IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JS 562/06

REPORTABLE

In the matter between:

ROSEMARY SCHATZ Applicant

and

ELLIOTT INTERNATIONAL (PTY) LTD

Respondent

JUDGMENT

A VAN NIEKERK, AJ

Introduction

1 The First Respondent (Elliott) employed the Applicant until her dismissal in March 2006. The Applicant contends that the reason for her dismissal was automatically unfair, because it was a reason related to the transfer of a business. In the alternative, the Applicant claims first that Elliott unfairly retrenched her because there was no adequate reason to dismiss her and secondly, that Elliott failed to follow the required procedure before it gave her notice of the termination of her

employment.

Factual background

2 The material facts are largely common cause. Elliot employed the Applicant in its Nelspruit office as a sales administrator. On 15 August 2005, Elliott's group operations manager addressed an email to the Applicant, directing her to address a letter to the landlord of the company's Nelspruit premises, cancelling the lease. The email further stated that the Applicant should 'contact Deon regarding the re-location of your branch'. The Applicant testified that she understood this to refer to a relocation of the office within the Nelspruit area.

3 After an exchange of correspondence, in November 2005, a Mr Deon Small (the branch manager) visited the Nelspruit branch. At a breakfast meeting with the Applicant and her colleague (the Second Respondent, to whom I shall refer as 'Fraser'), Small advised them that the Nelspruit office was to close, and presented the Applicant and Fraser with an election either to accept voluntary retrenchment, or to agree to engage in sales for the Applicant, on an independent contractual basis. Both the Applicant and Small presented with two draft agreements, one being a voluntary retrenchment agreement, the other being an independent contractor's agreement in terms of which the contractor agreed to appointment as a service provider to Elliott. Small suggested that the Applicant and Fraser consider the documents, and that they discuss them with him in due course.

4 Fraser elected to accept the offer to become an independent contractor. She resigned and began rendering services in her new capacity from 1 December 2005. The Applicant refused to sign either of the agreements presented to her. She (rightly) perceived the voluntary retrenchment agreement to be tantamount to a resignation. Concerning the independent contractor's agreement, the Applicant felt that she was not

suited to engage in sales, which is what the independent contractor's agreement would have required of her.

5 On 30 November 2005, Elliott advised the Applicant, by email, that it had closed its branch in Nelspruit, and that Elliott would need to proceed with its retrenchment programme. On the same day, the office furniture, stock, equipment and all administration facilities at the branch were relocated to Pretoria, and the Nelspruit branch effectively closed.

6 On 12 December 2005, the Applicant's attorney wrote to Elliott, recording the events that had transpired and stating that alternatives had to be negotiated with the Applicant, including a suggestion that she take up employment in Elliott's Pretoria office.

7 On 15 December 2005, Elliott presented two documents to the Applicant. The first was an offer of alternative employment in Pretoria, as a sales secretary, at a more favourable remuneration than that paid to her in Nelspruit. In the letter that offered alternative employment, Small wrote, in words that were to acquire a great deal of significance, that *'Elliott will pay your relocation costs from Nelspruit to Pretoria provided you do not resign within a twelve month period of relocating, failing which we would then pro-rata the relocation costs thereof for your account.'* The second letter was a letter giving the Applicant notice of the termination of her employment, intended to follow should the Applicant refuse the offer of alternative employment in Pretoria.

8 On 19 December 2005, the Applicant's attorney responded to Elliot's letter. The letter recorded that the Elliott was in violation of section 189 of the Labour Relations Act, and requested further information pending a decision by the Applicant. Elliott replied by stating that since the responsible persons were on leave, it would answer the Applicant's letter

as soon as possible in January 2006.

9 On 5 January 2006, Elliot's representatives wrote to the Applicant's attorney, and withdrew the letter of termination of employment. The letter confirmed that the Applicant remained employed by Elliott and noted that Elliott would initiate a consultation process. Elliott proposed a meeting on 11 January 2006. At the same time, Elliott enclosed a notice in terms of section 189(3) of the Act, advising the Applicant *inter alia* that Elliott had managed to secure alternative employment in Pretoria, as an internal sales secretary.

