IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: PA2/03

In the matter between:-

SPRINGBOK TRADING (PTY) LIMITED APPELLANT

and

W. ZONDANI & ELEVEN OTHERS RESPONDENTS

JUDGMENT

JAFTA AJA

Introduction

[1] On the 14th July 2000 the appellant terminated the respondents' contracts of employment. Aggrieved by this decision, the respondents took the resultant dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation. When the dispute could not be resolved through conciliation, it was referred to the Labour Court for adjudication. The matter came before **Ngcamu AJ** who, after hearing evidence from both sides, found that the respondents' dismissal was substantively and procedurally unfair. The Court *a quo* ordered the reinstatement of the respondents on terms and conditions no less

favourable to them than those that had governed their employment before their dismissal. With the leave of the Court a quo, the appellant now appeals against that order.

The facts and evidence

[2] The appellant and the respondents have two diametrically opposed versions on the main issue in this appeal which is whether the parties had reached an agreement in respect of the termination of the respondents' contracts of employment. The appellant says that they had whereas the respondents say that they had not. That issue may well be decided on the probabilities. Accordingly, it may be necessary to set out the parties' respective versions and extracts from their evidence in a more detailed manner than one would ordinarily do. This should help in the assessment of the plausibility and probability of each version and in that context I proceed to set out the facts and evidence.

[3] The appellant is a registered company which procures hides and skins in Southern Africa and gets them semi-processed and sells the product on local or overseas markets. The respondents are former employees of the appellant and members of the National Union of Leather and Allied Workers ("the union") who were dismissed from the appellant's employment for alleged operational requirements on the 14th July 2000. Mr Arthur Petrus ("Petrus") features prominently in this matter. He was the organiser of the union who dealt with the appellant in regard to matters affecting members of his union employed by the appellant including the respondents. Another person who features prominently in this matter is Mr Peter Bell ("Bell"). He was a director of the appellant and also owned a labour brokerage called Prostaff Agency ("Prostaff"). Prostaff provided a group of workers to the appellant

and charged the latter a fee for their services.

[4] At the trial the appellant called only Mr Bell as a witness. The respondents called two witnesses, namely, Mr Petrus and a Mr Ndleleni, one of the respondents. Bell testified that early in 2000 the appellant's directors had a discussion over what they regarded as the inconvenience experienced by the appellant in maintaining a separate payroll for its employees when Prostaff administered another payroll in respect of its employees who worked at the appellant's plant. Bell testified that during this discussion it was said that all the employees of the appellant should be placed on the payroll of Prostaff.

[5] Bell stated that on 23 May 2000 he held a meeting with Petrus to discuss various matters pertaining to members of the union who were in the appellant's employ. He said that he informed Petrus for the first time at this meeting that the appellant was contemplating retrenching its employees and to have them employed by Prostaff. Bell said that Petrus did not say much. Bell promised to send Petrus a letter in regard to the proposed retrenchment.

[6] Bell's evidence as to what transpired at the alleged meeting of the 23rd May was detailed. He said that the meeting took place at the appellant's premises. He said that their discussion was about **"grievances and disciplinary issues and stuff."** He said that he was just giving Messrs Petrus and Ndleleni ("Ndleleni") clarity on some questions. Bell went on to say:.

> **"One of the issues that came up that I do recall was that they wanted to know how they could get hold of me and how they could complain, because they did have problems and I asked them why they had not raised them up until that point in time, and they seemed to be confused about the fact that I was not on the premises, and I did explain to them how to contact me and that if**

they had a material issue that needed discussion I would be there for them, and that they need just give me a written grievance and hand it to, I gave them a contact person who was my contact person, because I used to come out every week or twice a week, but I would not bother to go into the store at that point in time if there was no issue that needed to be resolved on a daily basis, and I would drop off the wages with one of the people in the admin office, and I explained to them that they should use that contact, if they wanted to get hold of me, just give a written grievance, or if there was a really pressing matter go to him and make a phone call so that I could get there."

[7] Bell went on to say that they were discussing **"(j)ust a few nitty gritty issues about who was in charge, who should they report to, who could they complain to and so on and so forth and process."** He said that that was the basis of the meeting. Bell said that the meeting did not take long. He said that he did not take minutes of the meeting because he did not believe that there was a need to. He stated that the meeting was **"low key".** He testified that he explained to Petrus and Ndleleni how to get hold of him and said that, if there were any issues, he would address them.

[8] Bell further testified that at the end of the meeting he **"got into a little bit of a verbal banter, if you wish to start with Mr Petrus,**

to explain to him what was in fact imminently on the horizon." He said that he told Petrus that he had had a discussion with the other directors of the appellant and they were finding it rather inconvenient, time-consuming and wasteful to have two groups of employees working "**in tandem**" because they had to have a **"fancy wage system going for [the appellant's] employees which were separate from [those of Prostaff], the appellant had to have a person 'constantly on administrative issues of the employees of [the appellant] and effectively** I **was handling all the labour issues and they just saw it as being the obvious solution to their problem in terms of economics, administration and efficiency to place all the employees that were located in their premises under the obvious place, Prostaff Agency, which at that stage had been working fine."**

[9] Bell went on to say **"I took it as an opportune time to discuss it with Mr Petrus at that particular meeting of the 23rd, and I actually went into it in a large amount of detail because, well, as much detail as was possible for this rather simple matter, a case of this is what [the appellant's] management perceive, this makes sense, this is what we want to do, this is why we want to do it and this is how it is proposed that we do it, and all of that I went through with Mr Petrus at that particular meeting and I said to him but listen do not worry about it, he did not have any issues or questions, he just shrugged his shoulders or**

something if I remember again, and I said to him that I will formalise it because in terms of sec 189 it is required that I give him the letter stating the points, the reasons, etc what I propose. So I indicated to him at that point in time that a letter would follow shortly to him."

[10] On 30th May 2000 Bell addressed a letter to the union for the attention of Petrus as a follow-up to the discussion that he said he had had with him and Ndleleni on 23rd May. The letter read thus:.

"Re: PROPOSED RETRENCHMENT OF SPRINGBOK TRADING EMPLOYEES.

We act on behalf of Springbok Trading in the above matter.

As discussed at our meeting of 23 May 2000, it is proposed that all the weekly paid employees of Springbok Trading be retrenched and employed through the brokerage, Prostaff Agency.

The reason for this proposal is that the majority of the employees at Springbok are already employed by Prostaff, and it is economically and administratively wasteful running the workforces in tandem.

Prostaff is a professional employment organisation and the benefit of employing the employees through such a vehicle is that it frees up the management of Springbok to concentrate their efforts on their core business.

It is proposed that this change take effect as soon as possible and all the employees affected are free to offer their issues.

Please contact the writer in order that we may set a meeting date to discuss the matter."

Bell's evidence was that the letter was transmitted by telefax to the union and a fax report slip was put up in support thereof. The respondents and Petrus did not dispute that the letter was sent to, and, received by, the union's office but Petrus said that it did not reach him. As can be seen from the letter, Bell concluded it by inviting Petrus to contact him so that they could set up a meeting to discuss the matter.

[11] Both Petrus and Ndleleni denied having had a meeting with Bell on 23rd May. In fact they also denied that there ever was a meeting between Bell and Petrus which was attended by Ndleleni at any stage. Petrus testified that on the 23rd May he was attending a meeting of wage negotiations at the bargaining council and could produce documentary proof in support thereof. This had been put to Bell under cross-examination but he had persisted in his version in this regard. Petrus was never asked when he gave this evidence to produce the documentary proof of his attendance of the meeting of wage negotiations at the bargaining council nor did Bell or the appellant's Counsel seek the production of such documentary proof. Petrus denied that he had any discussion with Bell on 23rd May along the lines testified to by Bell.

