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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 337/16

In the matter between:

TIRISANO TRANSPORT AND SERVICES WORKERS UNION
obo THABANG JOHANNES THINYANE **First Applicant**

TIRISANO TRANSPORT AND SERVICES WORKERS UNION
obo MATHAPELO MAVIS MIYA **Second Applicant**

and

E C DE WET VERVOER (PTY) LTD **Respondent**

Determined on papers

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 11 June 2021.

JUDGMENT

MAHOSI, J

Introduction

[1] Tirisano Transport and Services Workers Union (TASWU) approached this Court on behalf Thabang Johannes Thinyane (Mr. Thinyane) and Mathapelo Mavis Miya (Ms Miya), jointly referred to as "the individual applicants", by way of a statement of claim challenging the fairness of their retrenchment.

[2] The matter was set down for trial on 21 May 2020. However, in light of the Covid-19 restrictions, the parties' legal representatives concluded a pre-trial minute on 05 May 2020, in terms of which it was agreed that the matter should be decided on affidavits and for that purpose they reduced the issues for determination as follows:

> "1. Whether the respondent failed to consider short time and reducing overtime as an alternative to retrenchment.
> 2. Whether Last-In-First-Out was applied. Whether Jan Cart, William Motshweneng, Daniel and Lazarus (Surnames unknown to the applicant), Mokete Ernest Tsholo and William Tsietsi Thebe should have been selected for retrenchment instead of the applicants.
> 3. Whether the meetings constituted consultation as envisaged in section 189(2) of the LRA."

[3] Prior to outlining the applicants' case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

Background

[4] The facts that form the relevant background to the dispute between the parties are not in dispute. The respondent conducts the business of transportation of

tractors and other agricultural equipment. Mr Thinyane was appointed on 30 September 2014 as a Corsa-driver and Mrs Miya was employed on 22 April 2014 as a Yard worker.

[5] On 14 September 2015 the respondent issued a notice of intention to retrench in terms of section 189 of the Labour Relations Act[1] (LRA) to individual applicants that reads, *inter alia*, as follows:

> 'Re: Possible retrenchment
>
> We refer to the above matter.
>
> The company is contemplating embarking upon a retrenchment process which may lead to the possible termination of employees' services. Accordingly, it is necessary in such circumstances to consult with you regarding the possible retrenchments, on issues as detailed below. We wish to confirm that none of these issues [has] been finally determined. The company's final decision will depend on such representations as you may make.
>
> In order for you to have full appreciation of the company's in-principle vision, we provide you with the following information, which you will be required to respond to in due cause if necessary.
>
> Why the company is contemplating retrenchments
> *Structural reason to cut running cost of it's fleet.*
>
> Alternative to retrenchments
> The company further undertakes to consider any proposed alternatives that you may table during the consultation process.
>
> Selection criteria

[1] No. 66 of 1995, as amended.

> Should the company have no alternative but to proceed with terminating employees' services, the company will use selection criteria that have been agreed upon, or, failing agreement, the criteria which will be both fair and objective. At present the company proposes using LIFO to select employees whose services may be terminated.
>
> Timing of retrenchment
> It is intended that the consultative process be finalised by 23 September 2015.
> It is the intention of the company to consult with you during this period before any final decision is taken. The company will inform you of the date and time of consultation.'

[6] On 15 September 2015, the respondent then sent an email to TASWU, stating as follows:

> 'Please note that we are busy with consultations.
> Please respond to the author.'[2]

[7] On 21 September 2015, TASWU addressed a letter to the respondent indicating its intention to engage with it to ensure amicable consensus and proposed that the parties meet on 25 September 2015. Despite this letter, the respondent proceeded to consult the employees in the absence of TASWU on 21 and 25 September 2015.

[8] The meeting of 21 September 2015, was between Ms Miya together with 13 of her colleagues also employed as yard workers and Mr Coetzee at the respondent's premises, whilst the meeting of 25 September 2015, was between Mr Thinyane together with 12 of his colleagues also employed as drivers with Coetzee.