10 The proposed meeting took place on 11 January 2006. The Applicant and her attorney attended, as did representatives of Elliott's management and Elliott's adviser. There was some debate in these proceedings as to whether this meeting constituted a 'consultation' for the purposes of section 189, or whether it was simply a 'meeting'. For reasons recorded below, very little turns on this spat

11 At the meeting, the Applicant's attorney contended that Elliott could not commence a section 189 consultation process, since Elliott had already handed the Applicant a letter terminating her employment. The argument raised was that although Elliott had retracted the letter, it could not be ignored, since it indicated that a decision to dismiss had already been taken. The Applicant's attorney also contended further that there had been an outsourcing of the Applicant's Nelspruit branch to Fraser, and that any dismissal of the Applicant would, for that reason, be automatically unfair given the provisions of section 187(1)(g).

12 In short, the attitude of the Applicant, though her representative, was that Elliott could not conduct a consultation process in terms of section 189, but that there had to be negotiations with the view to concluding

what was termed a “separation agreement”.

13 After the meeting on 11 January 2006, Elliott’s representative wrote to the Applicant’s attorneys. The letter recorded Elliott’s disagreement with the contention that there had been any transfer as contemplated by section 197, or any automatically unfair dismissal. The letter confirmed that the termination letter of 15 December 2005 had been withdrawn, and urged the Applicant to participate in the process that had commenced, as Elliott did not wish to terminate the Applicant’s services. Finally, Elliott confirmed that Elliott did not consider the option of accommodating the Applicant in Nelspruit to be viable. Elliott responded favourably to the Applicant’s proposal on an increase in salary. Elliott advised the Applicant that the salary of the position of sales secretary in Pretoria would be increased., to the extent that the Applicant’s cost to company salary would be increased from R8 249.83 to R12 141.50, being a total increase of almost R4 000.00 per month, without commission, which she had the capacity to earn.

14 The Applicant’s attorney responded to this proposal on 17 January 2006, recording that it was “*confirmed*” that the “*sales function*” of the Nelspruit branch had been outsourced to Fraser, and that the Applicant was therefore entitled to claim an automatically unfair dismissal. He also confirmed that the Applicant remained an employee of Elliott, but noted that the previous letter of termination “*could not be ignored*”. Finally, he requested reasons why the Applicant would not be accommodated in Nelspruit.

15 On 27 January 2006, Elliott’s representatives provided reasons, in writing, as to why the Applicant could not be accommodated in Nelspruit.

16 On 1 February 2006, the Applicant’s attorney responded, noting the

reasons that had been proffered. The letter went on to accept the offer of employment as contained in the letter sent by Elliott's representative on 16 January 2006, but "*as read together*" with the letter of 14 December 2005, relating to the payment of relocation costs.

17 At that stage, neither party had discussed what relocation costs would be, or the terms on which these were to be calculated and paid. In her evidence, the applicant stated that she intended this to be incorporated and contained in a settlement agreement. The Applicant further testified that Small contacted her and told her that he was happy that she had accepted the offer of alternative employment, and wanted to arrange her move to Pretoria. The Applicant then referred Small to her attorney regarding these arrangements.

18 On 6 February 2006, Elliott's representatives acknowledged the Applicant's acceptance of the position, and recorded that Elliott would pay the Applicant's relocation costs from Nelspruit to Pretoria. It was also recorded that Small would "*make the necessary arrangements for the relocation*".

19 In her evidence, the Applicant confirmed that she was satisfied with the position of sales secretary in Pretoria at the remuneration offered, that she was willing to relocate to Pretoria, but that the issue of relocation costs had to be negotiated and agreed to. In regard to these costs, the Applicant testified that she wanted to negotiate on this issue, and record the agreed quantum of relocation costs in a settlement agreement. Her attorney confirmed this approach in writing on 15 February 2006.

