REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 134/00

In the matter between:

CHEMICAL ENERGY PAPER PRINTING
WOOD AND ALLIED WORKERS' UNION First Applicant

MABUNDA, ELIZABETH & 20 OTHERS Second to Twenty-First Applicants

and

STRAT-CHEM (PROPRIETARY) LIMITED First Respondent

TECHNIDRYERS (PROPRIETARY) LIMITED Second Respondent
ABYX MARKETING CC Third Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

[1] Between the 27th and 29th January 2003, I heard evidence from one witness each for the Applicants and the Respondents. Mr Krook, ably led by Mr Hiemstra, was the first witness to testify on behalf of the Respondents. After cross-examination by Mr Orr, for the Applicants, and further re-examination by Mr Hiemstra, the Respondents closed their case. Mr Orr then called Petrus Petje, for the Applicants. Thereafter, the Applicants also closed their case, and, at my instance, both parties asked

to go and prepare Heads of Argument. I consequently adjourned the proceedings on the 29th January 2003 to 31st January 2003, for argument.

[2] I am extremely indebted to both Mr Hiemstra and Mr Orr for their very helpful Heads of Argument. On the 31st January 2003, having heard argument, I advised both parties that it would be in the interests of justice if I had the benefit of a transcript of the record of the trial proceedings on the days I had listened to the evidence of, particularly, Mr Krook. I indicated that it was critical, in giving judgment, that I satisfy myself that I had more than just functional and general understanding of the evidence led. For that reason, it was agreed that a transcript of the record be obtained.

[3] Indeed, the obtainment of the transcript was expedited, and, that, together with my notes, and the Heads of Argument, have made my very difficult task of deciding the issues here lighter than what it would have been had I not had the benefit of the transcript. That the delivery of this judgment comes now is due to other constraints which it is not necessary to deal with here.

BACKGROUND

[4] In his brief opening address, which he gave at the request of Mr Hiemstra – Mr Hiemstra in terms of a filed pre-trial minute had the duty to commence – Mr Orr stated that the case involved the three Respondents and the retrenchment of a number of individual applicants, about twenty of them, who were members of the Chemical Energy Paper Printing Wood and Allied Workers' Union, the First Applicant (CEPPWAWU). All the individual employees were employed by Strat-Chem, a chemicals manufacturing company. All the employees were retrenched in early October 1999.

[5] Mr Orr stated that his clients are not clear what the role of the Second Respondent (Technidryers) was. It appeared, though, that Technidryers was manufacturing, on contract from Strat-Chem, some of Strat-Chem's products. What Mr Orr was emphatic about – he had earlier stated that "*the matter is not a straightforward one, unfortunately*" – was that none of the individual employees were ever employed by Technidryers. Mr Orr contended that it was the Third Respondent rather – Abyx Marketing – against whom his clients had an issue.

[6] His clients' case was, firstly, that Strat-Chem's retrenchment of the employees was procedurally unfair, there having, essentially, been no compliance with any sort of fair procedure in their retrenchment.

[7] Mr Orr stated that Strat-Chem would be shown by evidence to have paid lip service to consultation, and that no attempt was made "*by the parties*" to reach consensus; that the dismissal was substantively unfair because it was not for a fair reason based on Strat-Chem's operational requirements; that the economic difficulties faced by Strat-Chem were not such that the employees had to be dismissed.

[8] The dismissal, it would be argued, was automatically unfair, not because Strat-Chem faced operationally difficult problems, but because Strat-Chem wanted to rid itself of CEPPWAWU. Strat-Chem wanted to have a workforce on a contract basis and thereby evade the provisions of the Labour Relations Act No 66 of 1995 (the LRA). It would further be contended, went on Mr Orr, that because the activities of Strat-Chem and Abyx Marketing were so intertwined, and because the individuals engaged in management in the two entities were indistinguishable, what purported to be a "*sale*" of Strat-Chem to Abyx Marketing was in fact a transfer as contemplated in Section 197 of the LRA.

[9] In any event, Mr Orr submitted, even if I did not, in terms, make a finding that there had been the sort of transfer contemplated in Section 197 of the LRA, I should nonetheless hold Abyx Marketing just as liable as Strat-

Chem for any relief I might care to award to the employees should I find against Strat-Chem.

[10] Mr Hiemstra, in response, simply stated that Strat-Chem experienced so many financial difficulties that it virtually collapsed, and had to be closed. Mr Hiemstra told me that Mr Krook's evidence would clearly show that the closure had been for operational reasons, and that entities like Abyx Marketing and Technidryers simply "*picked up some of the pieces after*" Strat-Chem's demise.

