

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no:

JA12/2001

In the matter between:-

FRESHMARK (PTY)LIMITED

APPLICANT

and

COMMISSION FOR CONCILIATION

FIRST RESPONDENT

MEDIATION & ARBITRATION

VAN DER WALT, J. ADRIAAN

SECOND

RESPONDENT

SOUTH AFRICAN WORKERS' UNION

ON BEHALF OF MRS DE KLERK

THIRD RESPONDENT

JUDGEMENT

ZONDO JP

INTRODUCTION

[1] This is an appeal from a decision of the Labour Court in an application that had been brought by the appellant to have an arbitration award that had been issued by the second respondent, a commissioner of the Commission for Conciliation Mediation and Arbitration, (“**CCMA**”), the first respondent herein, reviewed and set aside. The dispute to which the award related was between the appellant and the third respondent, the South African Workers’ Union, acting on behalf of one of its

members employed by the appellant, one Mrs Hendriena De Klerk, (**“the employee”**). The employee had previously been employed by the appellant but was dismissed for operational requirements. The dispute was whether or not the appellant was obliged to pay the employee severance pay.

[2] In the arbitration proceedings before the CCMA the commissioner found that the appellant was obliged to pay the employee severance pay. The appellant then brought an application in the Labour Court to have the award reviewed and set aside. The Labour Court, through Landman J, dismissed the application. The appellant appealed to this Court against the judgement of the Labour Court. In that appeal this Court, through Joffe AJA (with myself and Mogoeng JA concurring) noted that the record of appeal was incomplete in that part of the evidence of the employee before the commissioner was missing. This Court decided that the Court a quo should not have considered the review application when the record was not complete since the missing portions of the evidence were material. This Court set the decision of the Court a quo aside, directed the appellant to rectify the defect in the record and granted the appellant leave to approach the Labour Court afresh on the same review papers once there was a complete record.

[3] In due course the appellant rectified the defect in the record. The review application was set down for hearing in the Labour Court. Once again the review application came before Landman J who, after hearing argument, came to the same conclusion as before. He, accordingly, dismissed the review application and granted the appellant leave to appeal to this Court. This appeal is against Landman J’s judgement.

The facts

[4] The employee was employed by the appellant in 1984 as a debtors’ clerk. When she commenced her employment, her terms and conditions of employment required her to work a five day week, namely, from Monday to Friday. Due to the

appellant's operational requirements the appellant and the employee agreed in 1993 to effect a change in the employee's conditions of employment so that she would work every third Saturday. In November 1997 the appellant's Port Elizabeth branch got a new branch manager, one Mr Manley. After Mr Manley had started managing the Port Elizabeth branch, it soon became clear to him that there was a need to make certain changes in the operation of the branch in order to meet its operational requirements. Some of the factors that necessitated changes were a change in business practice in the retail sector, a high growth of the appellant's business and the introduction in the retail sector of trading on Saturdays and Sundays.

[5] It appeared to Mr Manley that it was necessary that the branch provide a comprehensive service on Saturdays. At that time only one employee in the administration department of the branch worked on Saturdays. The administration department was the department in which the employee was employed. The volume and pressure of work on the single employee working on Saturday was such that the employee would normally only finish work at about 16h00. Employees took turns to work on Saturdays. There were four employees in the department. They worked on the basis that each one worked every third Saturday.

[6] One of the reasons for the increase in the volume of work for the branch was that certain shops had been added to the list of shops with which the branch was doing business. In January 1998 Mr Manley called the staff to a meeting to discuss the problem relating to Saturday work. At the meeting he explained to the staff the changes that had occurred in the business environment in which the branch operated. In particular he explained that, because of the introduction of extended trading hours in the retail sectors, many shops to which the branch supplied fresh produce opened till late in the night on Fridays, and also opened until about 17h00 on Saturdays. He said that some of the shops had begun to ask that the branch make deliveries on Saturday mornings. He said that having one staff member on duty on Saturday was not working. He told the staff that the branch had to make certain adjustments. He told them that in Cape Town - where he had been before - they had gone through the same situation and

had made adjustments and these had worked.

