IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case no: **C842/2008**

In the matter between:

LORNA E NAUDE Applicant

And

BIOSCIENCE BRANDS LTD Respondent

JUDGMENT

CELE J

Introduction

[1] This claim is for an unfair dismissal of the applicant on the basis of the operational requirements of the respondent as envisaged in section 189 of the Labour Relations Act Number 66 of 1995, ('the Act'). The respondent opposed the claim on the basis that the dismissal of the applicant was premised on a fair reason and that it was carried out fairly.

Background facts

[2] The applicant commenced her employment on 19 September 2005 with a company called Bioharmony. In May 2008 she was promoted to the position of a Supply Chain Administrator with effect from 17 June 2008. She was based at the Wynberg office of the company and was earning R9029 per month. Bioharmony was a division of Enaleni Group and was subsequently sold to Arcay Financials, which has become the respondent company.

[3] A consortium headed by Arcay Merchant took control of Wellco Health Limited and it was renamed BioScience Brands Limited, the respondent. Arcay Merchant also acquired Bioharmony (Pty) Ltd and Aldabri 53 (Pty) Ltd t/a Muscle Science from Enaleni Pharmaceuticals Limited. These companies were transferred to BioScience, respondent, on 1 March 2008. The respondent subsequently acquired Phyto Nova from Thebe Medicare (Pty) Ltd on 1 September 2008. Chief Executive Officer (CEO) of the respondent at the time was Mr Mike Allan who was based in Durban.

[4] In the middle of May 2008 the Distribution Manager of the respondent, one Sian Stradling resigned from the company. The Financial Manager of the respondent, one Mara Draber approached the applicant and asked her to take over some functions that had been part of the portfolio of Ms Stradling. She agreed to the suggestion and the company increased the salary with an amount of R2000.00 per month, due to the additional task she had taken over.

[5] When the distribution Manager of the Respondent left the company, the applicant took over that portfolio on 17 June 2008. The Wynberg premises had its own warehouse and had distribution, invoicing and debt collecting functions.

[6] Up until September 2008 the applicant was engaged in the functions of:

> Credit controller,

> Forecast and Planning, and

> Sales consultant – Direct Marketing and Selling at the Wynberg premises of the respondent.

[7] In June 2008 the respondent employed one Ms Lizell Bright as its Supply Chain Manager in its Durban office. In August 2008 Phyto Nova employed the services of one Ms Janine de Grill at its Newlands office in Cape Town, as a Supply Chain Administrator through a labour brokerage company.

[8] As a result of the acquisition of subsidiary companies, the respondent underwent some transformation which necessitated a reconsideration of its structure. The respondent decided to outsource the warehousing, distribution, invoicing and debt collecting functions to Pharmaceutical Healthcare Distributors (PHD). The respondent decided to close down the warehouse it had in Wynberg.

[9] In August 2008 Mr Allan went to Wynberg to address the staff about the structural changes of the respondent. There was an option of some staff being transferred to Newlands Office. There is a

dispute about whether or not all staff in Wynberg could have been accommodated in Newlands.

[10] Mr Allan returned to the Wynberg Office on 10 September 2008 on which occasion he addressed the staff and consulted with each of those that wanted to talk to him regarding a possible retrenchment. He invited the staff to come up with any suggestions or alternatives in respect of their possible retrenchment. He met the applicant individually for about ten minutes. He suggested to the staff that he could be contacted by telephone, fax or email. He then issued to each staff member a letter dated 10 September 2008 entitled "Possible Termination of Employment". The letter reads:

> "*1. It is with sincere regret that management has to inform you that it is in the process of considering a number of options concerning its business and that you may be adversely affected thereby. It is possible that it may be necessary to terminate your contract of employment based on the operational requirements of the business.*
>
> *2. Section 189 of the Labour Relations Act 66 of 1995 obliges management to consult you before taking any final decisions. You are hereby invited to consult with management. Details of the first consultation meeting are set out in paragraph 5 below.*
>
> *3. For that purpose the following necessary and relevant information is being disclosed to you in confidence:*

Bioscience brands Limited ("BioScience") acquired Bioharmony (Pty) Ltd ("Bioharmony") on 30 November 2007. BioScience has decided to consolidate its accounting, office administration and supply chain functions at the BioScience head office in Durban. As a result the Wynberg office together with the relevant accounting, office administration and supply chain functions is not required.

The following alternatives were considered but for operational reasons were considered unsuitable.

- *Relocate the entire BioScience head office accounting, office administration and supply chain functions to Cape Town.*
- *Create satellite accounting, office administration and supply chain functions in Cape Town.*

It is expected that all eight (8) employees at the Wynberg office will be affected.

The office will be officially closed at the end of September but some employees will be required to continue beyond that date to finalise closure and attend to other matters. You would be required until 30 September 2008 and will be paid your normal salary until such date.

Subject to our consultations with you, we propose paying you the following:

1. *Retrenchment Pay:*

   Retrenchment pay will be calculated as per Section 41 of the Basic Conditions of Employment Act No.75 of 1977 – i.e. pay equal to at least one week's remuneration for each completed year of continuous service. Your employment commenced on 19/09/2005 and as such you will receive 3.00 weeks pay amounting to R 6 249.88.

2. *Leave Pay:*

   Leave will be paid pro rata up to the 30th September 2008 and on the basis of gross remuneration totalling R 416.66 per day.

3. *Ex Gratia Payment – In addition to the above proposal, the company will pay an additional ex gratia payment, amounting to R 9 029.00.*

A recruitment agency will be appointed to assist you in the preparation of a CV should you require it.