20 On 27 February 2006, the Applicant's attorney addressed a letter to Elliott, stating that the issue of relocation costs had to be contained in a settlement agreement. The letter further recorded that any relocation

and reporting for work by the Applicant in Pretoria could only take place once the parties had "*properly formalised*" the issue of relocation. For the first time, reference was made to the costs of the removal of furniture, alternative accommodation (intimating this had to be supplied by Elliott), and the sale of the Applicant's Nelspruit property. The letter recorded that "*It is most certainly not her position to have closed the branch in Nelspruit.*" Finally, the Applicant's attorney recorded that the instruction for the Applicant to report for work on 2 March 2006 was unreasonable, and requested Elliott to supply full particulars of what the relocation costs would entail.

21 Elliott's attorneys then entered the fray. On 28 February 2006, they replied to the Applicant's attorney, recording the Applicant's acceptance of the position in Pretoria. It was also recorded that the issue of relocation costs meant, as far as Elliott was concerned, the moving of the Applicant's household to Pretoria using its vehicles, at its cost. They recorded further that it was not Elliott's responsibility to find or provide alternative accommodation for the Applicant in Pretoria. The Applicant was advised that a truck would be provided on 3 March 2006 to move her to Pretoria, and that if she did not have alternative accommodation, her goods could be placed in storage by Elliott. The letter instructed the Applicant to report for work on 6 March 2006. Finally, Elliott drew a line in the sand. The letter stated that "*Our client is not willing, and simply will not, negotiate any further on this issue*."

22 On 2 March 2006, the Applicant's attorney responded, indicating that the Applicant would suffer damages if she relocated at that time. The Applicant's attorneys further advised that Elliott was breaching the agreement relating to relocation costs and the understanding that a settlement agreement would be concluded in this regard. The letter set out the Applicant's expected relocation costs and recorded that Elliott

had an obligation to assist the Applicant to "*mitigate her damages*" in this regard. Once again, it was recorded that "*she had no part in the decision to close the Nelspruit branch*".

23 In a schedule attached to the letter, the Applicant listed the items that she required Elliott to pay. The schedule included curtains, payment for the registration of motor vehicles, estate agent's commissions, fees and loss on sale of property and the purchase of new property. The amount given is some R55 000.00, being the equivalent of half the Applicant's annual salary.

24 Elliott's attorneys answered on 3 March 2006, recording again that "*relocation costs*" meant, as far as Elliott was concerned, relocating the Applicant using Elliott's vehicles, at its cost. The letter further recorded that the Applicant had accepted the alternative position in Pretoria, she also had to accept any prejudicial consequences that flowed from that acceptance. The Applicant's quantification of relocation costs was rejected.

25 On 3 March 2006, Elliott's removal vehicle arrived at the Applicant's premises in Nelspruit. The Applicant declined to move.

26 On 3 March 2006, the Applicant's attorney recorded that there was an impasse between the parties, and requested a meeting to resolve the matter.

27 The Applicant did not report for work in Pretoria on 6 March 2006 as instructed.

28 On 9 March 2006, Elliott's attorney wrote a letter to the Applicant's attorney, recording *inter alia* the following:

> "*That it held the view that the Applicant in failing to report for work on 6 March 2006 and be turning the truck away on 3 March 2006, repudiated the agreement;*
>
> *That due to this repudiation, Elliott is entitled to retrench the Applicant."*

29 The letter recorded that "*Our client does not want to discuss or negotiate the issue any further. The matter must now come to an end*." The letter went on to state that as a final attempt to avoid the Applicant's termination of employment, which Elliott did not want, the offer of the alternative position at Pretoria was repeated, on the conditions set out in the letter, which included relocation costs being limited to the relocation of the Applicant's household to Pretoria on Elliott's terms. The offer contemplated that the Applicant had to report for work on Monday, 3 March 2006, in Pretoria. The letter finally recorded that if the Applicant did not accept this final offer, she would face retrenchment, and would forfeit the severance pay that would otherwise have been payable. To avoid any misunderstanding about the terms of the alternative position offered in the past, Elliott presented the offer as a "new offer".

30 The Applicant's attorney responded on 10 March 2006, disputing any repudiation of any agreement by the Applicant, and stating that the intention of the parties was to discuss and negotiate "*the details of relocation*" which meant the timing and costs thereof. The letter importantly recorded that "*until such time that the parties have agreed to the terms and conditions of the relocation to Pretoria*", the Applicant would be "unable" to take up her employment in Pretoria. Once again, there is reference to the fact that the Applicant had "*no role to play*" in the closure of the Nelspruit branch, and that Elliott was required to "*assist or contribute*" to all costs of relocation. Elliott was asked to reconsider its "*firm stance*".

