IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C585/98

In the matter between :

MAINA SOMERS **Applicant**

And

FRIEDRICH-NAUMANN-STIFTUNG **Respondent**

JUDGEMENT

APPEARANCES:

On behalf of Applicant:	**Adv Frans Rautenbach instructed by A Silberstein & Associates**
On behalf of Respondent: (Cape Town)	**Mr PD Presbury, Deneys Reitz**
Hearing: (Johannesburg)	**9 and 10 September 1999**

Argument: **16 September 1999 (Cape Town)**

CORAM : MacROBERT AJ

1. The applicant challenges the substantive and procedural fairness of her retrenchment by the Respondent.

2. The Respondent is a Foundation funded by the German Government (in effect by the German taxpayer) and is linked to the German Liberal Party. It has offices throughout the world including Africa (with some seven national offices in different countries). Its aims include political education, fostering human rights and a market economy. Its head office is in Germany.

3. In South Africa it has offices in Johannesburg and Cape Town. When applicant was employed by respondent in 1996, she was a project co-ordinator and assistant to Mr Bunning, Chief Director of South Africa who, although based in Johannesburg, was also in charge of the Cape Town office. Also in the Johannesburg office were Dr Freier the Head of the African Regional Office (i.e. he was senior to Mr Bunning), a Finance Controller and other employees. The Cape Town office at that time included an employee in charge of finances and an office assistant/receptionist.

4. The intention was for Mr Bunning to move his base to Cape Town. Applicant was keen to relocate to Cape Town to continue working for him.

5. She moved to the Cape Town office with effect from 1 April 1997 under a new employment agreement, ahead of Mr Bunning, and a further agreement of employment was entered into in February 1998 in terms of which applicant would become Project Assistant remaining in Cape Town and reporting to Mr Bunning.

6. It was intended that Mr Bunning would relocate to Cape Town in late May 1998, his move to Cape Town having been delayed by the German head office. Amongst applicant's duties was the organising of workshops including with the Democratic Party Youth and the Association of Liberal/Democratic Councillors, who were two of the Foundation's "partners".

7. To complete the organisational background, Dr Freier had been involved in a serious accident which had led to his hospitalisation. Dr Reinert Erkens had joined the Foundation in August 1995 as Regional Director for Latin America. He was thereafter appointed Regional Director, Africa to take over this region with effect from 16 July 1998 from Dr Freier who was retiring. Mr Erkens visited South Africa in February 1998, including the Cape Town office, and again in May to enable Dr Freier to hand over to him.

8. In the meanwhile the applicant had perchance unearthed certain irregularities involving Mr Bunning and certain unauthorised expenses incurred by him. She reported these to head office in Germany who sent out a senior employee to investigate. Mr Bunning's employment then terminated in the last days of May (whether by resignation under threat of dismissal or otherwise is irrelevant to this matter). Co-incidentally, the events of Dr Freier's handover to Mr Erkens and the termination of Mr

Bunning's employment occurred within three days of each other at the end of May 1998.

9. Although the applicant was thanked by the senior German investigating employee for her efforts, she contends that the effect of her actions and "whistle-blowing" had been to rock the conservative establishment of the Foundation, thereby creating enmity towards her by the "old guard" of whom Mr Bunning was alleged to be an influential member.

The applicant considers this enmity to be the root cause of her subsequent retrenchment effected by Mr Erkens on behalf of respondent, thus rendering her dismissal substantively unfair by reason of an ulterior motive. I will address this perception below.

10. Mr Erkens then visited the Cape Town office between 27 and 30 July 1998, prior to going on leave before taking up his new appointment.

It is common cause that a number of meetings were held during this visit with the so-called partners of the respondent Foundation including Democratic Party parliamentarians, and other "partners" in which he sketched in broad terms his ideas for the functioning of the Cape Town office. However, he had no fixed plans at that stage and wished to cogitate whilst on holiday before finalising his thoughts.

11. The applicant wrote Mr Erkens a letter after this visit on 30 July in which she requested inter alia clarification of her position, her area of responsibilities and her "duties and rights". There were also certain residual issues pertaining to her terms and conditions in respect of which applicant was and had been unhappy, including her moving expenses from

Johannesburg to Cape Town, her salary etc (none of which are germane to this dispute) which she also wanted to have clarified.

No response to this letter was received.

