IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.

JS474/2002
In the matter between:

LISA JOY CROWHURST
Applicant

and

ABSA INVESTMENT MANAGEMENT SERVICES (PTY) LIMITED ("AIMS")
Respondent

JUDGEMENT

NDLOVU AJ

[1] The Applicant was employed by the Respondent on 1 May 2000 in the position of Consultant : Marketing and Promotions. On 4 June 2001 she received a letter from the Respondent advising her, mainly, that her position had become redundant. Her services with the Respondent were terminated with effect from 30 June 2001. At the time of the termination aforesaid her remuneration was R210 600,00 per annum.

[2] The Respondent (sometimes known as "AIMS") was a subsidiary company under the Absa Group of Companies ("Absa Group"). The human resources functions of the Respondent were undertaken by Absa Group. The headquarters of Absa Group

was at the Absa Towers in Johannesburg, whereas the offices of the Respondent were situated at Woodmead, Bryanston, Johannesburg.

[3] The Applicant contended in her pleadings that she was dismissed by the Respondent and that such dismissal was both substantively and procedurally unfair. However, in due course, the substantive fairness of the dismissal was no longer placed in dispute, leaving only the procedural fairness aspect in issue.

[4] The Respondent denied that the Applicant was dismissed. It submitted that the termination of her services with the Respondent was by mutual agreement between the parties. Alternatively, it was submitted when the Respondent engaged the Applicant in consultation she “amputated” the process and opted for termination of her services which the Respondent consented to. What she did therefore amounted to resignation.

[5] The Applicant testified that on 29 May 2001 after having knocked off duty and whilst on her way home she received a phone call from her line manager Marius Opperman. He told her about a rumour that she was going to be retrenched since her position had become redundant. It was in the evening at about 17h30. This message distressed her to the extent that she had a sleepless night. On the following morning (30 May 2001) she was still distressed and she then decided to phone Opperman and advise him that she would not be able to come to work. She explained to him about her distressed condition. He advised her to see a doctor and obtain a medical certificate to produce at work, as that was the normal practice.

[6] She had then consulted a doctor who indeed noted her distressed condition. The doctor put her on sedatives. He

booked her off sick till 4 June 2001.

[7] On the morning of 1 June 2001 Opperman phoned her again to inform her that there was an e-mail that had come through advising of an announcement to be made at work on that day. He suggested to her to report work in order to get what the announcement was about. Indeed, she called at the office. At the entrance she met one of the Respondent's directors, Lawrence Johnson, whom she asked if it was necessary for her to attend the briefing or presentation. Johnson said it was not necessary and that she could go and he would explain about it to her at some later stage. However, she decided to stay and attend the presentation. It turned out later that, according to the e-mail, she was one of the invitees to the meeting after all.

[8] The slide presentation was done by another director of the company, Mr Mel Harris. It lasted about 40 minutes. The presentation was about the resturcturing of the Respondent's operational systems and the resultant retrenchment of certain staff members, or the proposal towards such restructuring and the possibility of such retrenchment. As shall appear in due course there was a sidpust betwen the parties whether the presentation ws placed before the employees as a proposal or a *fait accompli*.

[9] Once the presentation was concluded, Harris told those employees who were affected, including the Applicant, that they would thereafter be called one by one for personal interviews with Johnson and the Respondent's human resources representative, Ms Gayle.

[10] Applicant further testified that when she came to the office she was shown a letter which was pre-dated about a month earlier ("the original retrenchment notice"). She could not remember

what the precise date was on the letter, but it was dated about the end of April 2001. Johnson and Gayle informed her that the Respondent's company was reorganising and that they knew it was a painful process for everyone concerned. They then outlined to her two options which they said were open to her, namely:

10.1 To stay at work the entire month of June and receive a two weeks' severance package; or

10.2 To leave work immediately, in which case the conditions contained in the original retrenchment notice would then apply.

More detail related to these 2 options will be referred to later.

[12] The Applicant then asked if she could not be offered any other alternative employment within the company. They told her that since Absa was down-sizing the bank there was no likelihood that there would be any alternative position to be offered to her in the future. At that moment there was certainly nothing, they said. The Applicant felt being in complete loss and desperation. She had taken loans from Absa which she was repaying. These included a study loan and car loan. She had been granted these loans at preferential bank rates, as a staff member. They told her that she would lose these special rates which at that time was about 11% and be converted to public rates.

[12] The Applicant further told the Court that at their introduction to each other, Gayle had told her that she was there to protect the Applicant's interest as well as that of Absa.