[12] Petrus' version was that pursuant to his letters of early May 2000

to the appellant he had met on the 11th May with Mr Kok of the appellant's management whom he thought to have been the manager of the appellant but Mr Kok had referred him to Bell. Petrus said that he then set up a meeting with Bell and that meeting took place on 14th June 2000.

[13] Petrus testified that at the meeting of 14th June he and Bell discussed the issues set out in his letter of the 8th May 2000 as well as **"the wage."** Those issues were reflected in the letter as the **"company's procedural guidelines",** disciplinary code and **"grievance Code and Employees."** Petrus said that he also discussed with Bell the appellant's failure to provide him with documents that he had requested previously. He said that Bell told him that he did not have copies of those documents with him but would supply Petrus with such documents in due course. Petrus testified that he then brought up the question of a wage increase for his union members. He stated that he wanted to know what the appellant's intentions were in that regard. He said that he asked Bell whether he would have a meeting with him regarding a wage increase for the employees and Bell said that he was in a hurry as he had other commitments and was not prepared to discuss a wage increase on that day.

[14] Petrus was asked whether Bell did not raise the question of retrenchment at this alleged meeting and he said that he did not. It was put to him that it was highly improbable that Bell would not

have raised that issue at that meeting if such a meeting had taken place as he had already written the letter of the 30th May to the union about the issue of a retrenchment. Petrus insisted that Bell did not raise the issue of retrenchment at that meeting. Under cross-examination Petrus emphasised that the meeting of the 14th June was held at his request and that the issues that he had wanted to be discussed "**were brought up, very fast, very quick and off went Mr Bell."** Petrus testified that, after his meeting with Bell, he had a meeting with his members and reported back to them what had transpired at that meeting. Bell denied having had a meeting with Petrus on the 14th June.

[15] Under cross-examination Petrus testified that, after the meeting of the 14th June 2000 but before the 19th June, he drew up wage demands for the union members at the appellant and sent them to Bell. He testified that among those demands he made a 20% wage increase demand. He testified further under cross-examination that he asked for the meeting of the 19th June to discuss wage demands with Bell. He said that he requested the meeting before the 19th June and on that occasion Bell mentioned to him that he wanted **"to bring up some proposed retrenchment."** Petrus said that Bell was also anxious that they have a meeting about the retrenchment.

[16] Under cross-examination Petrus' attention was drawn to the fact that in par 6 of the respondents' statement of claim it was alleged

that Bell had telephoned Petrus "**on or about 19 June 2000**" and asked Petrus to attend a meeting on the appellant's premises on the 19th June. Petrus was then asked whether the allegation in the statement of claim was incorrect and that he was the one who had requested the meeting of the 19th. Petrus answered that the allegation in the statement of claim was wrong as he was the one who had telephoned Bell and asked for a meeting to discuss wages. It needs to be observed that in his evidence in chief Petrus had said that Bell had telephoned him on the 19th June and asked him to "**come out**" to the appellant's premises and he had obliged.

[17] Petrus testified that he did not bring anyone to the meeting. Asked why he had not taken any one of the union members to the meeting, he replied that that was because he did not "**want to interfere with the production**." Earlier on Petrus had testified that he had not taken any employee to any meeting with Bell because there was fear that any such employee would be victimised because the only shopsteward for the union who had ever been elected in the appellant, one Raymond, had been dismissed "unfairly" which was perceived as victimisation. Petrus was then asked whether the reason why he did not take any one of the union members to the meeting of the 19th June was no longer fear of victimisation but a reluctance to interfere with production. To this he answered: "**and it is not proper that we take workers to wage negotiations, only shopstewards**."

[18] Under cross-examination Petrus said that the purpose of the meeting of the 19th June was to discuss wages and the first issue that he raised at that meeting was the issue of a wage increase. Petrus said that Bell's reply to this was that, if the appellant could afford an increase, it would consider giving an increase to certain employees. Petrus said that he then told Bell that "**there is no such thing that if the company can afford it that the people must get paid increase."** Petrus testified that Bell **"was very short and said [as] he always [said] that you can do what you want. I cannot even threaten him with industrial action because he said he can anytime get a truckload of workers to replace those that are taking part in the industrial action."**

[19] Petrus said that he then told Bell that he would report to the workers that Bell did not want to discuss wages with him. Petrus said that Mr Bell's answer to this was to say that Petrus could do whatever he liked. As far as the issue of retrenchment is concerned, Petrus said that at the meeting of the 19th June Bell said that he intended retrenching the workers from the appellant and bringing them over to Prostaff's payroll. Petrus stated that his answer to this was to ask Bell to put everything in writing and send it to him and they could take the matter further after that. Petrus said that Bell then told him that whether Petrus liked it or not, he was going ahead with the retrenchments. Petrus said that he then asked if he could speak to the workers and Bell told him that he could speak to

the workers and tell them what he had said but whether they accepted it or not, that was what was going to happen. Petrus testified further that, after his meeting with Bell, he met with the employees and reported back to them. He said that they were upset. He said that he told them not to sign any documents if Bell gave them documents to sign. Petrus testified that he instructed the workers not to sign any document because, as he put it, **"I know how Mr Bell operates."**

[20] Petrus was asked under cross-examination what Bell said to him when he said that, if he wanted to retrench, he should notify him in writing and put his reasons for such retrenchment and proposals in a letter. Petrus answered that Bell's reaction to his request was that whether he (Petrus) liked it or not, he, (Bell) was going ahead with the retrenchment. Petrus was then asked whether Bell did not at any stage say that he had already done that by way of his letter of the 30th May. Petrus said that Bell did not mention any such letter. It was then suggested to Petrus that it was highly improbable that Bell would not have referred to his letter of the 30th May if he, Petrus, had asked him to put this in writing because in effect this would have been asking Bell to repeat an exercise that he had already done. Petrus persisted in his version that no mention of such a letter was made by Bell. Petrus had maintained the same stance in respect of his alleged meeting of the 14th June. Petrus testified that the meeting of the 19th June did not even last for half an hour because Bell's attitude was **"whether you like it or not I**

am going ahead." Bell denied having had a meeting with Petrus on the 19th June and insisted that his second meeting with Petrus was on the 29th June or thereabout. Petrus testified that he then waited to see whether Bell would go ahead with the retrenchment. Petrus said that he thought that Bell might change his mind about retrenching the employees but, if he did not, his plan was to declare a dispute and refer to the CCMA.

[21] Bell was asked during his evidence in chief whether Petrus had contacted him in response to his letter of the 30th May. Initially Bell answered that Petrus had not contacted him. Bell added that that time was the season for annual wage negotiations for a number of companies in which the union was involved and Petrus was always complaining whenever Bell got him on the telephone about how busy he was "**travelling from here to there to Durban…"** He said that it was the peak season for annual wage negotiations for the various industries in which the union was involved and **"they were busy running from pillar to post."** Mr Bell testified that he eventually spoke to Petrus and they agreed upon a meeting on the 29th of June. Bell said that this meeting of the 29th June was convened to discuss the retrenchment. He said that he was 100% sure that Ndleleni also attended that meeting. Bell said that the meeting was held at the appellant's premises.

