

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case No. JA5/04

In the matter between:

**ABSA INVESTMENT MANAGEMENT SERVICES Appellant
(PTY)LIMITED**

And
LISA JOY CROWHURST

Respondent

JUDGMENT

COMRIE AJA:

[1] The appellant company is known by the acronym AIMS. It is part of the Absa banking group of companies. From 1 May 2000 to 30 June 2001 the respondent, Ms Crowhurst, was employed by AIMS as Consultant: Marketing and Promotions. During June 2001 AIMS and Ms Crowhurst parted company in circumstances to which I shall come presently. She sued AIMS in the Labour Court. After a trial Ndlovu AJ held:

- (i) that Ms Crowhurst had been dismissed by AIMS;
- (ii) that the dismissal was procedurally unfair;
- iii) that she was entitled to compensation in an amount equivalent to six months' salary; and
- iv) that AIMS pay the costs.

AIMS appeals with leave granted by the court a quo.

[2] The primary issue at the trial was whether Ms Crowhurst was

dismissed or whether (to use a neutral expression) she left of her own accord. The background was a restructuring process undertaken by AIMS which, if implemented (as it in due course was), resulted in her position and several other positions becoming redundant. Shortly before 1 June 2001 she heard a rumour from her immediate superior, Mr Opperman, that she was to be retrenched. On the morning of Friday 1 June she attended a slide presentation given by Mr Harris, the managing director, when the proposed restructuring and its rationale were explained. One of the slides, headed “*As a consequence*”, indicated which “*new posts will be established*” and which “*posts are no longer required*”. Among the latter were Mr Opperman’s position (Head - Sales and Business Development) and Ms Crowhurst’s position (Consultant -Marketing and Promotions). Another slide, headed “*Governing Principles,*” stated inter alia:

“- Consultation with SASBO and affected employees
- Redundancies administered in accordance with ABSA Group official reassignment policies”

[3] A third slide, headed “*Process*”, set out a three week timetable ending on 22 June for implementing the restructure. It included the following: “*Consult with employees filling redundant positions.*” Ms Crowhurst’s position was thus clearly identified by the slides as being at least potentially redundant. According to the evidence of Ms Crowhurst and Mr Opperman, the tone of the slide presentation was fairly final; questions were not encouraged.

[4] A brief word about the Absa Group reassignment policy referred to

in the second slide mentioned above. In terms of this policy an employee within the group whose position became redundant should, if possible, not be retrenched. If alternative employment was not immediately available, the employee was expected to work out a period of three months, during which period attempts would be made to find another suitable position for him or her within the group. Only when that failed would retrenchment, as a last resort, take effect. Failure by an employee to participate actively in the process might entail loss of the corporate severance benefits. However, exceptions to the policy were permitted. According to Mrs Gayle Piek the decision whether or not to make an exception was that of “*line*” management. Ms Crowhurst’s line manager was Mr Johnson, an executive director (to whom Mr Opperman reported). On any construction of events Mr Johnson made an exception in Ms Crowhurst’s case. She was not required to work out the three month reassignment period, but was allowed to leave on 1 June 2001 which, it will be recalled, was the day of the slide show. How this came about is at the heart of the primary issue.

- [5] It was common cause that after the slide show individual affected employees, including Ms Crowhurst, were “**consulted**” by Mr Johnson and Mrs Piek (the human resource person). According to Ms Crowhurst’s evidence, in summary, the redundancy was presented to her as a *fait accompli*. She was told that an alternative position in the group did not appear to be immediately available. She was offered two alternatives: either (i) work out the month’s notice of June and then leave; or (ii) leave forthwith. She chose the second alternative because the financial terms attached thereto were more lucrative. She was adamant that the three month

reassignment period was neither mentioned nor offered to her. Given her financial circumstances, she would have grabbed the reassignment option had it been offered to her.

- [6] It was also common cause that Friday 1 June 2001 was Ms Crowhurst's last proper day at work and that she later received a letter dated 4 June 2001 headed: *Termination of Employment*.

The first paragraph read:

“With reference to our discussion of 01/06/2001 we wish to confirm that your present position with AIMS has become redundant. We therefore wish to advise you that your service with Absa Group will be terminated with effect from 30 June 2001 (last day of service).”

Ms Crowhurst stated that she later discovered that there were several jobs available within the group for which she would have qualified, including one being advertised at the time on the so-called “*green screens*”. Access to the green screens was limited, and the advertised position was only drawn to her attention by Mr Opperman after the closing date of 5 June. Mr Opperman confirmed the limited access and that he handed the advertisement to her on about 6 June. Ms Crowhurst claimed further that her duties were whittled down prior to 1 June. I will deal later with certain matters with which she was confronted in cross-examination.

