IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C105/99

In the matter between:

W VISSER Applicant

and

SANLAM Respondent

ring: 16, 17 and 20 March 2000
ment: 23 March 2000
on: For the Applicant, Mr N F Rautenbach
For the Respondent, Mr H C Niewoudt

JUDGMENT

ARENDSE AJ:

1. This application concerns the alleged unfair retrenchment of the applicant by the respondent with effect from 31 October 1998 following the respondent's preliminary decision (in February 1998) to out-source its electronic business ("E-BIZ").

2.The matter comes to this Court by way of a referral in terms of section 191(5)(b)(ii) of the Act. However at the commencement of the hearing I sought clarity in regard to allegations made by the applicant that her dismissal was actuated by an improper motive on the part of the respondent, alternatively that her dismissal was the result of unfair discrimination based on gender. Following discussion and debate in Court (and adjournments to take instructions from his client) Mr Rautenbach, who appeared on behalf of the applicant, quite correctly in my view, withdrew the allegations relating to improper motive and unfair discrimination. The judgment accordingly only deals with the dispute relating to the substantive and procedural irregularities allegedly committed by the respondent.

3.It is common cause that the respondent had taken a preliminary business decision (in February 1998) to out-source E-BIZ to a company called BSW (subject to certain core functions in E-BIZ remaining in Sanlam). The reason for the respondent's preliminary business decision was that its management was of the view (shared by applicant) that a large proportion of E-BIZ is non-core business which will function better outside of Sanlam. The respondent's proposal was contained in a document prepared by its managing director, Mr Nick Christodoulou dated 2 June 1998. Should the out-sourcing of E-BIZ proceed, the respondent proposed as follows:

"*4.1 All the posts in the portion of E-BIZ which is out-sourced, will be abolished within Sanlam. At this date, we foresee that your employment with Sanlam will end if you are not redeployed within Sanlam in terms of 4.4 below.*

4.2 All the staff currently in these posts will be affected and therefore no selection criteria will be applicable. However, please advise us if you believe other employees should be included amongst the employees (including yourself) affected by this preliminary business decision.

4.3 We are confident that we can negotiate with the new company to offer you alternative employment with similar terms and conditions to that which you currently enjoy. In such circumstances no severance pay will be payable.

4.4 If for some reason you are not offered an alternative post in the new company, we will attempt to redeploy you within Sanlam.

4.5 Severance pay is only applicable if no alternative is found for you (within Sanlam or elsewhere (including the new company) or your refuse alternative employment (within Sanlam or elsewhere (including the new company))) on reasonable grounds. The applicable severance pay is two week's remuneration (as described in annexure "A") for each unbroken and completed year of service.

4.6 At this stage we do not have a proposed date when the out- sourcing will take effect and posts will be abolished. We will revert to you on this point.

4.7 The assistance which we are able to offer you, is an undertaking to negotiate with the new company for alternative posts, as described in point 4.3 above. If you believe that we can offer you any other assistance, please let us know.

Kindly let us have your written comments (Jaco Viljoen's office x 4002)

on the content of this letter by no later than 12:00 on Friday 05 June 1998. We look forward to hearing from you".

4.It is not in dispute that the respondent was commercially justified in taking the decision to out-source E-BIZ. Indeed, the applicant (a senior manager) not only supported this decision, but was also an integral part of the management team which was mandated to give effect to the respondent's decision. (The applicant's task was confined to dealing with personnel matters relating to the proposed out-sourcing to BSW). Importantly, the applicant testified that she was fully aware of Christodoulou's proposal of 2 June 1998 and in her evidence she stated that she was aware that the respondent's decision to out-source meant that all posts within E-BIZ (including her own) would be abolished as a result and that the employment relationship between E-BIZ personnel and Sanlam would be terminated. The applicant however sought to qualify her answer by stating that she was at all times under the impression that her (new) job with BSW would be secure. She based her impression on two things, **firstly**, her reading of Christodoulou's proposal of 2 June 1998 which indicates that only certain (core) E-BIZ functions would remain within Sanlam (excluding hers) and **secondly**, on 27 July 1998 most of the E-BIZ staff physically moved into the offices of BSW in anticipation of them being taken over by BSW.

