IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JS 149/05

In the matter between:

ANNE GREYVENSTEIN

Applicant

and

FLAIMING SILVER TRADING 62 (PTY) LTD

t/a SUNGLASS WORLD
Respondent

JUDGMENT

CELE AJ

Introduction

[1] This claim is about an unfair dismissal of the applicant based on operational requirements of the respondent. The respondent opposed it.

Background facts

[2] The Sunglass World and Sunglasses for Africa were together owned by MacHerb Investments (Pty) Limited with Mr Dean Glasser as its Managing Director. On 1 September 2003 the respondent company purchased the business as a going concern, resulting in the services of all its employees being transferred in terms of section 197 of the Labour Relations Act 66 of 1995 ("the Act"). Mr Dean Smith became the new Managing Director and the owner of the respondent with his two silent partners. The next in the command line were Area Manageresses. Each was placed in charge of a group of sunglass shops lumped together in terms of their geographic locations. The respondent had 7 groups in this country with 5 in Gauteng, one in Durban and one in Cape Town. The 5 in Gauteng were in West Rand, Pretoria, Sandton, Eastgate and Alberton. Some Manageresses were store bound, meaning they were placed in a particular shop within that group while others were not so bound. In her supervisory capacity, the Manageress had to constantly travel from one shop to another within the group and had then to report to Head office. As a consequence, the respondent granted some of the Area Manageresses a travelling allowance and supplied each such Manageress with a petrol card. The next in line were the Senior Sales Ladies, who were each store bound where they worked together with Sales Ladies.

[3] The respondent ran 2 types of sunglass shops, the "high street shops"

mainly in busy shopping malls and the "Meltz Shops" which were mainly located in the clothing factory shops. The respondent at the time had 13 "Meltz shops" and 28 "high street shops". When the respondent took over the sunglasses business in September 2003, it started with 25 stores, 13 of which have since been closed. The "Meltz shops" were started by the respondent under Mr Smith. At the times material to this matter, the business of the respondent was economically growing very well.

[4] The applicant commenced employment with the respondent on 15 August 1986 as a Sales Lady based in Sandton where she initially worked for half a day. When she sought to have a full time job, Mr Glasser placed her at the company's Head Office in Johannesburg in 1991. On 2 September 1996 she was appointed as an Area Manageress, in terms of a written letter of appointment which fixed her gross monthly basic salary then at R4 275, 00. In addition to the basic salary, she was to receive a guaranteed annual bonus of no less than 120% of her basic monthly salary, payable in December of each year, in consideration of:

- the services tendered by her in the course of her employment;

- the restraint imposed upon her and in addition to any other commissions and or incentives and/or bonuses which might be paid to her from time to time in the sole discretion of the respondent.

[5] The business of the respondent operated two incentive schemes for its staff. They were:

- Turnover incentive scheme

  If a turnover target, exclusive of VAT was achieved the permanent sales people shared R1250, 00; the casual sales people shared R750, 00 pro rata to the number of shifts worked and the Area Manageress received R400, 00 per shop, in their groups, if all such shops reached targets. Turn over, exclusive of VAT, in excess of the target attracted commission at the rate of 10% of the excess, which was split thus:

  - permanent sales people shared 50%;
  - casual sales people shared 30%;
  - area manageress: 20% - prorate as above

- **Discount incentive scheme**

  If the total amount of discount given was 0% of the total turnover, then a commission of 2% of turnover was paid. If the total amount of discount given was between 0, 1% and 3% of the total turnover, the commission of 1, 5% of turnover was paid. If the total amount of discount given was between 3, 1% and 5% of the total turnover, then a commission of 1, 0% of the turnover was paid. Where the total amount of discount given

was between 5, 1% and 8% of the total turnover, then a commission of 0, 5% of turnover was paid.

This incentive was shared:

Permanent sales people shared: 50%,

Casual sales people shared: 30%
Area Manageress: 20%

The scheme applied monthly, quarterly and annually.