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[2] Index to pleadings, p 4 para 15.

[9] On 28 September 2015, Mr Thinyane had a meeting with Mr Coetzee and the contents of this meeting are disputed. After the meeting, Mr Thinyane was sent to Cape Town to attend deliveries.

[10] On 29 September 2015, the respondent addressed a letter to TASWU in which it indicated that it is not considering mass retrenchments and that it first wanted to consult with every employee before moving to the next stage of the retrenchment process.

[11] On 12 October 2015, Mr Coetzee met with the employees and informed them that those who wanted to be retrenched and/or are over the age of 60 would form part of phase 2 to be retrenched and thereafter Last-In-First-Out (LIFO) would be implemented on 14 October 2015.

[12] On 14 October 2015, the respondent issued a notice of retrenchment to individual applicants that stated, *inter alia*, as follows:

> 'As you are aware we had discussions with employees on 14/09/2015 & 12/10/2015 [dates] where management consulted with the union/employees on possible retrenchments due to financial difficulties that the company currently experience. After due consideration of all relevant factors retrenchment of certain employees [is] inevitable.
>
> We regret to advise you that your position has been affected by this decision and your services will therefore be terminated with effect from 6/11/2015.
>
> You will be paid a severance pay of one week's salary for every completed year worked.'

[13] In accordance with the notice of retrenchment, the employment of the individual applicants was terminated on 06 November 2015. Aggrieved by the respondent's decision to dismiss them, the applicants referred a dismissal dispute to the

National Bargaining Council for the Road Freight and Logistics Industry (the bargaining council). The matter was conciliated unsuccessfully and a certificate of non-resolution was issued. This prompted TASWU to refer the dispute for arbitration. On 02 March 2016, the arbitrator issued a jurisdictional ruling in terms of which he found that the bargaining council lacked jurisdiction to arbitrate the matter and advised TASWU to refer the matter to the Labour Court for adjudication. Consequently, TASWU referred the dispute to this Court for adjudication.

Pleaded case

[14] It is not in dispute that there existed a *rationale* for the operational requirements for dismissal. In the statement of case, the applicants summarised their case as follows:

> '5.12 The respondent did not engage in a meaningful joint consensus seeking process as required in terms of section 189(2) of the LRA.
> 5.13 The respondent, in further breach of section 189(2) of the Act, also did not attempt to reach consensus on the selection criteria.
> 5.14 The respondent did not apply fair and objective selection criteria when the applicants were selected for retrenchment.
> 5.15 Alternatives to dismissal existed and were not afforded to the Applicants.'[3]

[15] In opposing, the respondent submitted that it complied with its duty to notify potentially affected employees of the intended dismissal and engaged in the process of consultation as reflected in the attendance register where it was discussed, specifically with the aim to secure consensus on measures to avoid the dismissal, minimise the number of dismissals, change the timing of the dismissal, mitigate the adverse effect of the dismissal and on the method for selecting the employees to be dismissed as well as the severance pay for dismissed employees.

[3] Statement of claim, p 4-5

[16] The respondent further submitted that the consultation followed a notice in compliance with section 189(3) of the LRA. It is the respondent's case that subsequent to the consultation process and consideration of representation and input from the employees, the respondent only proceeded to retrench those employees who did not accept the voluntary retrenchment and/or any retirement amongst. These included the individual applicants.

[17] Furthermore, the respondent submitted that the selection criteria of LIFO was the acceptable method for determining the employees destined for retrenchment having regard to the fact that different positions were affected including but not limited to wash bay employees, escort vehicle drivers and truck drivers. It is the respondent's case that it properly communicated the results thereof to the affected employees and complied with its duty in as far as both procedural and substantive compliance as required by the LRA.