5.Mr Stephanus Josias Botha gave evidence on behalf of the respondent. He was appointed as the senior manager of E-BIZ on 1 June 1998 and was mandated by the respondent to implement the out-sourcing of E-BIZ to BSW. Botha held regular weekly meetings with his management team (including the applicant) and twice-weekly report back meetings with E-BIZ staff. He testified that the project which he headed was

enthusiastically received by all the affected employees (including the applicant) presumably on the basis that those affected were under the impression that they would be taken over by BSW and that therefore their (new) jobs were secure. However it is clear from his evidence that all material times he was aware that the probability existed that not all the affected employees would be taken over by BSW. For example in a document prepared by him dated 17 June 1998 (and discussed subsequently with the affected group) he records under the sub-heading *"Human Resources"* as follows:

"· *Some of the e-Biz personnel will be transferred to BSW.*

- *e-Biz personnel not transferred to BSW will remain in Sanlam. If their functions are retained, they will report to Lizé Lamprechts. If their functions are not retained in Sanlam, they will be treated as "oortolliges".*

- *BSW do not have the same perks and working conditions as Sanlam.*

- *Remuneration in BSW will be equitable to the e-Biz remuneration".*

6. On 24 July 1998, the E-BIZ team (including Botha and the applicant) discussed, *inter alia*, the Sanlam/BSW contract; other contractual agreements; the proposed business structure; and other processes. At this meeting the proposed date of the out-sourcing is mentioned as 1 September 1998.

7. During the whole of the process up to and including 14 August 1998, the E-BIZ team was kept informed of developments regarding the contract with BSW.

8. At an E-BIZ meeting held on Wednesday 5 August 1998 (not attended by the applicant) various matters were discussed relating to the out-sourcing project. It is recorded in the minute of that meeting that George Holtzhausen (a senior member of the E-BIZ team) said the following:

"3.1 <u>E-Biz Personeel in Nobelpark</u>

George het dit duidelik gestel dat hy die e-Biz se personeel se frustrasie verstaan en hy wil graag net noem dat al is daar personeel wat reeds na Nobelpark oorgeskuif het, is daar nog geen aanbod aan die personeel gemaak nie - hierdie personeel het (soos die personeel wat nog in Sanlam is) geen idee waar hulle geplaas gaan word nie en poste moet nog individueel met ALMAL onderhandel word".

9. It was clearly stated at that meeting that BSW could not offer jobs to the E-BIZ personnel unless and until the contract between BSW and Sanlam was finalised. Indeed, the following question was posed to Holtzhausen:

lbertze: Van ons het klaar oorgetrek - ons sê dus by implikasie dat ons alles aanvaar - dus het ons klaar die deure van Sanlam van ons toegemaak!
Die deure is nie toe nie - die "deal" is nog nie gefinaliseer nie.
bertze: Hoekom kan BSW dan nie 'n aanbod maak vir die wat reeds geskuif het nie?
Die "deal" is nog nie gefinaliseer nie.

tegaan: Hoekom word die paar poste uitgesonder?

Sewe poste word binne Sanlam geopen – die aanstellings word vir Sanlam gedoen!

George noem dat behalwe vir die bestuurderspos, die ander poste eers die 11de sluit en dat die e-Bizzers 'n aanbod van BSW VOOR 11 Augustus sal hê om dan die verskeie opsies te oorweeg".

10. In an e-mail to Botha on 12 August 1998, Christodoulou (the MD) advised Botha that he hoped to inform the staff either on the 13th or the 14th (the Friday) what the outcome would be. On that same day, Botha had e-mailed to all the members of the team (including the applicant, although she was away in Pretoria) informing them of the current problems ("*hindernisse*") which included the following:

"*3. BSW het nog nie salaris aanbiedinge aan E-Biz personeel gedoen nie. Daar is reeds op 31-7-98 gekommunikeer dat BSW in die week van 3-7 Augustus met aanbiedinge (onderhewig aan die out-source kontrakte) aan personeel sou begin. Omdat selfs nie die senior personeel aanbiedings het nie, word geen vordering gedemonstreer nie en kom BSW se bone fides onder verdenking.*

4. Die uitdienstredings proses by Sanlam vorder goed. Info tov pensioen/medies, ensovoorts is beskikbaar. Omdat die uitdienstredings proses gereed is, maar die indienstredings proses sukkel, lyk dit asof die e-Biz personeel sonder werk gaan sit. Die risiko is dat dit in die lig van die Didata/Speskom aanbiedinge belangstelling ooit persgeleerdere kan lok".

11. Meetings were held on 11, 12 and 14 August 1998 where various matters were discussed relating to the contract with BSW and during which the E-BIZ staff expressed their frustration with the process.