[13] The Applicant then requested to take home the original retrenchment notice in order for her to discuss the contents of the document together with the implications thereof with her

mother. However, this request was refused. She was told that she would be called in on the following Monday (4 June 2001) to sign the "necessary documents". From there the Applicant proceeded to her office to clear it up and pack away her personal belongings.

[14] On 4 June 2001 she called at the workplace and when she went to her office she found one of the Respondent's managers, Greg Mason, using her computer. She then went through her files in the office. Johnson came up to her and told her that the document that she was to sign was not ready and that she would better leave. She then left the office.

[15] On 6 June 2001 she was called in to sign the "necessary documents". When she came there she discovered that the document dated 4 June 2001 which she was asked to sign no longer reflected the same amount of money as the one which appeared in the original retrenchment notice. The amount was then much less. She said she pointed this out. However, she eventually signed the document ("the retrenchment notice") under protest, reserving her right in that regard.

[16] She further told the Sourt that when she had gone through the files in her office her intention was to obtain copies of documents that she had produced herself on aspects, such as planning and creativity. She needed these copies to help enhance her chances in obtaining new employment.

[17] Since she had not been able to retrieve copies of documents from her files she had then phoned Opperman and requested him to obtain same for her. He undertook to do so. However,

in the meantime she received a letter from the Respondent's legal adviser, a Mr Jordaan. The letter was to the effect that it had come to the attention of the Respondent that the Applicant was harassing the Respondent's staff and that she was trying to steal files from the office. The letter further alleged that she had erased the hard drive of the Respondent's computer which she had been using. She was further informed that, as a result, she was no more welcome on the Respondent's premises. She then stopped going to the Respondent's workplace.

[18] She further testified that in or about October 2001 it was brought to her attention by an employment agency that there were numerous vacancies available within the Absa Group, which included the position of Consultant : Marketing Sponsorships. The job description for this position in turn included:

* Liaising with advertising agencies;
* Organising events;
* Incentives - for example when a broker managed to sell X amount of Absa products, the broker concerned would be offered a free overseas trip;
* Assisting with marketing, for example writing brochures;
* Accreditation, for example ensuring that brokers were competent to sell the products they were selling;
* Internal communications.

[19] According to the Applicant this particular advertised post was basically similar to the one of Consultant : Marketing and Promotions which the Applicant had occupied. The Respondent had however not informed her about this available vacancy before she was retrenched, or even after.

[20] Shortly thereafter Opperman downloaded from the computer what was described in the Respondent's terminology as the

"green screens" which Opperman handed to the Applicant. The "green screens" consisted of information stored in Absa's computer archives related to vacancies with the Absa Group. Opperman had given her a printout of the "green screens".

[21] The retrenchment notice, which the Applicant claimed she signed under protest was attached to her Statement of Claim, marked Annexure "A". Next to her signature she wrote the words *"accepted without prejudice on this day 5 June 2001 at AIMS' Head Office, Woodmead".* At this stage the Applicant corrected herself in that the original retrenchment notice was in fact pre-dated about the end of May (and not end of April) 2001. In terms of the retrenchment notice (Annexure "A") the total amount payable to the Applicant before tax was R47 170,94. According to the Applicant the amount in the original retrenchment notice was far more than that. Further, according to her recollection, the items in the retrenchment notice which were listed under sub headings *"Medical Aid", "Pension Fund", "Group Life", "Housing Loan (if applicable)" and "Credit Facilities"* were all not there in the original retrenchment notice.

[22] The Applicant further told the Court that she understood the first paragraph of the retrenchment notice as being a notification to her of the termination of her employment with the Respondent with effect from 30 June 2001. This paragraph read as follows:

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

[23] The Applicant refuted the Respondent's claim that she was not dismissed. She said if it was not so she would have gladly stayed and proceeded with her work.

[24] The pertinent slide in the presentation of 1 June 2001 included the slide with the heading "AS A CONSEQUENCE" which

conveyed information reading as follows:

"**The following new posts will be established:-**

*** Business Unit Heads x5**
*** Admin Controllers x5**
*** Bulk Processing Controller x1**
*** Bulk Processing Administrator x1**

The following posts are no longer required:-

*** Senior Manager - Admin**
*** Manager - Admin**
*** Manager - Special Projects**
*** Head - Marketing and Strategic Research**
*** Head - Sales and Business Development**
*** Regional Managers - Sales**
*** Consultant - Marketing and Promotions"**

[25] At the conclusion of the slide presentation the Applicant had concluded that she was being retrenched. She reached this conclusion even before the personal interview that took place thereafter, as well as before she was handed the retrenchment notice on 6 June 2001.

