IN THE LABOUR COURT OF SOUTH AFRICA HELD AT JOHANNESBURG

CASE NO: J934/97

In the matter between

LYDIA NTHEBO BUTHELEZI **Applicant**

and

AMALGAMATED BEVERAGE INDUSTRIES Respondent

JUDGMENT

de VILLIERS A J

1 This is a referral by the Director of the Commission for Conciliation, Mediation and Arbitration (Athe CCMA@), in terms of section 191 (6) of the Labour Relations Act 66 of 1995, concerning the termination of the Applicant=s employment contract by the Respondent after a 16-year employment relationship between them.

2 Facts pertinent to the determination of this dispute are as follows.

3 Late in 1995 the Applicant was promoted to the position of Public Relations Officer from a position of telesales clerk where she had worked for many years, moving up three grades on the Peromnes scale. Despite the fact that, according to the human resources personnel and a psychometric test, she lacked key competencies for the job, the general

manager of the Respondent=s Devland branch appointed her to the position because he believed she had required attributes - it was necessary to have a black person in the position because he/she would be required to work in the Soweto market. He also believed that, with training, she would perform adequately.

4 On 1 August 1996 she was relieved of her duties as PRO and the Respondent offered to reinstate her in a telesales clerk postion, an offer which she rejected out of hand as being an Ainsult@. She was then offered the position of customer care clerk. According to the Applicant, she provisionally accepted the offer by way of a letter dated 2 November 1996 which, she said, she intended handing over to the Respondent at a meeting scheduled for 4 November 1998. When the meeting did not take place, she did not hand the letter over to anyone else because Ait was not possible to hand over the letter@. (According to the Respondent, this letter only materialized at a subsequent CCMA arbitration.) According to the Respondent, she turned down the offer because, according to the minutes of a meeting Athe travelling would be too much@. In the letter she says she has Ano choice but to accept the offer. Provided you can provide me with means of transport@. She was then considered for the position of a Channel Assistant but was unsuccessful following a negative result of another psychometric test and a Astructured@ interview,

5 On 12 February 1997 the Respondent terminated her services Adue to incapacity@.

6 It would not serve any purpose to burden this judgment with a detailed summary of the evidence which dealt with Applicant=s alleged shortcomings, who was to blame and whether she was on probation or not. There were many allegations and counter-allegations. What is

material is that at the end of July 1996, when the Respondent relieved the Applicant of her duties as PRO, the Applicant herself acknowledged in evidence that nothing short of a full time six month PRO and business skills training course would be required to enable her to perform adequately in that position.

7 What the Applicant is aggrieved about and what she believes rendered her dismissal unfair, is that the Respondent, having promoted her to a position for which it knew she was not qualified:

1.7.1 was obliged to take reasonable steps to assist in improving her skills and performance and failed to do so;
2.7.2 failed to fulfill its own undertakings with regard to training and support;
3.7.3 did not allow her sufficient time to improve her performance (following the training which it did provide) before removing her from the position; and
4.7.4 failed to give adequate consideration to alternative positions for the Applicant before dismissing her.

8 It is common cause that, for the first few months, the Applicant was left largely to fend for herself despite an undertaking made at the time of her appointment that she would be given the training necessary to enable her to perform. She testified that she did receive some assistance during this period from the general manager, an Ernest Mchunu, and found his assistance helpful. (It appears from one of the documents handed in by agreement dated 23 January 1996 (Exhibit 197 in the bundle) that she was also receiving feedback on her performance from Wilson Communications South Africa during this period. However, this aspect of the letter was not canvassed in evidence and I have therefore attached no weight to it.)

9 The Respondent then deployed one of its Channel Managers (Sabino Pantone) from its Benrose branch to its Devland branch three days a week

to provide personal support and supervision.

10 At a meeting on 28 February 1996, the Respondent, after a lengthy counselling session, agreed to discuss an action plan which would include the following interventions for the Applicant:

1.10.1 an induction course during which the Applicant would spend time in different departments;
2.10.2 basic computer skills training;
3.10.3 software training
4.10.4 assertiveness training relative to her personal performance; and
5.10.5 business communication and writing skills training

11 The Respondent then arranged for the Applicant to attend an intensive four-week one-on-one PRO training course with Wilson Communications South Africa, an Afro-American consultancy, at a cost of some R10 000.

12 It also emerged from the evidence that, in some respects, the Respondent failed to fulfill its own undertakings and failed to follow the recommendations of Wilson Communications regarding the Applicant=s training requirements.

