

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

Case No. : JA 17/04

In the matter between:

PRIDE MILLING COMPANY (PTY) LTD

Appellant

and

KAREN VELTHUIS

Respondent

JUDGMENT

H.M. MUSI, AJA

INTRODUCTION:

[1] This is an appeal against a judgment of the Labour Court delivered on 6 October 2003 in terms of which Landman J, found that the dismissal of the respondent (the applicant in the court *a quo*) by the appellant (the respondent in the court *a quo*) was unfair and granted an order in favour of the respondent for compensation in the amount of R182 595,00 plus costs of suit. The appeal is with the leave of this Court.

Before considering the issues raised in the appeal, it is necessary to set out the factual background to the dispute.

FACTUAL BACKGROUND:

[2] The appellant (hereinafter referred to as “the company”) is a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business in Centurion, Pretoria. The company’s core business is the manufacturing, marketing, sale and supply of maize products. On 2 August 2001 the company took into its employ Ms Karen Velthuis (“the respondent”). Her job title is given as Spar Channel Manager which entailed, in particular, the servicing of two Spar retail outlets in the Gauteng region. She had sales representatives under her control, who did the actual selling of the company’s products. She had been recruited specifically because of her previous connection with the Spar retailers.

[3] The respondent initially reported to the General Manager of the company’s mill at Nigel, Mr Chris Schreuder

(“Schreuder”), whose assistant was Mr Marx (“Marx”), the respondent’s immediate superior. During January 2002 the respondent was called to meetings with these two gentlemen. She first met Marx on 28 January 2002 and subsequently Schreuder on 30 January 2002. In these meetings she was informed of the changes in the reporting lines, that she was no longer to report to the Nigel mill but rather to Mr. Nico van der Merwe, the Sales and Marketing Director of the company who was based at the head office in Centurion.

- [4] In the meantime, the company had interviewed Ms Marie Greeff and on 4 February 2002 she was appointed to the position of National Marketing Manager. Soon thereafter the company issued a letter dated 8 February 2002 which served as a notice in terms of section 189(3) of the Labour Relations Act No. 66 of 1995 (“the Act”), which initiated a process of consultation at the end of which the respondent’s position was declared redundant, which in turn led to her retrenchment on 30 April 2002.

- [5] The notice in terms of section 189 reads as follows in part:

“Further to your discussion with Mr Marx on the 28/01/2002 and with C Schreuder on the 29/01/2002 the company hereby gives notice in considering changes to the current work methods and utilization of staff at Pride Milling, which might affect your position.

Management thus intends to proceed with the process of consultation with yourselves and other role players about matters raised hereunder.

1. THE REASON FOR THE PROPOSED
RESTRUCTURING

Due to changes in the current market conditions and the emphasis the company is placing on marketing as an operational mechanism to increase its market share the company has been forced into a situation to investigate alternative, more effective and more efficient business methods in line with this strategic repositioning.

It was for that reason that the company appointed a Trade Marketing Manager with the responsibility to expand the function into the various elements of sales and marketing. Subsequent to this it has become evident that we need to make further rationalizations to further enhance the efficiencies in the sales and marketing department.

As part of these rationalizations we propose to incorporate the Channel Manager – Spar position into the Trade Marketing Manager's position. This proposed rationalization will affect your current position and the purpose of this letter is to inform you of these changes and the fact that your position could become redundant should the changes be implemented and to furthermore enter into consultations with you regarding these changes and the issues mentioned below.”

- [6] Paragraph 2 of the notice deals with alternatives to dismissal and lists the options available in this regard. Paragraph 3 deals with the number of positions to be affected and states that only one position in the marketing section (that of the respondent) would be affected. Paragraphs 4, 5 and 6 deal respectively with severance pay, future employment and the time schedules. The latter paragraph states:

“It is envisaged that the implementation of a new structure will be completed by the end of February 2002. It is therefore of the utmost importance that the Company and the respective role players continue with a process of consultation as soon as possible.”

