Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JS 69/17

In the matter between:

LAUREN DE ALMEIDA **Applicant**

and

REEFLORDS PROPERTY DEVELOPMENT (PTY) LTD **Respondent**

Heard: 31 July, 1 - 2 August 2018

Delivered: 15 October 2019

Summary: (S 187(1)(e) – Automatically unfair dismissal – pregnancy – issues leading to retrenchment predating pregnancy - absolution from the instance granted. S 189 – unfair retrenchment – agreement on alternative employment reached orally but not confirmed – failure to clarify whether employee was rejecting written offer or offer which was agreed on orally – retrenchment unjustified – procedure tainted with bad faith at the end of the consultation process).

JUDGMENT

LABOUR COURT

LAGRANGE J

Background

[1] The applicant, Ms L De Almeida ('De Almeida') brought a case against her former employer ('Reeflords') for alleged automatically unfair dismissal for a reason related to pregnancy or, alternatively, a substantively and procedurally unfair retrenchment.

[2] By agreement, the respondent's application for absolution from the instance in relation to De Almeida's claim of automatically unfair dismissal for a reason related to her pregnancy was only argued after Ms D Cheng ('Cheng'), a witness of Reeflords, had given part of her evidence in chief. The application was granted and the *ex tempore* reasons are summarized in the judgment below.

Summation of evidence

[3] I do not intend to summarise all the evidence that was led during the trial, but will to highlight the main features in the narrative of events leading to De Almeida's retrenchment.

[4] De Almeida started working for the respondent in 2014. When she began she was the only employee in the sales department except for the office manager. After her probation she set up a sales office in Midrand 'from scratch'. Her functions included recruiting staff for the department, managing contractors of various kinds engaged in Reeflords different projects, managing leases and other duties. Prior to being employed by Reeflords, De Almeida had worked in various property related jobs in which she had gained experience over a twelve-year period.

[5] In February 2015, De Almeida was made the operations coordinator of the sales department. Her responsibilities were managing staff, budgets for operations and marketing projects, procurement for show days, HR functions and the like. However, she was adamant that her exposure to marketing was limited, both in her previous employment and with Reeflords. Although she managed the contracts with marketing agencies based on service level agreements (SLAs), she did not perform the

LABOUR COURT

marketing function herself and had no knowledge of digital marketing technology or other marketing techniques and strategies.

[6] The sales department of the business was one of five departments, the others being finance, procurement, construction and development departments.

[7] After the office manager left, tensions developed between herself and Cheng, who had moved to the Department afterwards. Cheng was also designated as a senior manager and had been working for Reeflords in the development department before De Almeida was employed. When Cheng was transferred to the sales department she continued to perform some of her development work with the project and development manager, Mr W Huang ('Huang'). Cheng also did invoicing in the sales department.

[8] Another senior manager, Ms S Moonsamy ('Moonsamy'), had joined the Department in May or June 2015 after De Almeida had been promoted to the position of regional business and operations manager.

[9] In October 2015 Cheng expressed unhappiness with her job title, because she had worked longer for Reeflords than De Almeida had. A meeting was held with Cheng and Mr H J Zhang ('Zhang'), the CEO, the same month. At that meeting Zhang told De Almeida, Cheng and Moonsamy should run the sales department' hand in hand'. According to De Almeida, most of the work and the contracts still came to her. However, there was also a practice at the company that on Saturday mornings Zhang held a meeting with representatives from all departments, which was conducted in mandarin. Previously, the office manager from the sales department who was Chinese attend those meetings. De Almeida was effectively excluded from these meetings on account of the language used in the meetings. After the erstwhile office manager left, Cheng replaced him as the departmental representative at those meetings.

[10] Conflicts developed between Cheng and De Almeida because Cheng did not want to report to De Almeida. At the meeting in October it was agreed that staff will continue to report to De Almeida but Cheng would assist her in performing her duties in the sense that, if she was unable to do

LABOUR COURT

something for one other reason, then Cheng would substitute for her. The other staff in the department reported to the three senior managers separately in respect of those aspects of their work which fell within the area of responsibility of each manager. However, there were still problems in the management of staff, who were coming late or taking extended lunch breaks.

[11] By November 2015, sales were improving dramatically and changes were needed and it was agreed that there needed to be greater clarification of duties, which also required staff to be given clearer job titles to facilitate working with third parties. It was at this stage that De Almeida's title was changed to regional business and operations manager, though it did not involve a change in her duties. At the time, the company had wanted to change her title to chief marketing officer, but she declined this because she explained she had no background in marketing and such marketing work she did perform was limited. De Almeida had suggested she be given the title of chief operating officer ('COO') instead. Eventually, a compromise was reached on the title she was ultimately given, namely Regional Business and Operations Manager. At the same time, Cheng's title changed from office manager to head of department, and sales agents were re-designated as sales executives.

[12] De Almeida fell pregnant in September 2015 and went on maternity leave during 2016. In terms of an addendum to her contract, she was paid part of her salary during maternity leave and her statutory maternity leave period was extended by one month. De Almeida implied that Reeflords only agreed to this arrangement because the same arrangement had been made with Cheng, who had fallen pregnant around the same time. At that time, De Almeida reported to Zhang, and one "Grace", whom De Almeida considered to be the chief operating officer who also managed finance.

[13] De Almeida returned from maternity leave in September 2016, three weeks' earlier than she was required to. She testified that when she returned the 'vibes in the office' were different. Without any prior warning, on 29 September she was called to a meeting with Cheng, Zhang and Huang. She was asked if she was still happy with her work and position in

LABOUR COURT

the sales department and if she felt that there were any things that could be changed by way of adding or removing duties from her. They wanted her to move to work under Huang in the development department as his assistant. De Almeida was not aware what prompted the discussion but she asked if it was up to her if she accepted this. Zhang gave her until 5 November to consider the proposal.