[6] As an Area Manageress, the applicant was responsible for a group of 5 sunglass shops at East Rand Mall, Fourways Mall, Hyde Park Shopping Centre, Lakeside Mall and Boksburg. She received a travelling allowance and a petrol card from the respondent to use in the execution of her duties.

[7] During May 2004 the Area Manageress in Durban resigned. The respondent decided not to replace her but to restructure her role such that some of her duties were performed from Head office in Johannesburg while others were performed by the Store Sales Persons.

[8] Later in 2004 the respondent made arrangements to open a new sunglasses shop in October/November 2004, called Clearwater store. It then decided to restructure itself by utilising the services of the applicant and another Area Manageress, one Ms Anne Scholtz at the Clearwater store. On 17 August 2004 Mr Smith met with the applicant and Ms Scholtz where he explained the intended restructuring of business so that the group shops which had been headed by the two Area Manageresses would be run similarly to the Durban grouping.

[9] Mr Smith explained to the applicant and Ms Scholtz that he wished to consult with them regarding the intended restructuring and to attempt to reach consensus with them on issues relating to the terms and conditions of their continued employment with the respondent. He indicated to them that the respondent did not intend to terminate their employment services.

[10] On 19 August 2004 Mr Smith issued a letter addressed to the applicant. It explained the intentions of the respondent on restructuring. He indicated that discontinuing with the use of Area Manageresses was in line with his more hands-on-style of management. He explained that the new approach, in Durban, worked well for the company and he intended to extend it to other areas as and when the opportunity arose. He said that the opening of the Clearwater shop presented to him an opportunity to restructure the business without having to terminate the services of the applicant as the restructuring was solely due to the operational requirements of the company. He said that he intended to place her at the Clearwater store as a Senior Sales Executive and invited her to furnish him with other reasonable alternatives for him to consider. He pointed out that he wanted to have further consultations with the applicant to attempt reaching consensus with her. He indicated that the applicant and Ms Scholtz were, at that stage, the only employees likely to be affected by the restructuring and were selected because they were not stationed in a store. He invited her to a further consultative meeting scheduled for

27 August 2004.

[11] On 20 August 2004, the applicant had a telephonic discussion with Mr Smith. It lead to Mr Smith issuing a letter of the same date to the applicant wherein he explained working hours and the salary which was to be R6 900,00 per month plus the incentive schemes which were to operate from time to time. He invited her to a further discussion of the points raised in that letter.

[12] On 26 August 2004 the applicant responded to the 2 letters of the respondent. She pointed out that respondent changed her position from Area Manageress to senior sales executive, effectively a sales lady, that her working hours were extended and that her conditions of employment were unilaterally changed by the respondent. She pointed out that her salary was to be reduced drastically as per the proposed change with regard to her personal situation. She asked the respondent to reconsider the proposals given to her.

[13] The respondent replied to the applicant's letter with one dated 3 September 2004. It showed a flexible attitude to working hours subject to a further discussion with the applicant. It also indicated a willingness to revise the proposed salary by increasing it to R7 650, 00 per month as a package and pointed out that the then current package of the applicant was R10 976, 00 per month, including a travel allowance of R2 097, 50. It was stated that the travel allowance would fall away as the applicant would not be required to travel for

company business purposes any longer. The offer was indicated as being in excess of 85% of the applicant's then current package.

[14] The respondent conceded in the letter that the change would result in a drop in the income of the applicant and offered her a 6 months refundable loan equal to the difference in salary. It asked the applicant to respond to the revised offer by 8 September 2004 while pointing out that once the Clearwater shop opened, the applicant's position of Area Manager would not exist anymore but that there was no intention of terminating her services. It warned the applicant that she would not qualify for severance pay if she did not accept the position as she would be unreasonably refusing to accept an employer's offer of alternative employment.