In particular, it failed to send her on the promised induction course, it failed (apart from a brief intervention at the end of the Wilson Communications course) to assist in improving her business communication and writing skills and it failed to provide the Applicant with a clear job description or assist her to formulate a strategic business plan. (There appeared to be some dispute during the course of evidence as to whether the Applicant was or was not aware of the standard job description for the Respondent=s PROs. However, according to the Respondent=s own documentary evidence B the minute of the Applicant=s appeal hearing B Pantone stated that no job description existed for her.) Although it provided some training in computer and software skills, it only provided the Applicant with a computer some eight

months after she had taken on the position.

13 The Applicant argued that the failure to implement the recommendations demonstrated an indifference to her development and that, had she had a clear job description and a business plan, this would have gone a long way towards addressingt the difficulties which the Respondent was experiencing with her lack of judgment relative to setting priorities and developing strategies. The Respondent, in turn, argued that the Applicant=s shortcomings were of such a nature, so Adeep seated@, that no reasonable further effort on the part of the Respondent would have led to an improvement. Therefore, further training would have been a waste of time and money and it would have been Adisingenuous, even heartless@, to have given her a further period in which to improve her performance.

14 The circumstances of the Applicant=s dismissal do not fit neatly into any established norms.

15 At the outset I accept that the Applicant was appointed on merit, albeit without some of the necessary competencies required for the job. The Respondent had good reason to consider her for the position B she had been with the Respondent for 16 years and must have known the business well.

Apart from some difficulties with her time keeping, she appears to have performed well in the telesales position which she occupied prior to her promotion. According to the psychometric assessment report prepared at the time she was being considered for the promotion, she is recorded as having a Astrongly outgoing style and presentability@, Athe ability to make a positive impact on people@. She came across as Aspontaneous, enthusiastic and easy going@. She seemed able to Amake contact with people freely and easily@. She had strong Ainterpersonal skills@. On her

own version, the Applicant believed she Ahad what it takes@.

16 These attributes, coupled with her ability to work comfortably within the Soweto community B the target market for the Devland branch - because of her race and language skills, certainly recommended the Applicant for a PRO-type position and I am therefore satisfied that she was not promoted as a candidate on the Respondent=s Employment Equity programme thereby entitling her to the same considerations as those afforded to employees who were selected specifically for the programme.

17 On the other hand, because the Respondent promoted her knowing that she did not have some of the necessary skills and experience, it was required, up front, to provide something more than it would to an employee whom it believes, on all available evidence, had the necessary skills and attributes to perform effectively from the beginning.

18 The Respondent, in this case, went quite a long way, albeit somewhat late in the day, towards providing the Applicant with something more than it would be expected to provide any other employee in the ordinary course. However imperfect Pantone=s intervention may have been (and there was some evidence that he was not as enthusiastic or proactive about this task and not as available as he might have been), he was made available to the Applicant three days a week and she could call on him for assistance as and when she needed him. Sending her on the customized Wilson Communication course where she received intensive, personalized training, full time, over a four week period at a cost of some R10 000 was a more than reasonable attempt by the Respondent to fill some of the gaps.

19 Even if I accept the Respondent=s argument - and to a large extent I do - that in order to bring the Applicant Aup to speed@ the Respondent would

have had to invest considerable resources in her which, at the end of the day, might not have addressed the Applicant=s deficiencies because they were too Adeep seated@ and that further training would not have made a material difference, what concerns the Court is the Respondent=s failure, at the very least, to follow its **own** programme of action or to follow up on some of the key recommendations made by its chosen consultant, Wilson Communications.

20 In terms of the Code of Good Practice (Schedule 8 to the Labour Relations Act) when determining fairness, the Court has to weigh employment justice against the efficient operation of the business. Employment justice cannot be served by an employer who, as the Respondent did, enters into a lengthy counselling session during which the employee=s deficiencies are listed, devises a plan of action, and then fails to implement key elements of the plan and takes no account of key recommendations made by its chosen consultant regarding what action should be taken in order to assist an employee to address the deficiencies in their performance.

21 To permit an employer to ignore the plan which is the result of a counselling process and the recommendations of the consultant chosen by it to remedy the employee=s shortcomings, because they may not be enough to address the shortcomings, devalues the whole notion of counselling for poor performance and the remedial action that emerges therefrom. The plan which emerges from the counselling process and the implementation thereof is **the** essential element of procedural fairness in a dismissal which is related to an employee=s competence. The whole point of a counselling session relative to the performance of an employee is to devise a plan to address the deficiencies. Once an employer enters into the counselling process, in order to give the employee a fair chance at succeeding, it is incumbent upon the employer, at the very least, to give

effect to the outcome of the counselling process, implement the remedial action and allow some time to elapse to assess whether the plan is having the desired effect. Failure to do so renders the counselling process meaningless.