[14] De Almeida said she was anxious about the proposal because it would entail new responsibilities in an area she did not have the background experience in, namely dealing with government officials. She agreed that she had some experience in marketing but only from the point of view of contract management and measuring whether service level agreement requirements had been met. However, De Almeida said she had no experience in design or the development of advertisements and could not approve draft material prepared by the firm Caxtons which did Reeflords' advertising.

[15] De Almeida was referred to the job specifications of the marketing position and it was pointed out that in relation to a number of functions she would not be the only person responsible. For example, when it came to managing websites another staff member was also allocated responsibility for that. The job description did require her to perform market research, which she seemed to have less concerns about. Amongst other things that she would be expected to do would be to propose a detailed marketing strategy and perform design. Additional functions included: planning exhibitions, launches and events; budgeting and budget reconciliation; quality control; presales, sales and post sales functions; human resources work (on request from Cheng); teambuilding and attending to office administration. While acknowledging that in a number of functions she would be assisted by the department or specific staff members, according to the job specification sheet, she contended that, merely because another person was also identified as having a particular responsibility, it did not mean in practice they would actually perform that role. She claimed she had raised this issue before the consultation process took place.

LABOUR COURT

[16] The next day, 30 September, at the weekly sales meeting attended by all staff, Zhang was also attended the meeting. De Almeida said this was unusual because he seldom came to sales meetings. Zhang told the meeting that there was no hierarchy or structure in the department. In De Almeida's view there was a hierarchy because there were three senior managers in the department. According to De Almeida, prior to the meeting on 30 September, the sales department had been run jointly by herself, Cheng and Moonsamy, with staff in the department reporting to each of them for different reasons.

[17] In future, Zhang explained, there would be one manager of the sales department and one line of reporting. He told the meeting that he had decided to appoint Cheng, as head of the sales department because in previous years she had worked with him for long periods. A discussion ensued in which a realignment of roles and functions was set out, including the work scope of Cheng. De Almeida claimed this essentially involved Cheng essentially taking over De Almeida's functions such as handling HR matters, procurement and contracts. During cross-examination, De Almeida expressed the view that Cheng was given her duties because she could speak Mandarin and participate in the Saturday meetings. When Cheng testified she said that the need to speak Mandarin was the least of Zhang's concerns. Rather, attendance at Saturday meetings was determined by the position held in the company. Thus, Saturday meetings were attended by heads of department and the CEO, Zhang. However, this was one of a few instances in which Cheng was effectively offering hearsay testimony and, in any event, this particular explanation of who was to attend Saturday meetings was not specifically put to De Almeida during her cross-examination.

[18] Moonsamy was told her duties would be confined more to conveyancing work. Moonsamy, who was a qualified conveyancing attorney, asked if the proposal amount to a demotion, which Zhang denied. In addition to the reallocation of duties mentioned, no staff were to report to De Almeida or Moonsamy. Notably, Zhang is recorded as stating that the only manager in the sales department would be Cheng and that there would be no second or third managers in the department. Zhang told staff they must sign a

LABOUR COURT

minute of the meeting, but De Almeida refused, because she did not agree with the reallocation of duties. She did not dispute the correctness of the minutes. In her testimony, Cheng confirmed that Moonsamy's responsibilities and remuneration did not change with the change in her job title and she was not demoted.

[19] On 5 October, De Almeida responded to the development department proposal by saying she was content to remain where she was in the sales department but that she would find a replacement for Huang's assistant.

[20] The following day, De Almeida said Cheng had 'rushed' into the department and summoned her and Moonsamy to a meeting in the boardroom. Zhang was present and he announced that there would be changes in the sales department. He said there were "too many chiefs" in the department and a new structure was needed in terms of which they would all report to Cheng. He claimed to have been unaware that Moonsamy and De Almeida were also senior managers because this had never been previously related to him by one 'Grace', who performed the function of finance manager according to De Almeida. De Almeida agreed that the sales department was the only department which did not have one manager, but claimed that the level of work they each performed required them to be at managerial level. This was necessary in order to get subordinates to do things without having to seek higher authority to instruct them.

[21] De Almeida was called to another meeting around 11 October which was attended by Cheng and Zhang. She was given a sheet of paper containing the job specifications of a marketing director and was advised that she would not be doing any more operational work but would be doing marketing instead. She explained that she had no marketing degree or diploma and she could not fulfil the requirements of a marketing position. She claimed that Cheng phoned her and implied that she must sign acceptance of the position. Nonetheless, she agreed to consider the responsibilities set out and revert to them.

[22] On 13 October, De Almeida lodged a grievance. In essence, she complained that the new job, which entailed her being removed from all

LABOUR COURT

operational duties she previously was responsible for constituted a demotion. She claimed that it entailed changes to the reporting structure, job description, title terms and conditions of employment and duties and functions she performed. The second part of her grievance related to her reluctance to sign the minutes of the meeting of 30 October because she believed if she signed the minute she would be accepting her demotion. De Almeida submitted detailed written opening and closing statements at the grievance hearing. Issues canvassed in her statements concerned:

22.1 the changes in the management structure announced by Zhang at the staff meeting on 30 September;

22.2 De Almeida's perception that she had been stripped of her former duties and job title as COO and that these responsibilities had been given to Cheng, even though she had more management experience at Reeflords and in her previous employment than Cheng had working for Reeflords;

22.3 her perception that Cheng's and Zhang's demeanour towards her had changed since she had returned from maternity leave. For example, Cheng no longer responded to important emails she sent her, and she was being required to do things that took her away from the office and made it difficult for her to attend to her other duties and meet her deadlines.