- [7] It is convenient at this stage to refer to the evidence regarding the meetings that the respondent had with Messrs. Marx and Schreuder as reflected in the opening paragraph of the notice. Marx testified that he had called the respondent to his office on 28 January 2002 to inform her that she would no longer be reporting to him at the Nigel Mill but rather to Mr. Nico van der Merwe (Van der Merwe) at head office. He said that this change in the reporting lines not only affected the respondent but also other managers who had been reporting directly to him. In her evidence, the respondent said that subsequent to this meeting Marx phoned and informed her that she was going to lose her Spar channel but that her salary would not be affected and that she should contact Schreuder for further details. Marx denied this under cross-examination and maintained that the only restructuring that he discussed with the respondent related to the change in the reporting lines. He said that he had not known the details of how this would work and had told the respondent to see Van der Merwe in this regard.
- [8] Following the above meeting, the respondent went to see Schreuder on 30 January 2002 (there was some confusion

as to the correct date, whether it was the 29th or 30th). The respondent testified that she had referred Schreuder to an organogram of the company and inquired from Schreuder where she fitted, presumably in view of what Marx had allegedly told her telephonically. She said that Schreuder would not give her a direct answer and instead referred her to Van der Merwe. In his evidence, Schreuder did not dispute this, but insisted that only the reporting structure had changed at that stage and that is what he had communicated to the respondent. He said that how the system would work, he did not know and that is why he referred the respondent to Van der Merwe.

- [9] It was common cause that the respondent was not in a position to consult on the 8th February 2002 as she was taken by surprise by the contents of the notice and had become very emotional. Van der Merwe simply went through the letter with her in the presence of Schreuder. Another meeting was then scheduled for the 14th February 2002. On the eve of this meeting the respondent addressed a letter to the appellant. This letter reads in part:

"I hereby place on record the following:-

1. Notice regarding retrenchment was only provided to myself and no other employees of the company. As only one employee is to be affected, it is clear that your decision has already been made that I am the person to be retrenched. Therefore any discussions in this regard would be worthless due to your predecision in this matter.
2. As another person has already been employed on 4 February 2002 to take over my position, it is clear that there is no financial necessity leading up to the proposed retrenchments.
3. In my opinion you are attempting to abuse the retrenchment process in order to remove me from your company where no legal reason exists for my dismissal.
4. The entire process initiated by yourselves is both substantively and procedurally unfair, and I hereby note my objection to your letter of 8 February 2002.02.13."

[10] Nonetheless the meeting did take place on the 14th as scheduled. In his evidence in chief, Van der Merwe was not sure whether any proposals were discussed, but under cross-examination he conceded that the respondent had made one proposal. It was that instead of incorporating her Spar channel into Marie Greeff's portfolio, Marie Greeff should be given the Massmart channel, so that she could retain her position. Massmart is apparently a bulk supplier of goods that was based in Durban. The person handling this channel would also handle the business relating to other bulk suppliers like Macro, Browns and Metro Cash and Carry under the overall supervision of Mr Hennie van Rensburg who was based in Pietermaritzburg. On the versions of both parties, the Massmart proposal was the only one discussed at this meeting. Van der Merwe turned it down and said that someone had already been interviewed for that position and was due to start in due course. The subsequent evidence reveals that the person was Mr Gert de Bruin and that he took up the position on the 1st March 2002.

[11] Subsequent to the above meeting, the appellant addressed a letter to the respondent in response to the letter that the

respondent had addressed to it on 13 February 2002. This letter reads in part:

“Although we note the contents thereof we wish to clarify the following matters:

1. your notice is headed “Notice of Retrenchment”. This is incorrect as our notice clearly states that it is a notification of a proposed restructure and not of retrenchment.
2. as the proposed restructure relates to your department we have an obligation to inform you of such proposed changes that could affected (sic) your position. Should anybody else be affected by this restructure, after we have engaged into consultation with yourself, such employee/employees will be informed likewise.
3. we deny the fact that a decision has already been taken regarding the redundancy of your position and possible retrenchments.
4. we acknowledge that a new person has been appointed as Marketing Manager. On the question whether or not there is a financial necessity for the proposed restructure

it will be up to the Company to substantiate such reason during the consultation process;”

The appellant goes on to deny that they were abusing the retrenchment process or that they were acting unfairly. The letter concludes as follows:

“the company again wishes to stress that it is willing to consult on the issues raised in our letter dated 8th February 2002 and to actively engage you in finding alternatives;”

The appellant then proposed that further consultations be held on 20 February 2002. This date was, however, subsequently changed at the instance of Van der Merwe and a new date of 25 February 2002 was fixed.