[15] The applicant's response was through a letter dated 9 September 2004 where she explained, *inter alia*, what she understood was her salary structure, that the respondent misunderstood the travel allowance and her lack of understanding on how the opening of the Clearwater stores nullified her position as an Area Manageress. She expressed her lack of understanding of the financial implications that she was burdened with while the respondent was in the process of expanding its operations, turnover and exposure of the Group.

[16] On 26 September 2004 the respondent issued a notice in terms of section 189 of the Act to the applicant. It was indicated therein that dismissal was likely to take effect at the end of October 2004. The

applicant was invited to a consultative meeting scheduled for 30 September 2004. On 30 September 2004 the applicant served the respondent with a letter dated 29 September 2004 which called for an explanation on a number of issues therein raised. The applicant also wanted to know if there would be any objection to her legal representative attending the next consultative meeting with the respondent. The meeting of 30 September 2004 did not proceed as planned by the respondent as the applicant sought written answers to her last letter. The respondent rescheduled the consultative meeting to 6 October 2004 and allowed legal representation of the applicant. On 1 October 2004 the respondent issued a response to applicant's letter dated 29 September 2004.

[17] On 6 October 2004 the respondent, represented by Mr Smith and Mr Haffegee met with the applicant and Ms Scholtz while they were represented by an attorney, Mr A Theron. The consultative meeting covered a number of issues of concern to the applicant and Ms Scholtz. The respondent took the position that the restructuring was a shock to the applicant and Ms Scholtz in which event, it felt it was appropriate to give them time to think over the change. It undertook to issue a letter to each as an offer of alternative employment with terms and conditions of employment which would still be subject to further discussions between the parties.

[18] The contract of employment, with terms and conditions of employment was issued on 26 October 2004 to the applicant. The

applicant did not accept the alternative employment offered to her by the respondent. She felt it amounted to a demotion. She was not happy with the suggested working hours and the salary. Her commencing salary was to be R7 650,00 per month. One of the conditions of employment was to report to the Area Manageress or any designated Head office employee. She was to commence employment on 25 November 2004 at Clearwater Shopping Centre, Roodepoort. Her employment with the company required that she serve an initial three (3) months' probation period. On the successful conclusion of the probationary period, she would be appointed to the permanent staff whereafter her employment would endure for an indefinite period. She did not accept that offer of alternative employment.

[19] On 1 November 2004 the respondent issued a letter of termination of employment of the applicant due to her failure to accept the alternative position at Clearwater store. Termination of employment was with effect from 30 November 2004 but she was not required to report for duty from 1 November 2004. That brought about a dismissal dispute based on operational requirements of the respondent, which the applicant referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation. When conciliation failed to resolve the dispute, the applicant referred it to this court.

The issue

[20] It is to be determined whether the dismissal of the applicant was substantively and procedurally fair and whether she was entitled to a severance pay.

Evidence

[21] Most of the evidence in this matter was common cause between the parties. The difference appeared to emanate from a different interpretation of some of the issues. The dismissal of the applicant was beyond dispute. The respondent had then to show that dismissal was premised on a fair reason and that it was fairly carried out.

Respondent's version

Substantive issue

[22] The operation of the company without the Area Manageress is the route that the respondent was to take. The stock needed to be more directly controlled from head office. Mr Smith had to have that touch on the stock as was the position with the Durban ladies who were responding very well to his kind of approach. After 3 or 4 months without an Area Manageress, Durban was doing very well as the sales persons in the shop were good and mature ladies. He believed that he could get the same response from the ladies up in the Clearwater store.

[23] Mr Smith thought long and hard about the change in the company. He thought of other systems and had then seen things he wanted to do. The changes he introduced had started to work and were going well. The company was selling a lot more glasses than it did a year ago. Things had changed. In consultation with the sales ladies, he preferred to order the stock himself. He was in a better position to study fashion trends abroad and to introduce fashionable stock in the shops in South Africa. The creation of the "Meltz shops" had provided the company with an effective means of removing from the "fast street shops" that stock which was out of fashion to give room to new stock. His hands on approach made him believe that the company stood to improve and therefore had no intention of bringing Area Manageresses back.