22.4 Cheng was communicating with Reeflords' labour consultants, Invictus, about herself and was also questioning employees in the sales department to obtain "evidence" against her, which made her feel that Cheng had a personal vendetta against her. This information she had gleaned from seeing emails on Cheng's computer when looking for certain material on Cheng's desk, and

22.5 a claim that her workstation had been meddled with in her absence.

[23] As a resolution of her grievance, De Almeida proposed that she be reinstated retrospectively to her former position as COO on the same terms and conditions of employment she enjoyed prior to going on maternity leave. De Almeida also required an apology from the company for "these unfair procedures" and an apology to her colleague Moonsamy,

LABOUR COURT

whose alleged demotion was announced in the presence of other staff in the sales department.

[24] The chairperson of the grievance hearing recorded that Zhang responded by reiterating that the department needed restructuring as there were three managers for nine employees and owing to the language barrier, by which the court understands he meant De Almeida's inability to participate in the Saturday morning meetings, Cheng should be the head of the department. Further, Zhang said the company needed a local person to run the marketing department which was very important to it and although De Almeida's role and job as head of that department was changed, it did not amount to a demotion because a lot of trust was placed in her occupying that position and there was no change in her remuneration or working hours. In any event, she could not be reinstated in the position of chief operating officer because he had taken over the responsibilities of that position as well as performing the roles of CFO and CEO.

[25] In her testimony, Cheng confirmed that De Almeida's former duties as COO had been reassigned to Zhang and herself. Cheng also echoed Zhang's view there were too many managers in the department and, as CEO, he wanted a single point of contact with the department. All other departments only had one manager.

[26] The chairperson of the grievance hearing concluded that the parties could not resolve the dispute about De Almeida's position in the company and proposed they embark on a formal consultation process.

[27] On about 28 October, De Almeida received notice of her possible dismissal based on operational requirements, which invited her to attend a consultation meeting on 31 October. The reason for the anticipated retrenchment was the redundancy of certain positions resulting from restructuring the business. The letter further proposed as an alternative position for her the position of marketing executive. She was also invited to consider and propose any alternatives. In all other respects the notice contained the usual requirements of a notice issued in terms of section 189 [3] of the Labour Relations act, 66 of 1995 ('the LRA').

LABOUR COURT

[28] De Almeida claims that she only received the outcome of the grievance hearing on the day of the first scheduled retrenchment consultation meeting. She raised this as an issue in the consultation meeting. Cheng confirmed that she had received the grievance outcome on 23 October, but it had not been forwarded to De Almeida before 28 October.

[29] During the first consultation meeting the redundancy of De Almeida's previous position as COO was discussed and the meeting adjourned on the basis that she would have to think about the marketing position. A detailed minute of the consultation meeting was provided. In terms of the minute, it appears that De Almeida said she was there to listen on that occasion and would like to have her union representative present at the next meeting. The chairperson of the meeting was a consultant from Invictus, Hennie Bierman ('Bierman'). He commenced the consultation meeting by saying that the purpose of the meeting was to explain the consultation notice fully and to discuss any alternatives that already existed. Reeflords' representative was Cheng. It was suggested to De Almeida during her cross-examination that Bierman was really performing the function of a facilitator, but in her view he was biased in favour of the employer, because she felt he was pushing for her to be retrenched.

[30] According to the minute of the meeting it was explained that only De Almeida and a gardener were affected by the possible retrenchment and that she was selected for possible retrenchment on the basis that it was her position that had become redundant. Cheng repeated that the company was proposing the marketing position as an alternative to retrenchment. De Almeida queried the timing of the restructuring which coincided with her return from maternity leave and asked when it had first been contemplated. Cheng did not directly answer the question about the timing of the restructuring, but explained in essence that De Almeida's and Moonsamy's positions as managers had never really been confirmed by Zhang, even though the department had historically run on the basis that there were three of them. The title she held as COO ought to have been the title of operations manager (OM), because a COO oversees the operations of the entire business, which was a role performed by Zhang. De Almeida challenged this contention about her job title because her

LABOUR COURT

contract of employment containing it had been signed both by Cheng and Zhang. A constant refrain in Cheng's testimony was that titles were not that important: what was important were the functions performed.

[31] De Almeida made it clear that she had not accepted the alternative position and was not comfortable about it. Nonetheless, she was performing the work in the meantime. The meeting ended on the basis that De Almeida would think about the marketing position again and both parties were invited to present any other alternatives they might have the next meeting, but preferably beforehand.

[32] At the second consultation meeting, on 7 November 2016, De Almeida was represented by a union official, Paul du Plessis (du Plessis), though De Almeida subsequently made complained that a union official did not afford her the same level of representation the company supposedly had by using Bierman as the facilitator of the consultation process.

[33] In her evidence, she claimed that she only learnt that Bierman was an attorney late in the consultation process. That is why she only mentioned it in her letter to Zhang and Cheng, which she appeared to have sent to them on 28 November. De Almeida claimed she approached Bierman after the first meeting about who could represent her, and he suggested a trade union representative when she asked if she could bring a lawyer. The section 189(3) notice and the minute of the first consultation meeting confirm that De Almeida was permitted outside representation and no express limitation was put on whom that representative could be. In any event, at the last consultation meeting, De Almeida did not mention her claim that HB had suggested a trade union representative to her outside the first consultation meeting. She also did not mention her claim that she had been misled about having a legal representative in the letter of 28 November. When asked why she only sent the letter thirteen days after receiving the proposed contract, De Almeida said that she had discussed the contract with Cheng, but could not explain why she made no reference to such a conversation, apart from suggesting that she was very busy with other commitments. She testified that she rejected the marketing position because her conditions (discussed below) were not met and she saw no

LABOUR COURT

prospect of anything changing in this regard in the last consultation meeting.