- [12] On the 25th February 2002 the respondent brought her attorney along to the consultation meeting. However, Van der Merwe, having sought legal advice, refused to allow the attorney to attend the consultation. He suggested to the respondent that they, the two of them, i.e continue with the consultation but the respondent was adamant that she would not consult without her attorney. The meeting reached a deadlock.

[13] Thereafter the respondent's attorney addressed a letter of 25 February 2002 to the appellant. In that letter he confirmed acting for the respondent and stated that the meeting of that day had been postponed at the instance of Van der Merwe in order for Van der Merwe to obtain legal advice. He also indicated that he would be awaiting proposals regarding new dates and times for another meeting. The attorney had earlier handed his business card to Van der Merwe so that the latter could contact him. The respondent's attorney did not testify. The respondent did not in her evidence show that Van der Merwe was meant to come back to her attorney about allowing the attorney in the consultation. In his evidence Mr Van der Merwe made it clear that, when they all parted, his stance was known and it was that he would not allow the respondent's attorney to be part of the consultation.

[14] On the 28th February 2002 the appellant addressed a letter to the respondent. The first three paragraphs of the letter read thus:

“We wish to place the following on record:

1. Following our letter dated 08/02/2002 we were under the impression that you would meet with myself regarding our notice to you about the intended restructure. Although a date had been proposed in the abovementioned letter you did not attend this meeting and requested it to be postponed to the 25/02/2002.
2. However, we were somewhat surprised that you chose to attend the meeting on the 25th of February with your lawyer. At no stage did you request the company nor inform the company hereof. We furthermore of the view that we have embarked on a process of consultation with you, which is an internal matter, and that the company cannot allow outside representation while the internal process has not yet been completed;
3. You have furthermore indicated that you were not willing to consult with the company without legal representation being present. For the abovementioned reasons we cannot allow this."

[15] In the letter the author proceeded to express the view that by insisting on legal representation, the respondent had frustrated the consultation process and that in the circumstances the appellant had been entitled to proceed

with its restructuring, in terms of which the respondent's position had become redundant. The appellant offered the respondent an alternative position of a sales representative and invited her to contact it to discuss this. It indicated that if the respondent was not interested in the position it would still be prepared to consider other alternative proposals, alternatively, the respondent should contact it to discuss a severance package.

- [16] The respondent's attorney responded by a letter dated 1 March 2002. In that letter he started off by complaining about the appellant communicating directly with his client when he had made it clear that all communications should be addressed to him. He stated that the meeting of 25 February 2002 had been postponed at the instance of Van der Merwe and denied that the respondent had frustrated the consultation process. He then emphatically stated the following:

"We advise that our client rejects your offer and confirm that she shall contact yourself regarding the severance package."

This means that the respondent was no longer interested in taking up the invitation to propose alternatives at that stage.

- [17] On the 11th March 2002 the respondent met with Van der Merwe. A full transcript of that meeting is part of the record. It was a heated meeting. The discussion at this meeting focussed on two alternative proposals which the respondent made. These were either that Marie Greeff be given the Massmart channel so that the respondent could retain her position or that the respondent be given the Massmart channel. Van der Merwe rejected these. Van der Merwe stated that someone had already been appointed to the Massmart channel. Accordingly, he said that he could not accept the proposal involving the Massmart channel. The respondent asked why a person had been appointed to the Massmart channel while consultations with her were still on and demanded that she person be fired. Van der Merwe's response was that the position needed a person with qualifications in finance, which the respondent did not have. He said that the person appointed, Gert de Bruin, had a B.Com degree. The respondent also queried why that channel was not incorporated into Marie Greeff's portfolio.

Van der Merwe's response was that Marie Greeff would have had to get training first. The respondent was not prepared to consider the alternative post of the sales representative. The meeting reached a deadlock. On the 18th March 2002 the respondent was given a notice of termination of her services.

THE FINDINGS OF THE COURT A QUO:

[18] In finding in favour of the respondent, the court *a quo* essentially dismissed the appellant's defence set out in paragraph 33.3 of its answer to the respondent's statement of case, which reads as follows:

“33.3 the respondent had offered an alternative position to the applicant without loss of benefit as an alternative to retrenchment, which position the applicant had refused to accept.”