12. Then somewhat out of the blue, applicant received a letter dated 7 September from Mr Erkens dealing with the restructuring of the Cape Town office. In this letter he states as follows:

"I have given some thoughts to the matter of the future work of the Foundation in Cape Town. For the (Foundation) I am considering the possibility of the restructuring of the Cape Town office. The Cape Town office has the following functions:

representing the Foundation at the South African Parliament and providing advice for liberal MPs on the subject of legislation;

Conception, organisation and execution of all activities of political education in South Africa;

Advising and looking after the partners, in particular SALSA, ALDC, DPY, FMF, SAIRR as well as planning and supervising joint activities with those partners;

Attending to high ranking foreign visitors and execution of activities of the "international political dialogue";

Control of finances and accounting for the whole of South Africa

I presume that the position of the German "Expatriate" in Cape Town, left vacant by the dismissal of Mr Holger Bunning, will not be filled again. Instead I could imagine that the Cape Town office will be managed by a highly qualified local member of staff, who must have the necessary professional abilities. I have Ms Barbara Groeblinghoff in mind.

Should this restructuring take place, the position of Project Assistant would be superfluous. Your job would have to be retrenched (sic).

In consequence to the above I would like to invite you to a "consultation meeting" on Tuesday 8 September 1998 at 14h00 at the (Foundation) office in Cape Town. The aim of this meeting is to try to reach consensus in the following points:

1. *Whether the restructuring should take place.*
2. *If the position of Project Assistant should be retrenched.*
3. *Alternatives to the retrenchment of your position as Project Assistant.*
4. *Time frame of the restructuring.*
5. *Possible claims for your severance package.*

I want to stress again, that there has been no definite decision taken at present regarding the restructuring and that your opinion and contribution at the planned meeting will be of particular meaning."

Applicant responded immediately to this letter in somewhat emotive terms, but understandably so in the light of the communication she had received.

13. Prior to the first scheduled consultative meeting on 8 September, the applicant requested a private meeting with Mr Erkens which duly took place. Mr Erkens regarded this meeting as being completely off the record and not part of the consultative process, although somewhat strangely, after the meeting and once the parties had moved immediately thereafter into the formal consultative meeting which was also attended by Ms Groeblinghoff, certain aspects which were raised in the off the record meeting were tabled and taken down by Ms Groeblinghoff in a minute. There is some dispute between the parties as to the accuracy of Ms Groeblinghoff's minute of this meeting and there are also certain factual disputes between the parties as to precisely what had been discussed in the off the record meeting.

The applicant sought to correct or embroider these minutes (i.e. the recordal of the off the record meeting and the formal meeting of 8 September 1999) together with the minutes of a second consultative meeting which took place on 9 September 1999 in a memo which she gave to Mr Erkens on 9 September.

14. One issue that concerned the applicant was clarification of the five bullet points contained in Mr Erkens' letter of 7 September which sets out the functions of the Cape Town office as Mr Erkens saw them. Applicant took the view that the functions were not spelled out in sufficient detail to enable her to consider what possible future role she may have and she requested clarification in detail of these points. Mr Erkens testified that he had revisited these functions in the off the record meeting, and to his mind the points were made clear enough for the applicant to consult meaningfully. She had also not come into the process as an "empty

vessel" but with a store of knowledge. When sufficient detail was not forthcoming from Mr Erkens, she formed the view that he had a closed mind on the issue and that further consultations would prove fruitless. She therefore indicated after the formal consultative meeting on 8 September in words that are disputed, that in her view the process was fruitless and she queried whether there would be any useful purpose served in proceeding on to the second planned consultative meeting on 9 September.

She did however attend this meeting at which her retrenchment was finalised and a letter of termination was issued shortly thereafter.

15. As mentioned, the applicant handed Mr Erkens a typewritten document on 9 September seeking to correct or amplify the minutes of the two formal meetings (the first of which incorporated some of the matters that had been discussed in the off the record meeting). She also headed this letter with a request for a further meeting to take place on 28 September after her return from leave. (Her leave arrangements had been made some time before). This suggestion was somewhat strange in that it appears clear from the minutes that the retrenchment had in fact been finalised at the meeting on 9 September.