[34] At the second meeting, the marketing position as an alternative to retrenchment was discussed in more detail. Du Plessis made it clear that De Almeida accepted the position but subject to certain conditions, such as: her employment would be continuous; because she would be doing considerable driving, she ought to receive a mileage allowance of up to 500 km per month for a particular vehicle with mileage to be recorded in a logbook, and, importantly, training and guidance in the new position. De Almeida agreed he was mandated by her to say this. He also expressed her concern, given her lack of marketing skills, that she did not want to take the position if she was being set up for failure, which could lead to a constructive dismissal. No specific AA rate was discussed according to Bierman. De Almeida had merely said that she wanted to be compensated at the "AA rate" and he understood the company had agreed to this in the meeting. However, when du Plessis tabled De Almeida's two conditions near the beginning of the second consultation meeting, the AA rate mentioned was quite specific, even if not stipulated in rands and cents. The minutes read:

> "Paul: Okay, secondly we are going to drive a lot, in this new position, as I understand we've got an allowance of 500 km, together with an AA rate, on a certain vehicle. That was not previously included in her contract. So that needs to be included. The vehicle that she is driving, the AA rates on that specific vehicle, of the 500 km, of which we are prepared to keep a log even to our own detriment;…"

(emphasis added)

[35] De Almeida wanted the key performance indicators [KPIs] of the marketing job to be determined. She was concerned about being evaluated against KPIs and being "performance managed out of the job" if she had not received the necessary training to allow her to perform those duties. She claimed that this had happened to another employee, Mr M Malulese, who had been "performance managed" out of his job with the assistance of Invictus. Her suspicion in this regard was aroused by the sight of emails between Cheng and Invictus which she had seen on Cheng's computer

LABOUR COURT

screen. Cheng said the emails on her computer, which De Almeida would not have seen without activating the computer screen, did not concern any vendetta against De Almeida, but related to the anticipated restructuring of the department.

[36] As Bierman recalled, at the second consultation meeting Reeflords had agreed to assist her with training in the new position but the specific nature of the training was not discussed and that De Almeida was to specify this. Under cross-examination he agreed that it would not be reasonable of the employer to exclude training from the addendum to the contract if that was something agreed upon.

[37] By the end of the meeting De Almeida conceded there was agreement that she would take the new marketing position, subject to the kilometre rate and the KPIs being settled. Bierman did not recall a specific AA rate being discussed in the second consultation meeting. Cheng was under the impression that by the end of the second consultation meeting De Almeida had accepted the marketing position and had agreed to the terms and conditions discussed in that meeting.

[38] A few days after the consultation meeting, De Almeida received a contract with an addendum making provision for a medical allowance, which De Almeida said was part of her original employment contract as a COO, and a petrol allowance. The petrol allowance contained two components. The first component was a fixed transport allowance of R 2000 per month. In addition to that, the company offered to reimburse De Almeida, R2.53 per kilometre subject to maintenance of a logbook and submission of fuel slips for conducting development survey work and land sourcing, which were part of the marketing job specifications.

[39] De Almeida was happy to agree to the petrol allowance but not with AA mileage rate mentioned in the addendum, because the car she drove was a diesel SUV for which the rate was R 4.65 per kilometre. In cross-examination she said she had responded to the incorrect rate in an email. She was not happy about the omission of any mention of KPIs or training in the draft contract or addendum. Accordingly, because De Almeida was of the view that it was agreed at the second consultation meeting that she

LABOUR COURT

would take the position if her conditions were met, she decided to decline the position. Cheng denied that after the second consultation she had received any communication from De Almeida about what the 'correct' AA rate should have been, contrary to De Almeida's testimony. No documentary evidence was adduced of the alleged email specifying the required AA rate.

[40] De Almeida claims that Cheng phoned her late at night on 14 November telling her to sign the documents before further legal actions were taken against her. Although it was not put to De Almeida during her testimony, Cheng claimed that the reference to "further legal actions" was intended to refer to the continuation of the consultation and retrenchment process.

[41] The following day, De Almeida met and discussed the contract documents with du Plessis. They agreed that the documents did not contain all that was agreed on at the previous meeting. She then advised him that she would contact the labour consultant. From that point, du Plessis played no further role in the consultations. De Almeida claimed the reason she did not use him beyond that point was because she felt his representation was inadequate and she had discussed this with her attorney before the third consultation.

[42] On 28 November 2016, De Almeida addressed a letter to Cheng and Zhang about her proposed retrenchment in which she stated that she was of the view that the decision to issue her with a section 189 [3] notice was prompted by her lodging her grievance. She also complained that the company had been assisted by the labour consultant, whereas she had no similar assistance from an external party. She expressed the view that there was no reason to embark on the process, or to change the job she originally had. Lastly, she claimed that the alternative position offered was not a reasonable one as she could not do the job because she lacked the necessary experience and skill and that they had "refused" to provide her with the necessary training for the new job. Nonetheless she committed herself to attending the last consultation meeting when it was to be held. De Almeida never got a response to this letter before the third consultation meeting. When she was challenged about the fact that during the second

LABOUR COURT

consultation it had been agreed she would receive training, she defended her claim that they had refused to give her training on the basis that it was not set out in the contract she was given. De Almeida also could not explain why she had not mentioned her dissatisfaction with the AA rate in this letter.

