



REPUBLIC OF SOUTH AFRICA

Of Interest to Other Judges

THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG

CASE NO: JS 522-13

In the matter between:

LULU THEMA

First Applicant

and

ABSA BANK LIMITED

Respondent

Heard: 03 March 2014

Delivered: 26 November 2014

Summary: (Retrenchment – failure to hold one- on- one consultation unfair – no award of compensation – factors considered).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Ms L Thema, was employed as an events manager by the respondent ('ABSA') from September 2011 until her retrenchment on 18 October 2012. Thema believes that her retrenchment was procedurally unfair and seeks the maximum compensation payable

under the Labour Relations Act, 66 of 1995 ('the LRA') namely twelve months' remuneration as compensation.

- [2] During the last three months of her employment, she was on 'reassignment', during which she was not required to tender services but could search for alternative positions within the company or elsewhere. This period was due to end on 31 August 2012 but was extended until 18 September 2012, after which she was given one month's notice. In addition, Thema received two months' severance pay in terms of a collective agreement concluded between the trade union, SASBO and the bank.
- [3] On the first day of the trial, the applicant made an oral application to amend the relief she sought to include a claim for reinstatement in any position available that was appropriate given her experience. The application was opposed by the respondent on the basis that it was contrary to what had already been agreed in the pre-trial minute three months previously and also was contrary to the relief sought in the applicant's statement of case. In her statement of case, she had alleged that her dismissal was substantively and procedurally unfair but had only sought compensation. In the pre-trial minute, by agreement, she had confined her claim to one of procedural unfairness. In the circumstances, if the amendment was allowed, quite apart from the fact that it was not properly made by way of written application supported by an affidavit, it would have had the effect of expanding both the scope of the case the respondent was expected to meet, which was one of procedural unfairness, and would have materially extended the nature of the possible relief in a qualitative way. Such an amendment at so late stage in the litigation, even if it had been brought in the proper manner, was highly prejudicial to the respondent and would have necessitated an amendment to the pre-trial minute as well. When a respondent party is faced with litigation, it must naturally weigh up and assess the risks of opposing the action. At the time the applicant filed her statement of case in early June 2013, she only sought compensation. The respondent would have assessed its attitude towards opposing the matter at least based in part in the knowledge that the claim was purely financial and had no other

potential ramifications if the applicant succeeded. Moreover, when the pre-trial minute was concluded three months before trial, the case the respondent had to answer was further confined to one of procedural unfairness only. To have allowed the amendment would have been to require the respondent to deal with a case of a new character and scale. For that reason, the application was dismissed.

The reasons the applicant believed her retrenchment was procedurally unfair

- [4] Initially, the applicant complained that her dismissal was both substantively and procedurally unfair. She believed it was procedurally unfair because there was no proper consultation or attempt to reach consensus as required by section 189 (3) of the LRA. In particular, she felt that she was not consulted on ways and means of minimising retrenchment and the bank effectively denied her an opportunity to apply for alternative positions that were available. In particular, this related to the bank's alleged failure to provide her with access to its IT resources which she was supposed to be able to utilise to investigate alternative available positions. Secondly, she believed that another person, Ms D Stout ('Stout'), who was not previously employed by the bank, was employed in the Marketing Department in which the applicant worked to perform the same or similar duties the applicant was fulfilling before she was retrenched. Thema believes that she was unfairly denied an opportunity to apply for the position that was given to Stout because that post was never advertised. However, in the comprehensive pre-trial minute concluded between the parties, the applicant confined her claim to one of procedurally unfair dismissal. Nonetheless, the issue of Stout's appointment did surface in the evidence.
- [5] The applicant also contended in the pre-trial minute that she had more experience and was more suitably qualified than the two other employees, Ms P Truman and Ms V Moletjwa, who were placed in the new structure.
- [6] Once the evidence was heard and argument was submitted, Thema abandoned the claim that she was unfairly refused the position in which

Stout was employed. Instead, she focused on her claim that there had not been proper one-on-one consultation with her and that during the last two months of the reassignment process, she was not given the resources in the form of intranet and Internet facilities that would have allowed her to access suitable and available posts within the bank and externally. Accordingly, the judgement will address those issues.

