REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JS 319/13

In the matter between:

CHARMAINE N FACRIE **Applicant**

and

PARAS CARPETS T/A TONY NICOLELA CARPETS **Respondent**

Heard: 14-15 February 2014

Delivered: 27 August 2014

Summary: (Trial – s 189 – substantive and procedural fairness – employee well aware of impending retrenchment – offer of equivalent work at different branch rejected – no attempt to comply with s 189 – procedurally unfair - relief affected by applicant's failure to accept equivalent job offer and payment of severance pay in circumstances in which she could have been deprived of severance pay).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter was retrenched on 28 February 2013 having worked for the respondent since the end of May 2004. The respondent is a retailer of fine oriental carpets. Its last six year lease of showroom premises in Sandton City Shopping Centre was expiring and the owners had decided not to renew it. The applicant's job title was a secretary, but she actually performed general shop and administration duties and could not type or take dictation.

[2] The applicant claims that her retrenchment was both substantively and procedurally unfair. Originally, she disputed that there was a general need for retrenchment, but at the commencement of the trial her representative conceded that there was a need for retrenchment in light of the merger of the two showrooms and that the applicant was a viable candidate for retrenchment. Nonetheless, she maintained that the consultation process was so fundamentally defective that her retrenchment was both procedurally and substantively unfair. The applicant was paid severance pay even though the respondent claims that it had offered her an alternative position at its Kramerville showroom.

Common cause facts

[3] Some of the material facts which the parties agreed on were the following:

3.1 The respondent had leased showroom premises in Sandton City for 14 years and its last long term lease expired on 30 June 2012 but was extended to 28 February 2013.

3.2 In June 2008, the respondent had opened a showroom at Kramerville and was considering consolidating the Sandton City store with the Kramerville one.

3.3 On 30 November 2012 the respondent placed an advertisement in the Sandton Chronicle announcing a closing down sale. This was followed by a similar advertisement on 8 December 2012, which was placed in the Saturday Star, and later two more advertisements on

14 December 2012 and 15 February 2013, which both the appeared in the Sandton Chronicle.

3.4 The applicant was aware of these operational changes.

3.5 The respondent gave the applicant notice of termination on or about 29 January 2013 and gave as a reason for the termination the consolidation of the respondent's two businesses. Her termination was to take effect on 28 February 2013. The letter recorded that the respondent had complied with section 189 of the LRA and further indicated that she had been given the opportunity to voice her concerns.

The evidence

[4] The owner, Mr Y Michaeli, his spouse Mrs B Michaeli both gave evidence for the respondent as well as Ms G Strydom (the bookkeeper of the business since 1999) and Mr M Khosa (a former salesman for the company). The applicant gave evidence on her own behalf. It is not necessary to summarise every aspect of the evidence, but only those aspects having a bearing on the issues in dispute.

[5] The business had originated in 1978 when it had been located in town and had relocated to the Sandton premises in 1999. The lease was extended to February 2013 and thereafter on a month to month basis until it finally closed in June that year. Michaeli had taken the decision to consolidate the two branches for a number of reasons namely: his own age (63), his wish to spend more time with his family; declining turnover which had led him to use his bond to keep the business going, and the prospect of entering into another long lease, at what had become excessive rental of R 220,000 per month, was simply too much to consider. He had tried to sell the business as he had built up considerable goodwill, but the price was too high for interested buyers. It was a traumatic event to close Sandton City outlet after 14 years. He had hoped to sell the business but was eventually forced to reduce it to a shell which itself was a costly process.

[6] The business employed seven staff altogether and three of them transferred to the Kramerville operation namely, G Strydom, his son Elan and a driver. He had offered to transfer the applicant to the same premises but she had rejected his offer because she didn't want to work in Kramerville, which she characterised as an 'industrial area'. He had tried to persuade her that it wasn't an industrial area. She also queried what she would do at those premises given that his son and wife were both working there. Michaeli responded that she would do the same work she did at the Sandton store. Even though she did not consider herself a secretary, she was good at working at the front desk and he told her so.