- [7] Mr Opperman testified on Ms Crowhurst's side. He too gained the impression that the proposed restructuring was a *fait accompli*. He was offered the reassignment process, which he chose to accept. In due course he rejected an alternative position which he considered

to be a demotion. He was retrenched. Mr Opperman also stated that on the Friday preceding 1 June, Mr Johnson had indicated to him that he wished to get rid of Ms Crowhurst. He would consider the means over the weekend. On Monday, however, Mr Johnson told him not to worry as changes were coming in any event on Friday 1st (I observe, in passing, that the dates fit: on AIMS' case, investigation of a possible restructuring only commenced on 17 May). Mr Opperman also testified that according to reports made to him at the time by Ms Crowhurst and the other affected employees, it was evident that she was the only one who had not been offered reassignment, and that it appeared to him that she was being singled out.

- [8] For AIMS Mrs Piek was the only witness. In summary her evidence was that the slide presentation set forth proposals which were open for debate by way of consultation. Employees were not given 5 days written notice of the proposals, as ostensibly required by the ABSA group reassignment policy, because in her view that stage had not been reached (and in Ms Crowhurst's case never was reached). At Ms Crowhurst's individual consultation there was no practical discussion of the merits or otherwise of the proposed restructuring. This was because Ms Crowhurst, armed with a copy of s 189, arrived at the consultation with the settled view that she was to be retrenched. She was interested solely in the terms of her departure. Ms Crowhurst had short-circuited the consultation process. A change had later been made to the proposed restructuring at the instance of another employee, but this had not affected Mr Opperman or Ms Crowhurst.

- [9] Mrs Piek stated that three alternatives were put to Ms Crowhurst:
- (a) apply for another position within the Absa group (although no similar specialist position appeared to be then available in group marketing, which meant head office, not subsidiaries);
 - (b) go on the three month reassignment; or
 - (c) retrenchment.

She could not have offered Ms Crowhurst's option (i) to work out the month of June because its alleged terms were inconsistent with Absa policy, as will be explained later. Reassignment was put to all the other affected employees including Mr Opperman. Ms Crowhurst was not interested in this option. She wanted to leave and she wanted to know the attendant benefits. These were given to her to leave forthwith but calculated on a form, TS O2 as at the end of September, thus allowing for a three month reassignment process. There was no prior letter of retrenchment, as claimed by Ms Crowhurst; just the TS 02 completed at some time after 17 May. Mrs Piek agreed that she would not part with the document for the reason that it contained incorrect figures if Ms Crowhurst were to leave before the end of September. Ms Crowhurst insisted on retrenchment rather than reassignment and Mr Johnson, in the exercise of his line management discretion, consented thereto.

- [10] The termination of employment letter, dated 4 June 2001, was a pro forma letter used for departing employees. It was generated on Mrs Piek's instructions and she knew that it was the form to be used. The inappropriate language, especially the word "*terminated*", had been allowed to stand because of beneficial tax

implications for Ms Crowhurst. These implications had not been explained to Ms Crowhurst as, the witness in retrospect admitted, they should have been. The witness believed that staff had adequate access to the green screens (although the weight of evidence was against her on this point). Group marketing did not mean marketing positions in subsidiaries within the group. Mrs Piek had not checked the green screens herself to see if there was a position for Ms Crowhurst outside of head office. She was unaware of the advertised vacancy mentioned earlier. Mrs Piek furnished a reason, which I will examine later, for AIMS or the group not insisting that Ms Crowhurst go on reassignment.

[11] AIMS' case thus was that Ms Crowhurst, by electing option (c) – retrenchment-, voluntarily resigned; alternatively that there was a consensual termination of the employment contract not amounting to a dismissal. Alternatively, if there was technically a dismissal, it was not unfair. On Ms Crowhurst's case, on the other hand, she was offered only two options, both of which required her to leave. In argument on appeal it was accepted by Mr La Grange, counsel for AIMS, that if Ms Crowhurst's version were to prevail, then that would amount to a dismissal [see eg. *Unilong Freight Distributors(Pty)Ltd v Muller (1998) 19 ILJ 229 (SCA)*]; and that since, on that version, reassignment was not offered to her, the dismissal would be unfair. In such event the award of compensation was not challenged.