The court *a quo* found that the appellant had failed to show that the alternative post of a sales representative that it had offered to the respondent entailed the respondent retaining the same salary and benefits that she had enjoyed as a

channel manager and consequently that the respondent acted reasonably in rejecting such offer. This is one leg of the judgment.

- [19] The court *a quo* also made a finding to the effect that the appellant had pre-determined the decision to restructure and thus render redundant the respondent's post. The court *a quo* expressed itself as follows:

"I am of the opinion that the company was entitle (sic) to restructure its business. To do this it was required to consult timeously. It did not do this. The probabilities point to it having decided on the restructuring of Ms Velthuis' post prior to the appointment of Ms Greeff."

and further

"It was the company's case that between 4 February (the date on which Ms Greeff was appointed) and 8 February (the date on which the section 189 letter was handed over) that it contemplated a restructuring which would involve the position of the channel manager for the Spar division in Gauteng. This is so improbable that it must be rejected rightout."(sic)

THE APPEAL:**The issues****(a) RESPONDENT'S REJECTION OF THE ALTERNATIVE POST:**

[20] It is now opportune to discuss these findings of the court *a quo* and I propose to deal first with the main ground on which the court *a quo* found for the respondent. It is common course that, when the appellant declared the respondent's position redundant by letter dated 28 February 2002, it offered the respondent an alternative position of a sales representative and invited her to consult on *inter alia* this aspect. In response, the respondent, through her attorney, rejected this offer outright and proposed instead to talk only about a severance pay. The evidence as a whole reveal that the respondent was not interested in even discussing this offer and her stance at the meeting with Van der Merwe on 11 March 2002 confirms this. She wanted either that the Massmart channel be incorporated into Marie Greeff's portfolio so that she could retain her position or that she herself be given the Massmart channel. Nothing more and nothing less.

[21] The following exchange between the respondent and Mr Van der Merwe at the meeting is instructive:

“NvdM So what are you saying, your letter came through say that you don’t accept the position that we are offering you.

KV And I don’t accept the retrenchment and I don’t accept the package – whatever package you are offering – the package is immaterial. In terms of the retrenchment or redundancy or whatever you want to call it – I don’t accept any of the above. Still waiting for you from the 25th when nobody was here with my attorney. I’m still waiting for you to consult back with me so that you could see my proposal. I had it written and you wouldn’t consult with us. In terms of the retrenchment, redundancy, dismissal whatever other than a disciplinary I am entitled to external representation – we were here to consult with you, we are still waiting for that consultation.”

Later the following appears in the record:

“NvdM Where do we go from here? You are not accepting the position that we are offering you, you are not accepting a retrenchment package.”

Once again later the respondent said:

“KV My proposal is that you give me back my job in terms of I have done nothing wrong.”

Finally the following exchange took place:

Nvdm “We’ve offered you the position, we’ve offered you the package. At the moment that’s the two options on the table.

KV Nico, do you honestly think that the repping position is going to help anyway. The relationships aren’t there so.”

That was the last mention of the position of a sales representative in the entire discussions.

[22] It is clear that the question of what the post entailed never arose precisely because the respondent was not interested in discussing it and her attitude perfectly accorded with what

her attorney had communicated to the respondent by way of the letter dated 1 March 2002. The last mentioned quotation of the exchange between Van der Merwe and the respondent in the preceding paragraph reveals that the respondent said that she did not think that she could take the position because “the relationships aren’t there” anymore. In my view, the appellant could not be expected to give the details of the offer under those circumstances. I do not think that there was a proper basis for the Court a quo to reject Van der Merwe’s evidence that the respondent would have kept her salary if she accepted the offer of the position of a sales representative.

[23] At any rate, it is not even known for sure that the respondent would have accepted the offer had the full details thereof been disclosed. Her evidence on this aspect is interesting. In her evidence in chief she was asked whether she would have accepted the position of a sales representative if it was to be on the same salary level. Her response was as follows:

Q. "If the company had offered you a sales representative position on the same salary level, would you have accepted it?

A. --- In light of the fact that I am a single parent, I probably would have."

(my underlining.)

When she was asked under cross-examination why she had rejected the offer when it was made on 28 February 2002, she replied that nothing had been offered. She would not respond when she was referred to the relevant letter. When it was pointed out to her that the letter from her attorney made it clear that she was not interested in the position, she replied that she had acted on emotions when instructing her attorney to reject the offer. Indeed, the record reveals her to have been very emotional and confrontational and that partly accounts for the failure of the consultation process, on this aspect.