[26] The Applicant further told the Court that prior to the presentation on 1 June 2001 she had not been approached in any manner whatsoever by the Respondent whereby she was informed or given the slightest hint of the Respondent's operational problems or requirements and it contemplated embarking on a restructuring or reorganisation process. The first time she officially heard of this was at the slide presentation.

[27] The majority of the Respondent's staff were members of the trade union, the South African Society for Banking Officials (SASBO). However, the Applicant was not a SASBO member nor was she a member of any other trade union. She told the Court that nobody had been appointed to represent her in any discussion or consultation with the Respondent's management. She further

told the Court that when the slide labelled "AS A CONSEQUENCE" referred to above, was presented to them no suggestions or proposals were invited from them thereon. The contents of the slide were simply presented to them as a *fait accompli,* she said.

[28] Opperman was also retrenched by the Respondent three months after the Applicant's departure. He had occupied the position of "Head; Sales and Business Development" which also appeared in the list of the group that was declared redundant, in terms of the slide presentation.

[29] Although another slide labelled "PROCESS" indicated an item described as **"consult with employees filling redundant positions,"** this did not mean anything to the Applicant because according to her it was all a done deal. In terms of that prejudice slide there was also an item described as **"Establish consultation process with SASBO"** of which the Applicant was of course not a member.

[30] She testified that her work experience included the following:

* Brand Marketing at Fedlife. Her functions there included aspects such as Events, Promotions, Sponsorships and Internal Communications.
* One year Brand Marketing at AIMS (the Respondent).
* During her one year stint at AIMS she obtained a 6 month Marketing Diploma from Damelin College.

[31] She further told the Court that Respondent paid her the amount as shown in the retrenchment notice, namely R47 170,94. Among other things, she used this money to pay off her credit card debit balance and loans which she had had with the Respondent. She did not seek reinstatement with the Respondent but only an award for compensation.

[32] Under cross-examination the Applicant admitted that she went to

attend the presentation on 1 June 2001 already having her mind set that she was going to be retrenched. She denied however the suggestion that she did not understand what happened at the presentation because she had already told herself that she had been retrenched.

[33] The Applicant was then referred to the Respondent's policy document which included what was termed *"Reassignment Guidelines",* the extract whereof was included in the Court bundle. The Applicant acknowledged that in the ordinary course of her duties she would have had access to the information contained in this policy document. Hoever she had never seen the document before.

[34] The reassignment process was the Respondent's temporary relief measure accorded to a retrenched employee whereby the employee could be accommodated for up to three months within the Respondent's employ. During this period the employee would be engaged in some temporary work whilst efforts to find the employee alternative employment were being made. As stated, she testified that she had not been aware of the reassignment procedure. She only heard it for the first time after her retrenchment. She said if she had known about it she would have certainly opted for it because for her to have worked a further three months would have meant a lot. She denied the suggestion that the reassignment procedure was explained to her as one of the options that she was free to take and that she had however opted to leave immediately because that option carried a higher cash incentive.

[35] It was further put to her that during the personal meeting held with her shortly after the slide presentation it was highlighted to her that within the three months reassignment period another

jobe could be offered to her and that if she refused it then she would forfeit all the retrenchment benefits reflected on the retrenchment notice. She denied that this was ever explained to her. It was further put to her that she refused the reassignment procedure because she did not want to risk the forfeiting of the retrenchment benefits aforesaid. She also denied this.

[36] It was suggested to her that it was never the intention of the Respondent or Absa Group to get rid of her. All other employees who were retrenched together with her were given the reassignment option and that she could not have been treated differently. It was further pointed out to her that since she joined Absa she had received skills training at Absa's expense and that Absa had thereby invested in her. As a result, the Respondent or Absa would have no reason to simply dismiss her. It was put to her that the presentation on 1 June 2001 was only the beginning of the consultation process which she had unfortunately short-circuited by deciding to terminate her services with the Respondent immediately. She emphatically denied this suggestion.

[36]
(a) It was suggested to the Applicant that the slide presentation did not necessarily reflect the final structure which the Respondent would eventually adopt. In other words, it was only a provisional structure which was submitted as a proposal. The Applicant denied this proposition and reiterated that it was all a done deal.

[37] It was further indicated to the Applicant that the original retrenchment notice had reflected a higher amount because that

amount had been calculated on the assumption that the Applicant, like all other affected employees, would finish three months later, that is, with effect from 30 September 2001. The Applicant replied that she was not aware of that position and pointed out that when she and her attorney subsequently queried the difference in the amounts no explanation was given to them.

[38] The Applicant had since been employed by Barclays Bank, Sandton (Illovo Branch) and held the position of Communications Manager. She was also engaged as a freelance writer of advertisements for Oliver McIntyre, an advertising agency.

