

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

D670/06

REPORTABLE

In the matter between:

PIETRO CRESTANI

APPLICANT

AND

FRAME TEXTILE GROUP

RESPONDENT

JUDGMENT

INTRODUCTION

- [1] The applicant claims that he was unfairly dismissed by the respondent on the basis of its operational requirements. He seeks retrospective reinstatement on the same salary and benefits as were applicable at the time of his dismissal. The claim has been opposed by the respondent. There are facts of this matter which are either common cause or have not been disputed by either party that are germane in the resolution of those that are in dispute. They will be dealt with as the background facts.

BACKGROUND FACTS

- [2] The respondent is Frame Textiles Group, a division of the Scardel Group Trading (Pty) Ltd. The ultimate holding company of the respondent is Scardel Investment Corporation Limited, a public

company listed on the Johannesburg Stock Exchange and duly incorporated in accordance with the company laws of the Republic of South Africa, with its head office in New Germany, Durban. The respondent's operations are 11 in the following settings:

- Frametex Spinning Division- which includes Seltex 2 in Ladysmith.
- Frametex Weaving in New Germany,
- Framex Denim in New Germany,
- Frametex knitting in New Germany,
- Frametex Fibres in New Germany,
- Frametex Fabrics in New Germany,
- Frametex Fabrics in Mndeni,
- Frametex Manchester in Mndeni,
- Framatex Home Textiles in Cape Town,
- Berg River Textiles in Cape Town,
- Hex River Textiles in Worcester,
- Frame Factory Shops in Worcester,

[3] The applicant commenced his employment with the respondent on 5 April 1971. In 1986 he had become an Area Manager at the respondent's Seltex Mill, in the Winding Department. When the Seltex Mill closed down, he was transferred to the respondent's Pinetex operation and was promoted to the position of a Mill, Manager responsible for the running of the Mill, human resources and labour relations. In December 1996 the Pinetex Operation also closed down. The applicant was again transferred to Ladysmith but

he went there to work for a short period until his resignation on 31 December 1996.

- [4] The applicant resumed his employment services with the respondent through a letter of appointment dated 5 May 1999. His resumption took effect from 1 June 1999. He was appointed into the position of an Area Manager at the Saltex Mill II of the respondent based in New German, in Pinetown. As an Area Manager he was given grade 7 salary scale. He received various benefits arising from his employment which included a car allowance, medical aid and an annual leave.
- [5] His qualifications included a diploma in textile technology acquired in 1996, a number of certificates of competency in various fields, including labour relations since 1986. In 1997 he was appointed as a Mentor and Examiner by the Industry Training Board for Apprentice Technician Training Programme.
- [6] The applicant was involved in the production of yarn, 70% of the yarn produced was utilized by the group companies such as for knitting and dying, with the product being sold in the open market, 30% of the yarn was sold in the open market. Spinning, weaving and dying of the yarn constituted about 50% of the turn over of the group in a period of about 4-5 years. The spinning operation was alone generating about R750m per annum, continuous period of 5-6 years and entailed the employment of about 16 000 people. In the years 2003 to 2004 some significant changes took place in the market and included:
 - A foreign currency operating on a strong basis against the rand. R6 had been equivalent to US\$ and it changed to R13

to US\$. The effect was to encourage incorporation of textile into South Africa. That created a massive negative impact on imported goods as cheaper goods were imported into the country thus undermining the local textile industry.

- The whole situation regarding the Southern Region of Africa where importation of goods to Zimbabwe, Lesotho and Zambia became duty free. Again much cheaper cost undermined the local spinning industry. The consequence to the respondent was that, instead of 700-750 tons of yarn being produced it dropped to 400 tons per week. Still the respondent produced more yarn than there were customers for it or its product.