Legal principles and analysis of evidence

[18] Section 189(1) of the LRA outlines the process that needs to be followed when an employer contemplates dismissing employee(s) from their workforce due to operational requirements and it reads:

> '(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -
>
> (a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation –
>
> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be

affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

[19] In the present matter it is common cause that while TASWU was invited to attend a consultation by the respondent, the respondent nevertheless proceeded with consultations with the individual employees themselves, to the exclusion of TASWU.

[20] The respondent argues that it consulted with the individual employees and invited the union to attend thereby complying with the requirements of who to consult with in terms of section 189 (1). Alternatively, the respondent argues that it substantially complied with the requirements of section 189(1) as Mr Thinyane who was a shop steward and therefore a representative of the union, was present in the meeting.

[21] The question asked herein is: *"When retrenchment is contemplated who is the employer obligated to consult?"* The answer to the question is quite clear from the plain reading of section 189(1). When there is a contemplation of dismissal due to operational requirements, the employer must consult with any representative as contemplated in a collective agreement. Should there be no collective agreement in place, the employer must consult with either a workplace forum or a registered trade union and if there is neither, then the individual employees who would be affected by the retrenchment exercise.

[22] The argument that then comes to the fore, in a case where there is a registered trade union at the workplace, is whether the employer can consult with the

individual employees directly to the exclusion of the trade union. In the judgment of *Sikhosana v Sasol Synthetic Fuels*[4], the Labour Court found that the LRA did not envisage a dual consultation process, making it an either or situation. This view was endorsed by the Labour Appeal Court (LAC) in *Baloyi v M & P Manufacturing*[5] where the LAC concluded that to allow dual consultation would create a parallel system that would undermine the purpose of section 189.

[23] In the matter of *United National Breweries (SA) Limited v Khanyeza and Others*[6] the argument presented to the LAC was similar to the one presented in the current matter. Therein, the employer party argued that even if the Court found that it should have consulted with the union, which was not done, the Court should find that they complied with the provisions of section 189 in that they consulted with the affected employees themselves, thereby giving them the opportunity to make representations on the proposed retrenchments. To this, the Court held as follows:

> 'In the light of this it seems to follow that sec 189 (1)(c) is the provision that applies in a case such as this one where there was no workplace forum and the employee(s) proposed to be dismissed is or are members of a registered trade union. Accordingly, the appellant should have consulted the union in terms of sec 189(1)(c) of the Act.'

[24] This issue came to the fore recently at the Constitutional Court in the matter of *AMCU and others v Royal Bafokeng Platinum Ltd and others*[7] wherein the majority of the Court reaffirmed the position of the law in relation to section 189 and confirmed the principles found in both *Baloyi* and *Khanyeza.* The Constitutional Court found that section 189 is a *"cascading hierarchy"* which then places an obligation on the employer to consult in terms of the hierarchy established in section 189. This then means there is no obligation on the

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[4] [2000] 1 BLLR 101 (LC).
[5] [2001] 4 BLLR 389 (LAC).
[6] [2006] 4 BLLR 321 (LAC).
[7] 2020 (3) SA 1 (CC).

employer to consult with the individual employees and in fact, taking *Khanyeza* into consideration, should not consult with them should they be members of a registered trade union.

[25] Further, the Court in *Baloyi* confirmed that an employer may only consult with the individual employees if the representative chosen by the employees i.e. the workplace forum or the registered trade union, is no longer in existence or can no longer perform their function as a representative. Therefore, had the employer showed that the trade union was recalcitrant or was *mala fide* in conducting the consultations, they could then bypass the trade union to consult with the employees directly.

[26] This hierarchy was established by the legislature to ensure that parallel consultation does not take place, nor does the employer party bypass a chosen representative of an employee when he/she deems it fit. The constitutionality of the section was brought under scrutiny in the *AMCU* matter, however, the challenge was dismissed, and the principles as enunciated above stand.