[22] Bell testified that the next meeting was on the 29th June 2000. He said that present at that meeting were Ndleleni and Petrus, on

behalf of the union, and himself on behalf of the appellant. Bell gave a detailed version of what occurred at the meeting of the 29th. He testified that he went through the motivation for the appellant's proposal. He said that there was no objection or any comment from Petrus and Ndleleni. He said that he then took it upon himself to "**talk about practicalities, the details of actually making the change"** because he wanted to satisfy the union and the workers that "**there would not be any issues."** He said that he wanted to make the transition as smooth as possible for them. Bell went on to say: **"So there were no proposals whatsoever from the union, he sat and listened with a mouth full of teeth. I will be quite honest, and he nodded and he did not show any point of disagreement or otherwise, and I specifically looked at issues that I thought could be of concern to workers."** Bell said that he told Petrus that, if the workers were paid out severance pay and they were then employed by Prostaff, they would in such a case be employed as new employees at Prostaff in which case, if there was a retrenchment at Prostaff, they would "**bear the brunt of"** such retrenchment on the basis of the last in first out (LIFO) rule. Bell went on to say that he had told Mr Petrus that the employees in question were **"loyal chaps"** and he did not want them to feel threatened in any way that their services would be terminated. Bell testified that he proposed that he would "**put a rider into the agreement … that [he] would accept that the service would be counted as service, albeit not for future payment of severance pay, but for length of service."**

[23] Bell also testified that the other matter of concern to him which he raised at the meeting with Petrus and Ndleleni was that he did not want to have "**to pay out the bonus and leave accrual or allocations from [the appellant] to the employees [as] it was close to Christmas and [he] did not want them to end up having a situation where they got to Christmas and their bonuses had been paid out in August and they had nothing for Christmas**." Bell said that he proposed that the appellant hold back the bonus and annual leave pay **"so that they would not have an affected leave cycle or get their money and blow it before Christmas**." Bell said that he also proposed at the meeting that the employees' sick leave cycles continuous as their service was to be regarded as continues once they were in Prostaff's employment. He said that he had already spoken to the appellant about this. He testified that his aim in this regard was to ensure that the employees "**would not end up having sick leave that they did not have an entitlement to."** Bell said that "**those were the issues**" at the meeting of the 29th June "**otherwise it was the normal stuff, we will pay you this, we will terminate service on such and such a date, that is what the proposal was**."

[24] Bell emphasised that all the proposals came from him and that Petrus did not raise anything. He said that **"(t)here was no murmur whatsoever other than an acknowledgement, nodding of heads [in] recognition of what I was saying and that it in fact**

made sense, and further than that I proposed to look after the employees. And I raised concerns on their behalf because that was my honest intention. It was not meant to subvert them or anything. It was just a question of it was operational, the practical thing to do. At the end of that meeting Mr Petrus suggested that he would go back to the employees and revert to me and that is where we parted on that particular day." Mr Bell testified that most of the time during the meeting Mr Petrus sat there **"with a mouth full of teeth"** and did not say anything.

[25] However, Bell testified that Petrus failed to revert to him despite having promised to. Bell attempted to contact Petrus by telephone on a number of times without success. Bell testified that, when he eventually reached Petrus on the telephone, which was on the 11th July 2000, the latter reported that the union members had accepted the appellant's proposal. According to Bell, he then suggested that a written agreement be signed but Petrus indicated that he was not available. Bell testified that he then asked Petrus whether Ndleleni could sign the agreement instead. Bell said that Petrus answered in the affirmative. Bell said that he thereafter drafted an agreement for signature by Ndleleni. For reasons that will emerge in due course in this judgement, it is necessary to quote the terms of that agreement in full. That agreement read thus:-

> **"It is hereby agreed between Springbok Trading (the company), and the union represented by the below mandated shop steward on behalf of the employees, that**

the employees services with the company shall terminate with effect from Friday 14 July 2000 and both parties waive the requirement for notice beyond this point.

All the affected employees shall be entitled to severance pay in terms of the law.

Annual leave and bonus accrued shall be held in reserve and paid to the employees at the time it would normally have been paid had they continued with their employment with the company.

With effect from the same date as above, all the affected employees shall be given employment with Prostaff Agency, subject to their terms and conditions, and be placed on a labour broking basis, with Springbok Trading.

It has been agreed with Prostaff Agency that recognition shall be had for past service in as much as the determination of service length is concerned, although this shall not mean that Prostaff Agency has any obligation to pay severance payments on these years as this payment shall already have been made."

[26] It will have been seen from the agreement signed on 11th July that, after the retrenchment of the employees from the appellant, the employees would be employed by Prostaff on Prostaff's terms and conditions of employment. It will also have been seen from that agreement that Prostaff would place the employees with the appellant. In the light of the fact that the agreement of the 11th July contemplated that Prostaff would employ the employees on its standard terms and conditions, those terms and conditions of employment are obviously relevant to this matter. It is not necessary to quote the full standard Prostaff contract of employment for present purposes. It is sufficient to quote only

clauses 1-9 thereof. They read thus:

> **"1. Your services shall be hired out to companies who wish to use the services of Prostaff Agency. You shall take instructions and work under guidance from the client who is using our service and from the management of Prostaff.**
>
> **2. You understand that the client hiring our service, can terminate the work contract with Prostaff at any time, or can ask of the replacement of an individual or group of employees. Should this happen, you understand that if Prostaff is unable to place you at another of its client companies, your employment contract shall be suspended in its entirety until you are placed elsewhere. All benefits shall be suspended. You may also be placed on short-time without pay while at a client if need be in the event of shortage of work.**
>
> **3. In line with 2 above, you agree to work for any client or Prostaff if instructed.**
>
> **4. A 3 month probation period shall apply, whereafter the employer may, at his sole discretion, confirm permanent employment or extend the probation period if necessary.**
>
> **5. Your initial payrate shall be 6-22 per hour.**
>
> **6. Hours of work shall be within the limits prescribed by**

law and the employer reserves the right to alter starting and finishing times subject to his requirements.

7. **Overtime working, within statutory limits, shall be compulsory if so directed.**
8. **Should you be requested to work on a public holiday, you must oblige.**
9. **Any task related to the business of the client/employer, must be carried out if so directed, even if it is not normally or generally performed by yourself."**

[27] Bell testified that, after he had prepared the agreement, he called Ndleleni whom he had understood to be a shopsteward. He testified that he explained the agreement to Ndleleni in English. Bell went on to say that he told Ndleleni that the union had agreed to the terms of that agreement. This part of Bell's evidence accords with Ndleleni's evidence on this aspect. Bell said that he also looked for another employee, one Jacobs, and called him to come and sign the agreement as well. Bell said that he explained the contents of the agreement in Afrikaans to Jacobs. Asked under cross-examination why he had taken the trouble to explain the contents of the agreement to Jacobs as he was only going to sign as a witness, Bell said that he was not sure that Ndleleni would understand fully the terms of the agreement and did not want it to be thought that he had got Ndleleni to sign the agreement without understanding its

terms and wanted there to be someone else, too, whose ability to understand the agreement he trusted. Bell said that after he had explained the agreement to both Ndleleni and Jacobs, they both signed the agreement.

[28] Both Petrus and Ndleleni denied having had a meeting with Bell on the 29th June. In support of this version Petrus testified that, on the morning of the 29th June, he and other union delegates were on their way to a meeting of the national executive committee of the union in George which was to be held during that week-end. Petrus said that there was no way in which he could have had a meeting with Bell on the 29th June. This version was put to Bell under cross-examination and he persisted in his evidence that he had a meeting with Petrus and Ndleleni on that day.

[29] Petrus denied that he told Bell that the workers had agreed to the appellant's proposal that they be retrenched from the appellant and be taken over by Prostaff. He said that he never concluded any agreement with Bell and that he would never conclude such an agreement over the telephone. He said that **"we do not negotiate over telephones. It is in person."** He also denied that he had given a go-ahead that Ndleleni sign any agreement on behalf of the union. He denied, too, that Ndleleni ever accompanied him to any meeting with Bell. He denied the evidence by Bell that he had said that he was busy. Petrus said that, when it came to serious matters like agreements, he would make time even if his schedule was tight.