[39] She further told the Court that she did not question the Respondent's reason for deciding to streamline or restructure its operational requirements. She could therefore not challenge any evidence on the contemplated advantages that would be brought about by the proposed restructuring.

[40] Under re-examination the Applicant acknowledged the provisions of the Reassignment Guidelines (referred to above) which dealt with the item "Consultation Process" which provided as follows:

> **"CONSULTATION PROCESS**
>
> **<u>Staff and Trade Union where affected</u>**
>
> **Any reassignment exercise will involve a consultation process with staff in the affected functions as well as consultation with and involvement of the recognised union on the nature and extent of such event, where the union's members are affected.**

<u>Particulars and reasons</u>

During this consultation process full particulars of and reasons for the exercise must be provided.

<u>Providing of information 5 days in advance</u>

This information is to be provided in writing at least 5 (five) working days prior to the consultation taking place (as per PROPOSED LETTER TO UNION in topic DOCUMENTATION).

<u>Purpose</u>

* **The purpose of consultation is to inform staff regarding reassignment.**

* **After the initial consultation, individual meetings are held to discuss the effective and fair reassignment of staff by determining individual skills, ability, preference, transferability, aspirations and development needs in addition to information as detailed in the CV".**

[41] In particular, the Applicant denied that she was given any written notification of the intended consultation process, five days before the process began, as required in terms of the Reassignment Guidelines.

[42] The Applicant's witness, Marius Daniel Opperman, told the Court that at the time of the Applicant's dismissal he was also employed by the Respondent and held the position of Head : Sales and Business Development. He confirmed the evidence of the Applicant to the extent that it related to him. He told the Court that he also attended the slide presentation of 1 June 2001. According to him the presentation allowed for no flexibility. It was simply clear cut of what would take place.

[43] Opperman further told the court that in his case he was given two options to select from, namely:

43.1 An offer of being re-employed as Business Unit Head, which he regarded as below his current status;

43.2 An offer to undertake the three months reassignment process.

[44] He was also served with a retrenchment notice similar to the one given to the Applicant. He had initially opted for the Reassignment Process. During this period he was required to apply for the position referred to in option 1. However within the three month period he made his position clear to management that he would not be applying for the position in option 1 and that he would seek alternative employment within the Absa Group. He testified that in his observation the Applicant was treated differently.

[45] At the conclusion of Opperman's evidence the Applicant closed her case.

[46] Prior to the Applicant's case being concluded it was recorded on her behalf that she would no longer challenge the substantive fairness of the alleged retrenchment but only the procedural fairness aspect thereof.

[47] The only witness for the Respondent was Ms Gayle Jennifer Piek (referred to herein as "Gayle"). She told the court that she was in the employ of the Respondent and held the position of People Management and Accounts Executive, which was equivalent to that of Human Resources Executive.

[48] She testified that once a need was identified for the restructuring and reorganisation of the Respondent's operational requirements, consultative meetings were held with the affected employees and, where applicable, their union representatives. The possibility of restructuring had first been mooted within the Respondent's management on 17 May 2001. The intention of management was to communicate the Respondent's proposals to the affected employees and to obtain their inputs thereon. She testified that the process of submitting inputs was then finalised. Thereupon the Respondent notified the affected staff of a meeting scheduled for 1 June 2001. The witness had personally arranged this date with the recognised trade union SASBO. She had held a meeting with SASBO on the previous day (31 May 2001) at which she had proposed for the meeting.

[49] The consultation was divided into two sessions, the morning one (a slide presentation) and the afternoon one (a one-on-one interview with individual affected employees). She further said it was envisaged by the Respondent that the Applicant would be affected if the proposals as contained in the slide presentation were finally accepted. It was communicated to the staff at the slide presentation that even though the Respondent had performed well in its three years of existence as at that time, there was still room for improvement.

[50] The witness then referred to the copy of the slide presentation filed at page 23 of the Court bundle. That was the slide with the heading **"AS A CONSEQUENCE"** and which listed a number of positions (including that of Applicant) under the introductory sentence: **"The following posts are no longer required".** He told the Court that by that sentence was only meant to convey that those positions would no longer be retained if the proposals were finally accepted and implemented. She submitted that despite the

language used in the presentation, the matter was not a *fait accompli*. She said she had no idea why the language appearing in the slide was used. She further told the Court that Absa's fundamental intention was to retain skills within the Group.