Whether the meetings constituted consultations

[27] As aforesaid, TASWU's case is that the respondent did not engage in a meaningful consensus seeking process as required in terms of section 189(2) of the LRA in that it attempted to finalise the whole process without it and that the employees were presented with a *fait accompli* and that the procedural complaints were so flagrant, gross and excessive that it renders the dismissal substantively unfair.

[28] Section 189(2)[8] of the LRA requires the parties to engage in a meaningful joint consensus-seeking process in an attempt to agree on appropriate measures *inter*

[8](2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:

alia, to avoid and minimise dismissals; to identify the employees to be retrenched; to change the timing of the dismissal; and to mitigate the adverse effects of the dismissal. The question is whether, subsequent to its decision to restructure its business, the respondent complied with its obligations in terms of section 189 of the LRA.

[29] Section 189(1)(b)(ii) requires the respondent to consult any registered trade union whose members are likely to be affected by the proposed dismissals. In terms of section 189(3), the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to:

> '(a) the reasons for the proposed dismissals;
> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
> (c) the number of employees likely to be affected and the job categories in which they are employed;
> (d) the proposed method for selecting which employees to dismiss;
> (e) the time when, or the period during which, the dismissals are likely to take effect;
> (f) the severance pay proposed;
> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
> (h) the possibility of the future re-employment of the employees who are dismissed;
> (i) the number of employees employed by the employer; and
> (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.'

(a) appropriate measures -
(i) to avoid the dismissals;
(ii) to minimise the number of dismissals;
(iii) to change the timing of the dismissals; and
(iv) to mitigate the adverse effects of the dismissals;
(b) the method for selecting the employees to be dismissed; and
(c) the severance pay for dismissed employees.'

[30] In the current matter, the applicant's case is that the respondent only addressed an email to TASWU, after it had issued individual employees section 189 notices, informing it to note that it was busy with consultations and requested it to respond to the author. The respondent further proceeded to consult with individual employees without TASWU despite its clearly communicated intention to engage. In addition, the respondent, whilst in the middle of consultations, sent Mr Thinyane (the shop steward) to Cape Town for deliveries. It only responded to TASWU's letter on 29 September 2015, after it had consulted with the employees, stating that it was not considering mass retrenchments but only wanted to consult with employees before moving to the next step of retrenchments

[31] Regarding the meeting of 21 September 2015, TASWU's case is that employees interrupted and objected against the procedure followed and advised the respondent that it could not proceed without TASWU. Coetzee informed the employees that he had strict instructions from the owner of the business, Mr De Wet (De Wet) to reduce the employees without any further delay. Regarding the meeting of 21 September 2015, Mr Thinyane stated that Mavis and 15 of her colleagues employed as Yard Workers, met with Coetzee who informed them that the respondent could not afford all the employees any longer and would need to cut costs through retrenchments.

[32] On what transpired on 25 September 2015, Mr Thinyane stated that Coetzee met with him and 12 of his colleagues and informed them that the respondent could not afford all its employees any longer and that it would need to cut costs through retrenchment of employees. Mr Thinyane interrupted the meeting to object against the procedure being followed by the applicant and advised that the employees needed to be represented by TASWU. The meeting did not take more that 5 minutes and Coetzee informed the employee that he would call them for the next consultation after getting instructions from De Wet.

[33] Mr Thinyane further stated that on 28 September 2015, Mr Thinyane was sent to Cape Town to attend deliveries, which it is submitted, was done with the intention that he couldn't fulfil his duties as office bearer in relation to the retrenchment and to get him out of the way. Mr Thinyane also stated that Coetzee told him that he thinks he is clever, that the respondent should just "cut" him. Further that De Wet said he was a problem and should be dealt with.

[34] On 29 September 2015, the respondent addressed a letter to TASWU in which it indicated that it is not considering mass retrenchments and that it first wanted to consult with every employee before moving to the next stage of retrenchment process.