11.1 During this (what turned out to be crucial) week, the applicant was away in Pretoria. It culminated on Friday 14 August 1998 in an announcement that BSW would only be offering 12 contracts to E-BIZ personnel, and not 59 as originally thought by the applicant. It was also at this meeting that Holtzhausen walked out of Sanlam. (He also took the voluntary severance package and with him some E-BIZ staff members to join a company called Brainware. This company subsequently offered the applicant a job in August 1998 which was withdrawn 4 days later).

11.2 Holtzhausen had later that day telephoned Visser on her cell phone to inform her of the decision. The applicant testified that the news came to her as a great shock.

11.3 On the same day, Botha had e-mailed to all the affected staff (including the applicant) an A, B and C list of employees. The A list contained what is described as "*BSW job offers*"; the B list contained what is described as "*Sanlam shared service related functions*"; and, the C list contained a list of names which were described as "*not Sanlam shared service related*". The applicant's name appeared on the C list.

11.4 In his e-mail, Botha proposed that all E-BIZ personnel check and update the list and forward any changes to Jaco Viljoen who would then update the list further ahead of a meeting planned for the following Tuesday (18 August 1998) when the positions would be clarified. The applicant only received this e-mail on the morning of Monday 17 August 1998. It

is common cause that the applicant did not communicate to either Botha or Viljoen that she was unhappy about being placed in the C group. (The applicant explained in her evidence that she was still under the impression that she would remain with Sanlam having been placed in the central Sanlam resource pool, the C group. In this regard I mention that it is difficult to appreciate the applicant's evidence that she was *"shocked"* when Holtzhausen phoned her with the news on Friday 14 August 1998 whilst she was still under the impression on Monday 17 August 1998 that she would remain within the service of the respondent, having been placed in the central pool of employees).

12. On Tuesday 18 August 1998, the meeting proposed by Botha took place and at this meeting the three groupings (amended as per the request of some employees) referred to earlier, was confirmed. The minute of the meeting stipulates that staff in groups B and C would be redeployed within Sanlam until the end of September and if not so redeployed, would be declared *"oortollig"* (*"in excess"*) and they would have to leave the service of Sanlam in October 1998. At the meeting those in group C were requested to make proposals to management should they be *"onseker ... oor werk sekuriteit"*.

13. It is apparent from the evidence that after the meeting of 18 August 1998, the applicant did not forward any proposal to Botha (despite his request to her that she do so) that she be retained in the Sanlam structure in an alternative post. Indeed, she applied for a voluntary severance package on 31 August 1998 and thereafter (following a discussion with Botha) removed her name from the list (on 4 September 1998) and instead, applied for an alternative post within Sanlam. The post applied for by the applicant was then upgraded and was subsequently not

filled. (In this regard, the applicant's original allegation that the respondent acted improperly, was withdrawn).

14. The main thrust of Mr Rautenbach's argument on behalf of the applicant is that the offer by BSW to take over only twelve of the E-BIZ personnel on 14 August 1998, gave rise to a "*new commercial rationale*" which at that point enjoined the respondent (having regard to the relevant provisions of section 189 of the Act) to consult with the applicant in regard to the various matters listed in section 189. Mr Niewoudt, who appeared for the respondent, argued that the decision of 14 August 1998 was indeed the culmination of a process which had commenced with the respondent's preliminary decision in February 1998 and which had given rise to a process of consultation which took place in June, July and August 1998 and which had involved the active participation of the applicant. Mr Niewoudt contended that the applicant had perhaps naively believed that she would be offered a job by BSW but he pointed out that it is apparent from the minutes of various meetings (and indeed the respondent's initial proposal) that the possibility was mooted at an early stage that not all E-BIZ personnel would be taken over by BSW.

15. Section 189 (1) of the Act requires that an employer must consult the affected employees or their representatives when that employer "*contemplates*" dismissing the employees for reasons based on the employer's operational requirements. (The word "*contemplates*" is defined in the 10th Ed of the Concise Oxford Dictionary as meaning "*look at thoughtfully, think about, think profoundly and at length, have as a probable intention*"). It is clear that prior to embarking on the consultation process required by section 189, the respondent had indicated its intention (and in this regard I refer to Christodoulou's

proposal of 2 June 1998) that *"all the posts in the portion of e-Biz which is out-sourced, will be abolished within Sanlam"*. Thereafter Botha was put in charge of the out-sourcing project which resulted in a number of meetings with the affected group of employees (including the applicant), and with BSW.