FACTUAL BACKGROUND FROM PLEADING, BUNDLES OF DOCUMENTS AND EVIDENCE LED

[11] On the 4th May 2001, the parties filed a pre-trial conference minute with the Registrar of this Court. Facts that were common cause, among others, were that:

- Strat-Chem, in the business of (among other things) manufacturing chemical products, employed all the workers in this case until their retrenchment with effect from 4 October 1999.

- Technidryers, also in the business (among other things) of manufacturing chemical products, only engaged workers on a contract basis. It had no permanent employees.

- Over the years, Strat-Chem used to procure orders from its clients and outsource the manufacturing of some of its products to Technidryers.

[12] Abyx Marketing (Abyx), a close corporation, was incorporated on 23 September, shortly before the retrenchment of the workers. There is a dispute about whether Abyx was also engaged in manufacturing products. The workers alleged that it was. This was denied and, in the minute, the Respondents allege that Abyx purchased raw materials, outsourced manufacturing, and marketed the manufactured products. As a matter of fact, the heart of the dispute was minuted as being premised on a difference of view as to exactly what happened between the Applicants and the Respondents. The Respondents have denied allegations made by the Applicants, namely, that on or after 11 September 1999, Strat-Chem transferred its business, or part thereof, in which the workers were employed, as a going concern to Technidryers, or to Abyx, or to both Technidryers and Abyx. Respondents allege that no part of Strat-Chem's

business was transferred as a going concern.

[13] Apart from recording that all other factual disputes that are apparent from the pleadings remain in dispute, the Respondents admitted a series of facts in the pre-trial minute of the 4th May 2001, among which were the following:

- Strat-Chem sold its assets and ceased trading on or about 11 September 1999. As at that date, the company had not been liquidated or deregistered and existed still.

- On 12 August 1999, Strat-Chem had sent a fax to Edward Moseri (Moseri), a union official in the employ of CEPPWAWU, informing him for the first time that Strat-Chem intended to rationalise its operations due to "... *the economic circumstances experienced in this country...*" which had had an "*adverse effect on the operations of the company, resulting in "certain financial and productivity difficulties".*

[14] The Company, the minute records, could not "*carry on indefinitely in this matter*". Moseri was advised to attend a meeting with Strat-Chem representatives on 18 August 1999. Items on the agenda to be discussed were the following:

- Reasons for the need to rationalise operations, and possible alternatives to avoid any potential retrenchments;

- The number and job categories of employees likely to be affected by the rationalisation process;

- The selection criteria for employees who need to be retrenched;

- A timetable setting out the timing of the retrenchments;

- Proposed severance pay;
- Assistance to retrenched employees;
- Possibilities for re-employment of retrenched employees.

[15] The meeting, so records the minute, took place, eventually, on 30 August 1999, attended by union officials and Management, including Mr Krook, accompanied by Alta Bronkhorst (Bronkhorst), the financial manager in the Company, and Mr Van Rensburg, representing the Confederation of Employers of Southern Africa (COFESA) to which Strat-Chem is affiliated. At this meeting, one of the reasons given for the need to rationalise was that the workers were not meeting their production targets, and that, according to the Company, was because the workers:

- Always took extended toilet breaks;
- Habitually arrived late at work;
- Constantly took too much annual leave; and
- Kept on losing materials.

[16] The union representatives are recorded to have promised to respond to the Company's productivity concerns by 4 September 1999. Strat-Chem further told the workers that the Company was also losing money because of high labour costs by way of pension and provident fund contributions, union subscription fees, income tax and unemployment insurance contributions, among others. Both parties record in the trial minute that none of the issues on the agenda [see paragraph 14 ***supra***] was discussed at this meeting notwithstanding that it had been called for that purpose, as was stated in the notice.

[17] Strat-Chem sent Moseri (in whose place at the 30th August 1999 meeting Petje had attended) a fax in which Strat-Chem stated that it had not yet

received any communication from the union. If there was none within the following 24 hours, Strat-Chem, so advised the fax, might "*continue to act in its own interest to finalise the issue*". On 7 September 1999, Strat-Chem sent a further fax to Moseri, informing him that the Company had "*decided to continue with rationalisation of the operations as discussed in our meeting on the 30th August 1999 with Mr Petje and the shop stewards"*.