[51] The witness further testified that in the event of a position being declared redundant there were three possibilities and options available to the affected employee, namely:

51.1 Applying for a new position within the Respondent of Absa Group;

51.2 Opting for the reassignment procedure; or

51.3 Opting for retrenchment.

[52] The afternoon interviews were conducted by herself and Johnson. The purpose of this second meeting was to ensure that the proposals of the Respondent were clearly conveyed to each affected employee in a private consultation and the Respondent sought to ensure that it had covered all the necessary aspects of the process.

[53] She told the court that during their interview with the Applicant Johnson had asked the applicant if there was anything for her to ask related to the slide presentation. The Applicant had said she had no questions. Instead she only wanted to know what the implications were for her. At that stage Johnson had requested the witness to further explain to the Applicant what the next process from then would be. She said she then explained to the Applicant that she was entitled to apply for any of the proposed new positions. The Applicant had thereupon indicated that her skills were of a specialist nature and that she could therefore see no way how she could be accommodated in the proposed new structure. She said she had acknowledged that

the Applicant was correct in her view of the matter on that point. She had further explained to the Applicant that her position had been affected because of the need to centralise specialist functions (or support functions).

[54] The witness further stated that since she had known that the Applicant's position was of a specialist nature she had then thought it better to contact her counterpart in "Group : Marketing", Morne du Plessis from whom she enquired about staff positions within that division at the time. Du Plessis had indicated to her that "Group : Marketing" was also undergoing restructuring at that point in time and that he could therefore proffer no assistance to the Applicant. The witness said she explained all this to the Applicant. She further testified that she explained the reassignment process to her. She further pointed out that during the consultation the Applicant was carrying a copy of section 189 of the Labour Relations Act ("the Act").

[55] After the explanation the Applicant had stated that she was not interested in any new position within Absa and she asked if her services could be terminated with immediate effect.

[56] The witness further told the court that during her consultation with the Applicant (as was the case with all other affected employees) she was having in her possession a proforma computer printout called "TS02 Retrenchment Package Report" which contained the basic information and details applicable to all affected employees. In particular the money figures reflected on this document were calculated on the basis or assumption that each affected employee would opt for the reassignment procedure, which meant that the employee

concerned would finish off on 30 September 2001. An amount representing one month's notice with effect from 1 June 2001 would also be added to the total sum shown in the document. She acknowledged however that the date on that document (which in the case of the Applicant was the original retrenchment notice) was indeed earlier than 1 June 2001 although not long before then. She said she had explained to the Applicant that the contents of the document would only be applicable if the reassignment procedure in her case was put in place. However, the Applicant opted against the reassignment procedure. The Applicant persisted that since there were no other posts in Marketing, she would not be prepared to be redeployed to a different environment.

[57] The witness admitted that the Applicant requested for a copy of the original retrenchment notice. She said she had then explained to her that it would not be appropriate to give her a copy because there would probably be some changes in the calculations, occasioned by pension implications. She promised the Applicant a properly calculated copy by the following Monday (4 June 2001).

[58] According to Gayle it was then agreed between the Applicant and Johnson, the latter representing the Respondent, that her (the Applicant's) services would be terminated with effect from 30 June 2001. The Applicant had then inquired whether it would be necessary for her to come to work during her notice period. She indicated that she would prefer not to come. Johnson told her that there was no need for her to come. The witness further told the Court that the rationale for the restructuring was not debated with the Applicant because she had cut short her

consultation process and wanted to know what implications were there for her.

[59] Concerning the retrenchment notice the witness told the Court that the notice was prepared for the Applicant at her own request, as she preferred to receive the retrenchment package rather than undergo the reassignment process. The notice was prepared by the Human Resources Administration Department at the witness's instruction. It consisted of the standard wording for all retrenchment notices. The Court inquired from the witness that if the document contained notification of retrenchment by mutual agreement, how different would a document then be from this one which contained a notification of compulsory retrenchment. The witness replied that the two notifications would be the same in terms of their content. The witness stated that if the retrenchment notice had reflected the true position that the retrenchment was a voluntary one it would have had unfavourable tax implications for the Applicant. She said she had considered this aspect but had not explained it to the Applicant at the time. However, with hindsight, she realised she should have explained all this to the Applicant.

[60] Gayle confirmed that there was no other meeting held with the Applicant before and after 1 June 2001. However, she had left the Applicant with the message that in the event she had anything more that she wanted to know about she was free to contact her.

[61] The witness denied that she presented the Applicant with the two options which the Applicant testified about. In particular, she said the option of two weeks' severance package could not

have been possible in terms of the Absa policy. She said she only heard about the two weeks' severance package from the Applicant and she (the Applicant) said she had read about it in section 189 of the Act.

