IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 394/18

In the matter between:

NACBAWU obo MANANA & 11 OTHERS **Applicant**

and

ROADLAB (PTY) LTD **Respondent**

Heard: **3 – 6 March 2021; 22 – 23 March 2023 & 12 – 13 June 2023**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 11 March 2024.**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this opposed claim, the union, NACBAWU, seeks an order of behalf of its members (the individual applicants), declaring their dismissal on account of the respondent's operational requirements to have been procedurally and substantively unfair. The individual applicants seek retrospective reinstatement or in the alternative, compensation equivalent to 12 months' remuneration.

Background:

[2] The respondent renders professional materials laboratory and testing services to the civil engineering, construction and mining industries. It serves private,

government and municipal sectors with a focus on rendering civil engineering testing services. In essence, it is concerned with the sourcing and testing of raw material, road infrastructure control and quality control. It has 13 branches across the Republic, with its head office in Germiston, Gauteng.

[3] NACBAWU had entered into a recognition agreement with the respondent on 23 May 2017. In accordance with that agreement, NACBAWU had majority membership in the respondent's Germiston Head Office and Centurion branches. The individual applicants were employed by the respondent in various capacities.

[4] On 3 October 2017, the respondent issued notices in terms of section 189(3) of the Labour Relations Act[1] (LRA). The notice set out *inter alia,* the reasons for possible retrenchment, the alternatives to be considered such as voluntary retrenchment (with other alternatives to be considered during consultations); and the proposed selection criteria. It was further indicated that in the last twelve months, the respondent had retrenched 10 employees. At the time that the notice was issued, the respondent had a staff complement of 680 permanent employees throughout its branches. The reason for possible retrenchments and/or restructuring was 'to optimize efficiency and to ensure operational effectiveness'.

[5] The notices were forwarded to all employees in the East London, Bloemfontein and Germiston branches. The following departments in the identified branches to be affected were *viz*, Soils, Site Investigation; Maintenance; Occupational Health and Safety; and Stores. The respondent's other departments such as Commercial Facilities, Concrete Ashfield, Data Capture, Human Resources, Finance and Fleet were not affected. Other than indicating the branches and departments likely to be affected, the respondent did not state the actual number of employees that were likely to be affected. It was however indicated that the number to be affected would be discussed in consultations. It was further envisaged that the process was to be completed by no later than 31 October 2017.

[1] Act 66 of 1995, as amended.

The common cause facts:

[6] On 4 October 2017, NACBAWU sent an email to the respondent indicating that its members had made it aware of the notices issued to them, and that a copy was however not forwarded to it. It also requested information pertaining to the list and details of *all* the employees of the respondent in its branches, and further enquired what steps were taken to avoid the retrenchments. On 5 October 2017, NACBAWU sent further correspondence to the respondent's HR Officer/Practitioner, Mr Shriven Rooplall, requesting other information before a consultation meeting could be scheduled.

[7] On 9 October 2017, Rooplall provided NACBAWU with a list of the union members to be affected, their details and departments, and lamented the fact that the Union had not provided dates for the consultations to commence. He further invited NACBAWU for consultations, enquired what further information was needed, and indicated that all alternatives to avoid retrenchments would be discussed at consultations. He also indicated that only union members will be discussed and that non-union employees would be consulted with directly. On 11 October 2017, Rooplall sought to obtain a commitment from NACBAWU that it would attend a consultation meeting to be convened.

[8] Not much progress was made at the first consultation meeting convened on 13 October 2017. NACBAWU's position in that meeting was that it would not discuss the merits or engage in any discussions, because it was not formally furnished with a copy of the section 189(3) notice.

[9] On 15 October 2017 Rooplall sent an updated list of affected employees, and a letter explaining the respondent's financial position. NACBAWU in response complained that the updated list was not sufficient as it only covered the Germiston and Bloemfontein branches.

[10] On 16 October 2017, Rooplall sent to NACBAWU, a copy of the notice in terms of section 189(3) of the LRA that was previously issued to individual employees. He further requested NACBAWU to provide three dates on which consultations could be held. In its response on 17 October 2017, NACBAWU again complained about not being provided with information regarding the

names, dates of engagement and the job categories of *all* the employees in the workplace. It pointed out that the respondent did not indicate the number of employees to be affected in the notice, and further requested facilitation by the CCMA in terms of section 189A of the LRA.

[11] Rooplall responded on 18 October 2017, and indicated that all the necessary and relevant information required for the consultation meetings was furnished, and further indicated that there was a possibility of a retrenchment of 25 employees. Rooplall also indicated that NACBAWU had refused to deal with the merits when the parties met on 13 October 2017, and that the information of all employees as sought was private and confidential, and not relevant for consultations. He proposed that the parties should meet on 20 October 2017.