[7] The witnesses who testified for the respondent were:

7.1 Mr P Maharaj, the applicant's ultimate line manager and ABSA's former head of Human Resources and the Marketing and Communication Division human resources.

7.2 Ms M Moeletsi, ABSA's senior Human Resources business partner.

[8] The applicant gave evidence on her own behalf.

The restructuring exercise and consultations

[9] Maharaj said the restructuring exercise leading to Thema's retrenchment was conducted in terms of ABSA's Reassignment and Retrenchment Policy ('RRA'). He first met with staff in Marketing and Communications Department on 17 May 2011. At that meeting he explained the rationale for the proposed restructuring. Essentially, Barclays which owns ABSA wanted to establish a new operating model across the whole of Africa, which entailed a centralisation of certain functions. To minimise retrenchments that might result from the process, the policy provided for a three month reassignment process following two consultation meetings with SASBO. In terms of the policy once there has been consultation over the rationale and other items of consultation contained in the notice issued by the bank under s 189(3) of the Labour Relations Act ('the LRA'), then potentially affected individuals are notified. Once there has been consultation with the union over the criteria for filling jobs in the new structure, a second consultation meeting with SASBO is held in which the specific impact of the proposal and preliminary job matching proposals are discussed with the union. Following that, the posts in the new structure are identified and who will be allocated to those posts is communicated to

individual staff members, after the preferences of affected staff for placement in the available posts have been considered.

[10] Those staff members not identified for placement in the new structure are then issued with a letter notifying them of their reassignment and a notice in terms of section 189 (3). The same letter is sent to the union with a list of those employees placed on reassignment to alert them to the fact that they may request counselling or coaching under the Employee Assistance Program.

[11] A first meeting was held with the Department staff as a team on 15 May 2011 after which a one-on-one consultation was held with the applicant, which was confirmed in a letter of the same date. The letter recorded, amongst other things, that:

“During a consultation sessions (sic) held with you on 15 May 2012, a detailed rational (sic) and guiding principles were shared. In line with the changing operating model in Marketing, we hereby wish to confirm that your specific position in Marketing has been affected.

You are kindly requested to complete the attached preference form and indicate your preferred placement in the change process for positions within marketing. You will receive a link to the ABSA internal portal whereby you will be able to view all structures and roles available. You can then complete a preference form online as well, and submit electronically.”

Under cross-examination, Maharaj said he could not recall other meeting details, but claimed that he had meetings on the proposed restructuring timelines and related issues and how it affected the applicant on 9 and 15 May and June 2012.

[12] Thema’s recollection was that the talk about restructuring began in February when the head of events management, Ms P Mlangeni, Head of Events, explained the intention to amalgamate departments, but at that stage it was only the higher level structures which were being discussed.

- [13] In the meeting with staff in the Department on 17 May 2011 the selection criteria for the new structure was conveyed and was communicated by Mr P Freeborn ('Freeborn'), ABSA's Chief Operating and Integrating Officer. The selection criteria according to the policy were based on a number of factors provided they were objective and fair, which included the requisite skills, abilities, capacity, conduct, qualifications, job experience, training, job performance service record in any other objective criteria as well as the operational requirements of the bank. Under cross-examination, Maharaj was tested on why experience was not one of the listed selection criteria. His answer was that the knowledge criterion encompassed experience within it, because when trying to understand a person's knowledge one had to consider their experience. Thema said there were a number of consultations where all teams in marketing sat together and there was discussion about the possibility of restructuring and possible positions but it was only when they had to submit preference forms for jobs in the new structure that the lower level structures became apparent.
- [14] The severance pay formula set out in the policy which starts with a minimum of two months remuneration for an employee who has up to two years' service was also conveyed. Maharaj emphasised that in effect with the one month's notice period, the three months reassignment period during which the applicant did not have to work and the two months' severance pay, her effective package was six months remuneration even though she had only worked at the bank for eight months. He agreed that the severance pay formula had been finalised with the steering committee, but that did not prevent the applicant lodging a grievance if she was unhappy with it. In fact, in terms of the RRP employees who do not apply for suggested or suitable vacancies not eligible for severance pay, but in practice the bank did not apply this principle to Thema and other employees who failed to apply for positions. However, she denied that there were any one-on-one meetings except for the brief interactions with Maharaj on 1 and 4 June 2012. She also did not try and secure a meeting with Maharaj or Moeletsi because of the lack of clarity about what would happen even in the general meetings.