[18] Moseri responded, addressing the alleged lack of worker productivity, stating that this was due to a number of factors. Firstly, delay in production was being caused by the Company's failure to purchase sufficient raw materials. Secondly, the quality control department, being understaffed, resulted in long time-consuming queues of employees waiting to consult with quality control staff. Thirdly, Strat-Chem itself disrupted production by insisting on rotating workers between workstations.

[19] The minute records that Strat-Chem rejected this workers' input on Strat-Chem's decision to retrench the workers. In any event, Strat-Chem replied that shortages of raw material were influenced by financial constraints and in any event occurred in the first two days of each month. As for the quality control query, only one person operated the batch mixing 8 maximum tests, which would therefore not account for any delay. Staff were rotated because the union requested it in June 1999, so that workers could learn additional skills. According to the Company these issues had no influence on the production time.

[20] Taking the attitude the workers' responses were "*too late"* to influence its decision to retrench them, Strat-Chem announced its intention to sell its assets and stop operating; that because of labour costs, retrenchments had become necessary; that the company had considered alternatives to retrenchment such as a decrease in wages which it could not do without it resulting in some workers earning less than the minimum wage.

Consequently, all the Strat-Chem employees would be retrenched from 4 October 1999. Strat-Chem had worked out a timetable in terms whereof, on the 11th September 1999, Strat-Chem told the workers that they had been retrenched. They had been called on that day into a meeting with management where Krook told them that Strat-Chem was to be closed that same day; that they had been retrenched; that they would be paid notice pay until 4 October 1999. They would not be required to tender their services during the notice period.

[21] It was further recorded in the minute that before the workers left the premises on the 11th September 1999, Krook had told them that they could sign on as contract workers with Technidryers if they so wished, an option which some of them exercised; that Moseri had, in a fax to Strat-Chem, stated that the Company had failed to hold proper consultations with the workers as commanded by law – the Section 189 provisions of the Labour Relations Act, No 66 of 1995, as amended (the LRA), which had to be strictly adhered to, notwithstanding Strat-Chem's allegation that the union had failed to deliver, timeously, its response aforementioned.

[22] The employer's reaction, through COFESA's Van Rensburg, in a fax to Moseri, was that the union intended to delay "*the matter as far as possible*"; that there was no unfairness in their dismissal since severance packages had been paid after proper consultation with the union and its members; that a "*different company*" had taken "*over the manufacturing of some of the products that Strat-Chem previously manufactured*"; and that the retrenchments had already been concluded; that the union's reaction was belated. On 15 September 1999, the union had referred the dispute about the fairness of the dismissals to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The dispute remained unresolved.

[23] The workers, in the minute, are recorded to be have stated that Technidryers was formed in order to cut down on labour costs, and to

escape the provisions of the LRA in the process. The Respondents denied that. Against these background facts, the minute recorded, this Court would be required to decide whether there was a transfer of the whole or part of Strat-Chem's business as a going concern to Technidryers, or to Abyx. I have to decide, further, whether there was a fair reason for the workers' dismissal based on operational requirements; whether Strat-Chem complied with Section 189 of the LRA, and whether the dismissals of the workers were effected with a fair procedure, and, if not, what relief, if any, the workers are entitled to.

[24] The minute also records information that the Respondents furnished to the Applicants "*in order to shorten the proceedings*". Among others, the Respondents stated that machines and equipment were sold to Mr L Sloan on the 1st October for R127 600,00 (one hundred and twenty-seven thousand six hundred rand), raw materials and packaging to Abyx on 1 October 1999 to Abyx for R2 198 992,35 (two million one hundred and ninety-eight thousand nine hundred and ninety-two rand and thirty-five cents). No assets were sold to Technidryers. Workers L Kumalo, A Mkhabela, E Molope and S Nemadzihanani signed on as contract workers with Technidryers. For their part, to questions put to them for their comments by the Respondents, Applicants replied, ***inter alia***, that all the machinery used by Strat-Chem had been transferred to Technidryers and that certain products that were previously manufactured by Strat-Chem had been transferred to Technidryers.

Against the backdrop of these recorded, admitted and disputed facts and allegations, I heard Krook and Petje testify.

TRIAL EVIDENCE – PROCEDURAL FAIRNESS

[25] Krook was the main witness. He confirmed that despite the intention stated in his letter of 12 August 1999, not all the issues around which parties are obliged to consult, were discussed at the meeting on 30

August 1999. Krook gave three versions for this failure. Though in his pleadings the employer's position had been that the union had refused to deal with these issues when Krook allegedly attempted to raise them, before me, Krook, in his evidence in chief, stated that the failure to discuss the issues was because Petje was in a hurry. The meeting therefore never got around to it. In re-examination, however, he stated that he had no intention to raise these issues because it would have been inopportune to do so. Petje, on the other hand, told me that the issues had never been raised at all, the meeting having dealt only with financial and productivity issues. Krook's evidence is disturbingly conflictual in this regard.