[12] In response to Rooplall's email of 18 October 2017, NACBAWU denied that it was provided with all the relevant information or that it had refused to participate in the consultation process as alleged by the respondent. It suggested that a consultation meeting should be scheduled for 23 and/or 24 October 2017 at it was not available on 20 October 2017. It further indicated that the respondent still had to make proposals in regards to the Provident Fund. Consultations did not however take place on the suggested dates.

[13] On 31 October 2017, Rooplall sent an email to NACBAWU with an attachment of a list of employees identified for possible retrenchment in various departments. He again requested proposed dates for consultations. NACBAWU's response was that it was still not satisfied with the information furnished but had suggested 9, 10 or 13 November 2017 for consultations. Rooplall confirmed a meeting for 9 November 2017.

[14] NACBAWU had attended the meeting on 9 November 2017 (second consultation meeting). The respondent contends that all the issues for consultations were dealt with at that meeting.

[15] On 11 November 2017, Rooplall sent an email to NACBAWU with an updated list regarding the proposed selection criteria in the specific departments, and further requested dates to commence with the consultations. On 13 November 2017, a third consultation meeting was held where LIFO as a

selection criterion was discussed. NACBAWU also proposed a lay-off scheme, short-time, and placements at other departments as an alternative.

[16] On 15 November 2017, the respondent in correspondence to NACBAWU had explained its financial position and the reasons for restructuring, and further provided an updated list of possible retrenchments, and further outlined the steps and alternatives it had considered leading to the consultation process. In the correspondence, it was explained why it was not possible to move employees around different sections due to the nature of testing and breakdown of specific task, the skills level of some of the employees and the mundane nature of their tasks at the time.

[17] NACBAWU's response was to again complain that the updated list only related to the Germiston and Bloemfontein branches, and stated that it would be difficult to apply LIFO fairly without the information of all employees especially pertaining to other branches such as Centurion and Lephalale.

[18] On 22 November 2017, Rooplall indicated that the respondent had considered the applicants' proposal for the implementation of a lay-off scheme. He agreed that the scheme could work until June 2018. Rooplall however indicated that the respondent remained of the view that retrenchment packages were a better option.

[19] Rooplall in his correspondence further indicated that LIFO was only applied to departments and sites where employees would be affected. He reiterated that any further information requested would be of no assistance as the proposed retrenchments were limited to specific departments such as Maintenance, Stores and Lab Hire), OHS, Site Personnel, Investigations, and specific workplaces and laboratories in the Bloemfontein and East London branches.

[20] On 28 November 2017, the respondent received correspondence from the applicant's attorneys of record wherein it was stated that the respondent could not retrench without complying with section 189 or 189A of the LRA. The attorneys further enquired whether alternative measures were considered, and requested written information in that regard.

[21] The respondent's legal representatives responded on 29 November 2017 and outlined the history of the consultation process since October 2017 and indicated NACBAWU's resistance to consultations despite meetings having been held on 13 October, 9 and 13 November 2017. It was stated that all relevant information was provided to NACBAWU; that LIFO was not the only criteria applied; that alternatives such as lay-off, short-time, and placements at other laboratories were considered, including approaching clients for work. It was further explained how LIFO was applied. It was further indicated that from a financial point of view, the respondent could no longer delay the retrenchments and NACBAWU's legal representatives were requested to indicate which employees were willing to accept a voluntary retrenchment package, and to respond by 6 December 2017.

[22] When there was no response to the above correspondence, and since the respondent held the view that the consultation had reached a dead-end, it had on 13 December 2017, issued notices terminating the individual applicants' employment on account of its operational requirements.

The dispute:

[23] NACBAWU alleged that the retrenchments were procedurally and substantively unfair. NACBAWU relied on the evidence of Mr Lesiba Kekana, its full-time official who had corresponded with Rooplall and was involved in the consultation process. It also called its shop steward, Mr Shadrack Mabaso.

[24] The respondent disputed all allegations of unfairness as claimed by NACBAWU, and relied on the evidence of its Operations Director: Commercial Facilities, Mr Deon Juckers. Mr Rooplall, who had since left the employ of the respondent as at the time of the hearing of this matter was subpoenaed

The legal framework:

[25] Section 189(2) of the LRA requires the employer and other consulting parties (the trade union and its members) to engage in a meaningful joint consensus-

seeking process and attempt to reach consensus on the issues specified in section 189(2)(a) - (c). These include appropriate measures to avoid dismissals; to minimise the number of dismissals; to change the timing of dismissals, and to mitigate the adverse effects of the dismissals. The parties must consult over the method of selecting employees for retrenchment. The employer is also required to disclose relevant information and provide meaningful reasons for rejecting the employees representations or proposals.