- [15] Apart from the meetings with the staff in the Department, he held a meeting with Thema where the structure and preferential selection process for placement in the new structure was discussed. Thema agreed that meetings were held with staff, but the information provided at that stage was of a high level nature and Maharaj could not answer how many people would be affected in the different sections. As with other evidence, this particular allegation had not been put to Maharaj under cross-examination., Though Thema claimed to have advised her attorney of this fact.
- [16] A crucial interaction between Maharaj and Thema took place on 1 June 2012 in which the rationale for the changes in the Department was discussed and in which she made representations. In the s189 (3) letter handed to her before the meeting that day, the bank set out the steps taken in the collective consultation process and also refers to one-to-one consultations held between herself and a Management representative, which in Thema's case was Maharaj. The letter also recorded that she had been provided with a form to complete indicating her preference for positions in the new structure. The letter also contained an express invitation to Thema to consult essentially on the same issues which had already been dealt with in consultation with the union. Maharaj said that the purpose of the letter was to provide her with details of the process of consultation with the union, the rationale for the restructuring and how it would affect her. This was then consulted over at an individual level. He denied that he would ever have simply handed the letter to her without explaining it and asking if she understood the fact that she signed for receipt of the letter did not mean she accepted the contents.
- [17] Maharaj disputed Thema's version that she had simply seen him to collect the letter. He claimed he had taken her through its contents and explained them before she left. Thema insisted that she was called in by Maharaj, given the s 189(3) letter and told that she was affected and would be placed on assignment. She claims she asked him who else would be affected and he could not respond. The interaction was repeated on 4 June 2012 when she was called in and given the reassignment letter, also dated 1 June 2012. The interaction on those occasions was less than five

minutes, though she did agree that the contents of the letter had been explained to her. The short duration of these interactions was not put to Maharaj when he was cross-examined.

[18] Following the meeting, she was advised that her representations had been considered but it had been decided that her current role was redundant and she was placed on reassignment with effect from 4 June to 31 August. Thema said she had filled in the preference form before she got the reassignment letter on 4 June 2012. That letter was essentially a response to her stating her preferences for appointment in the new structure. If she had a grievance with that process it was open to her to raise it using the normal grievance procedure but she did not raise any complaint about the process. Recourse to the grievance procedure was specifically referred to, in the presentation made to the team on 17 May 2011 by Freeborn. Thema denied ever receiving a copy of that document. Moreover, SASBO had agreed to the proposed structure and the selection criteria. Thema herself had used the procedure during her first two months of employment so she must have been aware of it. It was also accessible on the intranet. Thema said she was not told about any procedure that she could invoke if she was unhappy with the process.

[19] Thema applied for three positions in the new structure but was not found suitable for any of them and while she was on reassignment, was advised of six possible positions, but her own view was that she did not meet the requirements of those posts. One of the positions for which she could have applied was that of a marketing consultant, for which she met the minimum requirements and therefore stood a chance of appointment to that position. Moeletsi agreed with this assessment. She did concede that ultimately another person who was not on reassignment was appointed to the post and the applicant would have been competing with that person for the position had she applied. Thema said that she did have a BCom degree but did not have the skills or knowledge to “fully and wholeheartedly deliver on the deliverables” the job entailed. More specifically, she did not have marketing experience in the financial services industry and neither did she have two years’ experience in

managing a marketing budget in excess of R 1 million, which were also minimum requirements for the job.

[20] Maharaj said that if a candidate met the minimum requirements for a post, the bank would consider further training for that person but they had to apply for the post. The purpose of this exercise was to try and ensure that retrenchment was a last resort. In the end of the twenty-two persons across the group placed on reassignment, only one person was placed into internally with the bank and another externally. The remainder were eventually retrenched. Thema was the only member of the ABSA Wealth section of marketing and communications who was retrenched. On the first day after the commencement of her reassignment period, Thema was asked to indicate if she was willing to consider permanent and contract posts and whether she was willing to have her personal details and CV circulated with external organisations.