[26] Krook further conceded in his evidence that his letter of the 7th September 1999, indicating the need for the rationalisation of Strat-Chem's operations meant that the entire workforce would be retrenched. (The significance of the underlined words will become clearer below here in paragraph 38.) When he told the workers on 11 September 1999, that contract jobs were available at Technidryers, Krook further conceded that he had not discussed this in any amount of detail with Peinaar, the Technidryers manager.

[27] The contention by the workers is that the absence of a consultative process on the part of the Company was manifestly unfair; that the so-called consultation process did not amount to an exhaustive joint problem solving exercise, something which Mr Orr submitted, by reference to decisions of this Court and the one above it, was critically important to determine the fairness or otherwise of a consultation process.

[See: ***Hedley v Papergraphics Ltd*** (2001) 22 ILJ 6935 (LC) at 953 I-J; ***Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*** (1999) 20 ILJ (LAC) at 96 C-97 D; ***De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd*** (1999) 20 ILJ 1753 (LC) at 1759 D-I; ***SA Chemical Workers Union & Others v Afrox Ltd*** (1999) 20 ILJ

1718 (LAC) at 1727 C; and ***Sikhosana & Others v Sasol Synthetic Fuels*** (2000) 21 ILJ 649 (LC) at 655 C-G.]

[28] Mr Orr, in his argument, submitted that the authorities, particularly the ***Johnson & Johnson*** case (***supra***), emphasize that where a court is confronted with a situation where a joint problem solving exercise has not taken place – as is the case herein – the court ought to determine whether this was due to a failure either on the part of the employer, or on the part of the employee. If it was due to the workers' failure, the dismissals that ensue cannot be declared unfair. If, however, failure to embark on a joint problem solving exercise is due to the employer, the resultant dismissals are procedurally unfair.

[29] Mr Hiemstra, also relying on ***Johnson & Johnson*** (***supra***) submitted that the proper approach to any investigation into whether Section 189 has been complied with or not is to examine whether the process was frustrated by either the employer or the employee. He further submitted that in ***Visser v Sanlam*** (2001) 22 ILJ 666 (LAC), it was held that the consultation process, in terms whereof parties must consult to achieve the objectives of the section, involved a bilateral process in which both parties must consult in good faith. He submitted that the company had attempted to consult with the union regarding all the issues mentioned in Section 189; that in the 12 August 1999 letter, issues for consultations had been spelt out, and that on the 30th August 1999, Krook went into the meeting with an open mind, and with a view to seeking consensus on means to avoid closure and retrenchment. Mr Hiemstra told me the union failed dismally to participate in such discussions.

[30] I have already stated, hereinabove, the three versions that Mr Krook gave as reasons why the 30th August 1999 meeting failed to discuss the Section 189 issues, including the reason that he did not raise these issues because it would have been inopportune to do so. Mr Hiemstra's submission is therefore remarkable, particularly if one considers what

Krook had said in his evidence in chief. When he was asked exactly what happened and the steps he took, he told me that, "***the initial process was the attempted meetings with the unions to find a solution to the situation, and when that failed, we then went on to the actual retrenchment process. And amongst the procedures were notices to the union***", whatever this means.

[31] Of course, these were wild claims by Krook, because we know from his evidence that seven days after the 30th August 1999 meeting, at which no consultations on retrenchment took place, dismissal letters had gone out; that he himself, on issues around retrenchments, had attended only one meeting, the 30th August 1999 meeting; that at that meeting he had threatened to sell the business as a going concern; that the meeting lasted "***probably half an hour, if that***"; that because he had not done it before, he did not consider proceeding with the meeting, in the absence of Petje (who he claimed had been in a hurry to go), with the shop stewards. He admitted that he never asked the shop stewards if they wanted to continue in Petje's absence with the agenda items that were not only critically important to deal with but which clearly had not been covered. He also admitted that his claim that Petje just walked out of the meeting was not reflected in the minutes. This admission calls into question the veracity of that claim, which in any event, Petje denied. Mr Krook also told me that in hindsight, he thought he was probably a bit in awe of the union. I struggle to imagine how this can properly be proffered as a reason for failing to consult.