[12] In a case raising highly material disputes of fact, I was disappointed not to find in the judgment of the court a quo an assessment of the respective credibilities of the three witnesses,

both generally and on specific points. The court below appears to have decided the matter in Ms Crowhurst's favour on its perception of the probabilities. Thus the judgment highlighted: the apparently final tone of the slides to which I have referred earlier; Mrs Piek's failure to observe the 5 day written notice provision of Absa's own policy; the language of the letter of termination (the tax explanation was described as "*unconvincing*"); that Ms Crowhurst's version was in part supported by Mr Opperman; and the failure of Mr Johnson, who was available, to testify. The judgment contains no criticism of Ms Crowhurst's evidence, yet in my opinion she was open to criticism both as a witness and as a claimant. We should bear in mind that on the primary issue, namely whether or not Ms Crowhurst was dismissed, she bore the onus of proof. Section 192(1) of the Labour Relations Act 66 of 1995.

- [13] In defence of the trial Judge's approach counsel for AIMS referred us to cases such as *Body Corporate of Dumbarton Oaks v Faiga 1991 (1) SA 975 (SCA) at 979 – 80* and *National Employers' General Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E)*, a full bench decision, at 440. To these may be added *S v Kelly 1980 (3) SA 301 (A) at 308*; *Germani v Herf and Another 1975 (4) SA 887 (A) at 930*; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000(1)SA. 1 (CC) at para's 78-80*; *Minister van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA) at par 38*; and *Allie v Foodworld Stores Distribution Centre (Pty)Ltd and Others 2004 (2) SA 433 (SCA) at para's 39-41*. These authorities emphasise the need for a civil case to be decided on the probabilities and caution

strongly against attaching undue weight to demeanour. However, credibility goes much further than demeanour; it involves an assessment of how the witness fares, especially under cross-examination, and in the light of the probabilities pertaining to the particular dispute. That the assessment is a highly skilled task appears from the illuminating Oliver Schreiner Memorial Lecture delivered by Nicholas AJA: *Credibility of Witnesses 1985 SA Law Journal 32*. It is for this reason among others that courts of appeal set great store by a trial court's findings of fact which, subject to well known limitations, are presumed to be correct. A trial court, it has often been said, has the advantage of seeing and hearing the witnesses, and of being steeped in the atmosphere of the trial. This does not mean that an appellant's right of appeal on fact should be rendered illusory, as the cases cited above attest. See too: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003(1)SA 11 (SCA)*; *Santam v Biddulph 2004 (5) SA 586 (SCA)*.

- [14] Counsel's reason for supporting the approach adopted by Ndlovu AJ was to counter the failure of AIMS to call Mr Johnson to the witness stand. That was indeed a factor which weighed with the learned Judge below. Counsel argued that the matter had to be decided in accordance with the probabilities; that the probabilities here were settled; and that therefore there was no point in calling Mr Johnson to re-enforce the probabilities. The first and basic flaw in this argument is that the presence or absence of corroboration is in itself usually an element of creditability. Two witnesses are sometimes better than one, although not always. Secondly, in this instance I am not of the view that the probabilities can be described

as settled. Thirdly, it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support – and may even damage – that party’s case. Compare Zeffertt et al : *SA Law of Evidence* (5 ed) at 128-130.

[15] In the absence for the most part of express credibility findings, we must on appeal do the best we can on the material available to us. A perusal of the transcript indicates that all three witnesses gave their evidence tolerably well, notwithstanding difficulties that were canvassed with Ms Crowhurst and Mrs Piek. Mr Opperman was not confronted with real difficulties, although his evidence was challenged in cross-examination. I turn to Ms Crowhurst in more detail. She was, by her own admission, “*terrible with dates*”, a fault that was demonstrated more than once. She initially claimed that Mrs Piek brought with her to the individual meeting of 1 June, a letter of termination dated roughly one month earlier. It contained figures more generous than the amounts eventually paid to her. Ms Crowhurst was eventually forced to concede that the document may well have been dated much later. This lent credence to Mrs Piek’s evidence that it was not a draft letter of termination, but a TS02 printout (post 17 May) of a calculation of benefits on the assumption that Ms Crowhurst underwent the reassignment procedure for three months. This in turn lent weight to Mrs Piek’s intention to offer reassignment to Ms Crowhurst, just as it was offered to all the other affected employees.

[16] We should not lose sight of the fact that Ms Crowhurst was under considerable emotional strain on 1 June, so much so that she

visited the doctor. She was expecting to be retrenched and as the events of the day unfolded, her fears were in her own mind confirmed. In the absence of an appropriate finding by the trial court, I would not go so far as to hold that Ms Crowhurst lied about the document in question. But that Mrs Piek's evidence on this point is to be preferred at least reflects adversely upon the reliability of Ms Crowhurst's recollection.