[24] For these reasons I do not agree with the finding of the court *a quo* that the respondent was justified in rejecting the offer of an alternative post.

(b) **WAS THE DECISION TO RETRENCH PRE-DETERMINED:**

(i) The cases of the respective parties:

[25] I now turn to consider the question of whether the appellant had already taken a decision to restructure and thus render the respondent's position redundant when it commenced with the consultation process. This was in fact the thrust of the respondent's case. Throughout the entire trial the respondent maintained that her retrenchment had been pre-determined. From the first day the respondent adopted the attitude that the consultation process would be a futile exercise because the appellant had already made up its mind. The extensive cross-examination of Van der Merwe, the lengthy examination in chief of the respondent and her rather unusually lengthy re-examination were all aimed at proving this. In his heads of argument and oral argument in this Court, Counsel, for the respondent largely focussed on this aspect. He strongly supported the finding of the court *quo* in this regard. He submitted that the effect of this finding was that the respondent's dismissal had been substantively unfair.

[26] The appellant, on the other hand, maintained that it had not taken any firm decision to restructure and to render the respondent's position redundant when it issued the notice in terms of section 189. It pointed to the contents of the notice which make it clear that these were proposals, that the respondent was being invited to make an input, that the appellant had kept an open mind and had been prepared to change its stance to accommodate any reasonable proposals from the respondent. It drew a distinction between what was envisaged when Marie Greeff was recruited and engaged on 4 February 2002 and what changed after the latter date. It maintained that it only contemplated restructuring after the appointment of Marie Greeff and had a legitimate reason to do so based on economic considerations.

[27] Argument by appellant's counsel proceeded along similar lines in this Court. She referred to the following sentence in the part of the judgment of the court *a quo* that I have quoted above where the Court said the following:

“I am of the opinion that the company was entitle (sic) to restructure its business.”

Counsel for the appellant submitted that this statement mean't that the Court a quo had found that the appellant had a valid reason to restructure. She submitted that the consultation process was frustrated by the respondent when she refused to consult without her attorney and that she failed to make any proposals because of her unreasonable insistence on retaining her position regardless of the need to restructure. Counsel submitted that that the respondent was retrenched purely due to her own unreasonable refusal to consider the alternative post offered and that the court *a quo* was wrong in awarding her compensation.

(ii) Discussion of the evidence:

[28] There are incidents, developments and other factors in this matter that cumulatively would seem to justify the conclusion that the appellant had already taken a decision to restructure and remove the respondent from her position by the time the notice in terms of section 189 was issued. I proceed to deal

with each incident with reference to the evidence, the correspondence and other evidentiary material on record.

[29] In the first place, the respondent had been recruited specifically because of her previous connections with the Spar supermarkets in order to boost the sale of the appellant's products and expand its business with the Spar supermarkets in Gauteng. She testified that during her interview she was told that she would grow with the business up to national level. Van der Merwe denied the latter claim but, nonetheless, made it clear that the respondent had been an excellent performer who had been meeting the targets set for her. The respondent had hardly been in the job for six months when another person, namely, Marie Greef, with the same Spar connection background was recruited and, as will be seen shortly, soon after her appointment, Marie Greeff had for all practical purposes taken over the respondent's channel.

[30] Secondly, Van der Merwe testified that the idea of restructuring was only conceived after Greeff's appointment. Yet he also conceded that, when Greeff was being

interviewed between December 2001 and January 2002, the restructuring was already under consideration. He explained this apparent contradiction by saying that the focus then was on marketing, the idea being to create the position of a marketing specialist who would see to it that the company's brand was aggressively pushed into the market on a national level. In this scenario, the position of the respondent would not be affected, so he testified.

[31] Apart from the fact that it is doubtful that the creation of a new post that would not affect existing positions in a company can be called restructuring, this explanation is questionable given that Van der Merwe also testified that restructuring is not something that can be decided upon overnight and that they had toyed with the idea for some three months prior to issuing the section 189 notice, which would cover the period during which Greeff was recruited and interviewed.