[32] For all these reasons, I cannot accept, with respect, Mr Hiemstra's submission that the company at any stage ever attempted to consult with the workers in the sense contemplated in Section 189. In my view, it is disingenuous to claim that Krook "*went into the meeting with an open mind*". Mr Hiemstra's claim that Krook's 30th August 1999 meeting was just but the first step in the consultation process is contradicted by

Krook's own concession, under cross-examination, that with regard to the retrenchment process, that meeting was the first – (and the last) - which he himself attended. Other than the letters going backwards and forwards, which in my view do not take the consultative process on retrenchment issues any further, the only evidence of any consultation comes from Krook. It is that of the 30th August meeting at which none of the issues for discussion on retrenchment ever took place.

[33] If there ever was a case of paying lip service to a consultation process that seeks to achieve the ends of solving a problem jointly, I cannot think of a worse example than the farcical manoeuvres at Strat-Chem that started, on 30 August 1999, with an admitted non-debate of agenda items that the law commands must be discussed if a company seeks to dismiss for operational reasons, and ended with a dismissal notice, without more, about seven days later. This was no attempt by Strat-Chem to promote an exercise at joint problem solving, let alone an exhaustive one, as dictated by the Labour Appeal Court in the ***Johnson & Johnson*** case (***supra***).

[34] Nor can it be said that the exercise engaged upon by Krook and his company was meant to serve either a pragmatic or a principled function or both. Moreover, in a constitutional dispensation in which fair labour practices enjoy entrenchment in the Constitution, it would be a manifest caricature of workers' rights guaranteed under that Constitution if I were to hold, against the tenor of the evidence in this case, that the workers were subjected to a fair process before they were retrenched.

[See: ***SA Clothing and Textile Workers and Others v Discreto, a division of Trump and Springbok Holdings*** (1998) 19 ILJ 1451 (LAC) 1454 E - J; and ***Kotze v Rebel Discount Liquor Group (Pty) Ltd*** (2000) 21 ILJ 129 (LAC) 132 E - H.]

I cannot, with a judicious mind and a rational evaluation of the facts, hold that the employees in this case were responsible for the failure by

the parties to hold meaningful Section 189 consultations. I therefore hold that the dismissal of these workers was procedurally unfair.

SUBSTANTIVE FAIRNESS

[35] Krook testified that Strat-Chem had to close due to compelling financial reasons. Mr Hiemstra argued that despite Mr Orr's "***thorough and able cross-examination***" of Krook, which was aimed at showing that the losses suffered by Strat-Chem were artificial, the facts remained as alleged by Krook, namely that whereas the company made a nett profit in 1997, it recorded a loss of R1 431 414,00 (one million four hundred and thirty-one thousand four hundred and fourteen rand) in 1999. Mr Hiemstra argued that Mr Orr's endeavour to show that the loss of Strat-Chem was off-set by the profit at Technidryers overlooked the graphs submitted in evidence by Krook that demonstrated that Strat-Chem and Technidryers made a nett loss of R754 212,00 (seven hundred and fifty-four thousand two hundred and twelve rand). Further graphs showed that the reason for Strat-Chem's decline in fortune was as a result of a decline in sales from R1 739 664,00 (one million seven hundred and thirty-nine thousand six hundred and sixty-four rand) in January 1999 to R1 143 535,00 (one million one hundred and forty-three thousand five hundred and thirty-five rand) in August 1999.

[36] All of this, Krook attributed to problems with the labour force, which he had tried to engage in discussions to improve productivity, to no avail. The union had not co-operated, leaving him with no alternative but to close the business. For confirmation of this failure to co-operate, Mr Hiemstra, in argument, seemed to rely also on Mr Petje's testimony which Mr Hiemstra claims confirmed that the 30th August meeting was devoted to a discussion about productivity. Mr Hiemstra argued that in a week from that date the union responded, two hours after Krook's ultimatum that he would finalise the matter unilaterally, not by pledging workers' support for productivity improvement, but by blaming the company for

the poor productivity. The company was left with no alternative but to close down.

[37] Mr Hiemstra also rejected the argument by Mr Orr that the real reason for the closure was not financial; that the closure had been designed to, and had the effect of undermining the transfer of the workers' contracts from Strat-Chem to Technidryers, or to Abyx, or to both. His argument was that if that were true, Krook would not have attempted to turn around the company by engaging the union and the workers in attempts to improve productivity.