4. *Management invites you to make representation about any matter on which you are being consulted. After considering such representations management will respond.*

5. *Management is prepared to meet with you on 10 September at the Wynberg office at 12h00. You may be*

represented by another employee of your choice from the same section.

6. *If there are any queries please do not hesitate to communicate with management.*

7. *Management is obliged by law to consult with any registered trade union of which you are a member. Please inform management as soon as possible if you are a member of any registered trade union."*

[11] He thereafter continued with consultation with each of the staff members who needed to talk to him and thereafter left Cape Town for Durban on the afternoon of the same day.

[12] On 12 September 2008 Ms Bright telephoned the applicant to schedule an appointment with her. She subsequently flew to Cape Town – Wynberg and met with the applicant. They went through the functions performed by the applicant.

[13] On 15 September 2008 the respondent issued letters of termination of employment to six of the eight staff members at its Wynberg offices. Two of the eight staff members were transferred to PHD. The letter informed them that:

(a) their last working day would be 30 September 2008,

(b) they would receive severance pay calculated on the basis of one week's pay for every completed year of service, which came to R 6249.88 for the applicant,

(c) the annual leave pay for the applicant would be R 2083.29 ,

(d) they would get an ex gratia payment of R 9029.00 .

[14] On 16 September 2008 Ms de Grill telephoned the applicant and also sent an email to her, scheduling an appointment so that the applicant could train and take her through the processes of the job that the applicant was doing. The respondent contracted with Alphatect company to give Ms de Grill training on Pastel computer system.

[15] The applicant then referred an unfair dismissal dispute based on the operational requirements of the respondent, to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The dispute could not be resolved and a certificate of outcome dated 17 October 2008 was issued. On 24 November 2008 the applicant referred the dispute to this court by means of a Statement of Claim.

The issue

[16] Procedural fairness of the dismissal is under challenge, where the questions to be answered are whether:

(1) a proper or meaningful consultation was followed;

(2) necessary information was in fact supplied;

(3) Mr Allan could have approached the consultation with an open mind;

(4) there was a position in the company that could have been offered to the applicant but was not so offered.

[17] Substantive fairness of the dismissal is challenged on the basis that there was an alternative position which could have been offered to the applicant but was not. That refers to the Newlands office occupied by Ms De Grill.

[18] Although not expressed in clear terms, the applicant suggested in her evidence that she should have been considered for the Durban post. The applicant made the following concessions in the document for the Judge President's Directions regarding Retrenchments for Operational Requirements-

- That there was a need to retrench;
- There was no dispute regarding the selection criteria and
- that there is no dispute regarding the manner in which the selection criteria were applied

[19] The applicant only seeks compensation to the exclusion of reinstatement or re-employment.

The trial

The version of the respondent

[20] The respondent's witnesses were its Chief Executive Officer, Mr Mike Allan and its Supply Chain Manager Ms Lizelle Bright.

[21] The respondent's Wynberg office, where the applicant was employed, was closed in its entirety at the end of November 2008. The applicant's dispute is the only unfair dismissal dispute referred against the respondent arising out of the retrenchment exercises undertaken by the respondent in the Western Cape.

[22] When the respondent acquired the various companies and brands there were a number of supply chain processes in place. The management of the respondent analysed the best way to consolidate these supply chains after the businesses were acquired. The last brand acquired in 2008 was Phyto Nova from Thebe Medicare (Pty) Ltd on 1st September 2008. The distribution, warehousing, invoicing and debt collection was outsourced to PHD which is based in Centurion on 1 June 2008. The applicant was only doing supply chain administrative duties from mid-June 2008 until her employment terminated some three and a half months later on 30th September 2008.

[23] The Applicant was initially doing the functions of "approximately one and a half jobs" and that is why she received an additional R2000 remuneration (an approximately 30% increase) when she assumed the supply chain administration functions in June 2008. Her previous position largely wound down after PHD took over the debt collection and credit control function on 1 June 2008. It was not the equivalent of two jobs, otherwise the respondent would have given her a larger increase in her remuneration if this was the case.

[24] There was a lot of uncertainty surrounding how the new businesses would be run as they had only recently been acquired and warehousing, distribution, debt collection and invoicing was outsourced to PHD. It was eventually decided in September 2008, after consultation, that the supply chain administration function of Bioharmony would be absorbed into head office in Durban. There

was a commercial rationale for the decision to close the Wynberg office

[25] The respondent has embarked on three retrenchment exercises in the Western Cape since March 2008. The respondent's distribution warehouse for Bioharmony, located in Wynberg, the Bioharmony Wynberg office and the Newlands office have all been closed in the last year. The respondent has saved significant costs by closing the Wynberg office.

[26] The operation of the Bioharmony and Phyto Nova brands and the supply chain administration of these two brands have been absorbed by the head office in Durban. The respondent's entire portfolio of brands now has two people managing their supply chain from the Durban office. The absorption of the Bioharmony supply chain into the Durban office occurred following the closure of the Wynberg office at the end of September 2008 and the absorption of the Phyto Nova supply chain shortly thereafter. There were intricacies of the consolidation of the supply chain at the respondent in Durban.

[27] Ms de Grill was employed through a temporary employment service (or labour broker), ETA Lyons & Associates by Phyto Nova, just prior to the brand being transferred to the respondent, on approximately 28th August 2008. From the supply chain perspective, the Phyto Nova brand was having a difficult period as the key supplier to the brand, Parceval, had "gone under" prior to the acquisition of the brand by the respondent and a new supplier had to be found. An alternate supplier, namely Afriplex was found

and Phyto Nova needed a person in a temporary capacity to assist with the transition and with other duties.