- [7] To adjust to the prevailing circumstances in the market, the respondent embarked on a downsizing of its production. During the financial year 2004/5 the respondent lost about R 40m, as it had more product than it could sell. The respondent took a decision to downsize its production in Ladysmith and to consolidate the bulk of its production in New Germany. The respondent decided to eliminate duplications in production of its goods which have been taking place between Ladysmith and New Germany. The consolidation process entailed the movement of its massive amount of equipment from Ladysmith to New Germany. In doing so it chose the most modern technological equipment and transferred it so as to maximize its production capacity in New Germany. There were two stages in the movement of the equipment. They were:

THE OPERATION AT SALTEX EXTENSION

- [8] This was the first stage. It started in August 2005. 31 machines were moved during this exercise. The process was completed in December 2005. The machines had to be commissioned, a technological testing process to confirm that they were operating properly and efficiently. Commissioning in Saltex was done in January 2006. Ongoing problems were however experienced with the balancing of lines in preparing for the production for the blow rooms. The respondent relied on in-house mechanic expertise of machine technicians operating its Trutzscheler machinery. However it became necessary to bring in a foreign technician who was responsible for dismantling of the machines in Ladysmith and assembly them in New Germany.

THE NORTEX PROJECT

- [9] This entailed a second phase of the movement of machinery from Ladysmith to New Germany. The process was completed and Commissioned in April 2006.
- [10] The respondent believed it had saved up to R25m per year once the consolidation process had been fully implemented.
- [11] Management took a position that the management of Saltex Mill had become complex. It decided that there was a need for a technical person to take charge of the Saltex Mill as there was an increase in machine capacity. It decided to restructure the Mill. On 18 May 2006 the applicant was called to a meeting attended by Mr. Peter Gaal, the General Manager of Frame Spinning Mill and the Human Resources Manager, Ms Linda Bremner. He had not been given any formal notice of the meeting nor had he been told what the meeting would be about.

- [12] On 19 May 2006 Mr Gaal issued a letter to the applicant which purported to encapsulate the contents of the discussion they had with him on the previous day. The body of the letter reads:

“RE FRAME SPINNING MILLS RESTRUCTURING:

This letter serves to confirm the discussion held between ourselves and L.Bremner on the 18th May 2006.

As you are aware, Frame Spinning Mills has over the past 6 years undergone major restructuring and downsizing due to the extremely poor market conditions brought about by cheap imports of textiles and the strong Rand. In this regard, Ladysmith has downsized drastically and machinery has been moved to Frametex to consolidate the spinning operation. This has resulted in the Seltex Mill installing additional machinery, increasing its production capacity and workforce. The management of the mill has become more complex and hence the decision to restructure the mill. Senior Management has reviewed the structure of the Mill and owing to the increased machinery capacity believe there is a requirement for a Technical person. In this regard, the position of Spinning Department Manager, Grade 7, is envisaged to fall away and the position of Technical Superintendent, Grade 8, created.

Owing to the numbers of employees affected by retrenchment in the Spinning Business Unit, it has been decided to open up this position to all suitable internal applications. In this regard as discussed with you, you will also be given an opportunity to apply for the position.

Should your application be unsuccessful, or should you not apply for this position, this will result in your current position becoming redundant, at which point we will commence retrenchment discussions with you in an effort to explore viable alternatives.

If you have any queries or problems whatsoever, please contact either myself or Ms. Bremner.”

[13] On 24 of May 2006 the respondent advertised the position of Technical Superintendent, Grade 8. In the advertisement the main job responsibilities were described as:

- > effective planning and co-ordination of maintenance,
- > upkeep and monitoring of planned maintenance schedules,
- > prioritization of breakdown repairs
- > diagnosing machinery problems
- > implementing maintenance improvements
- > managing and controlling employees
- > motivating and development of subordinates
- > manage the quality of count charges

[14] The qualifications and experience sought by the respondent were described as:

- relevant recognized mechanical qualifications,
- 3 year experience in open- end mill,
- good mechanical knowledge and skill,
- good people management abilities.

[15] The applicant applied for the position as did Mr Pragalathan Annamuthu, a shift Manager of Frame Textiles in Ladysmith. The

applicant was advised that his application was unsuccessful. It was given to Mr Annamuthu, who held Motor Mechanic's N3 qualifications with subjects that included engineering science, and motor trade theory. On 3 July 2006 the applicant was served with a notice of his retrenchment which was to take effect from 30 September. He was aggrieved by his dismissal and he referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, the CCMA for conciliation. After the dispute could not be resolved, he referred it to this court by means of the statement of claim.