- [17] The next criticism of Ms Crowhurst relates to option (i) that she stated was offered to her on 1 June. This option, according to her, was that she work out the notice month of June and receive two weeks' severance pay. Contrast this with option (ii): that she leave immediately, be paid for June, and receive two months' severance pay. Ms Crowhurst was hard put to explain why option (i) would have been offered to her. It was not contemplated by Absa policies, and made no apparent commercial sense when contrasted with option (ii). The best that she could come up with, when pressed, was expediency and the saving on office space (and thus expense). She pointed to the fact that other employees had used her office from 4 June. But then, why not, since she had vacated it? Whatever else may have been discussed, it appears most unlikely that Mrs Piek would have offered option (i) in the terms stated by Ms Crowhurst. It may be that Ms Crowhurst misunderstood the option, that she was side-tracked by her incorrect perception of s 189. It may be that Ms Crowhurst fabricated this option, although the trial court did not so find. While I hold that Ms Crowhurst's evidence about option (i) cannot be accepted, it does not follow that she was offered reassignment. On the contrary, her almost contemporary report to Mr Opperman was that she had only been offered

retrenchment, which distinguished her position in Mr Opperman's mind from the other affected employees.

[18] The third criticism of Ms Crowhurst arises from the case pleaded in her statement of claim and from an affidavit that she made in support of an application for condonation. Paragraphs 10 to 12 of the statement of claim appear to allege that the first she heard of her redundancy was on receipt of the letter of termination dated 4 June. A similar sentiment is exposed at par. 22 of the affidavit. Something must have gone wrong between Ms Crowhurst and her attorney. In the first place, the first sentence of the letter refers to "*our discussion of 01/06/2001.*" Second, everybody knew that she had attended the two meetings on 1 June, and she even reported to Mr Opperman on what had transpired at her individual meeting. Third, Ms Crowhurst's evidence in chief dealt with the two meetings and her role therein; it is not as though she tried to hide the meetings or pretend they did not take place. In the circumstances I do not regard the criticism as one of the substance.

[19] Notwithstanding the first two criticisms, there are a number of probabilities and other features of the evidence that favour Ms Crowhurst's version that she was not offered, and therefore did not reject, reassignment. Her evidence on this point both in chief and in cross-examination reads most persuasively. Given her financial and personal circumstances, reassignment was obviously the most favourable option. She needed a job, preferably an Absa job with advantageous rates of interest on loans. Reassignment would have meant another three months employment with Absa and the prospect of finding an alternative position in a large organisation

during that period. It seems unlikely that she suffered a rush of blood to the head or was overcome by the fear that she would forfeit the severance benefits (for failure to participate actively in the reassignment process). There is good reason to believe that she would have taken reassignment had it been offered to her.

[20] An alternative was suggested by AIMS. It was that Ms Crowhurst was expecting to be retrenched; that she was anxious to lay her hands on the “*capital*” represented by the severance payout; and that she feared losing or forfeiting the severance payment in the reassignment process. Hence, on AIMS’ version, Ms Crowhurst’s reluctance or refusal to consider reassignment, not her decision to opt unequivocally for retrenchment and severance pay. Well, this is a plausible alternative and falls to be weighed with all the other considerations including those still to be mentioned.

[21] According to Absa’s stated policy, termination (i.e. retrenchment) was the course of “absolutely final resort”. That being so, it is difficult to understand why Mrs Piek (and Mr Johnson) did not insist that Ms Crowhurst go on reassignment. Mrs Piek’s reasons were not impressive and unfortunately Mr Johnson (who on AIMS’ version took the decision) did not testify. A possible explanation, to which I will revert, is that Mr Johnson wanted to get rid of Ms. Crowhurst anyway, and that for this reason he consented to retrenchment as soon as it was mentioned.

[22] The inappropriate language of the letter of termination is against AIMS, as its counsel conceded. Not a word about the voluntary or consensual nature of Ms Crowhurst’s departure. I appreciate that in

a large organisation such as the Absa group form letters are used. I would have thought, however, that in an unusual case like the present, it would not have been too much trouble for Mrs Piek to compose an appropriately worded letter that matched the underlying facts. Besides that, I am reluctant to believe that a relatively senior Absa employee would be party to misleading the *fiscus*. The tax implications, if they played a role, should have been explained to the employee; Mrs Piek admitted that they were not explained.

[23] Mrs Piek did not fare too well, in my opinion, on the question of alternative employment within the Absa group. She conveyed to Ms Crowhurst that there was not a suitable position in group marketing and not likely to be one. But group marketing meant head office and not the subsidiaries. I think this qualification was probably not explained to Ms Crowhurst. We know that there was a vacancy advertised on the green screens and that in the Mr Opperman's view Ms Crowhurst would have fitted the bill. But Mrs Piek had not checked the bulletin board and was unaware of the vacancy. She relied in evidence on easy staff access to the green screens, but that reliance proved to be misplaced.