[28] The appointment of Ms De Grill was made before a decision had been taken by the respondent to embark on a retrenchment exercise at the Wynberg office. The position that she eventually occupied at Phyto Nova was initially advertised a long time before the acquisition of the Phyto Nova brand by the respondent. She initially applied for the job in March 2008 although the whole recruitment process was only completed on 28th August 2008 when she started working at Phyto Nova. When she started working there approximately 50% of the job consisted of supply chain administration and the other 50% consisted of product development.

[29] Ms De Grill was based at the Newlands office. There was no-one at the Newlands office to deal with the supply chain administration issues of the Phyto Nova brand at the time that De Grill was hired. The two brands and their supply chain administration were run completely independently of one another until the point when they were absorbed by the Durban office.

[30] Shortly after Ms De Grill commenced employment, she was diagnosed with cancer and took an extended period of sick leave, from 5 October 2008 until 5 January 2009. No one else was appointed to take over her functions at Phyto Nova when she went on sick leave and the respondent did not have any need to make such an appointment. Ms De Grill only did supply chain administration for a period of just over a month. The supply chain

administration of the Phyto Nova brand was absorbed by the Durban branch when Ms De Grill went on sick leave.

[31] When Ms De Grill returned to work in January 2009 there was actually nothing for her to do at the Newlands office. However, the respondent did not feel comfortable cancelling the contract two months before the fixed term was finished, considering that she had just been treated for cancer. When she got back to work in January she did administrative tasks and filing and that approximately 20% of her job was product development. Her job function had changed dramatically on her return. She hardly worked on supply chain administration. There was no supply chain administration work at the respondent, within any of the brands, in the Cape Town region from early October2008. The supply chain administration role of Ms De Grill was only ever going to be a temporary role whilst the supply chain of the brand got absorbed into the head office branch at Durban. On why the respondent did not offer the post that was occupied by Ms De Grill to the applicant, there was actually very little supply chain work for De Grill to do, even at the stage that applicant was consulted regarding retrenchment. Ms De Grill had also been hired to do product development which was a function that the applicant had no experience or training in.

[32] Ms De Grill had been hired as a temporary measure on a six month contract before the decision to retrench had been contemplated in Bioharmony brand. It did not make sense to offer the applicant the job as there was minimal supply chain work to do in the Phyto

Nova brand around the time of her retrenchment. There was simply no other job for the applicant to do in the region. Furthermore, the applicant's credit control and debtor's function had been outsourced to PHD in June and that she had been doing a limited credit control function in the period since that occurred. The entire operation in Wynberg had become redundant.

[33] Ms Bright contacted the applicant in mid September in order to discuss the absorption of the supply chain of Bioharmony into the Durban branch. Ms Bright had not done this to take over the applicant's job. Ms De Grill was asked to contact the applicant to learn how she ran the Bioharmony supply chain so that the Phyto Nova supply chain could be run in a similar fashion until it was absorbed into the Durban office supply chain administration. The respondent did not appoint Ms De Grill to take over the applicant's job. The applicant did not know anything about the Phyto Nova supply chain or what Ms De Grill's original position (before her illness) entailed. She misunderstood the circumstances in which she said that Ms De Grill was hired to take her job, despite the explanation that had been given during the retrenchment consultation. The applicant did provide information to Ms Bright and Ms De Grill though it became clear that not all of it was relevant to the supply chain of Phyto Nova. Ms De Grill and Ms Bright received a list of information from the applicant with contacts and a guide to compiling forecasts. However, a lot of that information was not relevant to them and they did not require it. The assertion that the applicant had to teach Ms De Grill and Ms Bright her job was clearly a gross exaggeration. The respondent

was clearly under no obligation to offer the applicant the position that De Grill was occupying at Phyto Nova.

[34] Mr. Allan did call everyone together for a meeting in the Wynberg office in August. However, he did not make a declaration of redundancy at this point. In August 2008 the respondent did not know how they would be running the various brands and had made no decisions regarding the closure of the Wynberg office. He advised the staff that if they were offered a good position elsewhere, they could take it as he simply did not know what would be happening with the company in the future and there was great uncertainty. Retrenchment had not been contemplated at that stage and redundancy had not been declared. Applicant's job was not redundant at that stage.

[35] As soon as retrenchment was contemplated by the respondent letters were sent to the employees at the Wynberg office. The letter is detailed and provides a great deal of information regarding the respondent's acquisitions and the alternatives which had been contemplated to avoid dismissals. Ms De Grill and the applicant met at the Newlands office prior to the retrenchment consultations taking place. Even if the applicant had not met Ms De Grill before the consultations occurred, by the time the consultations took place, it was clear that the Phyto Nova supply chain administration work would soon come to an end. It would not have made sense to offer that position to the applicant in consultation.

[36] Mr. Allan approached the consultation with an open mind. Due to his experience with retrenchments in his previous employment Mr. Allan knew that in an "acquisition situation" it was very important to keep an open mind. Often, the people who have been working in the business "know the detail" and will have very good ideas to avoid retrenchment. One could "miss a gem" if one did not keep an open mind in a consultation process in these circumstances. The employees had as much information as was available to the respondent and that the contents of the letter were discussed in detail with all the staff. He met each of the staff members on an individual basis following the group meeting.

[37] The applicant did not provide any alternatives to avoid retrenchment during the meetings or afterwards. The staff members were asked whether they would relocate to Durban and they were not willing to. The applicant never indicated a willingness to relocate to Durban. Mr, Allan did not try to "chase her" out of his office when she had an individual meeting with him. She did not give him any suggestions or raise any queries regarding the retrenchment.

