IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JS 400/05

In the matter between:

Sarasvathy Velayudan **Applicant**

and

Prudence Advisory (Pty) Ltd **Respondent**

JUDGMENT

CELE AJ

Introduction

[1] This claim is about an unfair dismissal of the applicant by the respondent. It is premised on the allegation that the respondent did not follow a fair procedure when it dismissed the applicant due to its operational requirements. The respondent opposed the claim.

Background facts

[2] The applicant commenced employment with the respondent as a New Business Consultant from November 2001. The respondent is a private company with the business of a financial service provider

with its sales staff facilitating the sale of life, health and investment policies to the general public. The company was previously known as Discovery Advisory Services (Pty) Limited but the assets and staff were transferred on 1 March 2004, as a going concern, to the respondent company. The respondent company had a number of branches in South Africa with its principal place of business at Bedfordview and Houghton. Its Managing Director was Mr Brookstone who was also a Managing Director of another company, called The Prudent Consulting Group (Pty) Limited, also situated at Bedfordview.

[3] The applicant was initially stationed at the Sandton branch of the respondent whereafter she was moved to the Melrose Arch branch where she worked under Mr McDonald, who was a Branch Manager of the applicant. She earned R 9 890-00 per month.

[4] At the beginning of 2003, the respondent launched an incentive competition for its employees. Such employees included the Administrative Clerks and the Sales Consultants. The winner thereof would take a few days' return trip to Rio de Janeiro in Brazil. The applicant won the competition. She made a loan agreement with the respondent and signed an acknowledgement of debt so that she could take her husband along. On 12 June 2004, the applicant, her spouse and Mr Brookstone, were part of a group which departed to Rio de Janeiro. They returned to South Africa on 21 June 2004.

[5] On 22 June 2004, the applicant and Mr Brookstone returned to work, at that time, there was already a rumour that the Melrose

Arch branch would close down because of financial difficulties. Mr McDonald was on leave but he returned to work after a few days, in relation to the return to work of the applicant. Mr McDonald and Mr Brookstone then held a meeting to assess the performance of the Melrose Arch branch and to determine the viability of its business. That meeting was held on 25 June 2004. It was finally agreed between them that the Melrose Arch branch was neither operationally nor financially viable and was placing a severe strain on the financial resources of the respondent. Closing down the branch became inevitable.

[6] On 28 June 2004 the applicant approached Mr Tohier, a Legal Advisor and Compliance Officer of the respondent. He then issued to her a letter dated 28 June 2004 of retrenchment which simply reads: "this serves to confirm that you have been retrenched from Prudent Advisory Services effective immediately." After the 28th of June 2004, the applicant did not return to work for the respondent. On the 29 June 2004 the applicant went for a job interview with another company called Discovery Holdings Group. She then commenced employment with that company as from 1 July 2004. The salary she received there was more than the one which the respondent paid her.

[7] On 29 June 2004 a letter was issued through the E-mail system of the respondent to the staff to inform it of the change of offices. It gave details of the Bedfordview offices. The respondent subsequently closed its offices at the Melrose Arch and moved its staff to Bedfordview. Soon thereafter, the respondent proceeded with the retrenchment of its staff which had been based at the

Melrose Arch branch. The respondent issued a second letter to the applicant. Its contents read:

> "**Re: Retrenchments**
>
> This is to confirm the decision management has taken with regard to closing the Melrose Arch branch where you were given an opportunity to forward your views. The following decisions were made:
>
> - As a result of the restructuring we have agreed that your position within the company has become redundant being a result of operational and financial constraints.
>
> Our notice period will start on the 01 June 2004 and end 31st July 2004 whereafter the New Business Associate Function in the Melrose Arch branch that you currently occupy will become redundant. This is inclusive of notice you are entitled to under your contract of employment. Your package is reflected in the schedule attached hereto."

[8] The respondent subsequently paid out a retrenchment package to the applicant. In doing so, it set-off a loan which the applicant had made during the incentive trip.

[9] On 4 August 2004 the applicant referred a dispute about an unfair dismissal, to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation. Since the dispute could not be resolved a certificate of non-resolution was issued and the

applicant referred the dispute to arbitration with the hearing set down on 1 December 2004. The respondent raised a point *in limine* that the CCMA lacked jurisdiction as there was a number of employees who were retrenched. On January 2005 Commissioner Govender sustained the point raised and then the applicant referred the dispute to this Court by way of a statement of claim.