[7] Mr Manley proposed to the staff that the four staff members in the administration department be divided into two teams of two and the teams work alternate Saturdays. He said that this would enable the branch to provide a better service to the retail shops. He also stated that, if one person worked alone on a Saturday, he or she finished late in the afternoon but, if two people worked together, it was likely that they would finish the work at about midday. The staff said that they understood the problem. Except for the employee, they all agreed to the proposed change in their conditions of employment. In due course the staff started working every second Saturday. Mr Manley testified that the change worked very well.

[8] As indicated earlier, the employee was the only one among the staff who did not agree to work every second Saturday. On the 27th March 1998 Mr Manley held a meeting with the employee to discuss the matter. He summarised the discussion he had with the employee in a memorandum dated the 17th April 1998 which he addressed to one Judith. The memorandum reads thus:

“Memorandum

To: Judith

CC:

From: Mark Manley

Date: 04/17/98

re: Discussion with Drinie de Klerk re: work on every alternate Saturday due to operational requirements

Judith

Drinie de Klerk was asked to join Mark Manley and Karen Grewar in Karen's office on Friday

the 27th March 1989 for a discussion on the need for her to attend work on every alternate Saturday due to operational requirements in the admin department.

Mark explained that due to the increase in the workload in the admin department because of the take on of the new OK business and the fact that our business is supplier to the retail trade who trade 7 days a week it had become operationally necessary to form 2 teams in the admin department to cope with the workload on Saturdays. Mark also explained that all the staff in the admin department had been involved in a discussion in regard to this issue and that all the staff members had agreed that it was a necessity in the department and had all agreed to the change in the amount of Saturdays now to be worked by them, every alternate Saturday.

Mark then asked Drinie if she would be willing to work every alternate Saturday with one of the admin teams so as to spread the workload and enable there to be a fair balance of the work apportioned to each of the team. Drinie replied categorically that she would not be able to work every second Saturday, as she was not

originally employed to work on Saturdays when she joined the company in August 1984. She maintained that she agreed with Merrick Coetzee's request to work every third Saturday when he requested that approximately 2 years ago but was in no way willing to work every second Saturday.

Mark then asked her what exactly her reasons for this decision were. She replied that firstly she wasn't paid enough to work every second Saturday and it wasn't in her contract to work alternate Saturdays. Secondly she said it was a problem because her husband had to bring her to work which he does every morning on the Saturday mornings which he does every morning but it was nuisance for him as they own a smallholding outside PE which they like to visit on the weekends but if they had to wait for her to finish work they would get to the smallholding late on the Saturday. Drinie then said that her work was always up to date and she did not see the necessity for her to have to come in to work to help in the department. Mark then asked Drinie if she was up to date with her work then surely it would be easy to assist on the Saturday morning so that the admin department as a whole would be up to

date with their work a lot quicker as she was employed to work in the admin department and to assist wherever necessary within the branch. Drinie then replied that if she came in on Saturdays it would be to do only her work as she had too much work to do and could not afford to help any one else with their work.

Mark then asked her once again if she would not reconsider her decision regarding working alternate Saturdays as it was an operational requirement and since the other people in the department had started working the alternate Saturdays they were finding it very beneficial and were finding that they were coping better with the workload and were more up to date with their work.

Drinie replied absolutely not and that she was only prepared to work every third Saturday as she had originally agreed to with Merrick Coetzee.

Mark then thanked her for attending the discussion and said he would get back to her later.

Mark Manley”

[9] By May 1998 the rest of the employees in the administration department had long been working every second Saturday. The employee was still in the appellant's employ but was still refusing to work every second Saturday. On the 22nd May 1998 Mr Manley had another meeting with the employee to discuss the problem and to try and persuade her to agree to work every second Saturday or to find a way of avoiding her retrenchment to make way for somebody who would be prepared to work every second Saturday. The discussion that took place at that meeting is captured in a minute dated 22 May 1998. It is appropriate to quote that minute from the fourth paragraph thereof. From that paragraph it reads thus:-

“Drinie replied that she did not see the need to work every second Saturday as her work did not require it and that when she was employed she was employed as five days a week. She said that Mark has no right to just change everyone's hours as he feels and that she knows her rights as her husband is on the Motor Industrial Council and that she knows that is it unfair practice to just change a persons working hours.

Mark stressed that he was not requesting her to work on Saturdays because he wanted it,

but that it had become an operational necessity for all to work these days. He explained that after previous discussions between himself, Drinie and Karen, he has started looking for alternative solutions, which he wishes to discuss with Drinie for her to consider and also give her the opportunity to provide alternative solutions.