Applicant's version

[38] Ms De Grill testified and thereafter the applicant presented her evidence. Applicant was never offered a job in Durban as averred by Allen. She would have worked part-time in order to alleviate hardship and that she would have accepted a downgraded post but this was never offered to her or discussed with her.

[39] Offering her Ms De Grill's job would not have been pointless and unfair merely because it could have been terminated on 1 (one) month's notice. During the August meeting, her understanding of what Mr., Allen had said to them was that they would be made redundant and that if they received a job offer they should take it. Shortly after the beginning at the Respondent company, she had received a bonus in the form of a gift voucher because she had identified weaknesses in the supply chain system and on her own initiative corrected them, including drawing up a register in which clients would sign receipt of deliveries and a cross referencing system where waybills were cross referenced with invoices. In addition to this and because of her previous experience, she had identified a weakness, a security risk, in the operations of the Respondent company because its stock was open to the public and on her recommendation the stock was safely secured. Mr. Allen did not know about these improvements made by the Applicant.

[40] On Mr. Allen's instructions, Ms Draber had offered her the job and had in fact pleaded with her to take the job of Supply Chain Administrator. The applicant was in fact doing two full time jobs and on a visit to PHD with Mr. Allen, she asked whether her job description would change and was told it would. In respect of the consultation, she received her Section 189 letter on 10 September 2008 on or just after 10h00 and consulted at about 12h00 with Mr. Allen. She understood the 10 minutes meeting to be the consultation and that she felt the company had already decided that there was no point in making representations. Mr. Allen said that they all had to get on with their lives. She had no information concerning Phyto Nova, the appointment of Ms De Grill, the

position at the Newlands office or any other possible positions. Her administrative skills were of a nature generic enough to do any supply chain functions required of her at the Newlands office. Both parties had to deal with Biomox. even though Mr. Allen said that he did not know why Ms De Grill would need information on Biomox. She could have done the job that De Grill did, because her skills as an administrator of supply chain functions were such that she could or at least should have been told about the job, and the fact that she had trained Ms De Grill to do work that she was currently doing meant that she could have done her work. She had been approached to do Supply Chain Administration by her employer, but she was qualified. Even though she only had 5 (five) months at the Respondent's company she had many years before that done work at BMD (Pty) Ltd of a general nature that involved administration and similar skills. Furthermore, that the Newlands office and the Phyto Nova Brands supply chain functions were different because there were new supplier she had dealt with new suppliers in her current job and it was simply a question of incorporating them into the system. In fact, the biggest part of her job comprised the taking of forecasts, including the balancing of stock. It was a labour intensive job which did not require any special product development skills.

[41] She did not experience the consultation as being a consultation or meaningful in any sense. Mr. Allen never put to her or any of the employees that they could apply for posts in Durban. She had very little interaction with Ms Bright who knew very little about her work. She did not know that dismissal for operational requirements was a "no fault" dismissal, and that businesses can

close for operational reasons. She had experienced two retrenchments in the past and had been a human resources officer at BDM Textiles. She did not know that after 5 October 2008 there was in fact no supply chain administration job left even if she was qualified to do it. As to why the applicant did not make representations to the respondent, she had been emotional and upset at the time. The fact that the applicant was the only person who was dissatisfied with her dismissal and who had decided to take the respondent to Court was borne out by the fact that she felt she had a right because she was not consulted.

SUBMISSIONS BY THE PARTIES

Respondent's submissions

[42] It is the respondent's submission, as confirmed in the evidence of Mr.Allan and Ms Bright, that there was no supply chain administration work at the respondent, within any of the brands, in the Cape Town region from early October. The respondent further submitted that the supply chain administration role of Ms De Grill was only ever going to be a temporary role whilst the supply chain of the brand got absorbed into the head office branch in Durban. This was the testimony of both Mr. Allan and Ms Bright and it could not be gainsaid by the applicant or Ms De Grill.

[43] Mr. Allan was asked under cross examination why he did not offer the post that was occupied by Ms De Grill to the applicant. He testified that there was actually very little supply chain work for Ms De Grill to do, even at the stage that applicant was consulted regarding retrenchment. He pointed out that Ms De Grill had also

been hired to do product development which was a function that the applicant had no experience or training in.

[44] Mr. Allan and Ms Bright testified that Ms Bright contacted the applicant in mid September in order to discuss the absorption of the supply chain of Bioharmony into the Durban branch. Whilst the applicant had initially pleaded in her application papers that Ms Bright had done this to take over the applicant's job, it was rightly conceded by the applicant at the start of the trial that Ms Bright was not employed to take the applicant's job. Ms Bright testified that Ms De Grill was asked to contact the applicant to learn how she ran the Bioharmony supply chain so that the Phyto Nova supply chain could be run in a similar fashion until it was absorbed into the Durban office supply chain administration.

[45] In the testimony of Mr. Allan and Ms Bright it was confirmed on a number of occasions that the respondent did not appoint Ms De Grill to take over the applicant's job. In her testimony the applicant conceded that she did not know anything about the Phyto Nova supply chain or what Ms De Grill's original position, before her illness, entailed.

[46] It emerged in the testimony of Mr. Allan, Ms Bright and Ms De Grill that the applicant did provide information to Ms Bright and Ms De Grill. However, it became clear that not all of it was relevant to the supply chain of Phyto Nova. Ms De Grill and Ms Bright both received a list of information from the applicant with contacts and a guide to compiling forecasts. When Ms Bright and Ms De Grill were taken through the list by the applicant's

representative they testified that a lot of the information was not relevant to them and they did not know why it had been included in the list as they did not require it. The applicant's contention in her papers and in her testimony that she had to teach Ms De Grill and Ms Bright her job, is clearly a gross exaggeration and should be rejected.