THE TRIAL ISSUES

[16] The following issues will be dealt with:

1. The meeting of 18 May 2006.
2. The job interview.
3. The meeting of 22 June 2006 and
4. The meeting of 30 June 2006.

THE MEETING OF 18 MAY 2006

[17] Mr Gaal said that the applicant did not challenge a number of issues which he raised in the meeting for a discussion. He said that such issues were centered around the failure of the Mill to produce set targets which had been the subject of their discussion since January 2006. He said that the production level information was always available to the applicant. He said that he told the applicant that a need for a Technical expert had been identified by the respondent and that it was envisaged that the position of an Area

Manager, occupied by the applicant, might become redundant. The proposal was that the Mill Manager was to oversee the Mill and that the company needed a person to oversee mechanical technical issues. According to him the applicant did not have a response to all issues raised to him.

[18] Mr Gaal testified that the job of a Technician Superintendent was very different from that of An Area Manager. He said that the applicant had good mechanical knowledge but that he lacked details of it. In relation to people management, he said that the applicant had some good and weak points. He confirmed the contents of the letter of 19 May 2006, issued to the applicant.

[19] The applicant testified and said he received a telephone call and was informed, to go to attend the meeting without it being explained why he had to attend it. He responded as told and had a meeting with Mr Gaal and Ms Bremner. He was told of the poor performance of the Mill, something he already knew. He was then told that his position would become redundant. That was to create another position of a Technical Superintendent. He said that he was told that the company had already decided on the change and that he could apply for the new position as it would be open to anyone in the company. He testified that he said nothing in response as he was being told what had been decided and that if he was not successful, he would be retrenched. He said that it was not a meeting but in fact, a briefing, which took him by great surprise as the meeting was held with him in the absence of his supervisor and a General Manager for Frematex, people that he reported to.

THE JOB INTERVIEW

[20] Mr Gaal said that he was a panelist for the interview held for the positions. Technical Superintended and the Mill Manager for which the applicant applied. He said that the applicant was not successful in either of the positions. He said that in respect of the Mill Manager position a Mr Strydom from Ladysmith was preferred over the applicant and the previous encumbered of the post, Mr Radfin, because Mr Strydom:

- Had a hands on approach to his work and had expertise in the issues of the mill.
- had people skills at an exceptional level
- had diverse mechanical experience
- over all, he had good management skills and was excellent on mechanical follow ups

[21] In respect of the Technical Superintendent position he said that the applicant performed badly when he was asked about his ability to repair machines and he mumbled his answers and than he said that he could not repair machines. He said that standard questions had been prepared for all candidates. He said that Mr Annamuthu from Ladysmith was a preferred candidate who was then appointed as a Technical Superintendent.

[22] In respect of an alternative position, Mr Gaal and Ms Bremner said that the applicant asked about the availability of the position of a staff shop and they referred him to a Ms Anita Coetzee who handled recruitment on site.

- [23] The evidence of the applicant was that he was subjected to a very strange interview, which was devoid of a scrutiny required as retrenchment was involved. He said that the panelists should have been people who either knew him or had read his files. He expected the company which had his curriculum vitae to know that he had worked with open end machines and inserters. He said that he was asked only 2 or 3 technical questions, one of which was whether he could repair machines. His response was that he was not a mechanic but, if it was required, he could repair machines. He said that he had repaired the Doblin machines all by himself. He however conceded that the machines transferred to New Germany from Ladysmith were not of a Doblin make. According to him the yearly changes in the model of the machine did not negatively affect his understanding of them as they retained their basic nature and function. When it was suggest to him that his qualifications did not list a certificate relating to machinery or mechanics, he said that he acquired the knowledge from experience and was even appointed as mentor in 1997. He conceded that as a Manager, his work was to oversee what artisans were doing but he said, with 30 years of experience with machines, he had to know what artisans were doing. He described the interview as a fake due to the absence of senior managers when the posts to be filled were management in nature.

THE MEETING OF 22 JUNE 2006

- [24] Both parties agreed that the minutes of this meeting were a fair recordal of the discussion they had. The minutes read:

“MEETING HELD WITH P. CRESTANI ON 22.06.06

PRESENT:

P. GAAL

L. BREMNER

P. CRESTANI

PG - During the course of this week we have concluded the interview process. There was late candidate. We have studied and discussed all the applications and have made a decision with regard to the successful candidate.