[21] Available posts Thema did not apply for were the Head of Communications, General Manager Communications, Communications Manager, Media Specialist, Marketing Consultant and Business Risk Officer. During the three months reassignment period any person in that position was treated as an internal candidate for available posts who would be entitled to preferential treatment vis-a-vis external candidates. Also, during the reassignment period, applicants were not restricted to applying for posts on the same level they currently occupied it could apply for posts that would have involved being promoted. Further, the filling of all posts was frozen from the time that the restructuring exercise is contemplated and would only be filled unless the post was critical. Maharaj claimed that she was advised of the six posts on 19 June 2012 and another post later. He was unsure if she ever responded to these notifications, but she certainly never made a formal application for any of them.

[22] Thema said that the six positions were either junior or senior to the position she previously occupied and that had been said that during the reassignment period one could not apply for a promotional post but only one at your own level. She denied that she had been advised that this

principle only applied at the initial stage when she had to state her preferences for positions in the new structure. In any event she felt the positions offered did not suit her knowledge and capabilities. She was “passionate” about the “events space” and the positions offered did not fulfil what she was looking for from a career perspective. She also did not apply because she did not feel confident enough.

- [23] Maharaj agreed that they were all different to the three positions she had shown preference for placement in the new structure, namely Event Specialist role 1, Team Leader 3 and Sponsorship Consultant role 1. He also pointed out that the last two positions would have involved a promotion, but the first one was on the same level she was on at the time. He did agree that, of the six positions mentioned, she only met the minimum requirements for the Marketing Consultant’s post. Even though there was no guarantee she would have got the job, if she had been the only candidate for it, she would have.
- [24] In relation to the applicant’s complaint about the appointment of Stout, she had been retrenched and was only engaged on a fixed term contract to assist with the transition of managing the move of ABSA Capital on to a new operational model. Secondly, it was not a post on the structure but was an executive position and the job was terminated. Moreover, it was a Communications job and not a marketing one. Under cross-examination, he also pointed out that if Thema did not feel she was qualified enough to apply for the Communications manager post, she could hardly have been expected to have been given the fixed term post filled by Stout. No evidence was led by the applicant to contradict this evidence of Maharaj.
- [25] Maharaj also disputed the contention that a decision had already been taken to retrench at the beginning of June 2012. This was evident from the calls to Thema and emails to her showing positions available, the details of which were reflected in the pre-trial minute and will not be repeated here. However, Maharaj said she never even applied for one vacancy where she did have the minimum qualifications. The decision to retrench was only taken at the end of the assignment process and far from being

the only person who was retrenched she claimed she was one of twenty persons who were retrenched.

[26] Thema had contended that either Ms P Truman ('Truman') or Ms Vuyiswa Moletjwa ('Moletjwa') should have been selected in her place for retrenchment. Moletjwa had joined the bank a month before the applicant had brought experience to the job which Thema did not have. Truman had joined ABSA marketing team in 2010 and had extensive experience in event management. The difference between Thema and Moletjwa was that Moletjwa's experience in ABSA Wealth had exposed her to a far greater range of work.

[27] Thema acknowledged that the letter received on 18 September 2012 confirming her retrenchment also advised her that she could enjoy a further six months preferential consideration in respect of any externally advertised positions by completing a form attached to the letter. Thema denied ever receiving the form with the letter. Somewhat reluctantly, Thema conceded that she had not made use of this additional opportunity.

The dispute about Thema's access to email, intranet and Internet during the reassignment period

[28] Thema had complained that on 3 July 2012 she had struggled to get access to the banks group network and had to request assistance from the IT and human resources Department, but no one was prepared to help her. She further claimed that on 17 July 2012 after visiting three offices of the bank in separate locations she was told by Mr M Mauritz that Mr G Coetzee ('Coetzer') had instructed him not to connect her to the group IT systems, which was contrary to the reassignment policy and as a result she missed out certain opportunities and positions advertised in the group. Regarding the applicant's complaint that she had been unable to access her emails in order to process her tax Maharaj stated that access to the intranet was provided for the purpose of making applications but not for tax purposes and as far as he was concerned she did have access to the intranet and email. Moreover, vacancies which she could process were communicated to her on the intranet. It is true that her access to ABSA

Capital's network was blocked so she did not have access to any client information, but she did have access ABSA's intranet and email. Also, she could have gone to the reassignment centre or even phoned to make job enquiries. She simply did not remain in touch with the human resources Department and the intranet was not the only way she could search for a job. Furthermore she ought to have picked up information on her BlackBerry phone. Maharaj pointed to evidence of email communications between Thema and the bank on 17 and 25 July 2012 using her phone. When the applicant said she was trying to access her profile and her personal folders on the intranet on 17 June 2012, the first office she went to was the offices of ABSA wealth, whereas she should have gone to the reassignment centre in Randburg, which she eventually did. Mauritz had no authority to give her access to the Internet. Moreover there were emails between herself and others that shows that she did have access as required by the reassignment policy. She also submitted her CV to the HR management via email on 6 June 2012.