31 On 15 March 2006, Elliott's attorney responded to the Applicant's attorney's letter of 10 March 2006, recording *inter alia* the following:

31.1 Elliott was not willing to consult any further on the issue or discuss the same any further;

31.2 for 'one last time' Elliott's final offer was repeated, on the terms which included relocation costs consisting only of removal of the Applicant's household to Pretoria using its business;

31.3 the Applicant was required to report for work on 17 March 2006;

31.4 if the Applicant did not report for work on 17 March 2006 at the Pretoria branch, she would be retrenched.

32 On 27 March 2006, by way of a letter, Elliott terminated the Applicant's services with effect from 13 March 2006, on the basis that she was retrenched, because she rejected a reasonable offer of alternative employment.

The claim of an automatically unfair dismissal

33 The Applicant contends that the reason for her dismissal was one contemplated by section 187(1)(g) of the LRA, in that it was a reason related to a transfer in terms of section 197. She is accordingly required to discharge an evidentiary burden by establishing that the primary (or a significant) reason for her dismissal was the transfer of a business or a reason related to it. (See *Kroukam v SA Express (Pty) Ltd* [2005] 12 BLLR 1172 (LAC).)

34 Section 197 reads as follows:

'*If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-*

> *(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*
> *(b) all of the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.*

49 A 'business' is defined in section 197(1) to include the whole or any part of any business, trade undertaking or service' and a 'transfer' is defined to mean *"the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern."*

50 Section 197 is thus triggered if the underlying transaction meets all three of the following conditions:

- there is a *transfer* by one employer to another;
- the transferred *entity* must be the whole or part of a business (here, the test is whether is there an economic entity capable of being transferred); and
- the business must be transferred as a *going concern* (here, the test is whether the economic entity that is transferred retained its identity after the transfer).

51 In *Van der Velde v Business Design Systems* (2006) 27 *ILJ* 1738 (LC), the Court expressed the view the view that section 187 of the LRA

imposes an evidential burden upon the employee to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary i.e. to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal. The Court also expressed the view that when an applicant alleges that the reason for dismissal is a transfer or is related to a transfer in terms of section 197, it is incumbent on an applicant to establish at least the following:

- the existence of a dismissal (see section 192(1);
- that the transaction concerned is one that falls within the ambit of section 197 (i.e. the transfer of the whole or a part of a business as a going concern);
- that there is some credible evidence to support the proposition that the dismissal and the transfer might be causally linked.

53 The existence of a dismissal is not in dispute. I deal first with the question of whether the outsourcing transaction concluded between Elliott and Fraser is one contemplated by section 197. there are two parts to this question. The first is whether the subject of the transfer is a 'business' as defined, the second (assuming the answer to the first question to be in the affirmative) is whether the business was transferred as a going concern. These are separate questions, and to confuse or conflate them can defeat the stated purpose of section 197, which the Constitutional Court has told us is to balance the often competing interests of employers and workers when a business is transferred. (See *NEHAWU v University of Cape Town* (2003) 24 *ILJ* 95 (CC), where Ngcobo J said that "…*section 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses*" (at 118H).

54 A business has been defined by the European Court of Justice as an 'economic entity', in the sense of 'an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues an economic objective'. (See *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997 IRLR 255 (ECJ, and the reference to *Whitewater Leisure Management Ltd v Barnes* [2000] IRLR 456 (EAT) in *National Union of Metalworkers of SA v Staman Automatic CC & another* (2003) 24 *ILJ* 2162.) In other words, the enquiry at this stage is whether there is a discrete economic entity - that in turn requires a court to enquire into the existence or otherwise of the various components that might be said to make up a business. These include, but are not limited to assets (tangible and intangible), a workforce, goodwill, operational resources, and the like.