[62] Gayle implored the Court to believe her testimony that the retrenchment notice was contained in a proforma with standardised wording. Only the specific personal information as pertaining to individual employees would differ, which would be filled in the proforma.

[63] It was pointed out to the witness that both the Applicant and Opperman had told the Court that they had never seen the reassignment policy document and that this evidence was never challenged during their cross examination by the Respondent's Counsel. The witness responded that she had also not produced this document to the Applicant but she had only explained the contents thereof to her.

[64] The witness was then referred to the item **"Consultation Process"** contained in the Reassignment Guidelines, particularly where reference was made to a consultation with trade unions. She confirmed that there was no suggestion that the Applicant was a member of SASBO. When she was asked as to how the provision of the policy document was complied with which required what the Applicant, be informed in writing, not less than 5 (five) working days prior to the consultation taking place, of the information contained in the policy document, the witness replied that at that stage of the process was not reached because the Applicant wanted her services to be terminated immediately. It was indicated to her that in terms of the document the 5 (five) days' written notification was supposed to have preceded any consultation process. Later in her evidence the witness stated that she did not believe that the 5 (five) day period envisaged in the "consultation process" directive meant that the reassignment guidelines had

to precede her explanation to the Applicant about the reassignment process.

[65] It was further pointed out to Gayle that when the Respondent received the Applicant's conciliation referral papers on 12 June 2001 alleging that the Respondent had dismissed her unfairly, the Respondent had not raised the point (at the conciliation meeting) of the fact that the Applicant had not been dismissed and that there was an apparent misunderstanding on her part. Further, that at that stage the Respondent could still have explained the option of the reassignment procedure to the Applicant.

[66] The witness reiterated that the Applicant's retrenchment was a consensual or voluntary one, despite the fact that she signed the retrenchment notice under protest and having indicated that she was accepting the benefits thereunder without prejudice.

[67] The witness further admitted that there was nothing discussed on 1 June 2001 which effected any change in the Respondent's proposed new structure, as originally "proposed" in the presentation of 1 June 2001.

[68] To the specific question whether the Respondent disclosed in writing to the Applicant the issues referred to in Section 189(3) of the Act as required, the witness replied 'No'. The witness further testified that the provisions of Section 189(35) and (6) could not be complied with in respect of the Applicant's case because the Applicant had not responded on the Applicant's proposals put on the table.

[69] The witness acknowledged that a private and personal letter, having some bearing on this matter, addressed to the Applicant by her attorneys, care of the Respondent's address, had been opened by the

Respondent without the Applicant's authority. The witness said she had no explanation to give why Absa had opened the Applicant's private letter.

[70] That basically summed up the Respondent's case.

[71] The issue before the Court was -

- whether the Applicant was dismissed by the Respondent; and if so,
- whether such dismissal was procedurally unfair.

As stated, the substantive fairness of the alleged dismissal was no longer placed in issue.

[72] The onus in dismissal disputes is governed by section 192 of the Act which provides as follows:

> "(1) In any proceedings concerning any ***dismissal,*** **the *employee* must establish the existence of the *dismissal;***
>
> (2) If the existence of the ***dismissal*** **is established, the *employer* must prove that the *dismissal* is fair".**

[73] The Respondent denied that the Applicant was dismissed and contended that the termination of her services was as a result of mutual agreement between herself and the Respondent. The Respondent further pleaded, in the alternative, that in the event of the Court finding that there was indeed a dismissal, then that such dismissal was based on the Respondent's operational requirements and was therefore substantively fair. It further pleaded that in such event the dismissal was also effected in accordance with a fair procedure in that, particularly, it complied with the provisions of section 189 of the Act. For the reason already stated it was no longer necessary for the Court to deal with the substantive fairness or otherwise of the alleged

dismissal, but only its procedural fairness aspect.

[74] In particular, section 189(1), (2) and (3) provides as follows:

> "(1) When an employer contemplates dismissing one or more ***employees*** **for reasons based on the employer's *operational requirements,* the employer must consult -**
>
> **(a) any person whom the employer is required to consult in terms of a *collective agreement;***
>
> **(b) if there is no *collective agreement* that requires Consultantion -**
>
> **(i) a *workplace forum,* if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum;* and**
>
> **(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals;***
>
> **(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals;* or**
>
> **(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.**
>
> **(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-**
>
> **(a) appropriate measures -**
>
> **(i) to avoid the *dismissals*;**
>
> **(ii) to minimise the number**

of *dismissals;*

(iii) to change the timing of the *dismissals;* and

(iv) to mitigate the adverse effects of the *dismissals;*

(b) the method for selecting the *employees to* be dismissed; and

(c) the severance pay for dismissed *employees.*

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to -

(a) the reasons for the proposed *dismissals;*

(b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;

(c) the number of *employees* likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which *employees* to dismiss;

(e) the time when, or the period during which, the *dismissals* are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;

(h) the possibility of the future re-employment of the *employees* who are dismissed;

(i) the number of *employees* employed by the employer; and

(j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months".