[43] Cheng was adamant that the company had agreed at the second consultation meeting that it would provide training for the marketing position. De Almeida ultimately conceded that the word "refused" in her letter was an incorrect characterisation of Reeflords' stance on training. In any event, it was common cause in the pre-trial minute that it had been agreed that training would be provided to her because she had no qualifications or skills in marketing, and that she could not be subjected to performance or KPI assessments until she had completed the training in question. A good deal of both De Almeida's and Cheng's testimonies canvassed the comparison between the existing marketing duties performed by De Almeida before the restructuring and the proposed duties she would perform in the position of marketing executive. The tenor of Cheng's evidence was that the new position would not have entailed a significant change in the marketing functions De Almeida previously performed, thereby implying that there probably was no need for her to undergo training. Be that as it may, there was an understanding at the end of the second consultation meeting that Reeflords would provide De Almeida with any necessary marketing training.

[44] During Cheng's evidence she said the company did not care whether De Almeida had a qualification in marketing. All that mattered was if she could do the tasks contained in the job specification for the post. She also referred to De Almeida's annual work report for 2015 in which she had recorded the marketing work she was doing then, though De Almeida was not asked to comment on this document during her testimony. Cheng confirmed that the marketing position still existed and had been occupied by two individuals since De Almeida left. The first to occupy the position had no marketing qualification but the current occupant did have one.

LABOUR COURT

[45] On Monday 21 November, De Almeida was notified of a further consultation meeting scheduled for 23 November, but she did not attend the meeting as she was booked off ill from 23 to 28 November. She received news from other staff in the department that Cheng had said she was looking for someone else to fill the position that she had/was offered. On 28 November De Almeida sent an email to Zhang and Cheng that she would not be accepting the proposed marketing executive position.

[46] On 29 November, De Almeida claimed that Cheng told her that she does not need her there and would find someone else to fill her position.

[47] The third consultation meeting was held on 30 November in which it was concluded that she would not accept the marketing position. She was then retrenched and told she did not have to work notice and must leave the company by 17:00 that day. De Almeida was issued with a retrenchment notice in the meeting together with a termination agreement requiring her to agree that she would not refer a dispute to the CCMA over her retrenchment. She declined to sign the retrenchment agreement. This meeting was also minuted and De Almeida also produced a transcript of a recording she had made of the proceedings, with the company's knowledge. Parts of the transcript reflected that the recording was indistinct and there was some controversy during the court proceedings about what was said in a particular exchange in the consultation meeting. However, in the written heads of argument submitted, neither party made anything of any apparent discrepancy between the transcripts referred to in evidence and the audible recording, so nothing turns on that.

[48] At one stage, in her own transcript of the third consultation, the following exchange was recorded near the start of the meeting:

> Chairperson: Okay? Alright. So, just to clarify, but I'll ask Dora just to clarify as well, the nature of this consultation, I remember in the second consultation we, well, there was an agreement reached according to me as per you and the representative. It was being stated that everything will be signed off, everything will be finalised, and then if no, of course, then unfortunately we have to consult again.
>
> Ms De Almeida: Ja

LABOUR COURT

Chairperson: And so I'm assuming that's why we are here today. Okay?

Ms De Almeida: Ja. Well, we're here for two reasons.

Chairperson: Ja.

Ms De Almeida: Obviously one of them is that the documentation, an addendum and everything that was put into writing was not, actually agreed upon verbally in the consultation, so that is a problem, and secondly, I have relooked at everything and I have found that it is unreasonable…[intervenes]

Chairperson: Okay, so you're …[intervenes]

Ms De Almeida: … to actually change – I will not be accepting the position [indistinct – speaking simultaneously].

Chairperson: Okay, so you're not accepting the position?

Ms De Almeida: No.

Bierman clarified that De Almeida was entitled to revoke her acceptance and Cheng commented that she did not think the offer was unreasonable as claimed by De Almeida in her letter of 28 November. Cheng said the company had not responded to the letter because the third consultation was pending. From Reeflords's side either the position was taken or there was no such position anymore. Bierman then reaffirmed that the position was still being offered to De Almeida but that if it was not accepted Reeflords would have no option but to proceed with the retrenchment, viz:

Chairperson: But, to make it clear if that isn't accepted, they don't have any option but proceeding, okay?

Ms De Almeida: Okay.

Chairperson: Once again, are you sure you don't want the alternative?

Ms De Almeida: Yes.

Chairperson: Okay.

However, De Almeida then proceeded to read out the letter she had sent, clearly intending to make some point about it by doing so. Bierman testified that De Almeida did not state in the consultation under which circumstances she would have accepted the offer and maintained that if she had come up with another alternative in the third consultation he

LABOUR COURT

would have entertained discussion of this in that meeting. Bierman said he could not comment on the portions of the transcript which were unclear but he was satisfied that what was clear was that De Almeida had rejected the offer. When challenged that it was obvious that she did not accept the post because it was unconditional, Bierman responded: “I interpreted that to mean even if it was unreasonable she still rejected it.” He was unwilling to accept that what De Almeida had rejected was the post without the conditions she wanted included. He was also reluctant to agree that by repeatedly asking her whether she accepted the offer, he was effectively asking De Almeida if she accepted the offer without the variations which had been agreed upon orally concerning AA rates and the provision of training. Under re-examination, Bierman said his understanding at the second meeting was that the company had agreed to provide training, and De Almeida did not state at the third consultation under what circumstances she would have accepted the offer.