[30] Ndleleni's version of how he came to sign the agreement on the 11th July ran thus:

> **"On this day, 11 July 2000, Mr Bell arrived when we were still at our jobs at Springbok Trading with this document. He said that I should look for another person who can witness to the signing of this document. He said that he was coming from our union office and Mr Petrus said that [I] should sign. I tried to get someone and I finally got Mr Jacobs to sign as witness. We went to the office and Mr Bell asked us to sit down. He said I should sign here and Richard on the other side. He spoke to Richard in Afrikaans. I requested him whether should I not phone my organiser, my union organiser, and ask him whether is this really the real document, is this truthful. He refused to give me the opportunity to phone. I again requested him to give me this document and go out and show this document to the other employees outside so that I can ask them whether is it correct for me to sign this document, and he refused me to do that. He said that I do not have a choice, everything has been agreed upon, it comes from my union. He further said that if I do not sign on this document then I will be on the other side of the gate. Then at that moment we stared at each other, myself and Richard, we were confused. We then ultimately both signed the document. Then the**

following morning, that means 12 July, I then phoned Mr Calvin Petrus, our organiser, telling him about this document that Mr Bell said we must sign, and he said that it was coming from him. He denied knowledge of this document and also he denied ever seeing Mr Bell in his offices. He then said that I must take this document and put it aside, I do not have to worry about it, because this what Mr Bell has done is not correct. That is all."

[31] Under cross-examination Ndleleni was asked why, if Bell was coming from a meeting with Petrus at the union office, he would not have got Petrus to sign the agreement as he was happy with it but instead come to the work place and ask him, Ndleleni, to sign the agreement. Ndleleni's answer was that maybe Petrus was not authorised to sign the agreement. It seems quite improbable, that Bell would have said that he had been to the union office and had met with Petrus who had said he was happy with the agreement but he had not got Petrus to sign the agreement but brought it to the workplace to be signed by a union member. Ndleleni testified that there were two reasons why he had signed the agreement despite the fact that Petrus had given instructions for the employees not to sign any document from Bell. He said that the one was that Bell said that he was coming from the union offices and Petrus was happy with the agreement and the other was that Bell had threatened him with dismissal if he did not sign the agreement.

[32] Petrus testified that on the 12th July he was telephoned by Ndleleni

who told him that Bell had forced him to sign an agreement. Petrus testified that he told Ndleleni not to worry and that, if Bell went ahead **"with this thing"**, he would declare a dispute and refer it to the CCMA. He did not ask Ndleleni to let him have a copy of that agreement. He also did not telephone Bell to ask him what was going on or ask him about Ndleleni's allegation that he had threatened him with dismissal if he did not sign the agreement or that Petrus had authorised the signing of the agreement. Petrus said that he did not think of contacting Bell about this because he thought that Bell would not go ahead with the retrenchment.

[33] Petrus testified that later – after the 12th July – Bell had telephoned him and **"told me that the people were already retrenched from Springbok Trading and they do not want to sign the contract of employment that he is offering them."** Petrus testified that his response ran thus: **"I told him Bell over the phone, Bell as far as I am concerned no retrenchment took place, and if you go ahead with this I am going to declare a dispute against Springbok Trading which is the company that they work for."** Petrus said that he knew for the first time on the 7th August that Bell had gone ahead with the retrenchment. He said that some of the workers were not allowed into the premises. He said that he then went to the company and had a meeting with the workers outside the gate and it was on that day that the workers gave him a copy of the agreement of the 11th July and a standard Prostaff contract of employment. Thereafter he wrote the letter of

the 8th August demanding the reinstatement of the workers.

[34] Bell said that in terms of the agreement between the parties, the contracts of employment of the employees were going to terminate on the 14th July. He testified that various documents were then included in the pay packets of the employees which included the standard Prostaff contract of employment which they were asked to sign on the 14th or the 17th July. The employees were meant to commence duty in Prostaff's employment on the 17th July. Bell said that on Monday, the 17th July, some of the employees signed the Prostaff contracts of employment but others, including the respondents, refused to do so. Bell said that, when he realised early in the week commencing on the 17th July that some of the employees were refusing to sign the Prostaff contracts of employment, he telephoned Petrus and told him this. He testified that Petrus was upset about this. Bell stated that he told Petrus that he would give him another week to sort the problem out and in the meantime he would allow the employees refusing to sign to work as casuals. Bell stated that Petrus said that he would sort the problem out.

[35] Bell testified that at the beginning of the week commencing on the 24th July he had the same problem as at the beginning of the previous week. He testified that the employees who had refused to sign the Prostaff contracts of employment the previous week

continued to refuse to sign. Bell said that he once again contacted Petrus who again said that he would talk to the employees. Once again Bell allowed the employees to work that week as casuals. Bell said that the same thing happened the following week. That was now the week commencing on the 31st July. Bell testified thus in regard to that week:

> "I think it was the end of that week [the week beginning the 31st **July]. I said well that is it and I had warned, I told Mr Petrus that, if they do not sign now finally that I will not allow them on the premises on the day that I think I gave them three weeks of indulgences where I contacted Mr Petrus on at least three occasions to tell him please sort it out, what is the problem, what is going on, and each time he told me he would get back to me, he will sort it out, and get them to sign. I kept saying I will give you an indulgence. Eventually I got to the point where I had to instruct the security guards not allow them onto the premises."**

[36] Bell said that round about the 8th August he heard that it was being alleged that he had misled Ndleleni and Jacobs into signing the agreement of the 11th July by saying to them that the union had agreed to that agreement. Bell said that he contacted Petrus and asked him what exactly this was all about. Bell said that he was "**flabbergasted**". Bell said that Petrus replied that one of the

employees had been to the union office to complain and the union's general secretary happened to be in the office at the time and the general secretary had insisted that Petrus "**take up the matter**" and he, that is Petrus, had felt that he had to do it. Bell said that Petrus said that that is not what he had wanted to do.

The decision of the Court a quo

[37] As already indicated above, the respondents did not accept the dismissal. They regarded it as unfair and demanded reinstatement. Needless to say, the appellant's attitude was that the termination of the respondents' services was fair in that it had been agreed upon with the union but that, even if it was found that the union had not agreed to such termination, same was fair both substantively and procedurally as there were valid operational requirements and a fair procedure had been followed. In the adjudication of the resultant unfair dismissal dispute, the Court a quo found that the appellant had failed to discharge the onus of proving that the union had agreed to the termination of the respondents' contracts of employment by the appellant and that they be moved into the employment of Prostaff. In those circumstances the Court a quo found that the appellant had failed to prove the existence of a fair reason to dismiss the respondents. With regard to procedural fairness, the Court a quo found that the dismissal was procedurally unfair because, among other reasons, the consultation process had not been completed when the appellant dismissed the respondents. As already indicated earlier, the Court a quo ordered the appellant to reinstate the respondents in its employ retrospectively to the date of their dismissal. It also ordered the appellant to pay the respondents' costs.

The appeal

[38] Basically the judgement of the Court *a quo* was challenged on the following grounds; namely;

a) That the Court a quo erred in accepting the testimony of the respondents' witnesses and rejecting the evidence of the appellant's witness;
b) That the Court a quo should have found that the respondents' contracts of employment were terminated in terms of an agreement concluded by the parties;
c) That alternatively to (b) above, the Court a quo erred in holding that the respondents' dismissal was substantively and procedurally unfair on the basis that a fair reason for the dismissal was not proved and that no proper consultation was held prior to the dismissal.

Issues on appeal

[39] The parties' version about a number of aspects of this matter are divergent. Both parties were agreed that, prior to the termination of the contracts of employment of the respondents, two meetings took place which involved Bell and Petrus. However, they differ on the dates on which those meetings took place and on whether Ndleleni also attended those meetings. On Bell's version the two meetings took place on the 23rd May and on the 29th June and he thought that Ndleleni attended the meeting of the 23rd May but was not sure but he said that he was '100% certain' that Ndleleni attended the meeting of the 29th June. On Petrus' version the two meetings that he said he had with Bell took place on the 14th and the 19th June and Ndleleni never attended any of those meetings. Ndleleni

corroborated Petrus' version that he did not attend any meetings with Petrus and Bell. Ndleleni's evidence was that Petrus had a meeting with the appellant's employees on the 19th June at about lunch time which was in accordance with Petrus evidence in that regard because Petrus testified that after meeting with Bell he had a meeting with the workers. At some stage in the course of his evidence Bell seemed unsure that the date of the second meeting was the 29th but said that he thought it was on that date. He said that the second meeting was near the end of June.