[38] Mr Hiemstra's eclectical argument overlooks critical elements of Krook's testimony. Krook told me that in early July, he was of the view that the solution to Strat-Chem's problems could be the retrenchment of some of the workforce. This, he said, would allow Strat-Chem to place the remaining workforce on full-time, resulting in increased productivity and improved delivery times. He wanted to discuss this with the union. Under cross-examination, he testified that had this plan been implemented, he would have been able to speak to all major customers, within two days, to place substantial orders on the basis that there were no problems anymore at Strat-Chem. This would have created increased turnover that was necessary to save Strat-Chem. The retrenchments (of some of the workforce) would also have been some cost saving.

[39] Not only was this proposal never discussed with the union. It was also not even implemented when Krook did in fact implement, unilaterally, his retrenchment plan on 7 September 1999. Instead of retrenching some of the workers, he retrenched all of them (my emphasis). Asked why he had not unilaterally implemented the retrenchment of fewer workers, Krook explained that he had lost faith in the union. I found this reply not only cynical, but disgraceful. It is insulting to everyone's intelligence who listened to Krook's testimony. It is disingenuous and does not succeed in persuading me that Krook's decision to dismiss his entire workforce was based on a genuine operational requirement. I reject it. I reject it, ***a***

fortiori, when I consider that his evidence of how he attempted to discuss with the union ways to improve productivity can only relate to the 30th August 1999 meeting, which he himself said, "*lasted for about a half an hour, if that*" – a meeting at which also by his own admission none of the issues relevant to retrenchment were discussed.

[40] All in all, I can find no reasonable basis to exist upon which Krook's decision to dismiss the workers for operational requirements can be said to be predicated. Furthermore, I cannot find anything to justify the unacceptable manner in which he went on to implement his unilateral decision. The reason he gave – and it does not have to be necessarily one which I would have given - does not sustain scrutiny. It is grossly unfair.

[See: ***BMD Knitting Mills (Pty) Ltd v SACTWU*** [2001] 7 BLLR 705 (LAC).]

I therefore conclude that the dismissal of the workers was substantially unfair.

TRANSFER OF STRAT-CHEM BUSINESS

[41] It was a bone of contention between the parties whether the evidence justifies the conclusion that Strat-Chem or some parts of it, was/were transferred to Technidryers or to Abyx, or to both, as a going concern. Mr Hiemstra argued that the Applicants rely on one single factor in contending that there was a transfer of the business as a going concern, namely, that Technidryers manufactures some of the products previously manufactured by Strat-Chem. He argued that in this case there was no severable part of the business that can be said to have been transferred. What had happened here was that another company had taken over the manufacturing of a few products. In such a case, argued Mr Hiemstra, there could be no question of there having been a transfer of the business of Strat-Chem, or part of it, as a going concern. For this submission, he relied on an English case, ***Melon and Others v Hector Powe Ltd*** [1981]

1 All ER 313 at 314, in which the House of Lords, ***inter alia***, held that:

> " ... a change in ownership of a part of a business will seldom occur except when that part is to some extent separate and severable from the rest of the business, either geographically or by reference to the products in some other way."

[42] Mr Hiemstra, I sensed, seemed to rely particularly on the following averment of the House of Lords:

> " ... the individual employees might continue to do the same work in the same environment and might not appreciate that they were working in a different business, but that would not affect the true position if on consideration of the whole circumstances the new operation was a different business"

(as per Lord Fraser of Tulleybelton referring, with approval, to Lord Denning MR in ***Lloyd v Brassey*** [1969] 1 All ER 382 at 384, [1969] 2 QB 98 at 103.)

[43] Mr Hiemstra also argued that he had support for his submission that Strat-Chem was not sold as a going concern in my brother Landman J's decision in ***SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd & Others*** (2002) 23 ILJ 2304 (LC) where, Mr Hiemstra argued, the Court had held there had been no transfer of part of the gardening services business as a going concern since the gardening services were not an entity with a separate management structure, own goals, own assets, own customers and own goodwill. Mr Hiemstra also referred me to a number of cases, referred to in the Constitutional Court judgment, ***Nehawu v University of Cape Town (UCT) & Others*** 2003 (3) SA 1 (CC) in which Ngcobo J, reading the unanimous decision of the Court, had held that since the phrase "*going concern*" is not defined in the LRA, it must be given its ordinary meaning unless the context otherwise indicates. He held that what was transferred must be a business in operation so that "*the business remains the same but in different hands*" [at para 57].

[44] Mr Orr, on the other hand argued that on the facts – and on the law – my conclusion should be inescapable that there was a transfer of the whole of the business of Strat-Chem as a going concern to Abyx and Technidryers. Mr Orr clearly did not rely on the "*one single factor*" identified by Mr Hiemstra in anticipation of what his argument would be, namely, that Technidryers manufactures some of the products previously manufactured by Strat-Chem. On the contrary, Mr Orr catalogued a series of facts on the basis of which he argued that Abyx, Technidryers and Strat-Chem were virtually in the same business.