16. The issues raised by the applicant in challenging the fairness of her dismissal were as follows:

that her retrenchment was a fait accompli due to her "whistle-blowing" on Bunning, leading to an ulterior motive on the part of respondent;

the failure by respondent to disclose information in regard to the five bullet

points contained in Mr Erkens' letter of 5 September which precluded her from being able to consider and suggest viable alternatives;

that the true financial or commercial rationale of respondent which formed an important basis for the retrenchment had not been disclosed to her directly;

that there had been insufficient consultation on, and consideration of, alternatives and that respondent had sought to place this obligation on applicant alone, and that in any event that respondent had not complied with the obligations provided in s189(3) of the LRA in terms of disclosure both of the true reasons for the proposed retrenchment and the alternatives the respondent had considered;

that the selection criteria had not been properly or at all consulted on by respondent;

that respondent had failed to consult on offering any assistance to applicant. In particular, applicant had requested a written testimonial in favourable terms from respondent which respondent had failed to give.

the timing of the retrenchment and the package were alleged to have been inadequately or at all consulted on, and that applicant had not been engaged in regard to these and these had been put up again as a fait accompli with no opportunity for discussion.

17. There is no doubt that Mr Erkens is bright, highly efficient, competent, motivated and determined. He had thought out his new position and his plans and had moved quickly to put these into effect. I have no doubt as to

his bona fides. He was also clearly concerned to protect the German taxpayers money.

18. From his evidence, and indeed that of Ms Groeblinghoff , it is clear that one of the important rationales for the retrenchment was the financial constraints of the respondent and also the continued existence of the Cape Town branch office. In this regard he testified that head office was concerned about South Africa having two offices which was most unusual in the context of the respondent's operations and that the possible closure of the Cape Town office had been discussed at head office level. It was for this reason that he had decided to refocus the functions of the Cape Town office to orientate these towards Parliament, thus to justify its continued existence.

19. There is however no mention in his letter of 7 September of the financial constraints or the Cape Town branch's continued survival, and indeed this rationale did not appear to have formed the basis of the consultation process at all. Mr Erkens' view was that there had been a conference in Zimbabwe in December 1997 at which the financial constraints of the organisation had been discussed with a view particularly to its African operations and it was clear that the region's budget had been cut by 30% and a number of offices in Africa had been closed. He had formed the view therefore that this was common knowledge and certainly knowledge that applicant would have had having been at that conference.

20. It was also clear from his testimony that with the departure of Mr Bunning, Mr Erkens had seen an opportunity for restructuring in such a way that Mr Bunning need not be replaced in that he (Mr Erkens) could assume some of Mr Bunning's functions and Ms Groeblinghoff could move

from Johannesburg to Cape Town to absorb such of the remaining functions that Mr Bunning and the applicant combined might have had. It does not appear as if this rationale had been properly consulted on with the applicant either.

21. I have no doubt that there was a sound commercial rationale for restructuring, but the problem for respondent in the context of this matter is that this rationale was not clearly put to applicant either in writing or otherwise. In essence, too much was assumed by Mr Erkens as being within the knowledge of applicant and although his perceptions in this regard were certainly genuinely held, it cannot be assumed that applicant had the full knowledge and background leading up to his thinking and his plans.

I will deal with the other procedural issues below.

22. On the issue of substantive fairness, there is simply no evidence whatsoever to suggest or lead to a conclusion that respondent had an ulterior motive in dismissing applicant. On applicant's own evidence it is clear that respondent did not do, write or say anything after the applicant's "whistle-blowing" to indicate that it was dissatisfied with her or unhappy. Applicant however formed this impression. One is dealing here in the realms of perception and I accept that that perception was genuinely held. However, the evidence does not convert that speculative perception into a reality.

23. On the procedural aspects, the correspondence, minutes of meetings, evidence and the argument indicate on the probabilities that what infused this process was the following.

Mr Erkens had done some hard and careful thinking. The termination of Mr Bunning's services presented an opportunity for cost cutting (an irony this, inasmuch as if applicant had not reported Mr Bunning and had he come to Cape Town as planned, she would in all likelihood not have been retrenched – certainly not in the shorter term).

Ms Groeblinghoff had the necessary attributes to run the newly focused Cape Town office (it was never an issue that applicant could have done this – at best she could have managed the office as an Office Manager, although it was the evidence of Mr Erkens that at his first private encounter with Applicant on 8 September, she put up as an alternative that she should do the job Ms Groeblinghoff was subsequently employed to do, although applicant denies this).