[35] Regarding the meeting of 12 October 2015, Mr Thinyane submitted that it was between the respondent employees who worked at the yard and wash bay. During this meeting, the respondent informed the employees that those who want to be retrenched and/or are over the age of 60 would form part of phase 2 of the retrenchments and thereafter LIFO would be implemented on 14 October 2015. The objection against the respondent's decision to proceed in the absence of TASWU was also raised during the last two meetings.

[36] On 14 October 2015, the employees were issued with the letters of termination. On 19 October 2015, a further meeting was held in which the respondent persisted with the notion that there was no need to consult with the TASWU because less than 10 employees were retrenched.

[37] The respondent denied TASWU's version on the basis that it was factually incorrect. Instead, the respondent submitted that TASWU was informed about the process and that Coetzee met with the union official in Bloemfontein. The respondent further submitted that consultation with Mr Thinyane and another office bearer who were present in consultation meetings was sufficient for the

purpose of the Act. Furthermore, the respondent relies on the letter from TASWU that, *inter alia*, clearly states that '*...it is common cause that today is the seventh (7) day since the union received invitation to consultation*' to demonstrate that TASWU was not excluded from consultations.

[38] It was the respondent's argument that TASWU was fully aware of the consultation process and further that there was no explanation why, if it harboured any concerns about the process, it did not apply to Court, wrote letters, made telephone calls and attended the workplace.

[39] In light of the above, there is clearly a factual dispute on what transpired between the parties at the meetings held in September 2015. However, what is common cause was that despite TASWU being '*invited*' to attend the meetings, the respondent clearly went ahead with meetings to the exclusion of the union. TASWU clearly indicated that they were willing to participate in the process and were to attend consultations with the respondent on 25 September 2015, when the respondent still went ahead with a meeting on 21 September 2015. This is a clear indication that the respondent merely invited the union as a spectator party to the consultation process when in fact it intended to consult the individual employees all along. Further, it never invited the union to consult prior to the issuance of the section 189(3) notices which indicates an intention to exclude the union.

[40] It cannot be said that TASWU was recalcitrant in participating in the consultation process. The invitation was clearly a checklist invitation with no intention to actually consult in a joint consensus seeking operation. The process began in mid-September 2015 and ended in mid-October 2015, with each class of employees being consulted once on the proposed retrenchments to the exclusion of their union.

[41] The Court in *Wheeler v Pretoria Propshaft Centre CC*[9] found that a party should not be allowed to mechanically comply with section 189 as if it is a ticking of a checklist. What the Court has to enquire into is whether the employer fulfilled the purpose of section 189. The purpose of section 189 is for both parties to come together and consult in a joint consensus seeking exercise to look for alternatives to try and avoid dismissals.

[42] It is apparent from the above and in applying the stated principles, the meetings held with the individual employees were not consultations as envisioned in section 189. The respondent did not consult with TASWU deliberately and merely invited them to join consultations whether they were available or not. This is not in accordance with section 189 as the obligation was on the respondent to consult with the union and not the individual employees.

[43] The respondent has failed to show that they did all that they could have done to bring the union to the table, thereby ensuring that they had good cause to consult with the employees individually. Further, one consultation with each class of employees cannot be seen to be consultations with the intention to consult on viable alternatives to dismissal. The procedure followed cannot be seen to be in compliance with section 189.

Does the presence of a shop steward cure the above defect

[44] The alternative argument by the respondent was that there was substantial compliance with section 189 in that there was a representative of the union present at the meetings.

[45] The Court in *Singh v Mondi Paper*[10] found that a shop steward is a recognised union representative for the purposes of consultation in a section 189 process

[9] [1999] 11 BLLR 1213 (LC).
[10] [2000] 4 BLLR 446 (LC).

unless it is specifically excluded in a collective agreement. If the respondent argues that the shop steward Mr Thinyane was invited to the meetings in his representative capacity of the union, then one could bear the argument that the employees were represented in the meetings.

[46] However, the facts of the matter show otherwise. Mr Thinyane was invited to the one meeting not in his capacity as a shop steward but as an affected employee. Therefore, he was not acting in his capacity as a shop steward or as a representative of the union. As for the other meetings with the other classes of employees, there was no representative from the union to consult. It follows that the respondent failed to consult the union in terms of section 189(1)(c).