55 The definition of a 'business' is more easily applied when an economic entity is substantial, with assets, workforce and operational resources that are of some significance. The slimmer the business bundle, and especially where the business comprises only the provision of services or is limited to a small group of employees dedicated to a common task, the more difficult it becomes to isolate and identify a discrete economic entity that might qualify as a 'business' for the purposes of section 197. An assessment must be made of the facts in each case, and the Court must determine whether all of the relevant components and elements that might constitute a business are present, and whether they are sufficiently and coherently structured for there to be an identifiable economic entity capable of being transferred. In the present instance, I doubt very much whether the sales function conducted by Fraser met the threshold requirements for classification as an economic entity or business capable of transfer.

56 The second leg of the enquiry (assuming for the sake of argument that the sales function in Nelspruit comprised a business) is whether the business was transferred as a going concern. In the *NEHAWU j*udgment, the Constitutional Court established the proper approach to this enquiry, based on that established by the ECJ, and perhaps best summarised by asking whether there has been a transfer of an economic entity that retains its identity after the transfer has taken place. This would be indicated, inter alia, by:

- the fact that its operation was actually continued or resumed by the new employer, with the same or similar activity;
- whether or not tangible assets, such as buildings and movable property, are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of its employees are taken over by the new employer;
- whether or not its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer; and
- the period, if any, for which those activities were suspended.

57 The Constitutional Court has emphasised that an overall assessment of the situation is necessary and none of the single factors mentioned above are definitive in themselves. What is crucial is whether the new employer continues or resumes the old employer's operations, with the same or similar activities. In other words, the degree to which the transferred business preserves a distinct and separate identity that continues or resumes the operation of the activity concerned, is crucial in a determination of whether a transfer has taken place for the purposes of section 197. (See *NEHAWU v University of Cape Town* (2003) 24 *ILJ* 95 (CC) at 120A.)

58 When a Court determines whether there has been the transfer of a business (or a part of it) as a going concern, 'outsourcing' is a label that must be approached and applied with caution. It does not automatically follow, as Mr Hennig appeared to suggest, that any transaction conveniently described as 'outsourcing' immediately and automatically triggers the application of section 197. There may be no 'business' capable of being transferred, or there may be no transfer at all rather than the closing of one business and the opening of another. (See Malcolm Wallis SC 'Is Outsourcing In? An Ongoing Concern' (2006) 27 *ILJ* 1 at 16.) The courts will always have regard to the substance of the transaction and its substantive consequences when applying the relevant test. Not every outsourcing transaction will trigger the application of section 197, and it is certainly not triggered simply because one (or both) of the parties choose to affix the label 'outsourcing' to their transaction.

59 In her evidence, the Applicant appeared to suggest that the business carried on by Fraser in terms of the agreement concluded between her and Elliott was the entire business that Elliott had previously conducted in Nelspruit, and that in this sense, Elliott's business had been 'outsourced' and therefore transferred in terms of section 197 to Fraser. In support of this contention, the Applicant produced newspaper advertisements, bearing Elliott's logo, which she testified had been placed in the local press after 30 November 2005. The only fundamental difference in comparison to advertisements placed prior to that date being the telephone and fax contact numbers- the advertisements produced in evidence contain Fraser's contact details. The Applicant conceded under cross-examination that the terms of the agreement between Elliott and Fraser contemplate that Fraser would be paid on a commission only basis, that she would be required to use her own facilities and equipment in discharging her obligations under the agreement, and that those obligations were confined to sales-related functions, similar to those undertaken by Fraser during her employment by Elliott. The Applicant further testified that the driver and packer employed in Elliott's Nelspruit office had been transferred to Pretoria prior to November 2005, and that all of the office furniture and

equipment, packing materials, the truck used for smaller local removals in the Nelspruit had all been sent to Pretoria.

60 Even if it were to be submitted, more narrowly (and on the facts, more accurately), that a part rather than the whole of Elliott's business (the sales functions performed by Fraser) was 'outsourced' and therefore transferred as a going concern to Fraser, I fail to appreciate how this had any consequence for the Applicant or her employment. The agreement effectively required Fraser to continue providing the same services that she had been providing previously in her capacity as an employee, but for her own account, and using her own resources and facilities. Assuming again for the moment that what was transferred constituted a 'business' as defined, the agreement provided for no more than the transfer of a part of Elliott's business, a part in which the Applicant was not directly engaged. The only employee potentially affected by any transfer in these circumstances was Fraser, who by signing the independent contractor's agreement varied the consequences of section 197 that might otherwise have applied to her.