[24] Mr Smith conceded that his business managing style might very well be different from that of another company owner who might prefer to have even more Area Managers then he had had. His style of work was to get out to his shops. He liked to touch and feel the business. When there were shows, he wanted to be at such shops, taking part in the setting up. He preferred to be there when packing up of stock was done and did so at the Rand Show, which he attended every day to see what was happening.

[25] The salary package of the applicant increased in November 2004 to R10 976 per month. It included a travelling allowance of R2 097, 50

in line with her duties of travelling to all shops with her group in the execution of her duties. The scheduling of the applicant's travelling allowance to ease the tax implications was not true and illegal. The annual bonus which the company paid once a year, in December, to the applicant, was because of the restraint of trade imposed on her in terms of the contract of employment.

Applicant's case

[26] As the respondent admitted that the company was financially doing well and progressing, the applicant could not understand why there was a need for restructuring. Mr Smith could have used the hands-on approach without doing away with the position of an Area Manageress.

[27] The basic salary, inclusive of the travel allowance and medical and was R10976, 00 per month. The travel allowance above R600 per month was, however, representative of the annual increases, but scheduled in such a way as to ease the tax implications. The medical aid was by agreement, deducted and paid over without it being firstly reflected in the gross income. For April and May 2004 she had been paid a basic salary R7774, 50 plus the travelling allowance of R2097, 50. In addition to the incentive bonuses which she received monthly, all her fuel expenses for the month were paid to her, inclusive of her travelling to and from work. She was in addition entitled to a 120%, of her basic monthly salary, as a bonus payable in December of each

year. She was also entitled to 4 weeks per annum. Her annual increase was at the end of September of each year.

[28] When taking all salary considerations her annual package came to R16 7099, 52 per annum being made up of:

Basic salary - R12 073-00 (10976 x 10%) x 13
Bonus - R 2 414-72 (20%)
Incentive - R 644 -00 (x 12)

Procedural issue

Respondent's version

[29] The respondent did schedule consultation meetings the first of which was on 30 September 2004. It however, did not take place as the applicant presented Mr Smith with a written representation and insisted on a written response prior to proceeding with the consultations. On 6 October 2004, a consultation meeting went ahead with both parties duly represented by their attorneys.

[30] The merits and demerits of the applicant assuming the position of an Area Manageress in the other yet unaffected shops were discussed. The applicant would not accept a transfer to Cape Town. Additional costs to the company had also to be considered. In respect of Sandton and Eastgate, the bumping out system would not be suitable to the company when considering the success achieved by the ladies

working in those shops. The applicant was, together with Ms Scholtz, better suited, in respect of their residence, for placement at the Clearwater store. Their wealth of experience would help to run the Clearwater store successfully as it was expected to be a flagship store.

[31] The Sandton and Eastgate Area Manageresses did not get a travelling allowance as they were store-bound and hence did not have to drive to undertake their duties. One of the two Area Manageresses earned much less than the applicant.

[32] Pretoria as an alternative to Clearwater for the applicant was also not suitable to the company. There would be additional costs to the company if the applicant moved to Pretoria. The Pretoria Area Manageress had established a sound team which it would be very risky to break up since the team had been together for some time, since the 1990's.

[33] Even if the applicant could be moved to the other shops, there would be no guarantee that she would not, later on, be removed from there as it was the intention of the respondent to do away with the position of an Area Manager, as and when time presented itself.

[34] During consultations the applicant had agreed to take-up the offer of Clearwater, provided she was paid the same salary she was receiving as an Area Manageress. Mr Smith found the Clearwater shop to provide the company with an opportunity of eliminating 2 Area Manageresses' positions without dismissing the incumbents thereof.

