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

Case No. JA 54/03

In the matter between

ARTHUR KAPLAN JEWELLERS (PTY) LTD **Appellant**

And

MARIET VAN DEVENTER **Respondent**

JUDGMENT:

DAVIS AJA:

Introduction.

[1] Respondent commenced employment with appellant on 17 April 1996. She was promoted to the position of manager of appellant's training and development department with effect from 1 May 1999.

[2] Due to excessive financial losses suffered by appellant's holding company, Retail Apparel (Pty) Ltd ('RAG'), the need arose for the companies in the RAG group to consider possible retrenchments in a number of RAG's subsidiaries.

[3] In particular, RAG sought to address a problem which essentially amounted to a duplication of departments between RAG and appellant. The management of appellant decided to act proactively. They determined to close down various departments,

including the staff training department, the department in which respondent was employed.

[4] When it became apparent that the training department was to be closed down and that retrenchment had become an imminent possibility, various alternative positions were offered to respondent. These alternative positions were rejected by respondent. Respondent was finally retrenched on 31 October 2000.

[5] Pursuant to her retrenchment, respondent declared a dispute related to her alleged unfair retrenchment and referred this dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA').

[6] On 15 February 2001 a commissioner of the CCMA issued a certificate of outcome in terms of which it was confirmed that the dispute between the parties had not been resolved.

[7] Respondent referred the dispute to the Labour Court on 20 April 2001, claiming that her dismissal was procedurally unfair. Respondent did not dispute the substantive fairness of her dismissal.

[8] The Labour Court, per **Zilwa AJ,** found against appellant, holding that the dismissal of respondent was procedurally unfair. The learned Acting Judge ordered

appellant to pay respondent an amount of R155 706,00, being an amount of twelve months compensation, together with costs.

[9] With the leave of the Court **a quo,** the appellant appeals to this Court against that order. Respondent initially sought to oppose the appeal but subsequently withdrew her opposition.

The decision to retrench.

[10] On 19 September 2000, Mr Young, the operations executive of appellant, informed a number of employees, including respondent, that the staff training department would be closed down with effect from 31 October 2000. There was no consultation between appellant and the affected employees in respect of this decision. In short, there was a clear absence of any consultation process envisaged in terms of section 189 of the Labour Relations Act 66 of 1995 ('LRA'), whereby appellant sought to achieve a consensus regarding the fate of the training department.

[11] Appellant's failure to so consult is not, however, determinative of the dispute. The key issue concerns appellant's subsequent conduct. As **Zondo AJ** (as he then was) said in **CWIU v Johnson & Johnson (Pty) Ltd** [1997] 9 BLR 1186 (LC) at 1198 e – h: 'In other words although the selection criteria was **prima facie** unfair in that it was not assumed that the female workers could not do those jobs which male workers with lesser service periods than themselves were doing (and this assumption was made without (prior to the 3 December 1996) the female workers being given a chance to try the jobs), the

ultimate reason why the female workers ended up out of the company is not that this discriminatory selection criteria was used in this retrenchment but that they, for reasons they and the applicant have elected not to explain both to the respondent and to the Court, chose not to take up the opportunity to say to the respondent they wanted the jobs it regarded as male-type jobs and were willing to show that they could do them when the respondent quite clearly exhibited an attitude that it was prepared to consider them for such jobs if they wanted them. Accordingly, I am of the view that such causal link as otherwise would have existed between the use of this selection criteria and the retrenchee's dismissal was broken by this **novus interveniens** and, in those circumstances, I cannot find that the dismissal was rendered unfair by reason of the respondent's use of this selection criteria'. This approach was approved by this court in **Johnson & Johnson (Pty) Ltd** v **CWIU (**1999) 20 ILJ 88(LAC) at para 50.

[12] In this case, the same enquiry is required namely: did the conduct of appellant, subsequent to the decision to close down the staff training department, comply with its obligation in terms of section 189 of the LRA and, flowing from this enquiry was it, in effect, respondent's conduct that led to her retrenchment.