- [29] Even though the bank had granted her access when there was a letter of complaint from her lawyers dated 27 July 2012 they extended her reassignment period into mid-September, since it had only been made aware of her problems on 17 July. Even on that date she was able to communicate via email about her IT access problems. On 23 July there was a follow up by the bank to ensure that the access problems she had reported on 17 and 19 July had been resolved. Moeletsi, a senior HR business partner denied that Thema had ever been prevented from granting the access she needed during the reassignment period. The access she was supposed to get was to the Outlook program for email and for vacancies. The access to the intranet was obtained using the email program. What was blocked was access to SharePoint which was where the bank's strategic and confidential documents were kept. The problem she complained of in the second half of July related to difficulties she was having with 3G communications and not with Outlook and the intranet. There were follow up calls in July and August after her complaint of been blocked from the system. The IT Department had even sent her a screen document showing that Thema had not been blocked off and the

email complaining of been blocked off came from her ABSA email. Moreover, each of the employees on reassignment was phoned to follow up on whether they had any interest in the advertised posts as well as notifying them of other vacancies which arose after the first month, even though this was not something required by the policy. As far as she was concerned, the applicant showed no interest in pursuing an appointment to other posts that were advertised.

- [30] Thema said that she had struggled to reset her cellphone password early in July and had been unable to log onto the ABSA Capital platform intranet or Internet in June so she logged a call with the service desk. When she went to ABSA Capital offices in Illovo on 4 July 2012 they were unable to assist her. This was important for her to be able to assist in making applications within the group and to other companies from home without having to be in the office.
- [31] She had been advised by Moeletsi to go to a satellite office in Randburg and she spent half a day there trying to access the intranet. Eventually, Moeletsi advised her to go to ABSA Capital, but when she got there she was denied access by Mr G Coetzer ('Coetzer'), a senior manager in the marketing department. Thema reverted to Moeletsi who replied by email to her in the early afternoon of 17 July 2012 to say that Coetzer would inform IT to provide her with the access she wanted. She agreed that five days later she had got an email from Moeletsi because she still had no access at that stage. The email got to her through her mobile phone and not her laptop. According to Thema she had no access to the intranet and Internet for the whole of the three months of her assessment period.
- [32] It was at an advanced stage in her cross-examination that Thema was asked whether she did not get the same access as all other affected employees in the reassignment pool. She then said as an ABSA Capital employee she did not have access to the ABSA group platform. All the forms she had filled in manually for this reason. She only had access on her mobile phone. The email she sent to Maritz on 17 July 2012 requesting her profile to be loaded for her to print was sent from the ABSA Capital offices in Illovo, where she could access her email. When

questioned about the content of various emails sent in the period between 18 July and 1 September 2012, the applicant explained that she did have access through her BlackBerry phone to email but not to the Internet.

Attack on Thema's credibility

[33] During the course of her cross-examination, Thema agreed that she had been receiving legal advice from her attorneys from the time they wrote a letter to ABSA on 27 July 2012. Thema was accused of being misleading by claiming at the time of applying for condonation for the late referral of her dismissal dispute to the CCMA, that she only became aware of the 30 day referral period on 23 January when she had a meeting with her attorney. Thema said she did not intend to make such a misrepresentation and it was a mistake. It was her attorney's mistake in not processing the referral in time she did not know about it. At the time she was also pregnant and highly emotional.

Evaluation

[34] Insofar as the applicant could still have claimed her dismissal was substantively unfair in relation to the possibility that she could have been retained in the new structure instead of Moletjwa or Truman or that she should have been offered Stout's fixed term appointment, the applicant led no evidence to contradict Maharaj's and Moeletsi's testimony, as to why those appointment decisions were not unfair to the applicant. In any event, the pre-trial minute effectively curtailed her cause of action to one of procedural fairness, so these issues relating to whether her selection for retrenchment was substantively fair do not fall to be determined.