Between Mr Erkens and Ms Groeblinghoff, they could cater for all the increased functions of the Cape Town office (another irony in this in that Mr Erkens foresaw increased functions of the Cape Town operation but yet decreased the overall personnel).

Therefore, in Mr Erkens' view of matters there would simply be no room for the applicant in the new scheme of things. The only other possible post in Cape Town was essentially a financial one which applicant indisputably could not fill.

Thus, in Mr Erkens' mind at least, and despite the last paragraph of his letter of 7 September 1999 which is somewhat more gentle in tone than the emphatic tone of the first half of the letter, there was simply no alternative and that view clearly influenced his approach to the

consultation process.

24. It was argued by respondent's attorney that I should have regard to the facts as they existed and although falling short of requesting the court to re-import into our jurisprudence the so-called "no difference" principle, (which the court indicated it would decline to do), it should take into account the contention that there simply were no alternatives.

25. This I am not prepared to do. It is not for me to second-guess the outcome of a joint consensus seeking process. When parties have their backs to the wall, and after all relevant information, including the true rationale for the proposed retrenchment, has been tabled, it is extraordinary how creative parties can be. To give just one example by way of illustration, the possibility of a post in Johannesburg was not discussed or explored (although I am aware that there had been retrenchments in the Johannesburg office). It was clear that Mr Erkens assumed that applicant would not be interested in this even if there was a post, bearing in mind that applicant herself had been keen to come to Cape Town. Such assumptions may not be made.

26. The difficulty in having something of a closed mind on one issue such as alternatives, is that this may well influence consideration of the other important items that s189(2) requires to be addressed, such as, for example, the timing of the retrenchment and offers of assistance. In this regard, it is instructive to note that Mr Bunning's termination and the fact that he would not be replaced created an immediate saving for the Foundation – his salary had already been budgeted for the rest of the financial year. Similarly in the case of applicant, her salary had also been budgeted for the full financial year – consideration of these aspects and

proper consultation on them may have led to a delayed implementation of the retrenchment.

27. Another matter which influenced Mr Erkens' approach to the process was his perception that applicant was not a willing participant and that she made no meaningful contribution. Indeed he was surprised at the lack of resistance put up by applicant to his proposals and the speed at which the process was concluded. Once again there is no doubt that his surprise was genuine. The applicant was clearly no "pushover".

28. He subsequently formed the view (as did Ms Groeblinghoff) that the applicant believed that respondent was not legally entitled to do what it sought to do because she had a fixed term contract and that come what may, she would be paid by respondent until its expiration. Some support for this impression is to be found in a letter that applicant's attorneys wrote after the dismissal in which, amongst others, that contention was made (although it must be remembered the contract provided for earlier termination, on notice, and if applicant held this view, it was incorrect).

29. Once again this is a question of perception. Applicant believed that Mr Erkens had a closed mind and to the extent indicated above, I am of the view that she was correct in this conclusion. Mr Erkens on the other hand believed that applicant was not co-operative and wanted the process to be concluded as soon as possible. He testified that he was surprised when he tabled the proposed severance package and timing that applicant accepted this without demur. Applicant on the other hand, testified that these were put up as givens and not as a basis for discussion or consultation.

30. When it comes to the crunch of loss of employment by reason of operational requirements, an employer must be wary of assuming, without more, anything, including any particular knowledge that an employee may have, or, for example, that an employee has a blameworthy recalcitrant attitude or approach to the process. If an employer believes this, the issue must be tabled and tackled. The employer holds the initial cards. The process is kick-started by the employer by reason of its operational requirements. For this reason, the initial running has to be made by the employer to set out fully its commercial rationale, all relevant information at that stage and what alternatives it has considered, before the employee can engage meaningfully. This is not to say that s189(3) necessarily means that the disclosure required need be a once off, up-front communication. The process is by definition not static, and such written disclosure can be supplemented along the way before the final decisions are made, for example by way of minutes of meetings, memoranda etc.

31. However, in this case, it is common cause that applicant formed the view at the end of the very first meeting that her employer had a closed mind and she made this view clear. It was thus incumbent upon respondent to allay these fears and perceptions and to engage more proactively. What respondent in fact did was to leave it to applicant to come up with alternatives, suggestions etc without venturing any of its own.