[49] When Cheng was questioned as to why the agreement on training and payment of AA mileage rates were not included in the addendum, she said that she never understood, merely because those issues had been agreed upon in the second consultation, that there was a need to do so,. The addendum was not intended to deal with non-monetary issues in her view. If she had been asked to put those issues in the addendum she would have considered doing so. Moreover, even though she could have done so, she was not instructed to do so. Cheng claimed that she only became aware of De Almeida’s unhappiness with the addendum at the third consultation meeting. Cheng was asked what was done to establish why De Almeida was not accepting the position. Initially she responded that, in the absence of a further alternative position being tabled, no discussion on this took place. She claimed that the process was guided by Bierman who had asked the parties to present alternatives and that De Almeida had rejected the position offered by Reeflords. When it was put to Cheng that De Almeida made it clear that one of her difficulties with the written contract and addendum was that things that had been agreed in the previous consultation were not included in it and this was not an unreasonable concern, Cheng response was that this was not the only

LABOUR COURT

reason De Almeida rejected the alternative. Cheng referred to the further comments by De Almeida that she had "relooked at everything" and "found that it was unreasonable", was why nobody questioned further why she was rejecting the marketing position. At the time she was under the impression that it was an outright rejection of the offer and it had been unreasonable of De Almeida to decline it. When asked if it was not unreasonable of the employer to have excluded the items orally agreed upon from the addendum, Cheng's response was that De Almeida had not said that the exclusion of the terms was unreasonable, and Bierman had given her an opportunity to confirm her rejection of the position which she did. Cheng was further pressed on her understanding of Bierman's statement that De Almeida was not accepting the position for "certain reasons", namely whether it was not obvious that this was a reference to the AA rate and training issues. Cheng answered that she could not assume that was the case in circumstances where matters had been agreed upon and there was no communication from De Almeida on those issues. Under re-examination, Cheng was later referred to a portion of the minutes of the third consultation where she stated:

> "… I really don't find that the contract in the addendum as well as the scope of work was actually in any way unfair or unreasonable. However, if you do not take it and then I see on the letter you sent me on Monday, I think, you find it unreasonable and then that's where I do understand that you don't want to actually accept the position…"

On reading this, Cheng reaffirmed her view that De Almeida had not elaborated on the circumstances under which she would have accepted the position.

[50] In keeping with her perception that her previous duties had simply been reallocated to Cheng or assumed by Zhang, De Almeida was adamant that there was no need for her position to be declared redundant.

Application for absolution

[51] The application for absolution in respect of De Almeida's claim of automatically unfair dismissal for a reason related to her pregnancy was granted for the following reasons:

LABOUR COURT

51.1 The mere proximity in time of De Almeida's retrenchment to the chain of events which began shortly after she returned from maternity leave is not sufficient to establish a causal link.

51.2 This is particularly so where the events which unfolded in September to November 2016 were plainly foreshadowed in developments relating to the management of the sales department which started as far back as October 2015. There is nothing to suggest that those developments prior to her going on maternity leave were in any way related to De Almeida's pregnancy or imminent maternity leave.

51.3 There was also no evidence that her absence from work on maternity leave led to developments taking place which would not otherwise have happened.

LABOUR COURT

Evaluation of the unfair retrenchment claim

The applicant' s case

[52] The essential elements of De Almeida's claim regarding the substantive and procedural fairness of her dismissal was that there was no need to retrench her from the position of COO. Further, the consultation process was inadequate and Reeflords failed to meaningfully assist De Almeida in finding an alternative position in the company.

Substantive fairness

[53] In the closing arguments submitted by De Almeida, she maintains that the company failed to make out a case that Reeflords had discharged the onus of proving that the retrenchment was justified because Zhang, who made the decision to restructure, was not called to testify.

[54] Having regard to the evidence, there was ample elaboration of Reeflords's reasons for embarking on the retrenchment exercise in the minutes of the various meetings which were canvassed in evidence, without any serious dispute being raised about the accuracy of those documents. Furthermore, in so far as Cheng gave evidence for the company, the bulk of her

evidence simply confirmed what was already self-evident from the minutes and, for the most part, was not an attempt to lead evidence of what Zhang had said. De Almeida's dispute about the rationale for her retrenchment was essentially twofold. Firstly, that the work she did as a COO did not cease to exist, but had been reallocated between Zhang and Cheng. This was common cause between the parties. Secondly, she was denied the opportunity of taking the marketing position because Reeflords was not prepared to honour the oral agreement reached in the second consultation meeting on the terms and conditions attached to that position. The respondent's position was that De Almeida's job as COO had become redundant as a result of restructuring and she had refused to accept the marketing post as an alternative to retrenchment.

[55] The reallocation of De Almeida's duties to Cheng and Zhang resulting in her redundancy was essentially linked to the broader restructuring of the sales department management, which was decided upon before any notice of possible retrenchment was issued. The alternative marketing position also was offered to De Almeida before any retrenchment consultations commenced. Consequently, De Almeida's contested redundancy had materialized as a consequence of the restructuring it had already implemented in the sales department, and before any discussions on retrenchment ensued.

[56] The department was the only one in the firm having three senior managers, with the staff reporting to different managers according to the functions those managers were responsible for. The ratio of staff to management before the restructuring was 3:1. I can see nothing *mala fide* in Reeflords wanting to simplify managerial lines of reporting in the departmental structure to bring the sales department in line with other departments. As, De Almeida's job functions were largely of a managerial nature, unlike those of Moonsamy, whose duties were essentially those of a conveyancing specialist, the appointment of a single manager necessarily meant that managerial responsibilities previously performed by De Almeida would be performed either by the new head of Department or someone else in the existing managerial hierarchy above the level of the department.