[7] After February, some staff stayed on until the store finally closed in June. The applicant had declined the offer of the month to month employment because she said she was not 'a casual'. When asked if he had any notes of discussions with staff Michaeli said that it was a one-man show and he was not a 'notetaker'. He claimed that meetings were held with staff that the applicant would not always attend and he would speak to her where she worked at the front desk. During November or December 2012 when he was away the applicant worked at the Kramerville premises, but she expressed unhappiness at having to drive so far and into an industrial area. He described Kramerville as the destination of interior decorators and that it was packed with people on Saturdays.

[8] When the advertisement was first placed announcing the closing down sale, leaflets explaining the closure had been printed and the applicant had stamped the leaflets. The second advertisement stated inter alia: "*We are consolidating our two stores and will be operating from Paras Carpets, 69 Kramer Road, Kramerville, Sandton.*"

[9] By his own admission Michaeli said he was not familiar with the labour law but advice was obtained from the Department of Labour to the effect that they should issue a letter a month before to those staff who did not want to stay with the firm. The termination letter of the applicant was drafted by Michaeli's other son, a lawyer. The body of the letter read as follows:

"We refer to the matter of termination of employment.

As discussed previously, kindly note that Tony Nicolella carpets (hereinafter referred to as "Tony") and its business as a whole is consolidating and moving premises from Sandton city shopping Centre situated at shop 22L Sandton City to the premises of Paras Carpets (hereinafter referred to as "Paras") situated at 69 Kramer Road, Kramerville on or about 1 March 2013.

Consequently and as a result of the consolidation of Tony and its business together with Paras, your services will no longer be required.

Kindly take note that Tony has and is duly complying with labour laws of the Republic of South Africa, more specifically section 189 of the labour relations act 66 of 1995 and this letter serves as written notice to yourself, to confirm the content of your dismissal based on operational requirements which has previously been discussed between Tony and yourself.

Kindly take note further that the termination of employment keen Tony and yourself will take effect on the 28th day of February 2013.

…[details of severance pay]…

Tony Furthermore confirms having discussed and apprised you of the aforementioned consolidation between Tony and Paras and the consequent result thereof. Tony Furthermore confirms having afforded you the opportunity to voice or lodge any concerns about the aforementioned matter and such concerns, if any, were duly acknowledged and considered by Tony.

Tony recognises and acknowledges your valued contribution and work ethic to the business and trust that our relationship with you will continue into the unforeseen future. Should you require any further assistance, such as a letter of recommendation or have any further queries concerning the aforementioned, we will gladly assist you.

…."

[10] On 29 January 2013, the applicant confronted him about the content of the letter and said that there ought to have been three letters she received before she could be retrenched. She was angry and he was shocked and told her that she knew the showroom was closing and she was leaving. She had cut him off and walked away. Michaeli was shocked as he thought what he had done was above board and said that she knew the business was closing and that she was leaving. Under cross-examination, he was asked why he did not approach the applicant to try and patch things up after giving her the letter when he saw how angry she got. He said he could call other employees into the office for a discussion, but the applicant could not be approached and he might just as well have 'asked her to jump off the third floor' as come to his office for a discussion. He did not find her difficult to work with as such, but sometimes she could be emotional and walk away from a conversation abruptly.

[11] He claimed that, what was set out in the letter reflected the interaction with her, but he testified that she did not comment on anything so he did not know what concerns she might have had.

[12] He claimed that from the time they had started talking about the closure the applicant had rejected his offer to move to the other premises two or three times and had repeated her reasons for not wanting to move namely the fact that it was further away, in an industrial area and she was not a secretary. The first time this possibility had been raised was in November 2012, but he conceded that the applicant might first have heard of it in September 2012 when she had asked him what would happen to her, to which he had responded she could go to Kramerville. He agreed that when she asked what she would do there, given that his wife and son were working there already, he had said she could stare at the ceiling if she wanted to, but this was meant in jest and there were times when things were quiet. For example, the bookkeeper would sometimes read books in an idle period. Nonetheless, he did need someone at the premises when he or his wife was not at the business. However, he did not need any sales staff. He did not expect the applicant to do anything more or less than what she was doing at the Sandton City showroom.