Nature of the Dispute

[10] Dismissal was placed in issue and if proved, it had to be determined whether the procedure followed was fair.

Evidence

[11] The applicant was the only witness called to testify in her case. Mr Brookstone and Mr Tohier testified for the respondent. The evidence was centred around three issues during the trial. I will therefore be guided by the same in outlining the facts of this case. They are:

1. Meetings of the applicant and management.
2. The retrenchment letters.
3. The events of 25 and 29 June 2004.

1. Meetings of the applicant with management.

[12] The applicant said that she was distressed when she heard the rumour that the Melrose Arch branch of the respondent would close down. She said that the rumour came to her at a time when she had just returned from an incentive trip. She said that she felt that she had to verify the rumour. It happened then that Mr Brookstone came to her office for some stamps. When he was

leaving, she said that she walked him out. She referred to that encounter as a corridor meeting. She said that she asked Mr Brookstone about the rumour. In return he told her that it all depended on whether Mr McDonald would stay on the branch or would leave. She said he further told her that there was nothing for her to worry about. She said that assurance allayed her fears as it came from the Director of the company. She said that she went back to work as usual.

[13] In her statement of claim she said that this meeting took place on 28 June 2004. In her evidence she corrected the date by saying that the meeting took place either on 24 or 25 June 2004.

[14] Mr Brookstone, in his evidence, denied having had such a meeting with the applicant. He said that he was aware of problems brought about by corridor meetings, and that therefore he would not have been a party to one such meeting. He also denied having deliberated with her on issues allegedly raised by her in such a meeting and he said that he would not have discussed these without having first spoken to the Branch Manager.

[15] The applicant said that when Mr McDonald returned from his leave, she confronted him about the Melrose Arch branch situation. She said that the meeting resulted in her being told that she was without a job due to her position which was to be rendered redundant with the closure of the Melrose Arch branch. It may be noted though, that the applicant said in her statement of claim that Mr McDonald informed her that her job was redundant as there was no alternative employment available for her at the Bedfordview branch. She said that she was told that she could

leave work immediately. The evidence of Mr Brookstone, on this aspect was, that he had not authorised Mr McDonald to have a meeting with the applicant to discuss the Melrose Arch branch issue. He said that Mr McDonald had not told him that he had a meeting with the applicant.

[16] The applicant said that she was distressed by the outcome of the meeting with Mr McDonald, as she was left without a job and for that reason, she said that she had to discuss her predicament with her husband.

[17] Mr Brookstone contradicted the evidence of the applicant on how the termination of her employment ended. He said that on 28 June 2004 he did have a meeting with the applicant at her behest. He said that Mr McDonald had called a staff meeting for 29 June 2004. He said that the applicant told him that she was concerned about the closure of the Melrose Arch branch, a matter which was to be discussed in the staff meeting on the following day. According to him she had told him that she feared that everybody would be retrenched, and that she had been offered another work opportunity which she wanted him to frankly advice on whether she should accept it.

[18] Mr Brookstone said that he responded that since production had decreased by about 75%, and on the basis of a staff meeting which was to be held on the following day, there was a strong possibility that she would be retrenched. He advised her when asked if she could take the other job, she should do it. He said that she wanted to know what retrenchment package she would then get. He said that he had reached an understanding with the applicant that she would take up alternative employment with the result that she would technically have been retrenched by the respondent.

2. **Retrenchment Letters**

[19] The applicant testified that once Mr McDonald had told her that

she had no job, she needed to have a letter as confirmation that she had been retrenched. She said that on 28 June 2004 she went to Mr Tohier to obtain one. Mr Tohier was busy with commissions on that day. He allegedly told her that he could not give her a full retrenchment letter, but he gave her a shorter version thereof.

[20] Mr Brookstone said that he did not know that Mr Tohier had issued the first retrenchment letter and therefore that he had not authorised it.

[21] Mr Tohier testified that he saw the applicant having a meeting with Mr Brookstone on 28 June 2004, whereafter the applicant came to his office and advised that "she had taken the package" requested a letter from the office, to take to her bank to activate certain credit insurance services. He said that he gave her the letter, but said that he had never told her that she would be retrenched. He had to wait for the meeting of the 29 June 2004, before he could raise the issue of retrenchment. According to him, he had been trained on retrenchments and had taken part in a retrenchment exercise of the staff the previous year and therefore he knew what management should or should not say in relation thereto. He testified that the applicant had told him that Mr Brookstone had undertaken to give her a retrenchment letter. He explained that, being aware that, the applicant had received preferential treatment in the past, and he had been busy with commissions, he decided to give her the letter without verifying the facts with Mr Brookstone. He alleged that he had been reprimanded by management for giving the letter to the applicant.