LABOUR COURT

[57] Nonetheless, despite the rationale being one that can be construed as operationally legitimate, that does not detract from the fact that it embarked on this step and simultaneously reallocated De Almeida's duties thereby precipitating her redundancy without embarking on the s 189 process beforehand. In Moonsamy's case, by contrast, her job functions appear to have remained more or less intact as a result of the management restructuring, save for the loss of her title as a senior manager. In fact, the process of diminishing De Almeida's managerial status in the sales department started before she went on maternity leave in 2015, when Cheng was given the title of head of department, having previously been performing her own functions and providing ancillary support to De Almeida.

[58] The real crux of the case relating to substantive unfairness concerned the failure to appoint De Almeida to the marketing executive post as an alternative to her retrenchment. By the end of the second consultation meeting it appears to have been common course that De Almeida was willing to accept the position subject to being provided with training in respect of any areas of the marketing position where she lacked proficiency and that she would be provided with a transport allowance based on AA mileage rates. It must be said that when Cheng testified, she somewhat grudgingly agreed that there was consensus on these issues.

[59] It was apparent that Reeflords was of the view that there was nothing materially different about the marketing duties De Almeida would perform in the new post compared with the marketing work she was previously performing, and that consequently there would be little if any need for additional training. However, it ought to have been obvious from the discussions in that meeting that De Almeida was particularly anxious that she might be subjected to performance review in the new position and performance managed out of the job because of areas of marketing expertise in which she might be found lacking. Although this concern might appear to have been unwarranted when the existing work she performed was compared with the job specification of the new post, her insecurity about the new position was not without any foundation given the way in which she had been gradually eased out of a managerial role in the sales

LABOUR COURT

department which had taken place in tandem with the ascension of Cheng to the position of head of the department. In the consultation process, the representative of Reeflords was the very person who had been her rival who had succeeded in supplanting her in the principal managerial role in the sales department. Cheng downplayed the importance of job titles to herself during her testimony, but the fact remains that functionally she gradually assumed the role of managing the department, while De Almeida's managerial role was marginalized. In consequence, De Almeida's sensitivity about protecting her ability to retain any new position was not baseless.

[60] In relation to the agreement on the application of AA rates, in her proposal in the second consultation meeting, as conveyed by du Plessis, De Almeida had identified on what basis the AA rate should be determined in her view. It was never suggested in the meeting that the applicable AA rate would not necessarily be linked to the vehicle she drove. It was not unreasonable therefore to believe that, in principle, the AA rate that would apply would be the one determined for her vehicle.

[61] The contract and addendum forwarded to De Almeida by Cheng did deal with the travel allowance but the AA rate of R 2.53 per kilometre was approximately half of what De Almeida would be paid if it had been calculated on her own vehicle. No explanation of how the rate was determined was contained in the covering email from Cheng and Cheng herself was unclear how the figure in the addendum was arrived at when she testified. Training was not mentioned at all in the contract, nor even in the covering email. On the face of it, it was not unreasonable to assume that the additional conditions proposed by De Almeida, which the parties had agreed upon were, at best, only partly reflected in the documents which was supposed to embody the terms governing her appointment as the marketing executive. Cheng did not satisfactorily explain why she felt it was unnecessary to mention the agreement on training. It is clear from Bierman's concluding remarks in the second consultation meeting that Cheng was expected to embody the changes agreed upon in writing and that only if there was still no agreement would there be a need for a further consultation.

LABOUR COURT

[62] It is apparent from De Almeida's letter of 28 November, she was still unhappy about the fact that she had been identified as redundant and that she believed the company was refusing to provide her with training, despite what had transpired at the previous consultation. The letter criticized the fundamental rationale for her proposed retrenchment and characterized the offer of alternative employment as unreasonable, with particular reference to the issue that appeared to have caused her the most anxiety in the previous consultation, namely the apparent absence of a commitment to provide training for a role she felt she might not be able to perform well in. At the very least, the letter signified that there was no consensus about De Almeida accepting the alternative and that another consultation meeting would be necessary. This much was recognised by the employer.

[63] However, the opportunity provided by the third consultation meeting to clarify matters before reaching a conclusion that nothing more could be done to obviate De Almeida's retrenchment was not utilised. Thus, even if the company was not prepared to revisit the overall rationale for restructuring on account of the fact that the consultation process had already moved on to the discussion of an alternative position, given that an oral consensus had been reached at that consultation, it should nonetheless have been self-evident that the reasons for not crystallising the oral consensus in writing ought to have been the first item in the order of business in the third consultation meeting.

[64] Because of the ramshackle way the meeting was conducted, the reasons for De Almeida's refusal to accept the written terms of the offer were never properly canvassed. Had it been done properly the two reasons which made her reject the written contract and addendum could have been easily rectified. Further, whether in truth there were any additional reservations she had about accepting the alternative position, those would have been identified and discussed. As it turned out, at the end of the meeting Reeflords could not have genuinely known whether De Almeida had rejected the offer of the alternative position as set out in the written terms of the contract and addendum or, had rejected the position even if the missing terms, which flowed from the consensus in the second

LABOUR COURT

meeting, were to be included in the written offer. It is apparent neither Bierman nor Cheng wanted De Almeida to unpack the specific reasons she was not accepting the position.

[65] In order to show that a proposed alternative had been considered in good faith but abandoned, Reeflords needed to be sure there was no misunderstanding between it and De Almeida about the terms of that alternative, particularly in circumstances where there had previously been manifest consensus. In this regard, it must be remembered that one of the objectives of the consultation process is to seek consensus. Section 189(2) of the Labour Relations Act, 66 of 1994 states:

> '189(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on—
>
> (a) appropriate measures—
>
> (i) to avoid the dismissals;
>
> (ii) to minimise the number of dismissals;
>
> (iii) to change the timing of the dismissals; and
>
> (iv) to mitigate the adverse effects of the dismissals;
>
> (b) the method for selecting the employees to be dismissed; and
>
> (c) the severance pay for dismissed employees.'