[35] On the evidence relating to the applicant's complaint that she was denied access to her email and intranet or Internet connection, the only evidence of a period when there might have been problems was between 17 and 23 July 2012. There was no evidence that there were any real difficulties outside of that period except for a problem with the applicant's password on her BlackBerry early in June which did not persist. Moeletsi testified that when she had received a complaint from the applicant on 17 July 2012, she had followed up and had been sent evidence from the IT

department that the applicant did have access. On 23 July 2012 she sent a confirmatory email to the applicant in which she undertook to follow the matter up again if she was still not able to connect. The applicant never denied receiving this email and there was also no evidence that she ever responded. Her attorney's letter four days later made absolutely no reference to this communication and portrayed the bank as being completely unresponsive to the applicant's complaints, which was untrue. In the circumstances, even if there had still been a problem on 27 July 2012, it is inconceivable that the applicant and her attorneys would have said nothing further about this issue. The applicant produced no evidence to show any emails she had been unable to send or evidence of calls she made subsequent to that brief period in July in which she attempted to raise any ongoing problem she might have had with her digital communications.

- [36] It is also apparent from the evidence that in fact the applicant was able to access her emails even using her phone and at worst still had access to the domain at one of the offices. Even if her own version were accepted, it seems that, apart from her difficulties on 17 July 2012, the most inconvenience she would have suffered would have been that she could not have accessed the intranet or Internet from her laptop at home and would have needed to go to the office to do so.
- [37] It is also important in this regard to bear in mind that the period during which the applicant had a window of opportunity to try and use the bank's facilities to search for internal and external vacancies was not a short one. For the month of June, the bank undertook to make an effort to look for alternatives, during which there was nothing to prevent the applicant from also doing so. This was followed by a two month period extended again by a further two weeks because of the applicant's complaints about her IT access. The period when her access might have been problematic at the most might have been a week or at most two weeks, which the bank sought to redress by extending her reassignment period.
- [38] I am not persuaded on the evidence that any disadvantage which the applicant might have suffered in being able to access the intranet for job

applications or the Internet was of such duration relative to the length of the reassignment period that she suffered any material prejudice as a result, apart from a brief spell of understandable frustration. I should mention that I have taken the most favourable view of the applicant's evidence in reaching this conclusion, which means I have ignored the fact that she changed her version during the trial to explain away the fact that certain emails from herself during the period she supposedly could not access her email, do not appear to have been sent from the Blackberry phone the bank issued her with. This belated explanation was not tested with the bank's witnesses under cross-examination.

[39] I am also mindful of the limited interest which the applicant did show in responding to available opportunities. I accept that the six positions she was notified of by the bank may not have been the most suitable for her either from the perspective of her ability to fulfil those roles or because they did not match her career aspirations. But Thema did not even attempt to apply for the Marketing Consultant post which she might have had a chance of getting. Moreover, there was no evidence, apart from the period around 17 July 2012, of any subsequent attempts by herself to apply for any positions or to obtain any information on other posts before her re-assignment ended in mid-September. Accordingly, I am not persuaded the applicant was even actively looking for alternative work during that time.

[40] It must also be mentioned that when an employee is facing imminent retrenchment, the purpose of looking for alternatives is primarily to avoid that person losing their employment. It is in the nature of such an inquiry that the opportunities which might arise will not always be ideal or ones which the employee would have chosen. In this context, continued employment in a suitable alternative position is the primary goal of the exercise. If the available alternative is substantially commensurate with the grade of job and remuneration package previously received by the affected employee, they ought to seize the opportunity to obtain that position, even if they do not regard it as best suited to their talents or career aspirations. It will not be often that an alternative job on offer is not only similar or better to that of the redundant post, but also dovetails neatly with the employee's longer term career goals as well.