The first option is alternative employment in the packhouse, including a possible demotion. Drinie became very upset at this stage and asked Mark if he was trying to get rid of her. Mark replied that he is trying his best to avoid looking at retrenchment as an alternative and are therefore looking at any other options open to her. Drinie mentioned the switchboard position, saying she would be able to handle that, but immediately realised that the switchboard position requires working every Saturday. All present agreed that there are no other positions in the packhouse not working at least every alternate Saturday.

The second option was alternative employment options i.e. part-time or casual positions. Having looked at the current operational plans it was clear that there are no vacancies for

casuals or part-time employment. Drinie was adamant that she was not open to this alternative.

The third option was a transfer to another branch. Drinie responded that she is a married woman and was not open to transfers to other branches. Mark asked Drinie if she was aware of any other solutions. Drinie replied that she thinks Freshmark is treating her unfairly as she was taken on to work 5 days a week and was being paid the lowest salary in the administration department. Karen asked her how she knew she was being paid the lowest, as this was confidential information and she replied she knew many things and that the walls had ears. Mark explained that her salary was not the issue as we were not negotiating salaries. Drinie said that she worked very hard, harder than any other person did in admin and regularly had to work late or take work home to get her work done. She mentioned that her husband had asked her whether she was married to Freshmark or him.

Karen asked if this was not an indication that she needed to work alternative Saturdays to manage her work and she had before

complained that she could not get to her work because of the queries for balances from the debtors. She replied that she works overtime as she had too much work as she is doing the accountant's work. When asked to explain, she said that the job she was given the previous week to do was the accountant's job and not hers. Karen explained that the work she was given was Drinie's as it was analyzing transactions and payments for debtors, which is Drinie's department.

Drinie replied that her work was becoming too much and that she was not being paid enough for the work she is putting in. Karen replied that the reason she had to work at home was that she is not working fast enough and is making errors in her work. Drinie denied that she works slow and asked why Karen had not brought this up before. Karen said that she was monitoring Drinie's work and had not yet had a formal discussion with her regarding her work, but will deal with it. Mark then said that the issue under discussion was not work performance but the operational issue of working alternative Saturdays and that everyone must please deal with this issue.

Mark asked Drinie why she is now saying she cannot manage her work whereas in the beginning she said that she did not need to work alternative Saturdays, as her work did not require it. Drinie said that Freshmark is not paying her enough to work every second Saturday and if they would look at her salary and adjust it, she would consider working every second Saturday. Mark asked her if she is stating this as a solution to the problem and she confirmed this. She said that if she were being paid for the extra hours she would work it.

Mark told her that the decision lies with Freshmark Head Office and that he will put the option to them. He asked Drinie if there were any other alternatives she had to the problem, to which she replied no. He asked her if she wanted some time to think of any other solutions and she said that she wanted to discuss the issue with her husband and would speak to him the next morning.

Mark then said that the meeting would be adjourned till the Monday morning at 9 o' clock when Drinie can propose alternative solutions to the problem. He said that he will wait till

Monday morning for all the proposals or alternatives before putting the salary issue to Head Office.”

[10] On the 25th May 1998 the employee wrote a letter to Mr Manley in which she indicated that her contract was based on a five day week. She said that at one stage her conditions of employment had been unilaterally changed to require her to work every fifth Saturday but later this was changed to be every third Saturday but now she was being required to work every second Saturday. She complained that she was being treated unfairly. She once again said that she was not being paid enough and her salary was not comparable to the salaries of the other ladies in the department.

[11] Mr Manley held another meeting with the employee on the 28th May. At this meeting the employee indicated that she was only willing to do her own work and nobody else's. Mr Manley explained that an employee was not employed to do a specific job but was employed for the branch as a whole and had to help out where necessary. Mr Manley asked the employee if there were any available alternative employment positions/capacities to consider to avoid retrenchment and the employee replied that there were none.