55 In summary, the only facts established by the Applicant that point to a transfer of a business or a part of it are that Fraser remained in Nelspruit selling removals for Elliott, and that advertisements appeared in the in the *Lowvelder,* advertising removals by Elliott, months after the branch was closed. I accept in the Applicant's favour, for present purposes (although this was vehemently disputed in cross-examination) that Small had agreed in the meeting held on 11 January 2006 that the sales function had been 'outsourced' to Fraser. None of these facts, viewed as they must be as a conspectus, supports the conclusion that the agreement between Elliott and Fraser provided for the transfer of a business as a going concern. In these circumstances, I fail to appreciate how it can be said that the agreement between Fraser and Elliott was

one that triggered the application of section 197, at least not in relation the Applicant. In my view, the most that can be said about the agreement is that on 30 December 2005, Elliott ceased doing business in Nelspruit, and that on 1 December 2005, Fraser commenced a new business for her own account, acting as a sales agent for Elliott. In so far as the Applicant was concerned, that part of Elliott's business in which she was engaged ceased to operate.

56 That brings me to the final requirement under this head- the causation requirement inherent in section 187(1)(g). Assuming for the moment that the transaction between Elliott and Fraser triggered the application of section 197, can it be said that the Applicant's dismissal was causally related to the transfer? Any temporal coincidence between transaction and termination in this instance is limited - the transfer occurred on 1 December 2005, and the Applicant was dismissed almost 4 months later, in on 27 March 2006. Elliott's case, put to the Applicant when she testified, was that it could operate its business more efficiently and cost effectively from Pretoria, without the infrastructure of small branches, using subcontracted sales representatives to procure removals to be executed from Pretoria. In these circumstances, assuming again in the Applicant's favour that the contractual arrangement between Elliott and Fraser constituted a transfer of a business as a going concern, I fail to appreciate on what basis it can be said that the Applicant's dismissal was related to the terms of the contract. In short, there was no casual link between her dismissal and the agreement concluded between Elliott and Fraser.

57 For these reasons, I conclude that the Applicant has establish none of the three elements necessary to establish with the necessary degree of credibility that the reason for her dismissal was a transfer or a reason related to a transfer contemplated by section 197. It remains then to

consider the Applicant's alternative claim, that she was unfairly retrenched.

The fairness of the dismissal for a reason based on operational requirements

58 In her evidence, the Applicant appeared to attack the substantive fairness of her dismissal in the basis that It is trite that an employer is entitled to take a decision to retrench, provided that this is not what has been termed a 'final' decision. The retrenchment process is generally triggered by a decision in principle, which in turn is subject to consultation with the appropriate consulting parties. In this instance, Elliott had clearly decided to close its Nelspuit branch prior to initiating anything that might remotely resemble a consultation process. While the Applicant testified that she was aware of the prospect of a relocation of the business, the presentation of the Hobson's choice of a voluntary retrenchment agreement and the independent contractor's agreement with instructions to consider their terms and revert to Elliott is hardly what the LRA has in mind when it requires joint consensus-seeking before any final decision to retrench.

59 This may be true. But the Applicant's contentions overlook the fact that in December 2005, no doubt having been advised of the error of its ways, Elliott retracted any dismissal that it might have contemplated, and commenced a consultation process aimed at addressing its operational requirements. There are two issues in dispute here- the first relates to the nature of the process initiated by Elliott's letter of 5 January 2006 (when Elliott unconditionally withdrew the letter of termination of employment it had addressed to the Applicant on 15 December 2005), the second relates to the point of whether an employer, having decided

to close a business (or, as in this case, having closed the business) can legitimately commence a consultation process after the fact of the closure.