[13] Michaeli agreed that the applicant's job description as a secretary was inaccurate because she was not qualified to do secretarial work. His wife had employed her and they were happy with her even though she couldn't do secretarial work as a qualified secretary was not really needed. He agreed that the applicant could be emotional and was somewhat highly strung.

[14] He testified that the applicant had worked at the Kramerville premises in November when he and his wife were away on holiday his son was not there. The applicant had been needed there to keep an eye on things even though the branch did not rely on passing trade. He had also hoped that it would give her an opportunity to experience working at those premises.

[15] On the meeting which took place between the applicant and Michaeli on 7 January 2013, it was put to him that when she had approached him and said she was worried what would happen to her, he had simply said he would get back to her later.

[16] Strydom said that the applicant had told her she'd been offered a position at the Kramerville premises but there was no proper job description. She had advised the applicant to discuss her concerns with management. She was also aware that the applicant had been offered a position with a medical practice but the applicant said it was not suitable for her because she was not qualified as a secretary. She had only calculated the severance pay after speaking to the Department of Labour but had no other role in the retrenchment exercise. Her recollection of any discussions between management and staff about the closure and impending retrenchments was very vague. All she could recall was that she knew from June 2012 that the lease would only be extended until February 2013.

[17] Khoza, a former salesperson who was also retrenched, testified too. He was made aware of his retrenchment a few months before the shop closed. The applicant had told him of the offer of the job, as expressed her concern that she did not know what she would do with the owner's wife and son being at the premises already. He advised her to take the offer

even if she did watch the ceiling because at least she would have employment.

[18] Mrs B Michaeli testified that she had no direct knowledge of the consultations and only knew what her husband had told her. However she had spoken to Charmaine about her unwillingness to go to Kramerville and told her that she did her job well but the applicant repeated her concern that she was not a secretary and said she intended to go on a long holiday. The applicant never disputed that she did not want to go to Kramerville nor did dispute the fact that she was offered a transfer to Kramerville. This evidence was not challenged.

[19] The applicant claims that she first heard that something might affect her when Michaeli told her that he would renew the lease for seven months and would see how things were going two to three years hence, but that he would not take a longer lease because he was too old for that. The claim that Michaeli had indicated such a longer time frame before he made a decision was not put to him in cross-examination. She felt that he was worried and she was too because it was not clear what was going to happen. In September 2012 she asked him what would happen to her if the shop closed and that is when he first mentioned that she could come to the showroom in Kramerville. She had asked what she would do there, given the presence of his wife and son at those premises, and he said she could 'stare at the ceiling', but she was not prepared to do that. Later under cross-examination she said that if Michaeli had told her in September that she could go and do the same job she was doing in Sandton in Kramerville she would have accepted that. When he had mentioned staring at the ceiling, she did not think he was being serious about making her an offer.

[20] She recalled that sometime in November or December 2012 she had to look after the Kramerville showroom while Mrs Michaeli was away on leave and Elan had gone to see clients, but it was only to relieve him and not for the purpose of showing her the premises. She was aware of the first advertisement that was placed and realised she might have no job.

[21] There were no discussions about the future of her existing job and the only discussion that she had was on 7 January 2013 when she asked Michaeli what would happen to her and he told her she would be retrenched and get a letter at the end of the month. This important allegation was not put to Michaeli during his cross-examination and in fact was at odds with the version put to him.

[22] When she received the termination letter on 29 January 2013 she claims that Michaeli told her that the company was sold to a French company and new owners would be taking over. He also referred to the letter as her resignation letter to which she had responded that it was a retrenchment letter. She had challenged him about the statement in the letter that there had been consultations and he replied that he had never closed a business before. He would not tell her who told him to put the paragraph about consultations in the letter. It must be mentioned that the details of this version were not put to Michaeli under cross-examination. When she read the letter she realised that the respondent had not complied with section 189 procedures because of her husband's experience when he was retrenched in 2010.

[23] At the end of February, he had asked her if she would stay on for March but only as a casual, but she told him that she needed a permanent position.

[24] The applicant also claimed that she had walked away from Michaeli on 29 January 2013 after she had again raised the offer of working at the showroom with him and he had then denied having ever said that. She also disputed that Khoza could have heard the conversation she had with Michaeli on 29 January, though again this was not an issue canvassed with Michaeli or Khoza during their cross-examination.