[12] At some stage during the meeting the employee stated that she was not prepared to work extra hours at her then salary. Mr Manley also restated at this meeting that he had

previously discussed with the employee the possibility of her being transferred to another branch but that she had said that she was a married woman and was not open to such an option. The employee confirmed this as correct and added that she was not prepared to give up her husband or child in order to take a transfer to another region. Mr Manley stated that the only alternative that the employee had given was that of the adjustment of her salary. He said that it seemed that the main reason why she was refusing to work every second Saturday was related to her salary. At this stage the employee said that, if her complaint about her salary was addressed and she was happy with it, she would work every second Saturday. She said that she was taking work home in order to cope with her work and was feeling that she was not paid enough. Mr Manley told her that whether or not her salary could be adjusted was a matter for the decision of the head office. He undertook to put the suggestion to the head office. On the 29th May a letter was sent to the appellant by the union. In the letter the union stated that the employee was **“not in a position to work every second Saturday”** and asked the appellant from then onwards to communicate with the union on the matter. The union sent another letter on the 6th June in which it alleged, among other things, that it seemed that a lot of pressure was being exerted on the employee to agree to work every second Saturday.

[13] On the 8th June a meeting was held between the appellant

and the union. At that meeting Mr Manley, having obtained the necessary mandate from the appellant's head office, made an offer that, if the employee agreed to work every second Saturday, she would be compensated either by a payment for the additional hours worked at normal hourly rate or she would be given time off during the week in lieu of additional payment. Towards the end of the meeting the employee stated that she would consider working on Saturdays if she was compensated and could get a full day off per month. Mr Manley then undertook to consult the appellant's head office on this but stated that he did not foresee a problem.

[14] On the 9th June another meeting was held between the employee and Mr Manley and others. The discussion that took place at that meeting is summarised in a minute of the 9th May. The minute reads thus:-

“Mark opened the meeting by informing Drinie that it was acceptable to the company for her to get the one day off per month if she worked every alternative Saturday and that the company would pay her at her hourly rate for the extra 4 hours worked every month. However if she would like to rather have her hours reduced in the week to make up the extra 4 hours that she will be working on the alternative Saturdays then the company could also accommodate her if she so wished. Drinie replied no, she wanted to be paid for the extra

hours on the Saturday. Mark replied that that would be arranged.

Drinie then asked what would her hours be. Mark replied that from Monday to Friday she would work from 08h00 to 17h00 with a 1-hour lunch break as per normal. Every alternative Saturday would be from 08h00 to 12h00. Drinie then said this would be acceptable. Mark stated that he was glad that this whole issue had finally been resolved and now we could get on with business as per usual."

[15] In terms of the meetings of the 8th and the 9th June it can, therefore, be said that an agreement was reached between the appellant and the employee that the employee would work four hours every second Saturday (i.e. 08h00 - 12h00) and she would be compensated at normal hourly rate for those hours and would, in addition, be given one full day off per month. Subsequently, the employee reneged on the agreement. In a letter dated the 9th June addressed to the appellant by the union, the union stated that the employee was not prepared to work every second Saturday and made a proposal for a severance package for the employee. On the same day the appellant responded and, after rejecting the contents of the union's letter and stating that the matter had been exhausted and they thought agreement had been reached, gave notice that the employee would be dismissed for operational

requirements on the 15th June 1998. The appellant stated that until close of business on that day it was still open to the employee to make representations to the appellant that would accord with the appellant's operational requirements which would result in the notice of termination being withdrawn.

[16] The employee's services were then terminated on the 15th June 1998 and no severance pay was paid to her by the appellant. The appellant's refusal to pay the employee severance pay was based on the contention that she had unreasonably refused an offer of alternative employment and that, in terms of sec 196(3) of the Labour Relations Act, 1995 (as it stood prior to such provisions being transferred to the Basic Conditions of Employment Act, 1998 ("**the BCEA**") an unreasonable refusal of alternative employment by an employee absolved the appellant from its obligation to pay severance pay. The union and the employee maintained that the employee was entitled to payment of severance pay. This gave rise to a dispute. The dispute was then referred to arbitration under the auspices of the CCMA.

The arbitration

[17] The first question that the commissioner had to decide in arbitrating the dispute was whether the appellant had offered the employee "**alternative employment**" within the meaning of that phrase in sec 196(3) when it offered the employee continued employment in the same position but with one

change to her terms or conditions of employment. Sec 196(3) read thus:-

“An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (1)”.

[18] The commissioner dealt in three paragraphs with the question of whether the appellant offered the employee alternative employment. Those paragraphs read thus:-

“ The difficulty for (sic) Mr Pitman’s argument is that the language of section 196(3) is clear. It refers to an offer of alternative employment. By no stretch of the imagination can it be said in the present matter that the [appellant] offered alternative employment to the [employee]. It offered the [employee] the position she occupied with a different condition, namely, that she had to work every alternative Saturday.