Regrettably you have been unsuccessful in this instance.

The chosen candidate for the Technical Manager's position has experience in Open End Spinning. He was chosen due to his technical skills expertise, which we believe will be required in the position.

You advised us at the interview that you are not able to repair machines yourself. Management are of the opinion person in this position would have good technical knowledge and able to repair machines as it is a hand on position.

Any questions?

PC - Nothing at this stage.
What about another suitable position.
Is the next step that my current position is redundant and we proceed to retrenchment

LB - Yes, the next step is to commence retrenchment discussions ...
Discussed retrenchment with PC- procedure explained.
Letter of proposed retrenchment given."

- [25] The applicant said that he did not ask many questions in the meeting because he could see that it was just a useless meeting. He denied having said in the interview that he would not repair machines. He admitted the receipt of a letter dated 22 June 2006 issued to him by the respondent, informing him that his position would be affected by rationalization and retrenchment. When pressed for what he did to show the respondent that he was not happy with the retrenchment process, he said that he wrote a letter to Mr D Duncan, a senior Manager of the respondent, telling him that the company had put him in a position where he was forced to accept the conditions of retrenchment, leaving him with his back against the wall. He asked for a meeting with Mr Duncan but Mr Duncan did not respond to his letter.

THE MEETING OF 30 JUNE 2006

- [26] The applicant was informed that the meeting was convened to discuss the retrenchment procedure, where an alternative to retrenchment was to be considered. He was asked if he had any suggestions and he referred to the position of a staff shop. He was told to consult Ms Coetzee and to keep his eyes on the notice board for more positions. He said that he had expected the company to advise him of alternatives. Nothing was said by the company representatives in that regard. He was told that in terms of his letter of appointment, his notice period was three months but that a shorter period would be considered on request. He pointed out that as a result of an injury on duty he had been boarded off and needed to consult with a Dr Steek. He was given a letter of retrenchment and the meeting ended.
- [27] The services of the applicant were terminated with effect from 30 September 2006. He was however excused from reporting for duty

after 28 July 2006. On 31 October 2006 the applicant was contacted by the respondent telephonically and he was asked if he wanted to apply for the position of a Shift Controller, Grade C1.

SUBMISSIONS BY PARTIES

Respondent's submissions

[28] Mr Maeso who appeared for the respondent submitted that the applicant had conceded that:

- a financial loss was sustained by the spinning operation of the company at the times material to this matter,
- duplicated functions were created between applicant's post and that of a Mill Manager,
- there was therefore a need to remove the administration of functions from the post held by the applicant.

[29] He said that mechanical skills were not a requirement for the position held by the applicant but that the position of a Technical Superintendent required such skills. He pointed out that the applicant had said if he had been appointed as a Technical Superintendent, he would have accepted the position. He argued that such acceptance of the post was indicative of the fact that he had no complaints on the change introduced by the restructuring. He submitted that it was not the function of the court to determine whether the company made the best decision.

[30] In respect of the procedural fairness, he conceded that the applicant walked into a meeting without knowing its purpose. He said that the applicant was however told of the purpose in the

meeting. He said that it was unclear when a dismissal was in fact contemplated. He argued that fair and objective selection criteria were used resulting in Mr Annamuthu being appointed because of his skills and a longer service. In respect of an alternative position he said that the position of the respondent was frustrated by the applicant who refused to go to the recruitment agent and that he did not apply for the position of a staff shop.

- [31] In regard to the relief if applicable, he said that the restructuring was ongoing and that the post in question and that of a Mill Manager had both been filled. He said that it would be inappropriate to reinstate.