[75] The wording of subsection (1) of section 189 is unambiguous. The consultation process envisaged in the subsection must be commenced immediately upon the employer contemplating a dismissal of one or more of its employees. In other words, the consultation process must be commenced before a final decision on the dismissal is made, not after. Each case is determined on its own merits. The subsection is further clear whom the employer must consult in terms of this section. The list of these persons was obviously intended to be in order of priority. The first person to be consulted was the one whom the employer was required to consult in terms of a collective agreement.

However, if there was no such collective agreement which specifically dealt with the consultation process envisaged under this section then the workplace forum must be consulted if there was such a forum in the workplace, as well as any registered trade union whose members were likely to be affected by the proposed dismissal. In the event that there was no such workplace forum or registered trade union of which an affected employee was a member, then the employer must consult with the affected employee directly.

[76] It was common cause that the first time the Applicant was ever informed about the Respondent's intended restructuring was on 1 June 2001 when she attended the slide presentation. What was explained to her at the presentation was clearly set out in copies of the presentation, which formed part of the Court bundle. What was important was the manner in which the Applicant and others were informed about their respective positions. It was this manner which determined whether, in terms of the slide presentation, what they were told about were mere proposals whereby the affected employees were being invited to engage in debate and furnish input, if any thereon, or whether what the Applicant and others were told about were final decisions on the issues concerned, which had already been taken unilaterally by the Respondent's management. The slide presentation (filed at page 23 of the Court Bundle) tends to answer this question. The top category of posts are described as those which **"will be established"** whilst the bottom category referred to posts that **"are no longer required".** The Applicant's post belonged to the latter category. This was plain and simple. Her position "(was) no longer required" by the Respondent. I was mystified by suggestions that, despite the clear and unambiguous language of the slide presentation, a contrary meaning should be attached to the wording of this particular document. Indeed, the Respondent's witness, Gayle, acknowledged that the so-called proposed restructuring was subsequently implemented precisely in terms of the slide presentation without any changes. This confirmed the real situation that what was presented to the Applicant and others at the meeting of 1 June 2001 was a *fait accompli* and in no way resembled the proposals.

[77] During the afternoon of the same day (1 June 2001) the Applicant was again interviewed in the office by the Respondent's representatives, Gayle and Johnson. There was some factual controversy as to the content of the discussion at that stage. However, what was not in dispute was the wording of the retrenchment notice, a copy of a similarly-worded one whereof was handed to the Applicant on 6 June 2001. Pertinent and most crucial of the retrenchment notice was its first paragraph the contents of which I propose to recall:

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

[78] It was noted that the retrenchment notice referred only to **"our discussion of 01/06/2001".** Indeed, according to Gayle no other meeting was held with the Applicant except for the two meetings of 1 June 2001. In other words, it was in the Respondent's own admission that the so-called consultation process was begun and finalised on the same day, 1 June 2001. The retrenchment notice was a mere confirmation of what had already taken place on 1 June 2001. The Respondent's explanation for this was that such situation was brought about by the Applicant who had chosen to short-circuit the consultation process. However, it would seem that the other employees who held the positions listed together with the Applicant at page 23 of the Court bundle were in exactly the same position as the Applicant. Their positions were also "no longer required". It was also Gayle's evidence that retrenchment notices similar to the Applicant's retrenchment notice were us in respect of all the affected employees when they were individually interviewed during the afternoon of 1 June 2001. It was therefore hard to comprehend on what basis it was alleged that the Applicant short-circuited the consultation process, if the same allegation was made in respect of the other affected employees.

[79] The wording of the retrenchment notice, particularly the first paragraph

thereof, read in conjunction with the heading of the notice which read: **"Termination of Employment"** required, to my mind, no further interpretation or amplification. The Respondent was merely confirming to the Applicant that, as informed on 1 June 2001, her services were being terminated with effect from 30 June 2001. This was no proposal and there was no condition about it. It was a final confirmation of her retrenchment. There was also not the slightest indication in any part of the retrenchment notice that her retrenchment was by mutual agreement between herself and the Respondent. It was noted that in an attempt to explain that omission Gayle stated that the fact of the retrenchment being a mutually agreed one was purposely omitted for tax implication reasons, which were considered would be favourable to the Applicant if that fact was omitted. Gayle acknowledged however that she had not explained to the Applicant those alleged tax implications at the time of her interview. She said she felt, with hindsight, that she ought to have explained this to the Applicant. To the Court this explanation was not convincing. In the first place it was obviously not the first time for Gayle to have handled a matter of this nature. I could therefore not imagine that the Applicant was the first retrenched or dismissed employee that Gayle had to handle, who would require the completion of a retrenchment notice form.