60 The second issue was recently addressed by the Labour Appeal Court. In *SA Airways v Bogopa & others* (2007) 28 *ILJ* 2718 (LAC**)** at 2734, the court said the following:

[43] *"Where an employer has declared an employee's position redundant without any prior consultation with the affected employee(s) and the employee rejects an attempt by the employer to hold the consultation after such declaration on the basis that any consultation thereafter would be a sham or would be unfair in the light of the declaration, the employee may, generally speaking, be justified in rejecting such consultation (compare with Nkomo & others v Administrator, Natal & others* (1991) 12 *ILJ* 521 (N) *at 521I – 528 A which was in respect of the audi alteram partem rule). However, this would depend on the circumstances of each case.*

[44] *There may well be circumstances where the consultation offered after the declaration is even fairer than the consultation to which such employee was entitled before the declaration. In such a case, if the employee rejects an offer of such consultation, and a dismissal follows, the dismissal might not be procedurally unfair. (See Semenya's case below.) However, where the employee agrees to consult with the employer after the employer has declared his position redundant prior to consultation, the procedural fairness or otherwise of any subsequent dismissal would depend largely on what happens during the consultation process. The initial unfairness which would have taken the form of the declaration of the employee's post or position redundant*

without prior consultation may be cured if the consultation becomes successful or if its ultimate failure has nothing to do with the initial unfairness but results from the conduct of the employee or his union during the consultation process. Where, for example, the consultation begins but fails to reach finality as a result of blameworthy conduct on the part of the employee or his trade union, the dismissal would be procedurally fair even though the consultation process may have started on a wrong footing. However, there may be a situation where the employer goes through the motions of a consultation process to try to cure the procedural defect which occurred when it declared the employee's position redundant without prior consultation with the employee. In such a case the subsequent dismissal may still be procedurally unfair because the employer participated in the consultation process with no intention of reaching consensus with the employee or his trade union."

61 In this instance, as I have noted, there is no doubt that the consultation process started on the wrong footing. Elliott clearly erred in presenting the Applicant and Fraser with the choice of a retrenchment package or a new contractual relationship before initiating the statutory process as it was required to do in terms of section 198(3). However, it cannot be said, on the evidence, that the process initiated on 5 January 2006, when the initial letter of termination of employment was with withdrawn, was irredeemably flawed. Without a detailed analysis of what transpired at the meeting held on 11 January 2006, it is clear that the reasons for the closure of the Nelspruit branch were discussed, and that by the end of the meeting, three options were open to the Applicant. These were a similar contractual arrangement to that accepted by Fraser, an alternative position for the Applicant in Pretoria (with a significant increase in her remuneration), and a settlement agreement were the

Applicant agree mutually to a parting of the ways. What followed was nothing less than a relatively protracted period of negotiation between the parties' respective legal representatives on the terms on which the Applicant would accept alternative employment in Pretoria. There is nothing in the evidence to suggest that Elliott was acting mala fide, or that it did not seriously wish to pursue any of the options that were put to the Applicant, or reach consensus with her on any of them. In contrast, the tone adopted by the Applicant's attorney was confrontational to say the least, one in which the sword of section 197 (a particularly blunt sword, as it transpires) was held over Elliott's head, while the Applicant sought to extract the maximum benefit she could from the process. That is all very well, and the Applicant cannot be faulted for what is colloquially referred to as 'pushing the envelope'. But what she could not do was require that Elliott meet her demands, or continue to negotiate with her beyond the point at which Elliott had clearly drawn its line in the sand. In short, I am persuaded that the process initiated by Elliott in its letter dated 5 January 2006 compensated for the procedural defects in the process initiated in November 2005, and that its conduct at and after the meeting on 11 January 2006 cannot be faulted. On the basis of the approach established in *Bogapa's* case, the Applicant's dismissal was procedurally fair.

62 Substantive fairness was never really in issue. Although the Applicant testified that in her view, there was no operational requirement that warranted the closure of the branch, in cross examination, she did not contest the proposition that she was hardly in a position to make financial judgments about the viability of the branch, or question the commercial rationality of that decision. These were issues raised and discussed at the meeting on 11 January 2006. I have no hesitation in concluding that the Applicant's dismissal was substantively fair.