[40] I agree with the Court a quo that it is not really necessary to decide on which of the two sets of dates provided by the parties the two meetings took place. However, it does seem probable that the first meeting took place on the 23rd May. Otherwise it is not clear what motive Bell would have had to refer in his letter of the 30th May to the union to a meeting of the 23rd May. There can be no basis for any suggestion that Bell fabricated that letter. What is important is what was discussed at the two meetings between the parties. There is also no particular significance on whether Ndleleni was present at one or both of the meetings between Bell and Petrus save in so far as he may be able to corroborate one or the other.

[41] With regard to what was discussed between the parties at the two meetings – irrespective of the dates when such meetings were held – the parties' versions converge only to very limited extent. On both parties' versions Bell did raise the issue of the retrenchment of

the appellant's employees and their being thereafter moved into Prostaff's employment. On Bell's version he raised it for the first time at the meeting of the 23rd May and gave motivation for it but told Petrus not to worry about it at that stage as he intended sending him a letter in which the full proposal would be made and motivation would be given. That is the letter that Bell sent to the union by fax transmission on the 30th May. On Petrus' version, quite apart from the fact that, on his version, there was no meeting between the two men on 23rd May, Bell did not raise the issue of retrenchment at the meeting of the 14th June but did raise it at the one of 19th June. Petrus testified that at the meeting of 14th June he and Bell discussed the issues in the agenda contained in his letter of 8th May – which did not include retrenchment but he had also raised the issue of the wage increase for the workers or wage negotiations but Bell had promised to let him have the documents he had asked for in the letter of 8th May and had said that he was not prepared to discuss wages on that day. Petrus said that Bell was in a hurry in that meeting and had told him that he had other commitments.

[42] Petrus' version was that, even prior to the second meeting of 19th June, on his version, Bell had told him that he wanted to discuss retrenchment with him when they met. Petrus said that Bell raised the issue of retrenchment in the meeting of 19th June. On the issue

of the content of the discussion of the issue of retrenchment between the parties, their versions are, once again, very divergent. On Bell's version he made a proposal to Petrus on 23rd May, gave motivation for it, followed it up with the letter or notification of 30th May and discussed it in great detail with Petrus and Ndleleni at the second meeting i.e. on 29th June. On Bell's version he even took Petrus through a standard Prostaff contract of employment and told him that the clause on probation in the standard Prostaff contract of employment would not apply but throughout these two meetings and this very important presentation Petrus, on Bell's version, challenged nothing, asked no questions, made no comment and gave no indication of disapproval or unhappiness. On Bell's version all Petrus did was to nod with his head in acknowledgement of what Bell was saying. On Bell's version for the whole time Petrus sat there with, as Bell put it, "**a mouth full of teeth.**"

[43] On Petrus' version Bell did not come to the meeting to make a proposal which needed discussion. He came to tell Petrus simply what he was going to do, namely, that the appellant intended to retrench the employees and they would be moved to Prostaff's employment and that, when Petrus said that he would need to discuss this with the employees, Bell told him that he was going to retrench the employees whether they liked it or not and irrespective of what they may have to say. On Petrus' version he told this to the employees and warned them not to sign any documents from Bell

but about four weeks or so thereafter Bell proceeded to falsely inform Ndleleni and Jacobs that he i.e. Petrus had agreed to the retrenchment of the employees and their being taken over by Prostaff and had given a go-ahead to Ndleleni signing the agreement of 11th July on behalf of the union which Ndleleni and Jacobs signed.

[44] On Petrus' version Bell thereafter proceeded to retrench the employees from the appellant on 14th July and tried to get them to sign the Prostaff contracts of employment which some signed but the respondents refused to sign. However, even on Petrus' version Bell telephoned him at some stage after 14th July and informed him that some employees were refusing to sign the Prostaff contracts of employment. On Petrus' version it is not clear what was happening in the workplace between 17th July and the 8th August but on Bell's version what was happening is that he was communicating with Petrus about the problem that had arisen when some of the employees refused to sign the Prostaff contracts of employment which, on Bell's version, was contrary to the agreement that he and Petrus had concluded and Petrus kept on saying that he was going to speak to the employees concerned. That which Bell said to Petrus when, according to Petrus, Bell telephoned him after the 12th July seems to be consistent with the conduct of somebody who was speaking to a person whom he expected to know about that which he was talking. According to Petrus, in that telephone conversation, Bell told Petrus: "**that the**

people were already retrenched from Springbok Trading and they do not want to sign the contract[s] of employment that he is offering them". This sounds like Bell was "**reporting**" the workers to Petrus for conduct that he expected Petrus to find unacceptable. Of course, Bell would expect Petrus to find the employees' refusal to sign the Prostaff contracts of employment unacceptable if, to Bell's knowledge, Petrus supported the idea that the employees sign the Prostaff contracts of employment. If that is so, that would, of course, corroborate Bell's evidence that Petrus had agreed to the proposal that the employees be retrenched by the appellant and taken over by Prostaff. It is, therefore, within this context and what follows hereunder that I have to determine whether the termination of the respondents' contracts of employment with the appellant and that they be employed by Prostaff had been agreed to by Petrus.

[45] The respondents' claim was that they were dismissed by the appellant and such dismissal was without any fair reason and there was no consultation as required by sec 189 of the Labour Relations Act, 1995 ("the Act")prior to their dismissal. The appellant's defence to the claim was that the termination of the respondents' contracts of employment was agreed between itself and the union and that, for that reason, the dismissal could not be unfair and could not constitute an unfair dismissal. In fact the effect of that contention is that, if there was such an agreement, no dismissal as contemplated by sec 186 of the Act occurred. If there was a mutual agreement to terminate the respondents' contracts of employment

that would be a complete defence by the appellant to the respondents' unfair dismissal claim. If, however, there was no agreement, this would mean that there was a dismissal and it would still be necessary to inquire into the question whether such dismissal was substantively and procedurally fair because the appellant contended that, even if there was no agreement, the dismissal was nevertheless substantively and procedurally fair. The central question is thus the following: Was there a mutual agreement between the appellant and the respondents that the respondent's employment contracts be terminated?

Was there an agreement between the parties to terminate employment the respondents' contracts of employment?

[46] As the appellant has pleaded that the termination of the respondents' employment was effected in terms of an agreement, it bore the onus to prove not only the parties' common intention to enter into the agreement but also its specific terms. In **Cotler v Variety Travel Goods (Pty) Ltd and Others 1974 (3) SA 621 (A),** the defendant had, in defending a claim for damages arising out of a wrongful dismissal, pleaded that the plaintiff's employment had been terminated in terms of an oral agreement concluded by the parties. In deciding where the incidence of onus lay for establishing the existence of the oral agreement, **Wessels JA** stated at 628H – 629C:

> **"Variety's defence was thus, on the pleadings that the plaintiff had contracted out his right to insist on three**

months' notice of termination of his employment. In substance, though not in form, Variety's case is that plaintiff by his oral agreement waived his contractual right to require three month's notice of termination of his employment. Proof of the conclusion of the oral agreement relied upon would have been the complete answer to plaintiff's claim against Variety. … The averment that plaintiff had contracted out of his right to three months' notice of termination of his employment, forms an essential part of Variety's case that plaintiff's employment was lawfully terminated. No other form of lawful termination is relied upon. In my opinion, therefore, the incidence of onus in relation to the defence pleaded by Variety is governed by the second principle referred to by Davis AJA in Pillay v Krishna and Another, supra at 951. The oral agreement relied upon is in effect a special plea, and the onus of proof quad that defence would rest on Variety".