[25] She further said that there had been a discussion with Michaeli in Strydom's office on 4 February when she asked him whether the company had been sold to the French company, but he responded that nothing had been finalised. The explanation for not accepting the casual month-to-month employment was because she had been told the company had been sold and she did not know who she would be working for. Moreover

she took leave in March. Strydom had not been asked about this meeting in her office during her cross-examination, so this incident was not tested.

[26] She agreed that when she went to Kramerville she saw that it was a 'nice upmarket and safe area but a lonely place'. However, she denied ever saying she did not want to work in an industrial area and repeated her concern that she was not a secretary.

[27] The applicant agreed that even after she had referred a dispute to the CCMA, the respondent had offered her the opportunity to remain at the Sandton City branch until it closed or to transfer to the Kramerville. She had declined because she had already referred the matter to the CCMA and she felt the trust relationship was broken and was unsure how she would be treated if she accepted. She conceded that she made an informed decision not to return. On the question of the prospect of working in a dental practice, which had also been offered to her by Michaeli, she said she had not pursued that possibility because she could not perform secretarial duties.

Evaluation

The Consultation Process

[28] What appears from the above is that there was no formal engagement with the applicant along the lines envisaged in section 189 of the LRA, which sets out a structured process for an employer to follow before embarking on any retrenchments, viz:

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

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-

(a) appropriate measures-

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

(4) …

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed dismissals.

(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the employees to be dismissed according to selection criteria-

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective."

It seems that the respondent believed that it was sufficient simply that it was already common knowledge in the small workplace that the business was closing and jobs were threatened and that it had made an alternative

offer of employment to the applicant. It is true that Michaeli did testify to a number of meetings with staff in which he consulted with him, but this evidence was almost devoid of any detail that would make this assertion credible. Moreover, there was no corroboratory evidence of these meetings given by Strydom or Khoza. At one point he conceded that he was not a 'note taker', and one cannot help but get a sense that employee relations were conducted in an informal and personal manner. It is also apparent that he pleaded ignorance of what was required when closing a business and only took advice on what had to be done when the termination letter was about to be sent out, so it is improbable he would have had the kind of consultations envisioned in s 189(2) before then. This was reinforced by Strydom who testified that she had phoned the Department of Labour to enquire about the procedure, severance pay and the retrenchment letter.

[29] It is common cause that it was known that the owner was not willing to take out an extended lease following the expiry of the last long lease in June 2012. Subsequently, there were the various closing down sale notices which explicitly referred to the consolidation of the two businesses and the leaflets printed to notify customers. In consequence, it is fair to say that the proverbial 'writing was on the wall'.

[30] The first direct discussion between the applicant and Michaeli took place in September 2012 apparently at her instance when she asked what would happen to her. Michaeli's immediate response was that she could move to Kramerville doing the same work and he tried to reassure her concern about the possible lack of work there by making his offhand remark that she could stare at the ceiling if she wanted. It is important to note at this juncture that not all staff in the Sandton centre were offered the opportunity to move. In particular, there would be no need for additional sales persons at the new venue and accordingly the existing sales persons were ultimately retrenched without the option of moving across to the Kramerville showroom. The respondent could simply have said that it had no need for the applicant's services either if it was not serious in offering a position to her.

[31] Also, Michaeli's initial response was simply that the applicant could move to Kramerville. When she queried what she would do there he told her it was the same work she was doing in Sandton. It was only in response to her further question about an implied shortage of work at those premises owing to the presence of his wife and son at those premises that he made his offhand remark, which the applicant interpreted to mean that the job offer had not been serious. In this respect she seems to have seized on one aspect of the conversation and chose to ignore that before he made that flippant remark he had said she could move to Kramerville and do the same job she was performing in Sandton.