[35] The consultation meeting of 6 October 2004 involved a discussion on all issues as prescribed by Section 189(2). The legal representative of the applicant even went so far as to invite the respondent to discuss the "separating money." When the issue came up an amount of payment was suggested by the respondent but was not accepted by the applicant and his legal advisor. During the consultation process the applicant did not raise as many issues as she did at trial. Mr Smith had an understanding of her predicament and therefore refrained from hurrying the process. Instead he preferred to give her a chance to get over the shock. He preferred to discuss the proposed change with her in person and only thereafter would a formal letter with figures be issued to her. Even then, the matter would be open for further discussions. The offer given to the applicant to go to Clearwater was serious nod meaningful. It was an appropriate measure taken with a view to avoid the dismissal of the applicant.

Applicant's version

[36] The applicant and Ms Scholtz were the longest serving Area Manageresses who, even according to Mr Smith, were doing very well. A fair retrenchment process would have included all Area Manageresses and not just the applicant and Ms Scholtz. The applicant should have been considered for a move to either Pretoria, Eastgate or Sandton, with a view to keeping her position since she had been with the respondent for a period of about 18 years. The

respondent confronted her with a *fait accompli*. No attempt was made by the respondent to minimise the number of dismissals. The respondent failed to mitigate the effects of the dismissal.

[37] While an alternative offer of employment was given to the applicant, it was not a reasonable offer. The benefits attached to that proposed salary were significantly reduced compared to what the applicant was getting at the time. The applicant was getting an average package salary of R13 333, 93 which came to R11 236, 43 when the travel allowance of R2097 was excluded. That was an amount earned by the applicant in May 2004. The proposed position had longer working hours and forced the applicant to work on a Sunday, when the position she held allowed her not to work on a Sunday. The position of an Area Manageress was drastically reduced to that of a Sales Lady, yet she had worked for about 18 years for the respondent. Her dignity stood to be impugned. Her annual leave was reduced from 4 weeks to 3 weeks. If she took the offer given by the respondent, she had first to be placed on three months' probation period despite her experience with the respondent. She would be liable for losses incurred at her shop with a deduction for the losses being made from her salary. The 13^{th} cheque – annual bonus was not only a consideration for the restraint of trade but also for work done. All considered, the applicant was entitled to a severance pay calculated on the basis of her 18 years of service with the respondent.

Analysis

[38] The applicant's evidence has corroborated that of Mr Smith to the effect that the respondent's intention was never to dismiss the applicant and her colleague Ms Scholtz. In his evidence, Mr Smith said that, had it been his intention to eliminate the applicant, he would have adopted a different approach in the consultative process. Whatever he meant thereby, the transcript of the consultative meeting of 6 October 2004 in my view depicts an employer who showed an understanding of the anguish that the applicant was going through and did not want to take an advantage thereof. The meeting appeared to have been very cordial. There was a stage when it was drawn to the applicant's attention that she was not as much probing into the issues as the situation called for. Mr Smith avoided confusing the applicant with any figures at an early stage of the consultation process.

[39] The respondent scheduled the first consultative meeting for 30 September 2004. No warning was given by the applicant prior to that date that she would not be ready for the meeting. Yet Mr Smith appeared to have readily agreed to the rescheduling of that meeting when the applicant insisted on her letter which though dated 29 September 2004, was on the evidence, produced and handed to the respondent in the course of the proceedings which should have been for consultation.

[40] In my view therefore, the intention of the respondent, not to want to dismiss the applicant, at the initial stages of consultation, was a

material compliance with section 189(2) of the Act. Mr Smith did reach a stage where he would have realised that the applicant would probably not accept a placement at Clearwater store. Towards the end of the meeting of 6 October 2004 Mr Haffagee indicated on behalf of the respondent that a formal letter would be drawn up and presented to the applicant as an offer of an alternative employment option. It was pointed out in that meeting that the respondent would still be open to further discussions of issues emanating from that letter. Indeed, as the applicant has correctly testified, there are issues of serious concern to her pertaining to terms and conditions of her employment, such as the service of the probation period after her long service with the respondent, the longevity of the annual leave, the longer working hours, even admitting to the discretion thereto of the employer and the computation of the annual bonus which was paid to her in consideration not only of the restraint of trade but also of the services she rendered in the course of her employment.