22 When an employer appoints someone to a position whom it acknowledges may not meet all the requirements for that position, it is under an even greater obligation to adhere to its remedial plans for that employee. While employers should not be unduly prejudiced for taking a chance on an employee who may have key attributes for a position but not all the key competencies, there is a greater obligation on that employer to devise a remedial plan and stick to it before taking action against the employee because he/she has not succeeded.

23 This the Respondent failed to do and hence a material part of the procedure which ultimately led to the dismissal of the Applicant was unfair.

24 One cannot quibble with the way in which the Respondent acted after it decided that the Applicant was not capable of performing her role as PRO without a fairly substantial injection of resources into her development which, I am satisfied, the Respondent, weighing employment justice against the efficient operation of the business, could not have been expected to provide.

On the Applicants own version she would have had to attend a full time PRO/business skills course for at least six months before she would be capable of performing adequately in the position. To have allowed her this, having already singled her out for the customized, personalized, expensive Wilson Communications intervention, would have opened the Respondent up to demands from other employees for similar treatment and accusations of behaving inconsistently if those demands were not met. The Respondent took a risk in promoting the Applicant and, having

done so, provided personal supervision by way of Pantone and exposed her, at some cost, to highly specialized training. It could not reasonably have been expected to do more. Then, having decided that the Applicant was incapable of performing adequately, it relieved her of the position and engaged in a process of seeking alternatives over a period of seven months. During this period, her grievance concerning the Ademotion@ was considered at a full hearing before further alternatives were explored.

1 I accept that had the Applicant conveyed her albeit provisional acceptance of the customer care clerk position to the Respondent she would still have been employed by the Respondent. Her failure to do so still requires explanation. Her explanation that she did not do so because the meeting at which she intended to hand in the letter did not materialize borders on the absurd. The letter is addressed to a L Plumstead who the Court understood to have been employed in the Human Resources Department. Despite being given several opportunities during cross examination to provide an explanation as to why she did not deliver the letter to Ms Plumstead or anyone else in the department, she failed to do so merely saying that Ait was not possible to hand over the letter@. On re-examination, she was adamant that she would have taken the customer care position despite the amount of travelling involved and that she would not have taken action against the Respondent if she had communicated her acceptance to the Respondent and they had Ainsisted@ on Ademoting@ her.

2 Hence, I am satisfied that the Respondent did take reasonable steps to assist in improving the Applicant=s competencies and gave adequate consideration to alternative positions for the Applicant before dismissing her. Where it fell short, was in failing to fulfill its own undertakings with regard to training and support and not

allowing her sufficient time to improve her performance (following the training which it did provide) before removing her from the position as PRO at Devland which, even if this had proved futile at the end of the day, would have made the entire procedure fair.

3 I therefore find that the dismissal of the Applicant was unfair because it was not effected in accordance with a fair procedure but that there was a fair reason, related to her capacity, to dismiss her.

1 Having established that, I now turn to a consideration of appropriate relief.

1 Much was made, during the hearing, of an article in the City Press newspaper concerning the Applicant=s dismissal. Had the Applicant been entitled to reinistatement or re-employment this evidence would have been material. Both the tone and appearance of the article, which goes out of its way to soil the Respondent=s public image, indicates an active and willing participation by the Applicant (despite her denial of this in evidence). Hence I would have been persuaded by it that, by participating in it, the Applicant had made continued employment intolerable and denied her reinstatement or re-employment . While employees have a right to freely express their grievances against their employers in the press, they do so at the risk of forfeiting their right to reinstatement or re-employment because high profile mud-slinging - particularly where an employer=s business depends on a positive public image -makes a continued employment relationship intolerable.

2 In any event, **Johnson & Johnson (Pty) Limited v Chemical Workers Industrial Union** [1998] 12 BLLR 1209 LAC, the Labour Appeal Court suggests, at 1219G-H, that an interpretation of the wording of section 193 (2) excludes reinstatement or re-employment as remedies in a dismissal thatis only procedurally unfair and confines an adjudicator to award

compensation in this event.

1 In addition it held that a Court or arbitrator finding that a dismissal is unfair only because a fair procedure was not followed has a discretion whether to award compensation or not. If the Court elects to order payment of compensation it is bound to award the statutory minimum set out in section 194 (1) which is an amount equal to the remuneration the employee would have received between the date of dismissal and the last day of the adjudication or arbitration.