Alternative to retrenchment and application of LIFO

[47] TASWU contended that, during the consultation meetings, the respondent dismissed the individual applicant's proposal to reduce overtime and/or implement short time in that Mr Coetzee informed them that no alternatives would be considered, as there was a need to reduce staff compliment.[11]

[48] In the notice of intention to retrench, the respondent undertook to consider any proposed alternatives that the employees may table during the consultation process. In the pre-trial minute, the respondent stated that there was no viable alternative to the retrenchment having regard to the operational requirements of the respondent. Further that the applicants were the unfortunate parties that fell within the identified group of employees whose positions could no longer be retained as a result of reduction in work and contracts that were available to the respondent at the time.[12] In the answering affidavit, the respondent submitted that there was not enough work and income to justify the staff compliment. For that reason, Mr Coetzee was instructed to commence with the retrenchment

[11] Index: Pleadings, p 7 para 32-35
[12] Index: Pleadings, p 29-29

process subsequent to considering alternatives.[13] The respondent made the point that although short time was never formally proposed, it was thoroughly discussed and considered even prior to embarking on the retrenchment process.[14]

[49] In essence, the respondent would have the Court believe that it afforded the individual applicants adequate opportunity to put alternative proposals, but to no avail. However, this version cannot be accepted. Firstly, the submission that the short time was considered even though it was never formally proposed, seem to suggest that the individual applicants were not afforded a formal opportunity to place alternatives. If they were, why would they put the alternative informally? Secondly, there is no evidence to show that the alternatives that were allegedly considered prior to Mr Coetzee being instructed to commence with the retrenchment and the reasons for rejecting them were either disclosed in writing or discussed in the consultation meetings as contemplated in section 189(3)(*b*) of the LRA. This becomes important because it is one of the issues the respondent is obliged to consult on in good faith in an attempt to achieve objectives specified in section 189(2).

[50] Thirdly, the respondents took the final decision to retrench the individual applicants prior to consultations. It is trite that the consultation process involves a bilateral process in which both parties have an obligation to negotiate in good faith in an attempt to reach consensus, appropriate measures to avoid the dismissal, minimise the number of dismissal, change the timing of dismissal and mitigate adverse effects the dismissals.[15] In *Super Group Trading (Pty) Ltd v Janse van Rensburg*[16], the Court stated that:

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[13] Index: Pleadings, p 22 para 15
[14] Index: Pleadings, p 35 para 48.2
[15] section 189(2) of LRA.
[16] (JA50/09) [2012] ZALAC 7 (25 April 2012)

> 'If the decision to make a post redundant is set in stone and not open to revision or discussion then the main aim of consultation has been thwarted before it has begun. If the decision to retrench a certain person has been pre-decided, consultation about whether this person should be chosen is a sham. What remains is consultation on the mitigation of retrenchment.'[17]

[51] In the current matter, the finality of the decision to retrench was confirmed by Mr De Wet's evidence when he stated that there were no viable alternatives, but to retrench. This makes the consultation meetings the respondent had with the individual applicants futile.

[52] The question becomes, how were the individual applicants selected for retrenchment. Where an employer intends to cut operational costs by downsizing its staff complement, it must show the costs associated therewith and how this will assist in its cost cutting strategy. In the absence of information, it makes it impossible for the Court to determine whether its decision was not arbitrary or capricious. In the current matter, whilst it is apparent from the evidence presented that the respondent was faced with financial challenges which necessitated that it takes measures to cut its costs, it is also apparent that it took the decision to reduce its staff prior to consultations.

[53] It is submitted that LIFO was the selection criteria chosen. However, there was no consultation around the proposed selection criteria, and although the law does not ask for the selection criteria to be agreed upon, the use of same needs to be at least consulted on. The Court in *Fourie v Iscor Ltd*[18] found that the question is not whether the selection criteria is appropriate or not, the issue it whether there was consultation around the selection criteria or not. However, even if it was consulted on, the applicant submits that it was not fairly applied.