[47] The respondent was clearly under no obligation to offer the applicant the position that Ms De Grill was occupying at Phyto Nova and so the applicant's allegation of substantive unfairness should be dismissed.

[48] Mr. Allan testified that he did call everyone together for a meeting in the Wynberg office in August. However, he emphatically denied that he made a declaration of redundancy at this point. He stated that in August 2008 the respondent did not know how they would be running the various brands and had made no decisions regarding the closure of the Wynberg office.

[49] As soon as retrenchment was contemplated by the respondent letters were sent to the employees at the Wynberg office. It was submitted that the letter was detailed and provided a great deal of information regarding the respondent's acquisitions and the alternatives which had been contemplated to avoid dismissals. In cross examination the applicant could not clarify what further information she required in the letter.

[50] The applicant was angry that Mr. Allan seemed "nonchalant" in his discussions with her. She cited this nonchalance and his alleged

comment that "Life goes on after retrenchment…" as reasons for her inability to provide suggestions to Mr. Allan regarding the retrenchment process. This was never put to Mr. Allan in cross examination and so he was never asked to comment on these allegations. The applicant stated under cross examination that she did not raise any queries regarding Ms De Grill or Ms Bright with the management of the respondent when they contacted her regarding her supply chain administration following the decision to close the Wynberg office.

[51] In any event, it is submitted that if the applicant had raised the issue of Ms De Grill with the respondent it would have been explained to her that Ms De Grill was not hired to replace her. Mr. Allan testified that the positions they were occupying were actually different although some of the functions were the same. They were dealing with very different products, different suppliers and the position was with a separate entity. The respondent would have reiterated that the supply chain administration of all of the brands was being consolidated in the Durban office. Mr. Allan gave evidence that Ms De Grill was "shutting down" and "integrating" the Phyto Nova supply chain. It is the respondent's submission that none of the issues raised by the applicant in relation to the procedural fairness of the dismissal can be sustained and that the respondent clearly fulfilled the obligations placed upon it in terms of the Act and the Code of Good Practice (the Code).

[52] The Act and the Code place substantive and procedural obligations on the employer in situations where dismissals for operational requirements are anticipated. It is the respondent's submission that

they fulfilled both the procedural and substantive requirements mandated by the legislation and that consequently the applicant's dismissal was fair. The obligations to consult are not only shouldered by the employer. The process of consultation has been held to be "…*a bilateral process in which obligations are imposed upon both parties to consult in good faith in an attempt to achieve the objectives specified.*…" in the Act. The employer cannot be blamed if the employee fails to engage adequately in the consultation process.

[53] The respondent attempted to engage with the applicant in consultation and that she did not endeavour to consult adequately. She was given ample opportunity to canvas the options and issues, that she knew what her obligations were in this regard and that she failed to do so. The respondent cannot be held to blame for this failure.

[54] The Act does not prevent an employer from coming to the table with a favoured proposal although it does require that the employer gives employees a "fair opportunity to express their views…" and to keep an open mind during the consultation process. The employer must be open to persuasion by the employees if it is argued that "…*[the] method is wrong or is not the best or that there is or may be another one that can address the problem either equally well or even in a better way.*…."

[55] It is the respondent's submission that this is exactly how it approached the consultation process at the Wynberg office. Mr. Allan specifically testified that he kept an open mind. He also

testified that there were no arguments, comments, or suggestions, persuasive or otherwise, given by the employees or by the applicant herself.

[56] It is submitted that the respondent did everything it could to achieve joint consensus-seeking and that the applicant was unwilling to meaningfully participate in the consultation process. The respondent could not shoulder the full responsibility of proposals to avoid retrenchment and the applicant had a responsibility to assist with proposals. It is clear from the letter that was given to the applicant and from the testimony of Mr. Allan that a number of options were considered before the decision to retrench was taken and that he was very eager to discuss alternatives with the employees.

Applicant's submissions

[57] Neither Mr. Allen nor Ms Bright knew the extent of the supply chain administration work that the applicant did. Neither of them knew the extent of the supply chain work that Ms De Grill did and neither of them knew the extent to which the work of both the applicant and Ms De Grill overlapped. At the very least 50% of all the work done by Ms De Grill could have been done by the applicant. In addition, some of the product development work was of an administrative nature and could have been done by the applicant. Finally, the respondent chose to hire Ms De Grill from a labour broker and the option was open to them to ask for a person who could focus only on product development. They chose not to.

No explanation was forthcoming as to why they could not have waited before hiring Ms De Grill.

[58] A consultation was held that lasted 10 minutes, alternatively, the applicant was expected to make representations and have a consultation by telephone or email with the CEO of a R100 000 000 company. The applicant was under the impression that the 10 minutes' consultation constituted the entire consultation. She understood Mr. Allen's words "that we must all get on with our lives" to mean that the retrenchment was a foregone conclusion. Mr. Allen understood it to mean an introductory discussion and that it was open to the employees after he had left for Durban to contact him per e-mail and by telephone to make any further suggestions.

[59] At the August meeting the applicant understood Mr. Allen's words to the effect that if people were offered jobs that they should take them to mean that retrenchments had been decided on and were going to take place. On Mr. Allen's version, he merely wished to indicate that the company faced an uncertain future and should a good offer come along an employee may be well advised to take it up.

[60] It is common cause that no information concerning the Newlands job was presented to the applicant or any information concerning the acquisition of Phyto Nova and the implications of hiring an outside person in the form of Ms De Grill. Mr. Allen testified that he could not employ the applicant because Phyto Nova had not yet been acquired by the respondent company at the time that Ms De

Grill was employed. In addition he testified that the supply chain functions were entirely different. This testimony was directly contradicted by both Ms De Grill, who fulfilled the functions of supply chain administrator in the Newlands office and the applicant who trained her to perform those functions.