[32] Furthermore, Van der Merwe testified that the real restructuring was only contemplated in the four days between Greeff's appointment and the issuing of the sec 189

notice on 8 February 2002. This evidence contradicts his evidence that it takes time to decide on a restructuring. In all probability Greeff was brought on board as part of the restructuring involving the respondent. This conclusion is fortified by what happened shortly after Greeff's appointment as set out hereunder.

[33] On 5 February 2002, a day after Greeff's appointment, Vander Merwe circulated an e-mail in which he called upon people responsible for specific accounts to prepare their budgets for the period ending 30 April 2003. Greeff's name already appeared there as the person responsible for the Spar channels and the respondent was excluded. In trying to explain this, Van der Merwe pointed to the use of the words "Spar National (all divisions)" and said that Greeff was to co-ordinate the budgets of all the Spar channels countrywide, whereas the respondent was responsible for the budget of only the Gauteng Spar channels, so that the e-mail did not mean that the respondent was no longer handling her channel. This evidence is somewhat contradicted by Marx who had been the respondent's immediate superior. He testified that, if the respondent was

still handling the Spar channel, he would have expected her to be on the list instead of Marie Greeff. This tends to corroborate the respondent's evidence that her channel had already been taken over by Greeff. The respondent testified further that she had subsequently made inquiries from her clients and these would no longer deal with her because they had been advised that another person was now in charge.

[34] The respondent further testified that at one stage she and Van der Merwe had an appointment with a person who did purchases for the Gauteng Spar outlets, Vanesh, on 6 February 2002. They were supposed to discuss price increases. Van der Merwe cancelled the appointment but subsequently went to meet Vanesh without her. She said that this was because she had already been removed from her Spar channel. Van der Merwe agreed that he had cancelled the appointment and that he, nonetheless, had met Vanesh alone. He said that this was not because the respondent had been removed from her channel, but that he had decided to have a confidential discussion with the buyer. He said that he was entitled to see his customers alone and that there was nothing wrong with it. In my view, Van der

Merwe's explanation is not convincing. A discussion of price increases relating to the respondent's channel needed her involvement, especially given the respondent's testimony that she had earlier been subjected to a disciplinary inquiry on account of failing to follow proper procedures in communicating price increases to customers.

[35] As indicated earlier, after the meeting of 14 February 2002 another meeting was scheduled for 20 February 2002. This was cancelled by Van der Merwe on the basis that he would not be available. He did not disclose to the respondent that in fact he would be attending a company workshop on that same day, from which the respondent was excluded. Van der Merwe's explanation for excluding the respondent from this workshop was that they were still consulting with her. It is a disingenuous explanation and lends credence to the respondent's contention that she was no longer seen as being part of the company.

[36] The meetings that the respondent had with Marx on 28 February 2002 and Schreuder on 30 January 2002 should be seen against the background of the above developments.

Marx was emphatic that the only restructuring about which he informed the respondent, was the change in the reporting lines and he made it clear that this involved all the people that had reported to him. Schreuder testified that he had been aware from as early as December 2001 that a restructuring was in the offing. He said that a decision had been taken to restructure but when pressed under cross-examination he said that that decision related only to change in the reporting lines. He had been unable to answer when pressed by the respondent to tell her where she fitted in the company.

[37] It will be noted that the respondent was desperate to get clarification from Schreuder about her future, precisely because of what she says Marx had told her telephonically after the meeting on 28 February 2002, namely, that she would lose her Spar channel but that she would retain her salary. Is it a coincidence that a few days later she gets a notice in terms of which it is proposed to incorporate her channel into Greeff's portfolio and she is subsequently offered (on the appellant's own version) a sales representative position without change in her salary? In my

view, the probabilities favour the respondent's version of what Marx would have told her on 28 January 2002. The inference becomes inescapable that a decision had already been taken to make her position redundant as early as January 2002 at the latest.

[38] In the light of the above I am of the view that the appellant decided to remove the respondent from her position before the commencement of the consultation process or at any rate before the consultation process could be completed. The appellant was obliged to complete the consultation process first before it could make such a decision. For this reason the dismissal of the respondent was procedurally unfair.