[47] In his heads of argument Mr Grogan, who appeared for the appellant, submitted that the appellant, represented by Bell, and the union had reached an agreement the terms of which were set out in the agreement of the 11th July. However, before us he adopted a different position. He submitted that the appellant's case was that Petrus had agreed to the "**core issue"** of the termination of the contracts of employment of the employees with the appellant and

that they be moved to Prostaff's employment but that it was not the appellant's case that Petrus had agreed to the terms and conditions under which they would be employed at Prostaff. This was, however, after Mr Grogan had accepted at the commencement of his address that the appellant had to satisfy the Court on what the agreement was on such terms and conditions. In my view once the appellant's case does not include that Petrus agreed to any specific terms and conditions under which the employees would be employed by Prostaff, the respondents' version that Petrus did not agree to the appellant's proposal to terminate the employees' service and move them to Prostaff's employment becomes even the more probable than if the appellant's version is that Petrus agreed to Prostaff's standard terms. I say this because it is highly improbable that a union organiser of 30 years experience in trade union work, as in this case, would have agreed to such a proposal without satisfying himself that his members would be employed under acceptable conditions once they were under a new employer. Mr Grogan's approach that what Petrus had agreed to was simply the dismissal of the employees by the appellant but not that he had agreed to certain terms and conditions that would govern their employment by Prostaff is at variance with Bell's evidence. Bell's evidence was that he was certain that Petrus had agreed that the terms and conditions under which the employees would be employed by Prostaff would be Prostaff's standard terms and conditions of employment. It is convenient to address the matter on both basis.

[48] Since Bell was the only witness called at the trial by the appellant, it is to his testimony that one must primarily look to see whether the appellant has established such agreement as well as its terms. Of course, the respondents' evidence must also be considered in order to establish the agreement and its terms. A close examination of Bell's evidence reveals that he testified that a proposal for the retrenchment of the respondents was made to Petrus who responded by promising to consult the respondents and revert to Bell. In this regard Bell's testimony is consistent with the appellant's defence as pleaded in its statement of defence. At paragraph 2 of the statement, the appellant alleged:

> "2.3 The [appellant] consulted with Mr Petrus of NULAW and Stephen Ndleleni, the 11th **applicant, regarding the proposed retrenchment on or about the 29th of June 2000; …**
>
> **2.3.4 At the conclusion of the consultations, Mr Petrus undertook to discuss the proposed retrenchment and the proposals of the [appellant] with the employees of the [appellant] and undertook to revert to the [appellant] after his discussions".**

[49] Bell testified that during a telephonic conversation between himself and Petrus, on 11th July, the latter advised him that the respondents had accepted the appellant's proposal and pursuant to that conversation, a formal agreement was signed by Ndleleni (on behalf of the union) and the appellant on 11 July 2000. It was not pleaded that the formal agreement signed on 11 July constituted a recordal of an earlier oral agreement.

[50] Initially Mr Grogan argued that the written agreement signed on 11 July reflected the terms of the proposal which was explained to Petrus at the meetings of 23 May and 29 June. He submitted that the union was bound by the terms set out in the written agreement because it had authorised Ndleleni to sign it on its behalf. However, the argument to the effect that the written agreement reflected the terms of the proposals made earlier was not supported by Bell's testimony. This is so because his oral evidence in respect of what he and Petrus had agreed would be some of the terms and conditions of employment of the employees at Prostaff differed in material respects from the provisions of the agreement of 11th July. Two examples in this regard relate to probation and the client with whom the employees would be placed. Bell testified that the agreement between himself and Petrus was that the employees would not be subject to probation on their taking up employment with Prostaff and yet in terms of the agreement of the 11th July read with the standard Prostaff contracts of employment during the first three months would the employees would be on probation. In regard to the clients with whom the employees would be placed, the agreement of 11th July said that would be the appellant, but the standard Prostaff contracts of employment said any client. Bell confirmed that it was the appellant with whom the employees will be replaced.

[51] Mr Grogan's further submission was that the appellant has succeeded to establish the existence of the agreement to terminate

employment against, at least, those workers who signed the written agreement 11 July. I do not agree. The written agreement was, as pleaded by the appellant, concluded by the union and the appellant. Throughout the trial, the appellant's case was that the two workers were authorised by and were acting on behalf of the union when they signed the document. It was never alleged that they were also acting in their personal capacities. In fact, the terms of the document itself expressly state that the agreement was between the union and the appellant. To the extent that the appellant's case was that in terms of the agreement concluded between Bell on behalf of the appellant and Petrus on behalf of the union, the respondents' employment by Prostaff would be governed by the standard Prostaff terms and conditions of employment, such terms and conditions were very unfavourable to the respondents. The respondents would be worse off than under the appellant. The clauses of such contract of employment relevant to this aspect have been quoted above. Clause 1 was to the effect that an employee had to agree that he would be hired out to companies which might wish to use the services of Prostaff Agency. Clause 2 was to the effect that, if a client terminated its contract with Prostaff and Prostaff could not immediately place the employee with another client, the employment contract between the parties would be suspended "**in its entirety**" until the employee was placed elsewhere. The employee also had to agree that he could be placed on short time "**without pay while at a client if need be in the event of shortage of work**." Clause 4 provided that: "**a 3 month probation period [would] apply, whereafter the employer [could] at his sole**

discretion, confirm permanent employment or extend the probation period if necessary"

In terms of clause 6, Prostaff reserved "**the right to alter starting and finishing times subject to his requirements**."

[52] As already indicated above, the appellant had to prove the agreement as well as its the terms and conditions that it alleged had been concluded. If that agreement was to the effect that, once the respondents were employed by Prostaff, they would be subject to the standard terms and conditions of employment applicable at Prostaff, the respondents would have to serve a probationary period. However, in his evidence Bell said that the three month probation period clause in the standard Prostaff agreement would not apply but everything else in the agreement would. Despite this, Bell emphasised that the agreement with the union was that the respondents "**would accept the terms and conditions of Prostaff Agency**." But at another stage he said: "**No, everything would have applied barring the three month probation**". If the position is that the agreement between the appellant and the union was that the probation clause of Prostaff's standard contract of employment would not apply, it is strange that the written agreement that Bell prepared and asked Ndleleni to sign contained a clause to the effect that the employees' employment by Prostaff was to be subject to Prostaff's standard terms and conditions when he knew that the standard terms and conditions of employment at Prostaff included a three month probationary period.

[53] During the cross-examination of Bell, the appellant's Counsel, during an objection to some line of questioning, placed on record that Bell's version was that the agreement was in writing and oral evidence could not be led about its terms. That is contrary to the evidence that Bell gave, namely, that the agreement was oral but the document signed by Ndleleni was simply a confirmation of the oral agreement reached between him and Petrus.

[54] Bell was asked whether he had explained to Petrus "**the intention**" of all the clauses of the agreement and he answered: "**I recall explaining them to him, I think they are fairly self explanatory, the clauses are**." The respondents' Counsel and Bell then had the following exchange:

> **"Counsel:** **I put to you earlier that clause 2 in particular strips the employees of their rights, and you said look well in practice that was not going to happen. Did you take Mr Petrus through these (intervention) …**
>
> **Mr Bell:** **I cannot say with 100% certainty that I did, but I believe that I did yes, that I explained to him that he need have no concern. What I do know, as I said before, is that it was clear to him that it was going to be under the terms and conditions of Prostaff Agency, that much I can say to you with 100% conviction and clarity.**
>
> **Counsel:** **If one now assumes your, if I can call it adapted version, I am going to argue to this court that the chances of the union**

representative, without putting up a fight, after having been made aware that his employees' job security is going to be stripped away, and just consenting to it, in fact shortening the process, it is almost inconceivable, it just does not happen. ---

Mr Bell: You put that to me, I have to say to you that as far as I am concerned there is nothing much in this clause here, in this agreement, that is different to any normal work situation, nothing much in this clause here, in this agreement, that is different to any normal work situation, nothing significantly so. It is quite possible to put people on short term. If a person requires discipline he can be disciplined. Yes, you maintain that in your view there is a question of that we can take the service away. The purpose of that is not about that, the purpose of removing a group of individual employee is to do with the cyclical movements. It is pretty much like short time."