[45] Without exhausting the submissions made by Mr Orr, the following evidence was referred to by him. Referring to several pages in the bundle of documents that formed part of the evidence, Mr Orr argued that Abyx, Technidryers and Strat-Chem were part of the same group; that Abyx marketed the same products that Strat-Chem produced and marketed; that Technidryers manufactured the same products Strat-Chem did; that Abyx sold products to a large number of customers to which Strat-Chem sold products, all of which in turn were produced for Abyx by Technidryers.

[46] Mr Orr further submitted that Krook managed Strat-Chem and Abyx; that with one exception, Abyx now employed all the former office staff of Strat-Chem; that Krook had testified that the companies from which Abyx sourced raw materials – for production by Technidryers – were the same companies from which Strat-Chem sourced its materials. Mr Orr submitted that Krook had further testified that the buildings in which Abyx and Technidryers are housed are across the road from the building in which Strat-Chem is housed; that Abyx and Technidryers have the same fax and telephone numbers which Strat-Chem had; that Abyx and Technidryers used the same software accounting packages licenced to Strat-Chem; that the bookkeeper at Abyx believed Strat-Chem had merely changed its name to Abyx and that there was a very fluid flow of funds between Strat-Chem and the other companies in which he, Krook, had an interest, a

position that persisted (as at the date of trial) with Abyx.

[47] Over and above this testimony from Krook, Mr Orr further submitted that documentary evidence from the bundle showed that Abyx used the trademarks held by Strat-Chem to market products manufactured by Technidryers; that Abyx had represented to suppliers, customers and its medical aid scheme that Abyx is merely Strat-Chem under a different name. Consequently, suppliers were of the view that Strat-Chem and Abyx were the same entity. Further, Strat-Chem had lent money to Sloan to buy its assets, at a loss, which assets were then utilised by Abyx and Technidryers.

[48] Notwithstanding the fact that Krook was not a member of Abyx, so submitted Mr Orr, Abyx had nonetheless lent Krook R1,4 million rand, interest free, in the same way that Strat-Chem had made such loans to Krook in the past, albeit not for comparable amounts. The documents also revealed that at the 30th August meeting, Krook had indicated that a possible restructuring method would be the selling of the business of Strat-Chem as a going concern.

[49] We know, of course, that when this was put to Krook in cross-examination, he testified that he had merely stated this as a threat to the union members. What he could not explain is whether a "*threat*" like that was appropriate in consultations of that nature. I find no hesitation in rejecting the facetiousness of Krook's testimony that he was merely "*threatening*" the workers when he told them that he was contemplating selling the business of Strat-Chem as a going concern.

[50] At any rate, Mr Orr further submitted that the documents in the bundle indicated that Pienaar would be the purchasing manager of Abyx. In his evidence, Krook testified that Pienaar was ostensibly only involved with Technidryers, testimony which is inexplicably not borne out by documentary evidence.

[51] At a structural level, Mr Orr submitted, it was remarkable that notwithstanding the fact that there were material conflicts between Strat-Chem, Abyx and Technidryers, they were nonetheless all represented by the same legal team. Finally, documentary evidence, confirmed by Krook's testimony, revealed that the incorporation documents of Abyx described Abyx's principal business as buying, manufacturing and selling of chemical products. Krook had testified that he had wanted to keep the issue of manufacturing chemical products, in an undisclosed future, as a possibility.

[52] Relying on the case ***Schutte and Others v Powerplus Performance (Pty) Ltd and Another*** (1999) ILJ 655 (LC), Mr Orr submitted that a court had to determine factually whether a transfer of a business, or part thereof had taken place. When once that determination had been made, it followed that the contracts of employment were automatically transferred from the transferor to the transferee, a view which had been rejected by Dijkhorst in ***Nehawu v University of Cape Town (UCT) and Others*** (2002) 4 BLLR 311 (LAC), who had held that employee contracts would only be transferred where the transferor and transferee had agreed that this would be the case.