[61] Finally, it was put to both Ms De Grill and the applicant that the Phyto Nova Brand and the Bio Harmony Brand were of a completely different type. Both Ms De Grill and the applicant considered this irrelevant and were of the view that the nature of the supply chain administration functions were the same or similar.

Procedural Fairness

[62] It is an absolute prerequisite for a fair retrenchment that a consultation take place where exhaustive and meaningful discussions are held at the earliest possible opportunity with employees. Failure to consult would be unfair. If there is any way to avoid a dismissal and the employer does not take the necessary steps to avoid such a dismissal then the dismissal will be unfair.

[63] Section 189 requires not only a consultation but a meaningful consultation. A CEO cannot have already approved the restructuring of a business and thereafter hold a consultation. Adequate and proper notice of the subject of the consultation is necessary. Furthermore an adequate opportunity to consider the position and to consult must be given to the employee. If the employee is not afforded such an opportunity the procedure is unfair. Failure to consult on and to provide information regarding

future re-employment at the employer is unfair especially where the employee has limited employment opportunities. Failure to make information available to an employee, either in writing or at all, and failure to provide all relevant information on possible vacancies in other departments is considered unfair.

[64] Discussions are to be exhausted as soon as possible and these discussions cannot be sporadic or superficial. The idea is to explore the reasons for the retrenchment and to hear representations on ways and means to avoid retrenchment by discussing and considering alternative measures. Our Courts have consistently held that a mechanical checklist approach to Section 189 is inappropriate. The proper approach is to ascertain whether a joint consensus seeking process has been achieved. Section 189 places an obligation on the employer and the Court must determine whether the employer in fact fulfilled the purpose of Section 189. The test for compliance of whether the purpose of Section 189 has been fulfilled is objective. This means that even if the employer believes subjectively that further consultation is fruitless, a fair procedure must still be followed.

[65] In considering alternatives to avoid retrenchment the employer must consult with an employee in order to ascertain whether the employee is prepared to accept the post even if that post is a downgraded post. The duration of the consultative process is also significant. The time allowed between informing an employee of the prospect of job loss and the actuality of that job loss must be such as to permit a fair consultation on relevant issues. The extent of this period is an essential element in assessing fairness. The

timing of the consultation is also relevant. An employer is required to consult with an affected employee as soon as it decides in principle to adopt a policy which might conceivable result in retrenchment.

[66] The dismissal of the applicant was procedurally unfair because there was no consultation, or there was no meaningful consultation. On Mr. Allen's version the meeting he had with the applicant was not the consultation. It was something else. The consultation according to him was the invitation to the applicant to contact him and discuss or make representations regarding the s189 letter. He was in Durban. She was in Cape Town. He was a CEO, she was a low-level employee. He assumed email or telephone would be sufficient for her to make such representations. On the applicant's version the 10 minutes she spent with Mr. Allen was the consultation. Whichever version is accepted, no consultation could be said to have taken place that would satisfy the requirements of s 189 as interpreted by our courts.

[67] No necessary or reasonably necessary (for purposes of consultation) information was provided to the applicant. She did not know about the opportunity at the Newlands office nor about the appointment of Ms De Grill and had she known it still would not have availed her because it is common cause that Ms De Grill had already been appointed by the time the applicant consulted with Mr. Allen. It does not assist the Respondent to argue that the supply chain administration functions were different or that Phyto Nova did not yet belong to the Respondent company. Even if they were different or of such a different nature that Mr. Allen felt it

would be impossible for the applicant to perform the functions he had to, at the very least, give her an opportunity to disagree with him.

[68] The fact that Phyto Nova did not yet belong to the respondent is irrelevant. The respondent knew prior to the appointment of Ms De Grill that it would be acquiring Phyto Nova, and therefore there was a duty on it, particularly in light of the fact that it would in all likelihood retrench employees, to either delay the appointment of Ms De Grill to give the applicant an opportunity to make proper representations, or to consult the applicant and offer her the Newlands job prior to the appointment of Ms De Grill. It does not avail the Respondent to argue that it did not yet own Phyto Nova and could not therefore have placed the applicant in the Newlands office. To do so would mean that employers could circumvent the protections offered to employees in terms of s 197 of the Act. The fact that Mr. Allen thought it would be unfair to offer the applicant a temporary post that could be terminated with one month's notice and that is why, or at least that was one of the reasons why he did not raise it with the applicant is procedurally untenable.

[69] The very purpose of the consultation is to have a discussion, between the parties and not for an employer to make unilateral decisions. Whereas the period between the time the employee gains the knowledge of the possibility of losing his job and the actuality of retrenchment is essential in assessing fairness, it would appear that the principle can equally be applied to the period between the knowledge the employee gains of the possibility of losing her job and the time when she is required to make

representations and consult. In the present case this was about 2 hours and the total amount of time between the applicant's receipt of her s 189 letter and her dismissal letter was 5 days. The fact that Mr. Allen told the employees that he was available on his cell phone or by e-mail is insufficient. He was in Durban. They were in Cape Town. It can hardly have been the intention of the legislature that a meaningful consultation is one conducted between a low level employee and the CEO of a company by telephone or e-mail exchange.

[70] Mr. Allen should have consulted with the applicant as soon as Bioscience had adopted the policy which might conceivably result in retrenchment and should have at least consulted with her about the Newlands post. Bioscience was aware of the imminent acquisition of Phyto Nova. It should have applied its mind to the consequences. It did not. Its failure to do so amounts to procedural fairness in as much as it disregarded the applicant's rights to put forward any proposals regarding her contributions to the Newlands office based on her supply chain administration experience and skills.