16. It is apparent from the evidence that the commercial rationale which set into motion the section 189 consultation procedure (effectively from June 1998 onwards) did not change on, or before, or after, 14 August 1998. Indeed, on 14 August 1998, the *"contemplation"* (as in *"probably thought"*) of dismissal became more of a reality when it was announced that BSW was only offering 12 positions to the affected employees instead of 59. I cannot agree with Mr Rautenbach that after the announcement on 14 August 1998, the respondent was again required to commence a new (or different) consultation process as contemplated by section 189 of the Act. It does not make sense to me that an employer is required to consult (in the context of a decision to out-source) on the topics referred to in section 189(2) and (3) of the Act after announcing its (initial) intention to out-source and then is again required to do so once the out-sourcing contract is concluded with the other party (or is close to conclusion) when it becomes clear that not all employees will be taken over by the other contracting party. Such a double responsibility is not contemplated by either a proper reading of section 189 of the Act, or if one has regard to the primary objects of the Act.

17. In **Kotze v Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ 129 (LAC) at 132A-J to 133A-G, Mogoeng AJA** restates very succinctly our law in regard to what is required (procedurally and substantively) for a

retrenchment process to be regarded as a *"fair"* process. Applying those principles to the facts of this case, it is clear to me that:

17.1 the respondent had at a very early stage (in February 1998) identified the retrenchment of the affected employees (including the applicant) as a possibility;

17.2 following its proposal of 2 June 1998, the respondent appointed Botha (the senior manager of E-BIZ) to co-ordinate and implement the out-source project. The task team included the applicant. The task team met regularly to report back to staff;

17.3 the applicant conceded that she was aware of the consequences of E-BIZ being out-sourced, namely that her employment with the respondent would be terminated.

17.4 the final decision of the respondent to retrench the applicant was taken only after:

1 extensive negotiations and consultations with affected staff and with BSW, the other contracting party. The negotiations with BSW included the possible placement or absorption of Sanlam E-BIZ personnel (including the applicant). Implicit in these negotiations was an attempt to achieve the object of avoiding retrenchments altogether, alternatively reducing the number of dismissals and mitigating their consequences;

2 the applicant and all other affected E-BIZ employees were given a fair

opportunity to make meaningful and effective proposals relating to the whole process of out-sourcing, including its consequences.

17.5 the announcement on 14 August 1998 served as reasonable notice to all the affected employees concerned that their proposed retrenchment was on the cards even though at the time those functions to be taken over by BSW were yet to be identified. Indeed, following the announcement of 14 August 1998, Botha (albeit unilaterally) grouped the affected employees into various categories, including an "*oortollige*" (in excess) category in which the applicant was grouped. He consulted with the affected employees requiring them to make their input in regard to their grouping before it was finalised. Some employees gave their input, while others did not. The applicant fell in the latter category;

17.6 the applicant had, after the announcement on 14 August 1998, applied for a voluntary severance package on 31 August 1998 and then withdrew her application on 4 September 1998, and instead, applied for an alternative post within the organisation. Her application in this regard was considered, but was not approved; and

17.7 the respondent's final decision to retrench was informed by what had transpired during the consultation process which took place during the months of June, July and part of August, 1998.

18. As stated in **Kotze v Rebel Discount Liquor Group**, (above) at **133D-E**, the requirement of consultation also serves a substantive purpose and that purpose is to ensure that the final decision to retrench is properly and genuinely justifiable by the operational requirements or by a commercial

or business rationale. Having regard to the facts in this matter, I am satisfied that the consultation process which spanned over a period of almost three months, achieved that purpose.

19. In conclusion therefore, I find that the retrenchment of the applicant was not unfair (procedurally or substantively) in the circumstances of this case. Because the applicant was under a mistaken impression that she would be offered the same job with BSW (and because it did not happen that way) does not make the retrenchment unfair. Indeed, even Christodoulou (the respondent's MD) indicated in his proposal of 2 June 1998 that *"we are confident that we can negotiate with the new company to offer you alternative employment with similar terms and conditions to that which you currently enjoy ..."*. However in determining substantive and procedural fairness, one must have regard to the actual consultation process as it unfolded. In this case (unfortunately) it became increasingly clear that not all the affected employees would be accommodated by BSW. For this, the respondent cannot be blamed, and it can certainly not be said that the respondent acted unfairly.

20. In regard to costs, having regard to the circumstances of the matter, the requirements of the law and fairness and the conduct of the parties, I am of the view that each party should pay her/its own costs.

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ARENDSE AJ