[55] Later on Bell said that the agreement with the union was that the employees would accept Prostaff's standard terms and conditions of employment. At some stage later Bell said: "**There was an agreement, the trade union said that they agreed to the retrenchment and the severance and everything else, they agreed to retrenchment. That agreement is contained in the document that was signed by Mr Ndleleni, and that is the document. I cannot force an employee who says I do not want to work for you to work for me, but it was agreed by the trade union …**" Bell's evidence that the document signed by Mr Ndleleni reflected the agreement with the union is in conflict with his evidence that the clause on probation in the standard Prostaff

contract of employment would not apply because in a Prostaff contract of employment the probation clause would apply.

[56] Bell testified that the employees "**were told that they would be employed at Springbok Trading …"** The standard Prostaff contract of employment envisaged that an employee would be placed with any client. In regard to the fact that the employees were being required to sign contracts of employment with such a clause, Bell said: **"… but that is the standard contract of employment of all people who work for my brokerage but they were certainly for Springbok Trading. I have no wish to meddle with them and change people around, so the agreement that was signed about them working at Springbok was until proven otherwise certainly correct, yes**."

[57] Bell was also referred to clause 2 in the standard Prostaff contract of employment which provided that, if an employee was placed with a client and the client asked for a replacement of that employee or group of employees and Prostaff was unable to place the employee with another client, the contract of employment of that employee would be suspended together with all benefits until the employee was placed elsewhere. It was put to Bell that his earlier evidence that the employees were being employed by Prostaff on terms that were comparable to those applicable in the appellant's employment was wrong because under the appellant their employment was not subject to such a condition. Bell's answer to this was that the purpose of the clause in the contract of employment was not to allow a client to dictate the replacement of an employee just because it might not like him. He said that, if after a month the appellant said that with regard to any of the employees, he would have argued with them that clause 2 of the contract was not meant for that. Quite frankly in this regard Bell was trying to maintain an indefensible position. There can simply be no doubt that the alleged agreement that he relied upon

placed the employees in a far more disadvantageous position than had been the case under the appellant.

[58] Furthermore the standard Prostaff contract of employment had a clause in terms of which the employees' employment by Prostaff would be subject to a probationary period of three months. When Bell was asked about this under cross-examination, he said that this clause would not have applied and said that he had not put it into the agreement. He said that his discussions with Petrus had not included a probationary period. Later on in his evidence under cross-examination Bell said that he and Petrus had discussed the probation clause and "**I had to tell him that on a matter of trust that I would not enforce it, because it is the standard contract, I did not change the contract.**" Despite this Bell still persisted in saying that the employees were going to be in comparable positions under Prostaff. When asked whether he had told whoever he had consulted with that the employees would be in comparable positions under Prostaff, Bell said: "**I in fact never did. I just told them the benefits in terms of what they would be paid, they would be employed under the terms and conditions of Prostaff Agency which Petrus was familiar with because he had certain members on my staff who were employed by Prostaff directly right from the outset."**

[59] Three observations need to be made in regard to the above. The one is that, if the appellant's version that Petrus agreed on behalf of the union to the dismissal of the employees from the appellant and their employment by Prostaff is to be accepted, then it will have to be accepted that he agreed to moving his members from one employer where they

enjoyed better conditions of employment to an employer whose conditions of employment were undoubtedly far more unfavourable to them than those provided by the appellant. The question which arises is why a union would have agreed to such a deal for its members. When this question was put to Bell under cross-examination, his answer was that the advantage of such a deal to the union was that, if the appellant got into trouble, they would not be without jobs if they were employed by Prostaff Agency, because Prostaff could place them with another client. I have serious doubt that this reason would have been attractive to a trade union because Prostaff provided the services of a labour broker and a labour broker is always available to take workers who are available and place them with clients who need their services. The employees did not need to have been with Prostaff for any length of time before Prostaff could place them with a client. The employees could have continued in the appellant's employ until such time that the appellant got into trouble and retrenched them before going to Prostaff. If they were to be retrenched by the appellant at some stage in the future and they approached Prostaff, Prostaff would not have turned them away but would have taken them and looked for clients with whom it could place them. As the appellant had not at that time given any indication to the union or the employees that it was in trouble, I cannot see what the union would have seen as attractive to the proposal. There was no advantage in the proposal for the union and the employees. If the union agreed to the proposal, it would have agreed to their members losing secure employment and being subjected to a probationary period and to suspension of their contracts of employment and all benefits when there was no client with whom they could be placed. In the event of a suspension of the contracts of employment of the employees if Prostaff could not place them with any client, the employees would not have been able to pay their union dues because they would have been without wages during such periods. The standard Prostaff contracts of employment did not put any limitation on the duration of such period. This means that an employee's contract of employment could be suspended for as long as, for example, six months or even a year if Prostaff did not find a client with whom it could place such employee.

[60] Another negative feature inherent in Prostaff's standard terms and conditions of employment is that, since the employees' contracts of employment could be suspended if there was no available client with whom Prostaff could place the employees, Prostaff would not at any stage have any need to retrench the employees because, if it could not

place them with any client, it would not be incurring any costs by way of wages if it kept them in its employ but on suspension. If it retrenched employees, it would be obliged to pay severance pay. If it did not retrench them, it would not have to pay severance pay. In such a case the period of suspension without pay could be so long that the employees might resign and go and look for alternative employment elsewhere and, if they resigned, Prostaff would not be liable for the payment of severance pay to them. I cannot see how any union could possibly agree to such a raw deal for its members, particularly when there appears to have been no sound reason for them to agree to such a deal and the person who is said to have so agreed on behalf of the union is a union official with about 30 years experience in trade unions.

[61] On Bell's version he had two meetings with Petrus in which there was some discussion of one kind or another relating to retrenchment. The first one was on 23rd May and the second one on 29th June. According to Bell, on both occasions Petrus did not say much but simply listened to what Bell had to say. To show how passive Petrus was at the second meeting, Bell even said in his evidence that Petrus simply sat there with "**a mouthful of teeth"** and said nothing. I find it very strange that a union official, when approached with an issue as sensitive as a proposal for the moving of all his members from the employ of their employer to that of a labour broker, would keep quite, ask no questions, challenge nothing and only say that he would consult his members and, thereafter, simply come back to say: my members agree.

[62] I also have some difficulties with certain aspects of the respondents' version. The one difficulty is that Petrus insisted up to the end that there had been no meeting between himself and

Bell on 23rd May even when he saw Bell's letter of 30th May which referred to such a meeting. Another aspect of the respondents' version that is cause for concern is that on their version Petrus told the employees not to sign any document from Bell and yet there is no indication in his evidence that he was upset by the news, when it came to his that Ndleleni and Jacobs had signed the agreement of 11th July

[63] Furthermore, there is the period from 12th July to 7th August. On 12th July Ndleleni apparently told Petrus about his signing the agreement of 11th July. Petrus did not do anything about this between 12th July and 7th August. I find it strange that during that period of three weeks Petrus did absolutely nothing in relation to the problems that his members at the appellant/Prostaff were experiencing. I would have thought that, if the employer had indicated an intention to retrench a union's members and the union had spoken to its members and they were opposed to the employer's proposal and the union was told that the employer had subsequently gone to some of the employees and falsely alleged that the union had agreed to the retrenchment of its members and had thereafter proceeded to mislead some of the union members into signing an agreement that the union is opposed to, the relevant union official would be so angry at what the employer has done that he would take the matter up with the employer and find out what was going on and not just sit back

and do nothing. Petrus' conduct in not doing anything for three weeks after this had been brought to his attention is not consistent with the conduct of a union official who had not agreed to the proposal and, indeed, who together with the employees, was strongly opposed to it.