63 There is a further point to address. Mr Hennig submitted that Elliott was not entitled to retrench the Applicant, since it had a vacancy in its Pretoria office. On this basis, as I understood the argument, Elliott should have pursued the option of disciplining the Applicant for a failure to present herself for work in Pretoria, and that Applicant's retrenchment was not a legitimate option open to Elliott. Mr Hennig referred to *SA Airways v Bogopa & Others (supra)*, where the following was held:

> *"The question which arises is what the obligation of the employer is in relation to the dismissal of the employees for operational requirements when it does away with an old structure and adopts a new structure. (For operational requirements). The employer has an obligation to try to avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position, the duties of which the employee concerned can perform with or without at least minimal training."* (Page 2740 (A) to (C)).

Further:- *"Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such position and ensuring dismissal would be without a fair reason. Where, however, the employer offers the employee such a vacant position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactory, the employer can deal with the case as a case of poor performance."* And further (Page 2740 (D) to (H)

64 Mr Hennig's submission overlooks the fact that Elliott had offered the Applicant employment in the vacancy at its Pretoria office, but that the Applicant had, by her conduct, effectively refused the offer. Whether

there was an agreement that the Applicant repudiated by her conduct, or whether there was an agreement on the terms of the offer subject to further negotiation on the quantum of the relocation costs was, by March 2006, an academic question. Elliott made its position quite clear - it was not prepared to make a more favourable offer on the issue of relocation costs, and had presented her with an ultimatum in the clearest possible terms. I fail to appreciate how Elliott could have been expected, as Mr Hennig's submission implies, to offer the Applicant continued employment at any cost.

65 This leads me to a final observation. It appeared to me, from her evidence that the Applicant's real grievance is that Elliott failed to make a further, more acceptable offer in relation to her relocation costs. This was affirmed by the Applicant on a number of occasions, when she attributed the unfairness of Elliott's conduct to the fact that the parties were in negotiations on the question of relocation costs, and that Elliott had failed to respond to her proposals. In these circumstances, the Applicant felt, as she put it, that she had been 'left dangling' by Elliott after a considerable number of years' service, and that for this reason, she felt that she had been unfairly treated. That may be so, and I do not dispute the Applicant's genuine sense of grievance at the termination of her employment. And the circumstances in which it occurred. What the Applicant overlooks, though, is that Elliott was never under an obligation to negotiate the terms of the relocation with her. Its obligation was seriously to consider any proposals made by her, and to provide reasons for its disagreement with any of them. Elliott was perfectly entitled to offer the costs of relocation on its terms, and to offer no more. There was nothing unfair in assuming that position. As matters transpired, it is not as if Elliott's attitude was entirely negative- it had, at the Applicant's behest, increased significantly the remuneration attached to the job on offer and afforded her ample time to make a decision on the terms on

which it offered the new job and the Applicant's relocation to Pretoria. Indeed, prior to dismissing the Applicant, Elliott extended the deadline by which the Applicant should report to work no less than three times.

66 In summary, by mid-March 2006, Elliott had offered the Applicant alternative employment in circumstances where both the job and the remuneration package on offer were acceptable. All that separated the parties was the quantum of the relocation costs that Elliott should contribute. The Applicant required a counter-proposal to her demand. Elliott, however, had reached the end of the line. It refused to make a counter-proposal, and reiterated its offer to remove the Applicant's furniture at its cost and no more. It required the Applicant to report for work in Pretoria, in a post and at a rate of remuneration that were acceptable to the Applicant, or face retrenchment. Elliott was required, in terms of its statutory obligations, to act fairly in its dealings with Applicant. The obligation to act fairly does not, contrary to what the Applicant contended in her evidence, imply that Elliott was obliged to reach agreement with the Applicant on the costs of her relocation on her terms, nor does it imply that Elliott could not, when it reached its final bargaining position, indicate that as far as it was concerned, the negotiation process was over.

67 For the above reasons, I make the following order:

> The Applicant's claim of unfair dismissal is dismissed, with costs.

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ANDRE VAN NIEKERK,

Acting Judge of the Labour Court

Date of Hearing : 21 and 22 February 2008

Date of Judgment: : 15 March 2008

APPEARANCES

For the Applicant : Mr M Hennig of Martin Hennig Attorneys

For the Respondent: : Mr S Snyman of Snyman Attorneys