[66] Consequently, when consensus on one of the issues identified in section 189(2) has been reached but breaks down, the need to understand why that breakdown occurred to see if it can be remedied should be readily apparent. The need to do so is also closely linked to the principle that retrenchment should be avoided where possible, as it is a no fault dismissal. Without doing this, Reeflords could not confidently say that De Almeida's retrenchment was operationally justified because she had failed to accept a reasonable alternative. In ***Oosthuizen v Telkom SA Ltd***,[1] the LAC put it thus:

> '[5] The obligation of an employer not to dismiss an employee for reasons of its operational requirements where it can avoid such employee's dismissal as now provided for implicitly in s 189 (2)(a) (i) and (ii) and 189

[1] (2007) 28 *ILJ* 2531 (LAC).

LABOUR COURT

(3)(a) and (b) of the Act is not a new obligation that came with the enactment of the Act. It is as old as our modern law of retrenchment in this country. (See Halton Cheadle 'Retrenchment: The New Guide-lines' (1985) 6 ILJ 127 at 128-9 particularly guideline no 5 at the top of 129 and the case of Gumede & others Richdens (Pty) Ltd t/a Richdens Foodliner (1984) 5 ILJ 84 (IC) at 91B-C.) Recently this court re-affirmed this principle in General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & others (2004) 25 ILJ 1655 (LAC). In this regard it is to be noted that article 13(1)(b) of ILO Convention 158, the Termination of Employment Convention, provides that the employer must give workers' representatives an opportunity to consult on measures to be taken to avert dismissals or to find alternative employment. This obligation also includes that, where the employee may need some training in order to be able to perform the duties attached to an alternative position, the employer should afford the employee the opportunity to get such training. Naturally, this has to be within reason because, obviously, the employer should also not be burdened with an exercise that may have undue cost implications. I note that para 21 of ILO Recommendation 166, the Termination of Employment Recommendation 1982 provides as follows:

'The measures which should be considered with a view to averting or minimising termination of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, ... internal transfers, training and retraining ....' (Emphasis added.)'[2]

[67] On the probabilities, if the training issue and the AA rate applicable to De Almeida's vehicle, as orally agreed, had been included in the written terms and conditions of the marketing executive post, De Almeida would not have rejected the offer of the post as an alternative to retrenchment and accordingly there would have been no need to retrench her. Insofar as De Almeida's poor articulation of the reasons for her apparent turnaround from the second consultation meeting might have contributed to the confusion about what was being rejected, she must bear some of the responsibility for that and this is dealt with under the compensation awarded.

[2] At 2354.

LABOUR COURT

[68] In conclusion, I am satisfied that De Almeida's retrenchment was substantively unfair because on the evidence, the employer has failed to establish that De Almeida had unreasonably refused to accept alternative employment and accordingly her dismissal could have been avoided.

Procedural fairness

[69] It was submitted on the basis of the failure of Reeflords to act in good faith in not resolving the written terms of the Marketing position, that the whole consultation process was a sham and not done in good faith. It is true that Reeflords should have embarked on consultations before reallocating her duties in the sales department to Cheng and Zhang because that action, in and of itself, made her existing post redundant and raised the possibility of her retrenchment if an alternative could not be found.

[70] However, I do not think that the entire process after that was a sham. Rather, the company was prepared to offer the alternative position, which was a genuine post as evidenced by other persons occupying it after De Almeida was dismissed. Where matters went seriously awry was when the issues agreed upon in the second consultation meeting were not reduced to writing. The confusion between what had been agreed orally and what was reduced to writing appeared to provide Reeflords with an opportunity not to retain De Almeida. It was obvious that rivalry existed between De Almeida and Cheng and that Cheng had limited enthusiasm to actively try and retain De Almeida. In short, during the first two consultations, the process had the hallmarks of a *bona fide* consultation process, but this broke down during the last consultation meeting where Reeflords no longer pursued a joint consensus seeking agenda. To this extent and bearing in mind that the consultation process ought to have commenced before making her post redundant, De Almeida's dismissal was procedurally unfair.

Relief and costs

[71] De Almeida did not seek reinstatement. Consequently, it is only necessary to determine how much compensation the applicant is entitled to. There was effectively consensus on retaining De Almeida, but no attempt was

LABOUR COURT

made to rectify the situation when the discrepancy between the oral undertakings and written undertakings came to light. At this point, Reeflords had acted in bad faith. De Almeida's retrenchment ought to have been avoided.

[72] Although Reeflords bears the primary responsibility for not trying to ensure that De Almeida's dismissal was avoided, De Almeida's less than clear representations after the second consultation and jettisoning her representative at an advanced stage, helped to exacerbate the difficulty of resolving matters. Another factor bearing on the compensation to be awarded is that the applicant only started working for Reeflords in February 2015.

[73] The time taken to lead evidence in De Almeida's case in respect of the claim of automatically unfair dismissal was limited, but she ought to have abandoned that claim at the end of her own evidence without Reeflords having to argue for absolution. Accordingly, law and fairness dictate an apportionment of costs.

Order

[1] Within 15 days' of the date of this judgment, the respondent must pay the applicant compensation in the amount of six months' remuneration amounting to R 132,000.00

[2] The respondent must pay the applicant's costs save that the applicant must pay the respondent's costs incurred in preparing and presenting argument in the application for absolution.

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R G Lagrange

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

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For the Respondent:	M A Lennox instructed by Birch-Stewart-Jordan Attorneys

LABOUR COURT