This change in conditions is the operational reason for the termination of her services. It cannot also be an alternative offer as envisaged in section 196(3).

It does entail that an employer cannot escape the operation of section 196(1) when employees refuse to accept amended conditions of service and are

dismissed for operational reasons. The employer can only escape the effect of this section if a different position is offered and the employee unreasonably refuses to accept such an offer. This was not the case in the present matter and severance pay must be paid".

A reading of these three paragraphs reveals that the commissioner held that what the employee was offered did not constitute alternative employment. The reason he gives for this conclusion is that the employee was offered the same position that she was occupying but with a different condition, namely, that she work every alternate Saturday. He reasoned in the third of the paragraphs that an offer of **"alternative employment"** as envisaged in sec 196(3) entailed an offer of a **"different position"**. There is only one statement that the commissioner made in the award that seems to contain his reason for construing the phrase **"alternative employment"** in sec 196(3) as necessarily entailing a different position. That statement reads: **"This change in conditions is the operational reason for the termination of her services. It cannot also be an alternative offer as envisaged in section 196(3)".** I am not certain what the commissioner was trying to convey with this statement.

Proceedings in the Labour Court

[19] In the review application that was brought in the Labour Court, Landman J held not only that the commissioner's construction of the phrase **"alternative employment"** was justifiable but also that the commissioner was correct **"in saying that an offer cannot at the same time be the cause of a fair dismissal and the cause of an exemption or defence to an application for severance pay."** Towards the end of par 7 of his judgement Landman J had this to say in

regard to the phrase: **“alternative employment.”**: **“In evaluating what alternative employment means for the purposes of section 191(3) one would also have to examine, in the light of the third consideration, whether the refusal was unfair and from this I conclude that the alternative offer of employment must be one which is reasonable. See also the observations of Mlambo J in Sayles v Tartan Steel cc 1999 (20) ILJ 1290 (LC).”** The third consideration that Landman J referred to was the question whether the employee’s refusal of the offer was unreasonable. There is nothing in the observations made by Mlambo J in Sayles v Tartan Steel that is relevant to the meaning of the phrase **“alternative employment”**.

[20] I am unable to agree that in determining what the phrase **“alternative employment”** means for the purposes of sec 196(3) one would have to examine whether the employee’s refusal of the offer was unfair/unreasonable. I think Landman J probably meant unreasonable instead of unfair in this regard. Whether what an employer is offering an employee constitutes alternative employment within the meaning of that term in sec 196(3) and whether, if it does, and the employee rejects such offer, such rejection is unreasonable are totally different issues. If the offer does not constitute an offer of alternative employment as contemplated by sec 196(3), it does not matter whether the employee rejects the offer and whether he or she did so unreasonably. In such a case he or she would be entitled to payment of severance pay. If the offer does constitute an

offer of alternative employment as contemplated by sec 196(3), and the employee rejects the offer, whether or not he or she is entitled to payment of severance pay will depend on whether or not it can be said that his or her refusal or rejection of the offer of alternative employment was unreasonable. If it was reasonable, he is entitled to payment of severance pay. If it was unreasonable, he is not entitled to severance pay.

[21] I am unable to agree with the commissioner that an offer by an employer to an employee of the position he occupies but on different or on new terms or conditions of employment does not constitute an offer of alternative employment within the meaning of that phrase in sec 196(3). The employment which the employee had with the appellant was on certain terms and conditions. These included the condition that she work every third Saturday. She was then offered employment on the basis that most of the terms and conditions would be the same as her then existing terms and conditions but that there was to be a new condition. That was that she would work every second Saturday which was going to be from 08h00 to 12h00 for which she would be paid at her normal rate and she would be given one day off per month. In my judgement the phrase “**alternative employment**” may incorporate employment by the same employer in the same position but on terms and conditions of employment that differ either in some or in all respects with the terms and conditions of employment that applied to the employee before or at the time the offer was made.