[24] I come to the failure of Mr Johnson to testify. There are at least four reasons why I would have expected him to give evidence. I deal with them in turn. The first reason is that he could have corroborated the tone of the first meeting on 1 June. It will be recalled that the learned trial Judge commented on the apparent finality of some of the slides. Ms Crowhurst testified that the presentation had a final air to it, and she was corroborated by Mr

Opperman. Mrs Piek's evidence was that the plan proposed in the slides was open for consultation. Her evidence was not corroborated by Mr Johnson. I am inclined to accept that there was relatively little room for debate.

[25] The second reason relates to the individual meeting with Ms Crowhurst on 1 June. It is not simply a question of tone, but refers to what actually happened and what was said. In particular it refers to the crucial question whether reassignment was offered to Ms Crowhurst as an option. On this question at least, surely Mr Johnson should have testified. His failure to do so provokes acute surprise and in my view warrants the inference that he would not have supported Mrs Piek's version.

[26] The third reason is that Mr Johnson was the person to rebut Mr Opperman's evidence that he (Mr Johnson) wanted to fire Ms Crowhurst and that she was singled out for treatment different to that accorded to the other affected employees. This was an aspect with which Mrs Piek could not be expected adequately to cope unless she was party to Mr Johnson's previous wishes, which was not shown. It can be argued that once his wish was overtaken by the restructuring plan, then the wish became immaterial. In my experience that would not necessarily correspond with the corporate mentality. If Mr Johnson thought (as must be accepted on the uncontroverted evidence of Mr Opperman) that Ms Crowhurst had to go, then the restructuring presented a heaven-sent opportunity for Absa to be shot of her without the unpleasantness, and other implications, associated with another form of dismissal. I would like to have heard (or, on appeal, to have read) from his own

lips that this was not his motivation, and to have gauged the quality of his response when challenged in cross-examination. That opportunity was not afforded to the trial court or to us.

[27] The fourth reason is that Mr Johnson could have explained to the trial court why he agreed to Ms Crowhurst's request for retrenchment; why he agreed so readily; and why he did not insist on the Absa reassignment policy being followed or at least rule that everyone should ponder the request, and its repercussions, over the weekend. His failure to testify on this and the previous point strengthens the inference that he did not abandon the idea of sacking Ms Crowhurst when the restructuring move intervened, but persisted therein and took advantage of the development to carry it out. This in turn strengthens the inference arising from the second reason above that reassignment was not offered to Ms Crowhurst.

[28] Weighing all the consideration in the balance, it appears to me that the scale of probability comes down in favour of Ms Crowhurst. I accept: that she was unlikely to have brushed the option of reassignment aside, had it been offered to her; that she was treated differently to the other affected employees; that the reason or motive for that difference was furnished by Mr Opperman; and that Mr Johnson's testimonial silence speaks volumes. I accordingly accept that she was not offered reassignment as an option. Ms Crowhurst was expecting to be retrenched and she had a copy of s. 189 (whether or not she understood it properly). Her mind was directed to retrenchment and the associated benefits. When her redundancy was confirmed, I think it probable that she immediately raised the subject of retrenchment benefits. I do not

think the discussion reached the option of reassignment because that suited Mr Johnson's purposes; the events played into his hand. In an almost contemporaneous report to Mr Opperman, Ms Crowhurst did not understand that reassignment had been offered to her. I do not accept that Ms Crowhurst was offered her option i). I think rather that in the strain of the moment she misunderstood whatever was said to her, whether or not it amounted to an option. But she could not have misunderstood the reassignment option had it been properly put to her. Nor can I think of an adequate reason why she would have concealed that option from Mr Opperman.

[29] Accepting, as I do, that the only practical option put to Ms Crowhurst was retrenchment, and that the reassignment process was not offered to her (and thus not rejected by her), the conclusion is inescapable that she was dismissed. The failure to offer reassignment rendered such dismissal unfair. In that event the *quantum* of the award is not challenged.

[30] The appeal is dismissed with costs.

Comrie AJA

I agree.

Nicholson JA

I agree.

Mc Call AJA

Appearances:

For the appellant	:	Adv W.G. Le Grange
Instructed by	:	Hofmeyr Herbststein & Gihwala Inc
For the respondent	:	Adv D.J. Vetten
Instructed by	:	Leppan Beech Attorneys
Date of hearing	:	1 September 2005
Date of judgment	:	11 November 2005