not know of the complaints against the respondent. But his evidence does not sit well with that of Walters who said that the details of the respondent's misconduct were supplied by the HR Department. Although the details had allegedly been supplied to the decision makers, which included Walters, Walters could not substantiate details of the complaints.

[15] The respondent admitted the finding of guilt in an assault case and explained how it came about. But he was unaware of the remainder of the complaints. The appellant had no evidence to substantiate a dismissal on the basis of these complaints. Moreover, the allegations were not put to the respondent for his comments. This is unfair.

[16] When it was put to Walters that the appellant had in fact dismissed the respondent on account of his alleged misconduct, Walters answered: 'No

comment'.[1] None of the other witnesses for the appellant had insight into the reasons for the dismissal of the respondent as it was taken at Exco level.

[17] In any event, it was unfair for the appellant to throw these baseless or irrelevant allegations into the consultation process.

Selection criteria: grounds 1, 3, 4, 5 and 6

[18] In the light of what has been said as regards the first two grounds of appeal, there is little need to deal with these grounds save to say that the court a quo correctly found that the consultation process was unfair. The respondent's evidence as to why he participated in this process in the light of what Peters told him is very plausible. The respondent did not want to accept that his job was lost; he wanted to undo the decision.

[19] Walters was correct when he answered a question put to him by appellant's counsel:

> 'So what was the purpose of the consultations that followed that letter in which Mr Van Rensburg was invited to engage the consultation process? --- It would have been in the normal process, I am assuming, that he would get invited to put forward some proposal that would *mitigate* that particular process.' (My emphasis.)

[20] The consultations were a "charade" or as the court *a quo* thought it was "a sham". It was purposeless insofar as it deprived the respondent of a chance to save his post or avoid his being selected for retrenchment. His representations on that score were to be fruitless because restructuring was a *fait accompli*. The addition of baseless complaints and an irrelevant disciplinary infringement (for which the respondent had been sanctioned) in the course of consultation were unfair.

[1] See page 310 lines 4-7.

Compensation: ground 8

[21] The court *a quo* awarded the respondent compensation in the amount of 12 months remuneration. The submissions of Mr Hutchinson, who appeared for the appellant, are premised on the basis that the dismissal was for operational reasons; but that the procedure was unfair. The dismissal was substantively unfair. It was, in part, founded on unproved acts of misconduct and incapacity. The procedure which was followed was also was unfair. The respondent had rendered 19 years service to the company and deserved to be treated with more respect and consideration that the appellant afforded to the respondent. I decline to interfere with the award of compensation.

[22] The appeal is dismissed with costs.

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LANDMAN AJA

I agree,

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TLALETSI JA

I agree,

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MAILULA AJA

APPEARANCES:

FOR THE APPELLANT: Tim Mills of Cliffe Dekker Hofmeyr Inc

FOR THE RESPONDENT: Wayne Hutchinson instructed by Fluxmans Attorneys