[71] Mr. Allen failed to provide all relevant information about possible vacancies in other departments, specifically the Newlands office and was obliged to do so. It is not sufficient for Mr. Allen to aver that it was in his opinion, a pointless exercise because the supply chain functions were so different. The test is objective. The continued emphasis by the respondent was on the business, how the new acquisition would affect and fit into the existing business, the degree to which it was a new brand, and its corporate eye was

fixed firmly on consolidation in Durban. In the process it forgot about its employees and in fact at one stage in his testimony Mr. Allen stated that he had an obligation towards his shareholders. But the Court's primary concern is the compliance with the Act, not the interests of shareholders.

[72] Furthermore, whilst Mr. Allen might have been of the view that he had genuinely engaged employees, his actual conduct measured objectively falls short of any meaningful consultation. The formal primary obligation remained with him to be available there and then for employees and not to remove himself to Durban. It was Mr. Allen's conduct that frustrated consensus being sought.

Substantive fairness

[73] If there is an employee in the organisation that can perform the work of another employee with shorter service then the first employee should be offered the job. In circumstances where there is a dispute on the facts as to whether there has been a meeting in the sense of a meaningful consultation, the courts have looked at what information was present at the meeting as a guideline. The court's view was that substantive fairness is inexplicably linked to procedural fairness because it is by way of exhaustive consultation that the economic rational, the fair reason, for the retrenchment, is established. The court's primary concern is with labour relations and not with the interests of shareholders. A company's financial position does not absolve it from its duties under the Act.

[74] The respondent could have avoided the dismissal of the applicant, because there was alternative work the applicant could have performed in the Newlands office. The failure of the respondent to avoid the dismissal on these grounds is substantively unfair. It was unfair of the respondent to hire in Ms De Grill from a labour broker when the applicant, a person already in the employ of the respondent, was not considered for the position. There was an alternative to retrenchment, a position that could have alleviated the hardship of the applicant, and the law requires the respondent to have offered, or at the very least discussed, the position with the applicant.

Evaluation

[75] When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult the relevant person or persons, see s189 (1) of the Act. The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus seeking process and must attempt to reach consensus on various issues, see s189 (2). The moment of contemplation is often very difficult to ascertain in a number of cases. Added to this difficulty is the fact that an employer is entitled to approach the retrenchment process with a favoured proposal on how to resolve what it deems to be an impasse to be possibly resolved through a retrenchment exercise, see *Nehawu & Others v University of Pretoria [2000] 5 BLLR 437 (LAC)*. The employer must however be open to persuasion by the employees or their representatives. A meaningful

joint consensus seeking process envisages a bilateral engagement in which obligations are imposed upon both parties to consult in good faith in an attempt to achieve the objectives of the Act, see *Visser v Sanlam [2001]3 BLLR 313 (LAC)*.

[76] Because of this dual responsibility of the parties as a basis for the meaningful joint consensus seeking process, the process may be frustrated by either party, that is, the employer or the employee. Where therefore, an employee refuses to constructively take part in the process, such a refusal may be held up against him or her, see *Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 1209 (LAC).*

[77] It needs to be pointed out that dismissals based on the operational requirements of the employer are “no fault” dismissals. In the present matter the dismissal of the applicant had nothing to do with her blameworthiness. It had everything to do with the inability of the respondent to continue with some of its operations in Wynberg and Newlands. The accolades received by the applicant do not therefore found a cause of action.

[78] Section 189 requires not only a consultation but a meaningful consultation. A number of factors follow from this type of consultation and to the extent relevant in this matter, a few of these factors need to be outlined. Adequate and proper notice of the subject of the consultation is very necessary. An adequate opportunity to consider the position and to consult must be accorded to the employee. Failure to consult on and to provide information regarding future re-employment at the workplace of the employer may be unfair especially where the employee has

limited employment opportunities. Similarly a failure to provide all relevant information on possible vacancies in other departments of the employer may be unfair, see *Visser v Institute for Medical Research (1998) 19 ILJ 1616 (LC).* The parties have to consider alternatives to avoid a retrenchment. The employer must therefore consult with an employee to ascertain whether the employee is prepared to accept a downgraded post, see *Reckitt & Coleman (SA) (Pty) Ltd v Bales [1994] 8 BLLR32 (LAC).*

[79] With these considerations in mind, I now return to the facts of the case before me. The challenge by the applicant to substantive fairness is one of a limited nature. It has not been sought to challenge the closure of the Wynberg branch office, where the applicant was based. In fact in the pre-trial minute there was no challenge at all to substantive fairness of the dismissal. The challenge, as I understand it, is that the applicant ought not to have been retrenched but should have been retained in the position occupied by Ms De Grill, which was a fixed term contract. A bold but unsubstantiated statement was made on behalf of the applicant that retrenchment was already foreseeable when Ms De Grill was employed. I must accept the version of the respondent that at that stage, retrenchment was not contemplated. There is no factual basis for holding otherwise.

[80] The undisputed evidence of the respondent is that Ms De Grille was employed by Phyto Nova, through a labour brokerage with effect from 27 August 2008. 5 days later Phyto Nova was taken over by the respondent. While the period between the employment of Ms De Grill and the acquisition of Phyto Nova by the

respondent is very short, in the absence of direct or even indirect evidence, it would be speculative to hold that the respondent had a say over who Phyto Nova could or could not employ.