[22] The applicant said that sometime in July 2004, she was telephoned

by the respondent who informed her that there was a retrenchment letter with the full retrenchment package for her to collect. She said that she had authorised a friend of hers, whom she had worked with, to collect it, as she went to fetch her own. Mr Brookstone and Mr Tohier confirmed that version.

Events of 25 and 29 June 2004.

25 June 2004

[23] Mr Brookstone testified that there was a very high volume of work which was produced by the Melrose Arch branch for November 2003. He said that it later turned out that most of that work was either fraudulent or was of very poor quality. He said that the result was that there had to be a measure of reversal of such work, which in turn led to there being resignation of some staff members. He said that by April and May 2004 it became obvious to the staff that there were problems in the Melrose Arch branch. He said that the applicant would have known about the problems as she dealt with the work which came in. He said that the staff would have come to know early in 2004, of the fraud, lapses and reversals in terms of insurance policies which had been brought in November 2003. He said that a meeting had been scheduled for 25 June 2004 for him and Mr McDonald to discuss the plight of the Melrose Arch branch. He said that a final discussion on what would become of the Melrose Arch branch, depended on the figures which had to be brought by Mr McDonald.

[24] Mr Brookstone said that the meeting proceeded in the afternoon of

25 June 2004. He said that in the discussion they held, Mr McDonald conceded that the amounts brought in could not justify a continued operation of the Melrose Arch branch, which was already running at a loss. He said that it had become clear that the branch was neither operationally nor financially viable and was placing a severe strain on the financial resources of the respondent. He said that he then agreed with Mr McDonald that, based on the figures, the Melrose Arch branch had to be closed down. He said that some staff had to be accommodated at the Bedfordview offices but that those who could not be accommodated had to be retrenched. He said that they called Mr Tohier who took part in the deliberations on the calling of a staff meeting. When it was suggested that the staff meeting be held on 28 June 2004, Mr Brookstone said that, according to Mr Tohier, the notice would be too short. It was then agreed that the meeting be held on the 29 June 2004. Mr Brookstone said that he then instructed Mr McDonald to issue the notice. He said that he did not see the notice and that therefore he could not comment on its contents. He said that the notice must have been issued to the staff as the staff meeting was held on 29 June 2004.

[25] Mr Tohier confirmed the meeting of 25 June 2004. He said that in the deliberations which were held no other alternatives could be found than to close the Melrose Arch branch. He said that the problem confronting management was that of the staff. He said that the meeting of the 29 June 2004 was to deal with the staff problem. He said that in considering the transfer of the staff to Bedfordview, it became apparent that, in the main, only the sales consultants could be accommodated. He said that an administration staff who wanted to go to Bedfordview could apply to be a sales consultant.

He said that while the Pretoria branch could accommodate some of the staff, he knew of no one who wanted to go there.

[26] The applicant who did not attend the meeting of 25 June 2004, could not dispute much of the evidence of the respondent. She did say though, that she could have taken any job if such was offered to her by the respondent.

29 June 2004

[27] The applicant said that she needed a job and had to be proactive in search of one. She said that she had heard that a Mr Strydom, a Manager at Picture Perfect – Discovery Consultants Services needed people to join his branch. She said that she got in touch with him. She said that on 29 June 2004 she attended a job interview at Picture Perfect. She said that she was then offered a position of a Business Consultant. She said that she had agreed to start on 1 July 2004.

[28] She said that on 29 June 2004 she did go to the respondents offices at Melrose Arch. She said that it was during that visit that she retrieved an E-mail massage for her which had been addressed to all the staff members, informing them of the particulars of the new offices at Bedfordview. She said that at about 11h00 or 12h00 she left, after bidding a goodbye to her friends.

[29] In his evidence, Mr Brookstone said that the notice of a staff meeting which was issued by Mr McDonald was aimed at

equipping the staff with the required information so that they could participate effectively in the meeting. He said that the notice was issued in compliance with a fair procedure for retrenchment.