[13] There was a considerable amount of uncontested evidence that appellant offered respondent a number of opportunities within its organisation. On 10 October 2000 Ms Luette Robertson, a member of the appellant's human resource department, wrote to respondent thus:

'Dear Mariet

I would hereby like to confirm the vacancies that exist within the company. You must feel free to apply for any of these positions should you wish to do so. The vacancies are as follows:

Manager -	Monte Casino in Fourways (Johannesburg)
21C -	Monte Casino
Sales Assistant -	Monte Casino
Manager -	Rustenburg Waterfall Mall
Manager -	Mar A Pula (JLB International Airport)
Manager -	Cresta (Johannesburg)
Counter Manager -	V & A Waterfront (Cape Town)
Sales Assistant -	Sammy Marks Square

You will be kept informed of all vacancies within Arthur Kaplan Jewellers as well as at RAG.'

[14] On 11 October 2001 respondent replied to Mr Young as follows:

'I would hereby like to acknowledge receipt of the vacancy list, given to me on the 10.10.2000.

On the latest vacancy list there are three reasonably acceptable management positions:

Monte Casino, Mar A Pula, Cresta available.

Unfortunately I won't apply for any of these positions due to a number of reasons:

- I reside in Pretoria
- My baby needs to be dropped off & picked up for crèche daily
- The crèche is closed over weekends

- Will not be able to work every weekend
- Will not be able to work extended trading hours
- Will not be able to do extensive traveling.

I herewith request the Management of Arthur Kaplan Jewellers to indicate what other positions with the Company you can offer me.'

[15] Under cross examination, respondent explained that the three acceptable alternative positions would have resulted in longer working hours. When it was put to respondent that she would not be required to work every Saturday and in addition to that, appellant utilized a shift system 'so even on Saturdays when you had to work maybe every second Saturday, you might only have to work a shift that might relate to working half day, up to 13:00 in the afternoon', she was unable to provide any evidence which indicated that these working hours would indeed be longer than those which she was required to complete in the staff training department.

[16] Respondent sought to raise a problem that the acceptance of an alternative position would necessarily lead to a loss of benefits. However, Mr Young's uncontested testimony indicated that respondent's remuneration might not be affected at all and indeed it may well have been beneficial to her should she have accepted one of the alternatives offered.

[17] In summary, the evidence shows that appellant engaged in a consultation process with respondent as to where the latter might be deployed in its organization. She was

offered the possibility of six different posts within the organization, three of which, on her own admission, were realistic alternatives. Contrary to the reasons which she offered for rejecting the three posts in her letter of 11 October 2000, the evidence revealed that she had worked every Saturday in the position of training manager prior to this position being made redundant. There is uncontested evidence of Mr Young that the positions that were offered to respondent would not have entailed extensive traveling or more week-end work than that which she had undertaken in her previous position. In short the reasons raised by her for rejecting the three alternatives failed the scrutiny of the uncontested evidence.

[18] In my view, the evidence is compelling that the alternatives which were proposed to respondent were reasonable and that she did not provide sufficient justification as to the reasons for refusing to accept one of these alternative positions. Accordingly, appellant acted neither substantively nor procedurally unfairly in the manner in which respondent was ultimately retrenched. On these facts it is therefore clear that even though the appellant may have acted unfairly in not consulting respondent about the closing down of the training department, such unfairness did not lead to her losing employment with appellant. She lost employment with appellant because she failed, without any justification, to accept one of the jobs offered to her by appellant and for that, she only has herself to blame.

[19] For these reasons, the appeal succeeds and the order of **Zilwa AJ** is set aside. It is replaced with the following order: 'The dismissal of the applicant is declared to be procedurally fair'.

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DAVIS AJA

I agree

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ZONDO JP

I agree

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NKABINDE AJA

Appearances

For the appellant	:	Adv D. De Bruin
Instructed by	:	Ludik & Booysen Attorneys

For the respondent	:	Adv B Roode
Instructed by	:	Justin Dorkin Attorneys
Date of judgment	:	21 February 2006