APPLICANTS SUBMISSIONS

- [32] In respect of procedural fairness, he submitted that procedural irregularities were so gross that substantive reasons proffered by the respondent could not stand. He wondered if Mr Annamuthu was also due for retrenchment, submitting that if he was, the respondent must have used bumping. He asked the court to find that the applicant was told in the meeting of the 18 May 2006 that his position would be redundant. In the absence of minutes for that meeting, he said that the version of the respondent that it was envisaged that the position of the applicant would fall away, was to be rejected. He asked that the letter written by the applicant to Mr Duncan be regarded as applicant's assertion that there was no compliance by the respondent with S189 of the Act. His further submissions are that:

- The applicant had been a Miller Manager before and therefore the post could have been given to him,
- The advertisement did not speak of a hands on mechanics,
- What the advertisement had was what the applicant was already doing. If they wanted a mechanic, they did not advertise for one.
- The applicant thought the new position was his job without management.
- The applicant was only asked 3 questions during the interview and he never said he could not repair machines.
- The applicant could not have been interviewed for the Mill Manager position as nothing was said to him about it.
- There was no agreement on selection criteria
- He was not tested for his skills as the panelist were not qualified to test for such skills, Rather they looked at his performance. That Mr. Strydom attended to details and the applicant did not, was relevant to performance.
- The respondent had 11 divisions. It should have applied Lifo or bumping because of applicant's

length of service and that he was a good manager.

ANALYSIS.

- [33] Through out these proceedings, the dismissal of he applicant, based on operational requirements of the respondent, has not been placed in dispute. The respondent had then to prove that the dismissal was premised on fair reasons and that a fair procedure was adopted in carrying it out. Section 189 of the Act is applicable in this matter. It obliged the respondent to follow the consultation process prescribed by S 189 (1) of the Act as soon as the respondent contemplated a dismissal of the applicant. Clearly, the purpose of the section is to endeavor to achieve consensus in respect of, *inter alia*, appropriate measures to avoid the dismissal, to mitigate the adverse effects of the dismissal, to change the timing of the dismissal, to select a fair and objective method for the dismissal and to provide an appropriate severance pay for the dismissed employee. See in this respect *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC).
- [34] The legislature has however not expressly stated that a failure to follow all or any of the procedures laid down in S189 of the Act will necessarily render a retrenchment unfair, or that a strict compliance with the procedures will necessarily result in the retrenchment being declared unfair. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated, but ultimately the Act provides only a guide for the purpose and cannot be treated as a set of rules that conclusively disposes of the issue of fairness, see in this regard *Fletcher v Elna Sewing Machine Centre Pty Ltd* 2000 21 ILJ 603 LC.

[35] It remained common cause that the meeting of 18 May 2006 constituted the first consultative step taken by the respondent to engage the applicant in his possible retrenchment. It was conceded by and on behalf of the respondent that the respondent failed to supply the applicant with a S189 notice. The consequence of that was felt by the applicant who walked into a meeting without knowing what it was for and therefore totally unprepared to deal with the issues pertaining to his possible retrenchment. The respondent is therefore partly responsible for the inactive role played by the applicant in that meeting. It is a partly understandable excuse proffered by the applicant that he felt that the respondent was just going through the motions and that is why he did not raise a number of issues. The applicant is also not without blame in the passive role he played in that meeting. He was a Senior Manager boasting of many years of experience in this field. One of the certificates of competency he acquired was in the Labour Relations. As a Manager he himself dealt with the retrenchment of his junior staff. He had also been retrenched by the respondent previously. He ought therefore to have taken issue with the manner in which the respondent handled the initial consultative process once he realized what the meeting was about. He could have demanded a postponement of the deliberations of the day so as to go and prepare himself, instead of just going along.

[36] In my view however, the approach initially adopted by the respondent, in commencing the consultation with the applicant, was of such a gross nature that it could not reasonably have been completely mitigated by the passive role which the applicant played as postulated in *SAA v Bogopa and others* [2007] 11 BCLR 1065 LAC at para 44. The consolidation of the machinery in New

Germany might have bolstered the employment position of the applicant such that he could have run out of words when he was suddenly told that his position might be in jeopardy of his position being rendered redundant. There is a dispute about whether or not the applicant was told that his position would and not could be redundant. Mr Gaal's evidence was that if the applicant was appointed as a Technical Superintendent, his position would be rendered redundant. The probabilities of this case point towards the applicant having been told that his position would be redundant.