32. Turning to the question of selection criteria, there was simply no consultation on this at all. The respondent's argument is that the selection of applicant was the only possible outcome of the restructuring exercise. Once again, it is not for the court to decide this. The selection criteria must be tabled and if possible, agreed. If not, then fair and objective criteria

must be set. There was simply no meaningful, if any, discussion on this. In any event, as indicated, the true commercial rationale was not clearly articulated or consulted on.

33. Once again, the court is not seeking to question the respondent's bona fides. I am certain that Mr Erkens believed in his own mind that he had thought of all possible alternatives and that there were none. However, an employer is not entitled to take this view at the outset of the consultation process, for the reasons given.

34. On the issue of assistance as envisaged by s189(2)(g), it appears clear that respondent did not address this either in its letter of 7 September, or in the truncated process that followed (as required by s189(3)). A seemingly innocuous item such as a favourable reference or testimonial can be very important to an employee who is about to be retrenched. In this instance, respondent did not only not deal with this issue in consultation, but refused to furnish a reference after dismissal after applicant's attorneys requested this, because applicant had instituted proceedings against respondent.

A favourable reference (and in this regard there was no dispute that the applicant had been a competent employee) coupled with suitable timing of retrenchment can also be important. It is lore of the workplace that it is easier for an employee to locate suitable alternative employment whilst in employment. Hence the deferring of the termination date for as long as is reasonable or feasible may assist an employee. This approach was not adopted by the respondent which took the line of least resistance, i.e. that if a termination date is proposed on a best case scenario for the employer and the employee does not demur, then that is the end of the matter. Once again this line of approach is not in keeping with the required joint

consensus seeking approach, nor is this in keeping with the obligations imposed on an employer by s189(2)(e).

35. When coming to these findings, I have taken into account the respondent's argument that the parties did not come to the table as empty vessels but with a store of knowledge. I have also considered the authorities put up which correctly reflect that a joint consensus seeking approach is a bilateral one which requires input from both parties and that one party can frustrate the process. I am not satisfied on the facts of this matter that it was the applicant who frustrated the process, and for the reasons given above, I believe and find as such, that it was incumbent upon the respondent to engage constructively and positively and allay the fears and conclusions reached by the applicant. (This would of course only have been possible had the respondent truly had an open mind and been willing to engage in respect of the matters that s189 requires consultation on).

36. I have sought to reach to the quick of the aims of s189 and on the facts of the matter have endeavoured not to place undue obligations on the shoulders of the employer. Process is process but it has a substantive end in mind, namely to achieve equity insofar possible. However, and over formalistic approach to the requirements of the legislation is not what was intended. I have taken due regard of the decisions in Johnson and Johnson (Pty) Ltd v CWIU (1998) BLLR 1209 (LAC) and O'Doyle v All Circles Screenprint CC (1999) 20 ILJ 191 (LC), put up by respondent's attorney and I am satisfied that my findings fall well within their respective purviews.

37. It will appear from the aforegoing that the termination of the applicant's

employment on the ground of operational requirements was substantively fair but procedurally defective and thus unfair. In particular it was procedurally defective in the regards I have outlined above, both as to s189(2) and s189(3) of the Act, and I find accordingly.

38. When it comes to remedy, the port of call is s194 of the Labour Relations Act. I am satisfied in all the circumstances that an order of compensation from the day after the date of dismissal (i.e. 1 November 1998) to the date of hearing (i.e. 16 September 1999) is appropriate, such compensation to be based on applicant's remuneration (which was not dipsuted), her annual package including the 13th cheque totalling R127 530, thus amounting to R10 627,50 per month. Duly pro-rated, the amount of compensation in respect of September 1999 would be R5 668,00 to which must be added the balance of the arrears period namely ten months which, multiplied by R10 627,50, totals R106 275,00. The total amount of compensation thus payable is the sum of R111 943,00.

39. In the premises the Order of Court is as follows:

39.1 The dismissal of applicant by respondent was procedurally unfair within the meaning of s188(1)(b) read with s189(2) and s189(3) of the Labour Relations Act;

39.2 The respondent is ordered to pay compensation to the applicant in the sum of R111 943,00, such amount to be paid to applicant by close of business on 29 October 1999, failing which interest at the prescribed rate will accrue on this amount from that date until date of payment;

39.3 Respondent is to pay applicant's costs of suit on the High Court scale.

DATED AT CAPE TOWN ON THIS THE DAY OF OCTOBER 1999.

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MacROBERT A.J.