Relief

[39] Although the respondent thought that the appellant had decided to remove her from her position before there could be a consultation between them, she, nevertheless, took part in the subsequent consultation until a deadlock was reached on whether the consultation should take place with or without her attorney. The appellant's stance was that it wanted to

continue with the consultation process with the respondent but that this would have to occur without the respondent's attorney while the respondent took the stance that she wanted to continue with the consultation process but with her attorney taking part in the consultation process. The appellant was in law entitled to take the position that it took with regard to the respondent's attorney. Accordingly, in so far as the collapse of the consultation process may have been due to whether or not the respondent's attorney should have been allowed to take part in the process, the respondent should take the blame therefor.

- [40] Another matter which is of huge importance is the fact that, after the parties had reached a stalemate with regard to the respondent's attorney attending the consultation, the appellant addressed a letter to the respondent in which it made an offer to her of a position as sales representative. The appellant asked the respondent to discuss the offer further with it if she was interested. The following day the respondent's attorney rejected that offer out of hand and indicated that what was left was to discuss the severance pay. This notwithstanding, another meeting subsequently

took place between the appellant and the respondent but no agreement could be reached. Subsequently the respondent was dismissed.

[41] In his evidence Mr Van der Merwe testified that the appellant had intended to keep the respondent on her managerial salary if she accepted the offer referred to above and became a sales representative. The letter conveying the offer of this position to the respondent had not disclosed this. The respondent had also not asked about this aspect. It seems to me that the respondent should take the blame for this because she rejected the proposal without asking for any further information despite having been invited to do so if she was interested.

[42] Under cross-examination the respondent said that her response through her attorney's letter was an emotional one. She seemed to imply that in retrospect she thought that she should not have rejected the offer without asking for more details. She said in effect under cross-examination that she would have been a fool to reject such an offer if she had known that there would be no reduction in her remuneration.

If she had not reacted with emotion to that offer, the respondent, if we are to accept her evidence under cross-examination, would have accepted that offer and there would in all likelihood have been no litigation about this matter. I must say that in re-examination, the respondent did not appear to be someone who would have taken the offer even if she had known that she would have kept her salary. If she had taken the offer, she would have enjoyed that salary for a long time.

[43] The appellant's letter to the respondent offering her the position of a sales representative invited her to discuss the matter with the appellant if she was interested in the job. If the respondent had been interested, she would have asked Mr Van der Merwe whether she would keep her salary if she accepted the offer. If she had asked about this, she would have been told that she would keep her salary. However, because she was not interested at all in the position, she rejected the offer without asking any questions including a question about the salary. She has herself to blame for the consequences that flowed from her decision in this regard. All the suffering that she testified about which she went

through because she was unemployed after the dismissal is suffering that she would not have gone through if she had accepted the offer.

[44] I am of the view that the Court a quo erred in rejecting the evidence that the appellant intended to pay the respondent the same salary as she had been paid before if she accepted the offer of the position of a sales representative. There was no proper basis to reject this. There may be a suspicion that the appellant was not going to pay the respondent the same salary but the matter cannot be decided upon suspicions.

[45] In the light of the above I would exercise my discretion against awarding the respondent compensation in the light of the fact that she brought all of the suffering upon herself. I am of the view that the Court a quo would probably have exercised its discretion in the same way had it accepted that the respondent had rejected an offer that would have given her the same salary as the salary she had been paid before.

[46] With regard to costs the Act provides that an order of costs should be made if it accords with the requirements of the law

and fairness to make one. In my view the requirements of the law and fairness dictate that no order as to costs should be made both in respect of the appeal and in respect of the proceedings in the Court below.

[47] Accordingly, I make the following order:

1. The appeal against the order that the respondent's dismissal was procedurally unfair is dismissed.
2. The appeal against the order awarding the respondent compensation is hereby upheld.
3. There is to be no order as to costs on appeal.
4. The order of the Court a quo is set aside and replaced with the following one.

“(a) The applicant's dismissal was procedurally unfair but substantively fair.

(b) No order is hereby made for either the applicant's reinstatement or re-employment or for the payment of compensation to the applicant.

(c) There is to be no order as to costs.”

H.M. MUSI, AJA

I concur.

ZONDO, JP

I concur.

JAPPIE, AJA

On behalf of appellant:

Adv Louise Charoux

Instructed by:

Yusuf Nagdee Attorneys

On behalf of respondent:

Adv Michael van den Barselaar

Instructed by:

Attorney Eastes

Date of judgment:

15 June 2007