[53] In the Constitutional Court case – ***Nehawu*** (***supra***) – my brother Ngcobo J, whose opinion was that of the apex Court as aforesaid, resisted Van Dijkhorst AJA's findings – who had been articulating a majority view in a 3 judge court – by firstly questioning the view of the majority in the LAC that the purpose of Section 197 is to facilitate the sale of businesses as going concerns by enabling the parties to the sale transaction to take over employees as well as other assets. Ngcobo J felt that this view of what Section 197 was all about looked only at the aspect of the legislative purpose which concerns the interest of the employers. He held that the purpose of the legislature, however, involved protecting the interests of both the employers and the workers. In much the same way as employers were at risk as far as severance pay was concerned, so also were

employees (workers) at risk in relation to their jobs.

[54] Ngcobo J, consequently, held that properly construed, Section 197 is for the benefit of both employers and workers. Whilst it facilitates the transfer of businesses, it at the same time protects workers against unfair job losses, a balance that is consistent with fair labour practices [at para 70]. I am in respectful agreement with the sentiments expressed by Ngcobo J, and with his conclusion that upon a transfer of a business as a going concern as contemplated in Section 197(1)(a), workers are transferred to the new owner. I agree with him, too, that the fact that there was no agreement to transfer the workforce, or part thereof between the transferor and the transferee, cannot, as a matter of law, prevent a finding that the transfer of the business was a transfer of such business as a going concern [at para 71].

[55] Applying the law to the facts of the present case, I find that the evidence overwhelmingly indicates that the entire business of Strat-Chem was transferred as a going concern to Abyx and Technidryers. As Mr Orr submitted, and I agree therewith, the marketing and selling functions of Strat-Chem were transferred to Abyx, and the production functions were transferred to Technidryers. The only aspects of Strat-Chem that were not transferred to Abyx or Technidryers are the name “Strat-Chem”, and the production workers by Strat-Chem. Thus, though not in form, yet in substance, the whole of the business of Strat-Chem was transferred as a going concern to Abyx and Technidryers, and I so hold.

[56] In the view that I have taken of this matter, I find it unnecessary to consider the further ***casus belli***, so to speak, between the parties, namely, whether the dismissal of the workers was also automatically unfair. In doing so, I leave open the question of whether the evidence of the apparent hostility of COFESA to trade unions is something that can necessarily also be imputed to Krook, given that there is evidence that Strat-Chem had been unionised for many years and, on the face of it, appears never at any time to have resisted unionisation. I also leave open

the argument by Mr Orr that Krook acted on the advice of COFESA and showed an absolute disregard for the procedural rights of the workers, and that the last minute offer of an independent contractor arrangement with Technidryers was an additional indication that Krook's objective was to rid himself of a unionised workforce.

[57] I am satisfied, on the evidence, that the dismissal of these workers (the individual employees) was both procedurally and substantively unfair. I have not found that the Respondents have put forward any compelling reasons as to why reinstatement is not the appropriate remedy. I also am contended to hold that the business of Strat-Chem was transferred as a going concern to Abyx and Technidryers and that the contracts of employment of the individual applicants were transferred to Abyx and/or Technidryers.

[58] Before I conclude, I find it necessary to remark about Mr Krook. He was most unsatisfactory as a witness. He left me with a feeling of sadness rather than of anger, to which he sometimes inevitably pushed me in the manner in which he testified. He was evasive and self-contradictory in many ways. He altered his evidence to suit the occasion, and thus exposed himself to rigorous and relentless cross-examination which led him further and further into the quicksand of mendacity which he had unfortunately created for himself. He did not hesitate, oftentimes, to take liberties with the truth. I was constrained, on occasion, to caution him to answer questions which I considered were direct and called for direct answers. He was a poor witness. The Respondent's case rests on his sole testimony. I have been constrained, therefore, to approach his evidence with the appropriate caution that it warrants. I have found very little in his evidence which is plausible, save only those aspects in it that have some tangential support from the documents.

[59] In the result, I order as follows:

59.1 The dismissal of the Second to Twenty-First Applicants (the

individual applicants so called) by First Respondent ("Strat-Chem") was procedurally and substantively unfair.

59.2 The contracts of employment of the individual applicants were transferred from Strat-Chem to Technidryers (Second Respondent), alternatively to Abyx (Third Respondent), or both.

59.3 The individual applicants are ordered to be reinstated, on terms and conditions no less favourable to the terms and conditions existent as at the date of their dismissal, to the employ of Technidryers and/or Abyx.

59.4 The Respondents, jointly and severally, one paying the other to be absolved, are ordered to pay costs of suit, such costs to include all and any costs occasioned by interlocutory applications.

[60] It is so ordered.

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D B NTSEBEZA
Acting Judge of the Labour Court of South Africa

Date of Hearing: 27 and 31 JANUARY 2003
Date of Judgment: .....

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