[30] Mr Brookstone said that the staff meeting of 29 June 2004 went ahead as scheduled. He said that the financial position of the company was explained to all the staff through a slide presentation. According to him, the staff was invited to come up with alternative suggestions to retrenchment. He said that when no viable alternative could be found, it was agreed by all present that the Melrose Arch branch be closed. Regarding the non-attendance of the staff meeting by the applicant, Mr Brookstone said that he had taken it that she had absconded from work. He said that it was because of the unfortunate work situation which he was confronted with which made him feel that he had to pay her notwithstanding her unauthorised absence from work. He said that they paid out money to the staff to put them in a better position so as not to treat them as though they were insignificant.

[31] Mr Tohier confirmed that he had not seen the notice of the meeting which was sent to the staff. As a consequence he said that he could not comment on whether or not any provisions of section 189 of the Act were incorporated in the notice. He agreed with a proposition that, if Mr Brookstone had told the applicant that, if the branch closed down, she would be dismissed. He conceded further that if the branch closed down, the applicant's post would be redundant. He confirmed Mr Brookstone's evidence that all staff members agreed in that meeting to the closure of the Melrose Arch branch.

That, in brief, is the evidence which was adduced during the trial.

Submissions by the parties

[32] Mr Badenhorst, for the applicant, submitted that Mr Brookstone and Mr Tohier admitted in their evidence that the respondent dismissed the applicant. He said that the onus resting on the applicant to prove that she was dismissed, was accordingly discharged. He conceded that no patrimonial loss was suffered by the applicant in this matter.

[33] He submitted that there was never any consultation with the applicant and that any evidence of the respondent that consultation was held, was false. He said that the applicant was never informed of the meeting of 29 June 2004. The result of this, he said was that she was never given an opportunity to consider her position. He pointed out that, unlike in **Johnson & Johnson (Pty) Ltd v CWIU (1998) 12 BLLR 1209 LAC,** the applicant in this application did not frustrate the negotiation process. He said that even if it were to be said that there was some settlement between the parties, the respondent was obliged to follow retrenchment procedures and referred me to the decision in **May v Mannesman Demag (2001) 22 ILJ 2019 (LC),** in support of that view.

[34] Mr Mawonje for the respondent asked me to find that the applicant was not a credible witness. He based that submission on the changed evidence of the applicant. In her statement of claim, the applicant said that she had a meeting with Mr McDonald on 28 June 2004. He said that such change was due to the applicant seeking to deny having met with Mr Brookstone on 28 June 2004

and that therefore the applicant was manipulative. When considering the manner in which Mr Badenhorst took the applicant through her evidence in the statement of claim on the date 28 June 2004, he must have had prior discussion with her on it. That was so apparent during the trial that when she denied such a discussion, she was obviously lying. He further referred to her denial of having taken a loan for her husband for the incentive trip, as an indication that the applicant was not a truthful witness. Parties had agreed not to dwell on this part of evidence. He asked me to find that the applicant knew about the financial status of the Melrose Arch branch and that she then took a decision of finding another job, even before the meeting with Mr Brookstone. He asked me to find further that the applicant did have a meeting with Mr Brookstone on 28 June 2004 and that Mr Tohier saw them. He submitted that it was not plausible that Mr Brookstone told the applicant that she had nothing to worry about, but that on the contrary, he would have suggested that she was to take the opportunity for another job. He said that the applicant was the one who demanded the first retrenchment letter, knowing very well that she had another job lined up for her and that therefore she suffered no patrimonial loss. He said that even if there was infringement on the part of the respondent, the applicant was not entitled to any compensation.

Analysis

[35] In so far as it is relevant here section 189 of the Act provides that:

> "**189 Dismissals based on operational requirements**
>
> 1) when an employer contemplates dismissing one or more *employees* for reasons based on the *employer's operational requirements*, the employer must consult –

(a) any person whom the employer is required to consult in terms of a *collective agreement*;

(b) if there is no *collective agreement* that requires consultation-

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

(c) If there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(d) If there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for the purpose."

[36] It is clear from the section that consultation is obligatory and that it should begin as soon as the employer contemplates the dismissal. Subsection 2 takes the matter further by stating *inter alia* that, the employer and the other parties must engage in a meaningful joint consensus-seeking process and must attempt to reach consensus on various issues. It goes against the spirit of the section then for the employer to wait until a retrenchment process is inevitable before he engages the employee into a consultative process, when retrenchment was long contemplated. To confront the employee with a retrenchment process which is *fait accompli* would therefore be procedurally unfair when consultation could reasonably have been done earlier.