[41] The consultation is a consensus seeking process entailing a dual participatory role. Once the respondent had issued the formal offer of alternative employment, it remained open to the applicant to play her part by identifying issues of concern and to take the respondent on its offer for further deliberations. No evidence of the applicant having done this was produced. In court, when the issue of the applicant having to serve probation was pointed out to Mr Smith, he said that a standard type of offer of employment was used for the applicant and that he was always willing to discuss any issues raised therein. That

evidence was in agreement with his attitude in the consultative meeting of 6 October 2004. He was never shown to have been lying in that regard. I am, accordingly bound to accept his version namely that he was open to a discussion of any of the terms and conditions of employment of the applicant. In my view, the blame for the absence of such a further and an important discussion lies at the door of the applicant.

[42] The respondent approached the consultative process with a predisposition towards placing the applicant at Clearwater store. That was a method of solving the problem of having to dismiss the applicant. The respondent was entitled to such an approach – see the decision in **NEHAWU and Others v University of Pretoria (2006) 5 BLLR 437 LAC** at para 55.

[43] Mr Theron who represented the applicant in the consultations of 6 October 2004, took the respondent through to various options other than to take the applicant to Clearwater. The respondent proffered an explanation as appears on the record, why each option was not appropriate for the company. In my view, the respondent was accordingly open to change its mind as persuasive argument was presented to it, that the proposed method was wrong or was not the best. When it was suggested that there was another alternative of addressing the problem, such as moving the applicant to Clearwater without a demotion or to move her to Pretoria or Sandton or Eastgate, the respondent did not just dismiss those alternatives at hand but

considered the long term business implications against the interests of the applicant.

[44] I conclude therefore that, all the evidence considered, the dismissal of the applicant was in my view, procedurally fair.

[45] The evidence of the respondent on the economic rational underlying the intended eradication of the position, of an Area Manageress, in the operations of the respondent, stood virtually unchallenged. It is now trite that a company may retrench even in circumstances when it is economically doing well. Mr Smith was not just speculating on the intended change as likely to produce a good return for the company. He had the Durban shop as a living example. In other areas he waited for an appropriate opportunity before he could effect a similar structural change. He made a calculated business decision. No ulterior motives were suggested for picking up the moment when the Clearwater store was to open. There was overwhelming evidence that Mr Smith wanted to utilise the experience of the applicant and Ms Scholtz in running the Clearwater store. He hoped that the shop would have been such a success story as to make it a flagship. He offered the applicant a six months financial assistance while she would be adjusting to the change. Overtime and bonuses stood to augment the reduced salary which the applicant would get. She would be shop bound with the result that she would incur less travelling expenses. That would bring about a drop in her expenditure.

[46] In my view, the declining by the applicant to take up the alternative offer of employment, provided the respondent, in the circumstances, with a fair commercial reason to dismiss her.

[47] For purposes of this judgment, I shall assume that the Court has jurisdiction on the severance pay issue. In my view the applicant did not receive the best of the advice she was entitled to, after engaging the services of an attorney. As pointed out earlier, the issue of alternative employment was still open to further deliberations, with the respondent notwithstanding the time constraint. The decision to decline alternative employment was made precipitously and therefore denied the parties a further chance to attempt reaching a compromise on terms and conditions of employment, when the applicant was, in principle, not against a move to Clearwater store. I find that the applicant's refusal to accept the alternative employment was therefore unreasonable in the circumstances, when all evidence is considered.

[48] I have considered the fairness in making a costs order and I proceed to make the following order.

1. The application is dismissed.
2. The applicant is not entitled to any severance pay.
3. No costs order is made.

CELE AJ

Date of hearing: 16 August 2006

Date of judgment: 29 December 2006

For the applicant: Adv Welz

(Instructed by Jurgens Bekker Attorneys)

For the respondent: Adv Mooki

(Instructed by Imraan Haffegee Attorneys)