[22] It is the employment that is required to be alternative and not the position. Where an employee who is employed on certain terms and conditions is offered employment on terms and conditions that overlap with those of his or her present employment by the same employer, that is still alternative employment. It is not necessary that there be no overlap at all in the terms and conditions of the existing contract of employment and the terms and conditions of the contract of employment that is offered. In **Public Carriers Association v Toll Road Concessionaries (Pty) Ltd & others 1990 (1) SA 925(A)** the court had occasion to consider the meaning of the phrase “**alternative road**” within the context of s 9(3) of the National Roads Act, 1971 (Act no 54 of 1971) (“**the Roads Act**”). Sec 9(3) precluded the National Transport Commission from declaring any portion of a national road under sec 9(1)(a) of the Roads Act as a toll road unless there was “**an alternative road**” to the toll road along which the same destination or destinations could be reached as that or those to which the route of the toll road leads. In that case one of the issues that arose was whether the fact that the non-toll road overlapped with the toll road - which meant that for some distance the people who wanted to use the non-toll road had to travel on the toll road - about 79 kilometres - but would bypass the toll gates where the toll had to be paid - rendered the non-toll road not to be an “**alternative road**” within the meaning of that phrase in sec 9(3). The Court held that that fact did not have the effect that the non - toll road was not an alternative

road. At 944 E-F the Court, through Smalberger JA, had the following to say:-

“... In the result the words ‘alternative road’ in s9(3) of the Act do not mean a road entirely separate and distinct from the declared toll road, but mean an alternative route which may be travelled without the need to pay toll to reach the same destination as the toll road, even though it traverses sections of the toll road. In the present case the designated alternative road satisfies the requirements of an alternative road **in s 9(3) notwithstanding the fact that it has 79 kilometres of roadway in common with the toll road.**”

It seems to me that it can equally be said in respect of the phrase “**alternative employment**” in sec 196(3) that it does not necessarily mean, as the commissioner seems to have thought, that there need not be any overlap between the terms and conditions of employment of the employee under the earlier contract and the terms and conditions of employment attached to the offer. There can be such an overlap and it may include the same position or it may be a different position.

[23] The commissioner seems to have read the word “position” into sec 196(3). That can be inferred from the fact that he held that an offer of “**alternative employment**” as envisaged by sec 196(3) necessarily meant an offer of a “**different position**”. Sec 196(3) does not refer to an “**alternative position**”. It refers to “**alternative employment**”.

[24] The purpose of sec 196(3) is to deny payment of severance pay to an employee who unreasonably rejects an offer of employment as an alternative to his or her dismissal for

operational requirements. The rationale behind the provision is that, whereas the right to severance pay conferred by sec 196(1) is predicated upon the fact that an employee loses employment due to no fault on his part and, should therefore, be paid some compensation therefor, an employee who unreasonably refuses an offer of alternative employment is not without fault. He has himself to blame if he subsequently finds himself without employment and, therefore, does not deserve to be treated on the same basis as the employee who finds himself without employment due to no fault on his part. Accordingly, he should not be paid severance pay. Where the employer offers to continue to employ the employee - whether in the same position but on different terms or on the same terms but in a different position or in the same position and on the same terms but in a different place, that is still alternative employment. It is an offer of an alternative contract of employment.

[25] An employer enters into a certain contract of employment with an employee on certain terms and conditions because he or his business or undertaking requires an employee who is prepared to work in accordance with those terms and conditions in order to meet the operational requirements of the business or undertaking. When that contract of employment as a whole or some of its terms and conditions can no longer serve or no longer suit the operational requirements of the business, that is a valid reason for the employer to terminate that contract of employment. However, if the employer has need to employ an employee on a contract of employment that is different either as a whole or only in some respects from the one that he has terminated, or wishes to terminate the employer must offer the new contract to the employee whose contract of employment has been terminated or is under threat of termination if that employee is suitable for employment on

the terms of the new contract of employment. If the employee accepts the offer of a new contract of employment, he avoids being out of employment but this does not mean that his previous contract of employment remains. It does not. It is cancelled or it is amended. In either case the employment of the employee by the employer is subsequently governed by the terms and conditions of employment that are different from the terms and conditions which previously governed his employment. From this it is clear that the position is that the reason why in this case the contract of employment of the employee was terminated is that it was no longer suitable for the operational requirements of the employer, but, the reason why the employee was not employed on the new terms and conditions, and, therefore, why she became unemployed is that she rejected the appellant's offer of employment on terms and conditions of employment that, save for one new condition, were the same as the terms and conditions of employment that governed her employment.