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[17] at para 5

[18] [2000] 11 BLLR 1269 (LC).

[54] Although the respondent submitted that LIFO was implemented, it also submitted that different criteria applied to different departments and that some employees were retained because of their skills. In the face of these contradictions, the Court is left with no option but to conclude that the respondent did not apply LIFO as per its proposal.

Conclusion

[55] The Courts have always held that although substantive and procedural fairness are two distinct concepts, they are inextricably linked. Therefore, procedural fairness is '*not only a value in its own right, but a means of establishing whether substantive grounds are in fact present.*'[19] The Court in *NUMSA obo Maifo and others v Ulrich Seats (Pty) Ltd*[20] went on to state that:

> "The prescriptions of s 189 are clear, notorious, well understood, wisely crafted and tailored to oiling the wheels of a meaningful joint consensus-seeking process. It is the wise employer who follows them to the letter. Those employers that choose not to, do so at the peril of a finding not only of procedural but also substantive unfairness... where the purpose and methodological prescriptions of the process envisioned by the statute are so evidently not understood, the distinction between process and substance becomes blurred to the degree that the dismissal cannot be held to have been for a fair reason as required..."

[56] In light of the finding that the consultation was a sham and further that the respondent has not shown that it considered the alternatives placed by the respondents or that LIFO was applied, it follows that the dismissal of the individual applicants was both procedurally and substantively unfair.

Relief

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[19] See: *NUMSA obo Maifo and others v Ulrich Seats (Pty) Ltd* (2009) 30 ILJ 654 (LC).
[20] (2009) 30 ILJ 654 (LC) at para 36.

[57] The remaining issue to be considered is the relief to be granted to the applicants. Section 193(2) of the LRA makes reinstatement the primary remedy unless one of four exceptions is applicable and it reads as follows:

> 'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
>
> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[58] According to Section 193 of the LRA, the primary remedy in instances where the Court found the dismissal to be unfair is reinstatement or re-employment. The Court must require the employer to reinstate or re-employ the employee unless where the employee does not wish to be reinstated, or where continued employment is intolerable, or it is not reasonably practicable for the employer to reinstate the employee or the dismissal is unfair only because the employer did not follow a fair procedure. The discretionary nature of the power to grant relief in terms of section 193 was reaffirmed in the case of *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha and Others*[21] where the Court stated as follows:

> '...If the exceptions to the remedy of reinstatement do not apply, the Labour Court and arbitrators only have discretion with regard to the extent to which reinstatement should be made retrospective. An employer wishing to avoid reinstatement must satisfy the arbitrator that one of the exceptions to reinstatement applies, in this case to show that it would not be practicable. The

[21] (JA 4/15) [2016] ZALAC 25 (14 June 2016) at para 8

employer should lead evidence concerning relief in anticipation of a finding that a dismissal might be ruled unfair.'

[59] In the current matter, none of the exceptions contemplated in section 193 of the LRA exist. The applicants seek reinstatement and the respondent did not lead evidence with regard to the extent to which reinstatement should be made retrospective.

Costs

[60] In terms of section 162 of the LRA, the Court has wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others,*[22] that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[61] Accordingly, I make the following order:

Order

1. The applicants' dismissal was both procedurally and substantively unfair.
2. The respondent is ordered to reinstate the applicants with retrospective effect from the date of dismissal to date, without loss of income and benefits.
3. There is no order as to cost.

D. Mahosi

Judge of the Labour Court of South Africa

[22] (2018) 39 *ILJ* 523 (CC); [2018] 4 BLLR 323 (CC) at para 24.

Representatives:

Attorney for the applicants:	Mr Charlie Higgs of Higgs Attorneys
Counsel for the respondent:	Advocate Anton Roux
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