[32] I doubt on the probabilities that the applicant did not think the offer was serious. Khoza, Strydom and Mrs Michaeli all testified that she had raised the job offer with them, at the same time expressing her concerns about why she would not take it, but none of them recall her saying that she did not take it seriously or did not believe it was genuine, and Strydom encouraged her to discuss it further with management and Khoza advised her to accept it. None of this testimony was challenged. On a balance of probabilities, I believe the evidence shows that it was a genuine and reasonable offer of employment and the applicant was aware of this, the only material difference being that it was in a different suburb a few kilometres away from Sandton City. It appears that she was not keen on going to work in Kramerville and for that reason alone did not accept the offer.

[33] Had the respondent refused to pay the applicant severance pay on the basis of her having unreasonably refused this offer of alternative employment, it is unlikely the applicant would have been entitled to severance pay in terms of s 41(4) of the Basic Conditions of Employment Act 75 of 1997.

[34] The applicant also rejected an opportunity to work a month longer, assuming in her favour that she understood that only a month's temporary employment was on offer.

[35] The next interaction took place on 7 January 2013 and the evidence about what transpired on that occasion does not yield a clear understanding of

what took place. Michaeli had said that he was uncertain he would have to move to Kramerville or whether new owners would take over the business, but knew for certain by February that the business would not be sold. The applicant's own version that he had simply told her she would be retrenched at the end of the month was not canvassed with him, so this version of the applicant was not properly tested with him.

[36] The last occasion was after the applicant had already been given a notice of termination and concerned the option of working on a month to month basis or reconsidering the Kramerville option. Both offers were reiterated by the respondent after the applicant referred her unfair dismissal claim to the CCMA in March 2013.

[37] On the evidence of Khoza and Mrs Michaeli, it seems that the applicant did consider the move to Kramerville but decided it did not suit her.

[38] What emerges from the above is that, substantively the applicant was offered a reasonable alternative to retrenchment but none of the type of consultations which should have taken place in a more structured way occurred. As such it cannot be said that there was a meaningful consultation process with a view to reaching consensus as envisaged by s 189(2) of the LRA and her dismissal was consequently procedurally unfair.

[39] It was argued at the start of proceedings that the want of procedural fairness was so gross that the dismissal was also rendered substantively unfair. For the sake of completeness the issue of substantive fairness will be addressed, though in truth it had fallen away as an issue by the time argument was presented.

[40] The general need to retrench was no longer in dispute by the time trial commenced, nor was the fact that the applicant would not have been a suitable candidate for retrenchment. The applicant based her case of substantive unfairness's only on the idea that where procedural fairness is completely lacking the procedural unfairness has the effect of transmuting into substantive unfairness as well.

[41] I do not think this is a sound principle. If the applicant does not contest the substantive fairness of the dismissal on the merits by which substantive

fairness is normally measured, I fail to see how gross procedural unfairness can transform what is otherwise a substantively fair dismissal into a substantively unfair one. The distinction between the way procedural and substantive fairness are assessed is well established and there is no reason to blur those distinctions by an act of transubstantiation. I mention this only because this argument was raised in the opening address of the applicant's counsel, but I notice it was not raised in the applicant's heads of argument which were filed subsequent to the hearing.

[42] I am satisfied that even if a claim of substantive unfairness had been persisted with, it would fail because the retrenchment was substantively fair.

Relief

[43] The only question is what relief if any the applicant should be granted for the lack of procedural fairness. Any award of compensation she might be due, in my view, is significantly affected by the fact that she received severance pay she could have been denied given her failure to accept a reasonable offer of employment. It is also affected by the fact that the offer of alternative employment meant she could have avoided retrenchment entirely merely by accepting working at new premises which were less convenient to her.

[44] In the circumstances, the appropriate compensation in my view ought to be significantly reduced from what it might have been in the absence of the considerations mentioned.

Costs

[45] As the applicant is partially successful the applicant should pay half her costs.

Order

[46] In light of the above,

46.1 I find that the applicant's retrenchment by the respondent was procedurally unfair but substantively fair;

46.2 The respondent is ordered to pay the applicant compensation in the amount of one months' remuneration, being an amount of R 10,000-00 (ten thousand rands), less any tax deducted in terms of a tax directive, which must be paid within 15 days of this judgment being handed down.

46.3 The respondent must pay half the applicant's costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Saunders instructed by ODBB Inc.

FIRST RESPONDENT: J Du Randt of Du Randt Du Toit Pelser Attorneys