[37] In **May v Mannesman Demag** *(supra)* while the applicant was on maternity leave, a restructuring exercise took place at the

respondent's company causing some 20 employees to leave the respondent's head office. On her return from leave she was called to a meeting where she was informed that her retrenchment would be discussed and sometime later a meeting was held. In that meeting the applicant was told that she was to be retrenched. During that meeting the applicant signed an agreement which had been brought to the meeting and prepared in advance. Revelas J had this to say when this case came before her:

> "[17] Clearly, there was no consultation whatsoever as envisaged by S 189 of the Labour Relations Act 66 of 1995 (the Act). None of the sections were complied with. The applicant was faced with *fait accompli*. The respondent contends that the dismissal was not procedurally unfair since the agreement which was signed, justified the absence of the process envisaged by S 189 of the Act."

[38] At paragraph 11, Revelas J said that it was unfair to present the applicant with a *fait accompli* and such an agreement. She also found it questionable whether an employee who was unrepresented at a meeting could be required to sign away, his or her rights conferred by Labour Relations Act. She found the dismissal to have been procedurally unfair.

[39] I accept, without doubt, the submission by Mr Badenhorst that there is overwhelming evidence that the applicant was dismissed by respondent. Mr Tohier made one such unequivocal concession. The next enquiring is whether such dismissal was procedurally fair.

[40] Mr Brookstone testified that he realised as early as April and May 2004 that the Melrose Arch branch was not doing well. He said that

a final decision on what would become of the Melrose Arch branch, depended on the figures which Mr McDonald had to bring on 25 June 2004. It follows from his own evidence that he would have contemplated the closure of the branch even before 25 June 2004, as he waited for final figures on that day. This is not a case, according to evidence, where the respondent had another alternative to retrenchment to explore. In my view therefore, it was unfair of Mr Brookstone to wait until 25 June 2004 to decide to consult with his staff. From 25 June 2004 it had become a *fait accompli* that the Melrose Arch branch had to close down with the consequence that most of the staff had to be retrenched, including the applicant. That is specifically why no other alternative to retrenchment presented itself. The respondent had waited until it was too late for there to be another alternative. Had consultations begun in April 2004 for instance, the employees might have come up with a solution. According to Mr Brookstone, it is the staff at Melrose Arch branch that caused the problems of the branch. Given time therefore, the staff could have come up with an alternative to the closure of the branch.

[41] The dispute about whether or not the applicant met Mr Brookstone in a meeting on 28 June 2004 does not, in my view call for a resolution. By then the respondent was legally bound to follow S 189 with any of the employees it sought to retrench, which included the applicant. This it did not do. It is indeed, common cause that the respondent retrenched the applicant, even if one were to ignore the first letter of the retrenchment and consider only the second letter.

[42] Even if it were to be assumed, in favour of the respondent that Mr

McDonald issued a notice to the staff to attend a meeting on 29 June 2004, there was no evidence of what information was contained in that notice. There is no evidence that the respondent complied with S 189 (3) of the Act. The applicant was entitled to such information as is envisaged in S 189 (3). As a legal advisor and a compliance officer of the respondent, Mr Tohier did not say that he helped Mr McDonald in drawing the notice of the meeting. I entertain doubt that such notice, assuming there was one, was in compliance with S 189(3).

[43] In my view, the dismissal of the applicant was procedurally unfair.

Relief sought

[44] The applicant asks to be compensated for her procedurally unfair dismissal. It took a matter of a few days for the applicant to start working for another employer, after she left the respondent. She accordingly succeeded in mitigating her damages. The new job even paid her more than the respondent did. I am however not persuaded by the submissions made by Mr Mawonje that the applicant is not entitled to any compensation. Such an approach would tend to encourage employers to engage in flagrant disregard of S 189 of the Act and would not be in accordance with the administration of justice. The applicant had just returned from an incentive trip and it is reasonable to say that she expected her work with the respondent to continue. It was abruptly cut short.

[45] In the circumstances I make the following order:

1. The respondent is to pay the applicant compensation equal to 4 months' remuneration calculated, at the rate of R 9 890-00 per

month, within 14 days from the date of this order.

2. The respondent is to pay the applicant's costs.

CELE AJ

DATE OF HEARING : 10 NOVEMBER 2006

DATE OF JUDGMENT : 26 MAY 2006

Appearances

For the Applicant : Mr W. S. S Mr Badenhorst (advocate)

Instructed by : **HUMAN RESOURCES HELPLINE CC**

For the Respondent : Mr M Mawonje (Advocate)

Instructed by : **MELAMED & HURWITZ INC**