[64] On Bell's version there is clear evidence of what was happening during the period of three weeks between 17th July to 7 August. On that version some of the employees were refusing to sign contracts of employment with Prostaff during that period and, Bell telephoned Petrus on no less than three occasions telling him that some of the employees were refusing to sign the contracts and each time Petrus promised to speak to them. On Petrus' version there seems to have been no contact between him and Bell during that three week period. It is rather difficult to believe that, when there was the tension that there must have been between Bell and the workers during that three weeks period arising out of some of the employees' refusal to sign the contracts, Bell would not have contacted Petrus about the problems at all during that period of three weeks. It is also difficult to believe that the employees did not themselves contact Petrus and tell him what was happening which would prompt him to have contact with Bell if Bell had not been in contact with him about these problems .

[65] Another aspect of concern in regard to the respondents' version is that even on Ndleleni's version, it was Bell's idea that Ndleleni

> should look for someone else who would sign as a witness when Ndleleni signed the agreement of 11th July. The question that immediately arises is why Bell would want a witness to Ndleleni's signing of the agreement if, indeed, the union had not reached any agreement with him. That is not conduct that is consistent with somebody who was falsely implicating the union in a raw deal for its members.

[66] From what I have said above it is clear that I have difficulties with both the appellant's version that Petrus agreed to the appellant's proposal as well as with the respondents' version that no such agreement was struck between the two men. However, although the respondents' version has the various difficulties to which I have referred above, I return back to the fundamental difficulty I have with the appellant's version that Petrus, a union official of 30 years experience in trade unions, agreed to such a raw deal for these employees in this case. That seems to me highly unlikely. If, of course, as Mr Grogan submitted, he was not contending that Petrus agreed to any specific terms and conditions of employment for the employees at Prostaff, then this raises even more disquiet because it would mean that this very experienced union official had agreed to the termination of the employees' services without securing anything in return for them. That is the one point. The second point is that that was never the appellant's case in the trial.

[67] Although none of the versions of both parties is beyond criticism, it is important to bear in mind that the appellant bears the onus to prove that the appellant concluded an oral agreement with Petrus representing the union and what the terms and conditions of such agreement were. In the light of all the difficulties to which I have referred in the appellant's version, I am of the view that, imperfect as the respondents' own version is, there is sufficient doubt about the appellant's version to justify the conclusion that the appellant has failed to discharge that onus. Accordingly, I conclude that on a balance of probabilities the appellant has failed to prove the agreement upon which it relies as well as the terms of such agreement. As I have said above, the appellant's version is even more improbable if the matter is approached on the basis that Petrus only

agreed to the dismissal of the employees from the appellant's employment without necessarily agreeing to any specific terms and conditions under which they would be employed by Prostaff.

Substantive fairness

[68] The appellant bears the onus of proving that the dismissal was both substantively and procedurally fair.

[69] According to Bell the respondents' jobs were not redundant nor did the appellant want to operate with a lesser number of employees in order to reduce costs. The appellant required the same number of employees to do the work which was done by the respondents before the retrenchment. The reason given by Bell for the retrenchment was that it was **"economically and administratively wasteful"** for the appellant to run two workforces in tandem. That reason was not sustained by the facts as testified to by Bell. He stated that Prostaff's employees were on its own payroll and that he was responsible for all labour issues relating to the appellant's employees. Therefore, there is nothing indicating that the appellant was in any way involved in administering Prostaff's employees. Instead Bell stated that the appellant had its own payroll for the respondents and other employees. One person was employed to administer the appellant's payroll and that person was not retrenched when the respondents were retrenched because his services were still required as not all of the appellant's employees were retrenched. In essence, the appellant continued to maintain a payroll for the remaining employees. This seriously undermines the reason given for the retrenchment to the extent that it can hardly

constitute a fair reason. No evidence was given to prove that it was "economically wasteful" to keep the employees in the appellant's employment. It seems to me that, at best for the appellant, such administration as there was in connection with the payroll of all the affected employees was a little but of an inconvenience for the appellant and it wanted to do without such inconvenience. I do not think that that kind of inconvenience was a fair reason warranting to dismiss the employees.

[70] Moreover, Bell's evidence on whether there was any decision taken to retrench the respondents was extremely vague. At one stage he stated that a suggestion to have them retrenched was made at an informal meeting he had with two other directors of the appellant company. But he could not remember if the discussion went beyond the level of a mere suggestion into an actual decision to retrench nor could he recall which director took the decision. When asked under cross – examination if the decision was taken by Mr Staples (one of the directors), he said:

" I guess at the end of that day if you were to (sic) he would be the first person (sic) you would call upon and then he would explain himself further in that respect. I do not know that he would necessarily recall exactly whether he made the decision by himself or whether he consulted, or (sic) [whether] it was himself, because it was not really a major issue, we did not take minutes of it, it was a discussion about the realities of their operation and the practicalities thereof, but I guess technically he is the guy that should be or could be approached regarding that actual initial decision".

[71] Surprisingly, Bell was the one who decided to initiate and take steps towards the implementation of the retrenchment. He gave notice to the union setting out the reason for retrenchment and yet he could not recall if and by whom the actual decision to retrench was taken. It appears that Bell stood to gain financially from the retrenchment because he intended to employ the respondents through Prostaff and charge the appellant fees for their services. Therefore, it is likely that he was motivated by the financial gain in hastily implementing the retrenchment without first establishing whether a proper decision had been taken or not.

Procedural fairness

[72] The process of consultation was, according to Bell, prematurely terminated and no consultations were held after the meeting of 29 June. This was the meeting at which the first formal discussions on the retrenchment were held. Bell's evidence did not prove that any alternatives were considered but of course on the appellant's version that was unnecessary when, on their version, an agreement was reached between the parties. Since I have concluded that the appellant failed to establish such agreement, the procedural fairness of the dismissal must be decided on the basis that the consultation process was not completed. Indeed, Counsel for the appellant conceded that, if we find that there was no agreement, then we must find that there the consultation process was not completed. As a result I must conclude that the appellant has also failed to prove that the dismissal was procedurally fair. Accordingly, it was procedurally unfair.

[73] In the circumstances, the appeal is dismissed with costs.

Jafta AJA

I agree.

Zondo JP

I agree.

Davis AJA

Appearances:

For the Appellant: Adv JG Grogan

Instructed by:	Schoeman Oostheizen Inc.
For the Respondents:	Adv PN Kroon
Instructed by:	Brown, Braude & Vlok Inc.
Date of judgment:	9 July 2004

[13] The Court a quo took the view, correctly I think, that the terms and conditions of employment by Prostaff which the respondents would be governed by if they signed the agreement, were significantly less favourable to the respondents then their then current. The Court a quo found that on the probabilities it was highly unlikely that the union official would have agreed to the termination of permanent employment of the union's members in favour of unattractive terms and conditions offered by Prostaff. This finding appears to be justified when viewed in the context of the relevant facts. Under Prostaff the respondents would not have security of employment. They could have been placed with any of its clients and could only be required to work when their services were required. When there is no work available, they would lose income because their contracts of employment, and with it, their benefits, would be suspended. It is highly improbable that any union official would agree to a retrenchment of the union's members induced by the terms and conditions of employment offered by Prostaff.