[81] Ms De Grill was off sick for the better part of her employment period. The undisputed evidence is that her work was done from the Durban office, while she was on sick leave. There is overwhelming evidence suggestive that, in fact there never was a need to employ her in the first place, let alone a need to employ someone else in her place. When her fixed term of employment ended, her functions were taken over by the Durban office.

[82] It must follow as of necessity than that the respondent has succeeded in showing that it had a fair reason for not substituting Ms De Grill with the applicant. There was some challenge by the applicant that the Durban office was never offered to her. The respondent said that the offer was extended to her. It is noteworthy that the applicant did not say that she could have uprooted to Durban, had the offer been made to her. In the letter of 12 September 2008 issued by Mr. Allan to the applicant and other staff members, the following information was given- "…*BioScience has decided to consolidate its accounting, office administration and supply chain functions at the BioScience head office in Durban. As a result the Wynberg office together with the relevant accounting, office administration and supply chain functions is not required……..*

It is expected that all eight (8) employees at the Wynberg office will be affected….."

[82] The letter proposed a payment of the retrenchment package, subject to a consultation with the staff. It further invited the staff to

make representations about any matter on which the staff was being consulted and a response thereto. Against this, there is paucity of evidence on the applicant suggestive that she would have wanted to move to the Durban office.

[83] I hold therefore, as I must, that the respondent has succeeded in showing that the dismissal of the applicant on its operational requirements was substantively fair.

[84] In August 2008 Mr. Allan went to the Wynberg offices of the respondent. He addressed the staff on the structural changes on the respondent. He discussed the possibility of some staff moving to Newlands offices. The understanding by the applicant of what Mr. Allen said in that meeting was that their positions would be made redundant and therefore that if they received other job offers, they were to take them. This goes against the evidence of the applicant that Mr. Allen told her that her position was secured. The evidence of the applicant is unclear in this regard. It could mean that there is something that Mr. Allan said which the applicant understood to mean their positions would be redundant. In that case she failed to tell court what that something was so that court would assess it on its own. There is room for a misunderstanding by the applicant. News of a possibility of a retrenchment is never good news. Also, the evidence of the applicant in this regard is lacking in details. Against it there is the unequivocal denial by Mr. Allan that he had uttered the disputed words. I accordingly find that there is insufficient evidence that Mr. Allan had already decided to retrench the Wynberg staff in August 2008.

[85] The next enquiry pertains to the procedural fairness of the dismissal. Section 189 (2) and (3) considerations, to which I have already referred, are apposite. On 10 September 2008 Mr. Allan came to Wynberg and held a staff meeting pertaining to their retrenchment. He had not apprised them of the purpose of the meeting. They had not been placed in a position from which they could meaningfully contribute to a joint consensus seeking process. It is not surprising that he said the meeting was not part of a consultation process. The applicant thought it was. Objectively it could not have been. It was only after that meeting that he distributed the letter of 10 September 2008, which is a written notice as envisaged by section 189 (3). It gave the employees two days within which to make any representations they might want to make. Paragraph 5 of the notice is interesting. It reads- "*Management is prepared to meet with you on 10 September at the Wynberg office at 12h00. You may be represented by another employee of your choice from the same section.*"

[86] It can not be that the employees were given an adequate proper notice of the subject of consultation. Such consultation was to take place on the same day of the receipt of the notice. They were not given reasonable time to reflect on their position, to consult and then to think of the way forward. They could not choose to be represented by an employee of their choice from the same section as each was concerned about her own position. The notice told them that the office would officially be closed at the end of the same month, giving them effectively 20 days' notice of the termination of their employment. It is not surprising that the

applicant felt angry and confused at the time. Mr. Allan was just taking the employees through predetermined stages of their dismissal, when he met them individually. Theirs was just a *feit accompli* dismissal. It could never have been procedurally fair in the circumstances. One can not tell what suggestions they might have made had they been given an opportunity to reflect and consult. The applicant was well vest with her duties. She might for instance have come up with proposals to delay the time of retrenchment which the respondent might have found acceptable. The applicant's failure to follow up on the terms of the letter of 10 September 2008, as its contents suggested, is accordingly excusable. To the extent that procedural fairness touches on Ms De Grill, the version of the respondent stands unshaken.

[87] The dismissal of the applicant by the respondent is accordingly found to have been procedurally unfair.

[88] The applicant has requested that the compensation to be awarded to her, on being successful, should be punitive to take account of the behavior of the respondent. There is authority for this approach. In the case of *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Super Care Cleaning* (2005) 26 ILJ889 (LC), this court held that the provisions of Section 189 are prescriptive, clear, notorious, well understood, wisely crafted and tailored. Their aim is joint consensus seeking and court stated in unambiguous language that employers that do not follow them do so at their own peril.

[89] The applicant was represented on pro bono basis. The considerations of law and fairness of this matter suggest that a costs order should issue against the respondent. There is no specific provision in the rules of this court for the awarding of costs in these circumstances. Rule 40 of the High Court provides for a costs order for a successful litigant *in forma pauperis.*

[90] The following order will issue –

(1) The respondent is ordered to compensate the applicant in an amount of money equivalent to six months of the salary she was earning on the date of her dismissal. (R9029 x 6 =R54174.00).

(2) The respondent is ordered to pay so much of the costs of counsel for the applicant as were actually incurred, to include any court fees and sheriff's charges as may have been disbursed.

……

Cele J

DATE OF HEARING : 22 OCTOBER 2010

DATE OF JUDGMENT : 11 MARCH 2010

APPEARANCES

APPLICANT	:	EDWARD NATHAN SONNENBERGS
RESPONDENT	:	SHEPSTONE & WYLIE ATTORNEYS