1 The only guidance given by the Labour Appeal Court as to how this Aall or nothing@ discretion ought to be exercised is at 1220A where Froneman DJP says the discretion not to award compensation must be exercised judicially and at 1220C-D where he says the following:

> **"The nature of an employee's right to compensation under s.194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s.194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."**

1 In judgments subsequent to the **Johnson and Johnson** decision, in exercising its discretion and deciding what constitutes Asubstantial redress@ on the part of the employer or Afrustration by the conduct of the employee@,

the Court has introduced the principle of fairness and has also taken the degree of the employer=s departure from the requirements of procedural fairness into account when deciding whether to award the statutory minimum imposed by section 194 (1), or nothing. (See **Whall v Brandadd Marketing (Pty) Limited** J1130/97 unreported **; Lorentzen v Sanachem (Pty) Limited** D637/98 unreported; **de Bruyn v Sunnyside Locksmith**

Suppliers (Pty) Limited J361/98 unreported).

1 As Grogan AJ points out in **Whall v Brandadd Marketing (Pty) Limited** (supra) at paragraph 37:

> **The sole guiding principle mentioned by the Labour Appeal Court on whether not to grant compensation (or indeed whether to grant it) is that such decision must be exercised judicially. Guidance as to *how* such a discretion should be exercised must be derived from the purposes of the Act as a whole, read within the broader Constitutional context, and of sections 193 and 194 in particular.**
>
> **When exercising the discretion as to whether to grant compensation the Court must, in my opinion, have regard to what is fair to both the employee and the employer. One of the purposes of the Act is to protect employees against unfair dismissal (section 185). Others are to advance economic development (section 1) and to effectively resolve labour disputes (section 1 (d)(v)). While the punitive effects of section 194(1) may be ameliorated by the (implicit) limit of compensation to the equivalent of 12 months' remuneration, the decision as to whether to order compensation must nevertheless in my view be exercised with the above considerations in mind.**

1 In this case more than two years has elapsed between the date of the Applicant=s dismissal and the last day of the hearing of this dispute. Following the reasoning of Maserumule AJ in **Vickers v Aquahydro Projects (Pty) Limited** D424/97 unreported**,** I believe the Court must limit compensation for procedural fairness to an equivalent of the remuneration the employee would have earned over a 12-month period. If the Court exercised its discretion in favour of ordering the Respondent to pay compensation to the Applicant, the Court would be bound to award the Applicant that amount.

1 To do so, I believe, would be grossly unfair to the Respondent for the following

reasons.

0.1 The degree of the Respondent=s failure to follow a fair procedure in the context of the entire process which led to the Applicant=s dismissal was not that great. In this regard, I have attached considerable weight to the fact that the Respondent spent some seven months attempting to seek alternatives for the Applicant and to the Applicant=s failure to convey her acceptance of the customer care clerk position to the Respondent . By her own admission and on the evidence of the Respondent=s witnesses, had that acceptance been conveyed to the Respondent, she would not have taken issue with the Respondent in this Court and would still be in employment. To this extent, the Applicant was the author of her own misfortune and to expect the Respondent now to pay the Applicant a year=s salary would be grossly unfair.

0.1 The Applicant received substantial benefits from occupying the PRO position for some nine months. She jumped two grades in salary and was provided with a company car which she retained for a few months even after she had been relieved of the PRO position. The Respondent took a risk in promoting the Applicant and the Applicant benefited from that risk. It would be unfair to penalize the Respondent so heavily because the risk did not pay off.

0.1 The Applicant=s grievance about the Ademotion@ received the Respondent=s full attention at a formally convened hearing.

1 Fairness thus demands that I exercise my discretion in favour of not granting payment of compensation to the Applicant.

1 The Respondents are not seeking a costs order against the Applicant.

1 I therefore make the following order:

0.1 The reason for the Applicant=s dismissal was a fair reason related to the Applicant=s capacity.

0.1 The dismissal of the Applicant was not effected in accordance with a fair procedure.

0.1 There is no order for relief or costs.

YYYYYYYYYYYYY..

I de VILLIERS A J Acting Judge of the Labour Court

Date of Hearing : 12 April 1999 to 15 April 1999 Date of Judgment : 11 June

1999 For the Applicant : Advocate Paul Jammy

instructed by Julian

Hurwitz Attorneys For the Respondent : Advocate Martin

Brassey SC instructed by Rooth and Wessels