[80] Besides section 189, the Respondent appeared to have failed to comply even with its own consultation process guidelines. Gayle insisted that she explained to the Applicant about the reassignment process but the Applicant persistently denied that this was explained to her during either the two meetings of 1 June 2001 or at any other time. She only saw the document for the first time later, apparently after this case was instituted. Her witness Opperman said the same. Their evidence was not challenged by the Respondent during cross-examination. The Court therefore accepted that the Applicant was never informed about the reassignment process as claimed by Gayle.

[81] In any event, the controversy about whether or not the Applicant was

informed about the reassignment process during her interview could easily have been avoided had the Respondent complied with its own consultation process guidelines. In terms of this Guideline (filed at page 52 of the Court bundle) the information on the reassignment process was supposed to have been **"provided in writing (to the Applicant) at least 5 (five) working days prior to the consultation taking place".** As I have indicated, the Respondent did not comply with this guideline which should have served to it as an instruction. Gayle furnished no satisfactory reason why this did not happen. Her explanation was only that she did not believe that she had to give a 5 (five) day notification before she could explain to the Applicant about the reassignment process. If she was correct then I would not understand to whom the consultation process guideline in question was intended to apply, if not the Respondent.

[82] It further seemed to me that if the Respondent's version were true, or probably true, that it did not dismiss the Applicant and that the Applicant had simply short-circuited the consultation process, and further that the reassignment option was still available to her, Gayle, who attended the conciliation process, would not have stopped to point this out, as she apparently did. The Applicant was adamant that had she been informed about the reassignment procedure as an option available to her she would have certainly taken it as it would have meant at least a further three months remunerative engagement for her.

[83] The Court is inclined to accept that the Applicant successfully discharged her onus in proving that she was dismissed by the Respondent and that such dismissal took effect on 30 June 2001. In the light of what has been said above, the Court is also satisfied that the Applicant's dismissal was not effected in accordance with a fair procedure. She should, therefore, be entitled to compensation.

[84] In determining the appropriate compensation which would be just and equitable in all the circumstances of this case, I have taken into account a variety of factors. I have considered the fact that the Applicant had worked for the Respondent for only 1 (one) year. During that period she had undergone and passed important career courses which were offered to her at the expense of the Respondent. As a result of her retrenchment the Respondent had itself sustained a loss in its investment in her. The latter factor is however not entirely mitigatory. It is diluted by the fact that the loss of her services to the Respondent was as a result of the Respondent's own making.

[85] On the other hand, I have also considered, among others, that the Applicant, a decent and professional person who had been "head-hunted" by the Respondent, was shabbily and unfairly treated in the manner that the Respondent did to her. It did not appear from the evidence what it was which motivated the Respondent to treat one of its senior employees in such a manner. The Applicant had a study loan and car loan which she had taken out from the Respondent and whose debts were still outstanding. The Respondent was aware of these loans, yet it did not even allow time to the Applicant to repay the debts in full. The loans had been taken out on a preferential repayment rate by virtue of the Applicant having been a staff member of the Respondent. As a result of the retrenchment the loans' repayment rate had to be converted from preferential to public rate immediately effective on the date of her dismissal. Her medical aid facility was also to be stopped. All this came upon her as a bomb without any notice whatsoever.

[86] In the circumstances, I consider that the appropriate compensation would be an amount equivalent to 6 months' salary, calculated at the rate of the Applicant's remuneration as

at the time of her dismissal. It was common cause that her last salary rate was R210 600,00 per annum.

[87] In the result, I make the following Order:

1 The Applicant was dismissed by the Respondent, which dismissal was effective on 30 June 2001.

2 The Applicant's dismissal aforesaid was procedurally unfair.

3 The Respondent is to pay compensation to the Applicant on the amount equivalent to the Applicant's 6 month salary, calculated at the rate of her remuneration as at the date of her dismissal, namely: R210 600,00 (per annum) ÷ 2 = R105 300,00

4 The compensation aforesaid is to be paid within 60 (sixty) days from the date of this Order.

5 There is no order as to costs.

NDLOVU, AJ

Appearances:

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For the Respondent : Mr W LaGrange
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Date of Judgment : 28 November 2003