- [41] On the question of whether there was one-on-one consultation between the applicant and Maharaj, I agree that the applicant's representative should have put to Maharaj that the meeting they had on 1 June 2012 and the subsequent one on 4 June 2012 had not been longer than five minutes each. However, when I consider Maharaj's own evidence, I did not gain the impression that he saw the purpose of the meeting as anything more than to go through the contents of the two letters issued to the applicant. The letters may have said all the right things about the process that had been completed and the process which was to follow, but there was no concrete evidence from his account of those meetings that he specifically asked her what her response was to any of the issues in the letter and in particular whether he engaged her in the meeting on the issues that the letter invited her to consult over.
- [42] It seems more probable to me that the main consultation process had in fact already taken place with the union and that the interaction with an individual like the applicant after that process was complete was chiefly intended to address the issue of seeing if she could find a placement in the new structure and, if not, proceeding to the reassignment stage if she was unsuccessful. At best, there was a single one-on-one meeting with the applicant that could have dealt with all the items section 189(3) requires consultation on. Maharaj provided no detail of any engagement with Thema on those issues, or whether he even asked if she accepted that her position was now redundant and that there were no alternatives except to follow the reassignment route. The letter supposedly confirming what transpired in the meeting refers to 'having considered your representations in the consultation meeting' but no mention was made of Thema making any either by Maharaj or herself. I am not persuaded that there was much substance in any consultative process which took place during that meeting and that it did not amount to the kind of engaged discussion expected by s 189(2)(b) of the LRA. It was more of an explanatory session. In this sense her retrenchment was procedurally unfair. This matter is distinguishable from ***National Education Health &***

Allied Workers Union & others v University of Pretoria¹ in which the appellant union participated in a process and then later complained it did not constitute consultation as envisaged in the LRA. In this instance the evidence that the respondent seriously tried to initiate a consultative process except on paper is thin.

Relief

[43] Having concluded that there was no meaningful one-on-one consultative process, the question arises whether any relief should be afforded to the applicant for that failure. The applicant has a BComm degree in Business Management and Marketing and a Project Management qualification. If she felt that the consultation process itself was wanting, she never gave any hint of that at the time. Interestingly, no issue was made of it at the time her attorneys wrote to the banks about her IT access, by which stage she was already on reassignment. It is reasonable to infer that if she had been unhappy with the phase preceding her being placed on reassignment, she would have articulated that by then. In the circumstances, this is not the kind of case where the employee asks to be given more time to discuss matters or raise issues for discussion and then is rebuffed by management not responding to them. Even if Maharaj had not engaged with Thema on 1 June 2012 after issuing and explaining the s 189(3) notice, Thema took no step to take the bank up on the invitation to consult contained in the letter, nor did she protest about the lack of consultation when she received the follow up letters on 4 June 2012. In her evidence she gave no indication why she never raised the lack of consultation before her employment ended some three and a half months' later. The only complaint she did articulate was the one relating to her IT access.

[44] It has been said that the consultation process is a dual participatory one², which means that once the opportunity for consultation is available the

¹ (2006) 27 ILJ 117 (LAC) at 135, paras [58]-[61]

² See *Greyvenstein v Flaming Silver Trading 62 (Pty) Ltd t/a Sunglass World* (2007) 28 ILJ 1081 (LC) at 191, para [41].

affected employee or their representative must take up the opportunity to engage: if they do not do so, their passivity ensures that it will not take place. I do not think the applicant made any effort to engage with the bank when the consultation process under s 189(3) was opened up, nor did she protest if she thought it was prematurely curtailed. Accordingly, any prejudice she might have suffered from consultation not taking place was also the result of her own failure to engage with the employer's formal invitation it had made at the appropriate time.

[45] Taking this into consideration, as well as the efforts made by the bank to assist her in finding alternative employment, and the fact that the applicant had short service of only eight months and effectively received six months' additional remuneration (including a generous two months' salary severance payment), which amounted to 75 % of her total earnings before that, and for which she was not required to render any services, I do not think that this is an appropriate case to award any compensation for the absence of a thorough one-on-one consultation process.

Order

[46] The applicant's retrenchment was procedurally unfair in that even though the respondent formally invited the applicant to engage in a consultation process, there was no sincere effort to initiate the process or to go through the different issues in a consultative fashion.

[47] For the reasons stated above, no order of compensation is made.

[48] Each party must pay its own costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: A Motake
Instructed by: Thabang Ntsebe

For the Respondent: X Matyolo
Instructed by: Norton Rose Fullbright

LABOUR COURT