[26] As the commissioner has failed to give any statutory basis for his reading "**alternative position**" into section 196(3), when the statute refers to "**alternative employment**", I am left with absolutely no idea of the basis on which that construction can possibly be said to be justifiable. Instead I am of the view that the construction, and, therefore, the conclusion, based thereon is wholly unjustifiable. The commissioner's construction leads to results that completely undermine the purpose of sec 196(3).

[27] The next issue for consideration is the question whether the employee's refusal of the appellant's alternative employment was unreasonable. The commissioner did not consider this question because it became unnecessary for him to do so once he had concluded that the appellant's offer was not an offer of alternative employment. In the first judgement Landman J also expressed the prima facie view that the employee's offer was not unreasonable. In the second judgement he indicated that, after Counsel had pointed out various passages in the evidence which indicated that the employee had rejected the offer on monetary grounds, he found that, if the appellant's offer was an offer of alternative employment, her refusal of the offer was unreasonable.

[28] There is no doubt that the appellant had a valid reason for the appellant to work every second Saturday like all the other employees in the administration department in which she was working. It is common cause that all the other employees in the department accepted that there were good reasons for the appellant to require them to work every second Saturday. It is also common cause that they all agreed to work every second Saturday. Further, the evidence given by Mr Manley that the change worked well and addressed the problem it was intended to address was not disputed.

[29] The one reason that was advanced by the employee in support of her rejection of the proposal to work every second Saturday was that her contract was for a five day week and to work every third Saturday. That was no reason at all to justify rejecting the proposal because it was precisely that contract that was no longer suitable for the appellant's operational requirements. Another reason relied upon by or on behalf of the employee in support of her rejection of the appellant's proposal was that on Saturdays she and her husband normally went to their smallholding and, if she agreed to the appellant's proposal, this would be inconvenient because the two had one car and her husband would have to wait for her to finish work at about midday before he could leave for the small holding. The employee did not explain why this would be a difficulty because she was already working every third Saturday and one can assume that on such Saturdays her husband had to wait for

her if they had to go to their smallholding. In any event the inconvenience that she complained that they would suffer is not sufficient to justify her rejection of the appellant's proposal.

[30] The last reason that was advanced - which was actually the main reason - was that she was not paid an adequate salary to justify her working every second Saturday. She said that she would be prepared to work every second Saturday if the money she was paid was right. Mr Manley referred this to the appellant's head office. The appellant ultimately offered to pay the employee at normal rate for the four hours it was requiring her to work every second Saturday and to give her one day off once per month as well. Mr Manley testified that the employee then accepted this offer. She even asked what her hours of work would be on every second Saturday. In her evidence the employee sought to deny that she accepted this. She said that she did not say that definitely she was agreeing to the proposal. She said that she had been put under tremendous pressure to agree.

[31] I think that on the probabilities the employee accepted the offer. A reading of Mr Manley's evidence seems to make this conclusion inevitable. The employee later changed her mind and reneged on the agreement. She had no acceptable reason for not proceeding on the basis of the agreement. Accordingly her rejection of the appellant's offer of alternative employment was unreasonable. However, even if the matter were to be decided on the basis that she did not accept the appellant's offer, this would not make any difference in the end because she offered no sound reason for not accepting the appellant's offer of alternative employment. Indeed, her rejection of the offer was, even on the basis of that version, unreasonable. Accordingly on either version the employee unreasonably refused the appellant's offer of alternative employment and this disentitled her to payment of severance pay.

[32] In the result the appeal must succeed. As the review application in the Court a quo and the appeal in this Court were not opposed, it is, in my view, fair that no order should be made as to costs.

[33] I make the following order:-

1. The appeal is upheld.

2. The decision of the Court a quo is set aside and replaced with the following order:-

“(a) The award issued by the Commissioner for Conciliation Mediation and Arbitration in this matter is hereby set aside and is replaced with the following award:

‘(i) the applicant is not entitled to severance pay and her claim is dismissed.”

ZONDO JP

I agree.

Nicholson JA

I agree.

Van Dijkhorst AJA

Appearances:

For the respondent:

No appearance

For the appellant:

Mr A Reddy (Heads of Argument)

having been drawn by Mr A. Franklin S.C.)
Instructed by: Perrott, Van Niekerk &
Woodhouse Inc

Date of hearing: 1 March 2002

Date of judgement: 11 December 2002