[37] As a result of the ongoing difficulties confronting the respondent at the time, the retrenchment process was an on going event in its work place. When Mr Gaal came to the meeting with Ms Bremner, they would have discussed the purpose of the meeting with the applicant. Ms Bremner was a senior employee as an HR Manager. The conclusion is inescapable that they deliberately omitted to give the applicant a S189 notice and to engage him on the suitability of the date of the meeting. Clearly therefore they came to present him with a *fait accompli*. Their position is distinguished from that of an employer who comes to the consulting table with a predisposition towards a particular method of solving the problem which has given rise to the contemplation of dismissal based on operational requirements, see *National Education, Health and Allied Workers Union and others v University of Pretoria* (2006) 27 ILJ 197 (LAC)

[38] In respect of the job interview, there is the undisputed evidence of the respondent that a standardized set of questions was prepared for and put to each candidate. When the applicant was asked, as was done with others, whether he could repair machines the probabilities are that he said he could not do the repairs. In his

evidence he said that he was not a mechanic. It was the evidence of the respondent that some of the machines needed constant monitoring and repair work and hence a need for a person who could attend to such repairs immediately without having recourse to foreign experts as it did happen. The fact that the advertisement was not particular about this requirement did not throw it out of the scope of issues for consideration. Neither is the fact that 3 or 4 technical questions were put. Each question could, by its nature, require a detailed answer as to be reasonably informative of the abilities of a candidate. The probabilities of the evidence point towards the interview having been conducted in an objectively fair manner. Mr Annamuthu was a qualified mechanic while the applicant was not. The applicant admitted that he could not repair the machines. It can not be wished away that the applicant had a broken service with the respondent. Mr Annamuthu had then a longer service than his. No ulterior motive was suggested by the applicant on why he could have been manipulated into not getting the position of Technical Superintendent.

- [39] The meeting of 22 and 30 July 2006 had to deal with a search for an alternative to the dismissal of the applicant. One of the alternative positions that stood to be considered for the applicant was the position of a Mill Manager. The evidence of the respondent was that a Mr Strydom was preferred over the applicant. There never was any evidence by the respondent on when it had considered the applicant's application for that position. It has to be borne in mind that his application was dated 30 June 2006, after he had been informed that he did not make it to the post of a Technical Superintendent. The respondent had an obligation at that stage to avoid dismissing the applicant where that was possible. There is no evidence at all of what the respondent did in search of an

alternative to dismissal. The applicant raised the issue of the position of the Staff Shop position but pointed out that it was than late as the position might have been filled. In my view, it was not enough to tell him to watch the notice board as he would, in any event, be leaving the company premises. When the applicant was contacted on 31 October 2006 he was asked if he wanted to apply for the position of a Shift Controller. It is unclear what his response was. It is also a mystery how that position ranked in relation to the position he had held. If anything, it showed though that the respondent was willing to offer him a helping hand after he had been retrenched.

[40] In respect of substantive fairness, there is overwhelming evidence that the respondent had to consolidate its operations to meet up its financial challenges. Similarly, the probabilities point in favour of there being a business need for the respondent to have had to cut down on its staff component. The applicant realized that and did not challenge it. His challenge when properly assessed was about why it had to be him who had to go. His challenge was therefore more about the selection criteria and how that was applied. His evidence that he had to go along with the decision of the respondent and to subject himself to an interview was not convincing. The respondent had confronted him with a *fait accompli* in making his post redundant but it did not necessarily follow that the respondent wanted to dismiss him as well.

[41] A consideration of all the evidence informs me that the dismissal of the applicant on the operational requirements of the respondent was substantively fair but procedurally unfair. I have already found

that the applicant compromised his position as well, in the consultative process.

[42] Accordingly, the following order will issue.

1. The respondent is ordered to compensate the applicant in an amount of money equivalent to five months of salary he earned on the date of his dismissal, being $R12\,640 \times 5 = R63\,200$.
2. This compensation is to be paid within fourteen days from the date hereof.
3. The respondent is ordered to pay the costs of this application.

Cele J

DATE: 30 January 2009

Appearances

For the Applicant: Adv Mark Bingham

Instructed by : BRADLEY ALIPHON ATTORNEY

For the Respondent: Mr. M Maeso - SHEPSTONE & WYLE