[26] Flowing from the approach in *SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)*[2], the fairness of a dismissal under section 189 of the LRA is found in the requirement of consultation prior to a final decision on retrenchment. This approach was buttressed in *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another*[3]where it was held;

> 'Retrenchments should not be resorted to until "certain procedural requirements intended to minimise the impact on employees" have been complied with. When employers contemplate dismissing their employees for operational requirements, they are required to consult in terms of section 189(1) of the LRA. The nature of such a consultation process, including "its objective and agenda", is prescribed by section 189(2) of the LRA. This consultation "requires engagement by all the consulting parties with the purpose of reaching consensus". It is important to note that the approach to this consultation must not merely be a checklist approach – that is, it must not be purely formalistic. There is both a procedural and substantive aspect to this consultation process...'

[27] In *Solidarity obo Members v Barloworld Equipment Southern Africa and Others*[4] *(Solidarity),* it was held that for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make

[2] [1998] ZALAC 9 (22 June 1998); (1998) 12 BLLR 1228 (LAC); (1998) 19 ILJ 1451 at para 8
[3] [2020] ZACC 23; [2021] 1 BLLR 1 (CC); (2021) 42 ILJ 67 (CC); 2021 (2) BCLR 168 (CC) at para 40
[4] [2022] ZACC 15; (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC); 2023 (1) BCLR 51 (CC) at para 46.

informed representations, and seriously consider their representations. This entails that the employer must furnish reasons for rejecting representations made by the consulting party.

[28] The Court in *Solidarity* further added that approaching the consultation with a pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful. Equally so, it was held that the purpose of consultations is to seek consensus and there is no requirement that the parties should reach agreement[5]. Thus, the failure to reach consensus or agreement did not necessarily translate to there not being any meaningful consultation process[6].

Procedural fairness:

[29] The Court accepts flowing from *Mbekela v Airvantage Pty Ltd*[7] as correctly pointed out on behalf of the applicants, that substantive and procedural unfairness with regards to retrenchments overlap and should not be considered in silos. It is trite that the line between procedural and substantive fairness is often blurred, and it is accepted that procedural unfairness may result in substantive unfairness. In the majority decision in *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others*[8], it was accepted that compliance with section 189(1) procedural fairness does not mean that the outcome may not be challenged on the basis of substantive unfairness. The Court however in *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited*[9] had held that the question of procedural unfairness only arises in the event that it is found that the dismissals were not substantively fair.

[30] In the light of the above principles, I intent to consider the overall fairness of the procedure adopted in ultimately dismissing the individual applicants, within the context and evaluation of the consideration of substantive fairness, more

[5] At para 49.
[6] At para 53.
[7] [2021] ZALAC 47 (26 November 2021).
[8] [2020] ZACC 1; (2020) 41 ILJ 555 (CC); 2020 (4) BCLR 373 (CC); [2020] 5 BLLR 441 (CC); 2020 (3) SA 1 (CC) at para 101.
[9] [2018] ZACC 44; (2019) 40 ILJ 87 (CC); 2019 (3) BCLR 412 (CC); [2019] 4 BLLR 323 (CC); 2019 (3) SA 362 (CC) at para 42.

particularly to the extent that it may be found that the dismissals were substantively unfair.

Substantive fairness:

[31] An enquiry into the substantive fairness of retrenchments involves a consideration of what in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*[10] was referred to as a general question and a specific question. In this regard, the LAC held that;

> '…The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place.'[11]

(i) Commercial rationale:

[32] In regard to the general question, NACBAWU's contentions were that there was no need for retrenchments. Implicit in the fairness requirement is that it is upon the employer to demonstrate that the ultimate decision is properly and genuinely justifiable by operational requirements (a commercial or business rationale). It has also been stated that fairness in this context goes further than a *bona fide* and commercial justification for the decision to retrench, and that ultimately, the enquiry is whether the termination of employment was the only reasonable option in the circumstances[12].

[33] The function of a court in scrutinising the consultation process is however not to second-guess the commercial or business efficacy of the employer's ultimate decision, but to pass judgement on whether the ultimate decision to retrench was genuine and not merely a sham. It is thus not for the Courts to

[10] (2006) 27 ILJ 292 (LAC).
[11] At para 55.
[12] *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC) 409.

decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, taking into account what emerged during the consultation process[13].

[34] As a starting point, it needs to be reiterated that it is not sufficient for the applicants as in this case, to merely allege that there was in general, no need to retrench. Against NACBAWU's contentions, Juckers' evidence was that the retrenchment exercise which affected certain departments, resulting in the ultimate retrenchment of the 12 individual applicants, was necessitated by the financial difficulties the respondent faced at the time, which were caused by a variety of factors.

[35] These factors included that over 2016/2017, the civil engineering industry as a whole had experienced severe financial strain due to a lack of projects and long term contracts combined with a reduction in construction work,. This necessitated that costs reduction and saving measures be initiated. There was further overstaffing in various departments, and a major contributing factor was that the major contractor, South African National Road Agency

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[13] See also *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 18(h)-(i) where it was held;

> "The final decision to retrench must be informed by what transpired during consultation. That is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but it also has a substantive purpose. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by a commercial or business rationale."

And

> "The function of the court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process."

See also *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR (LAC) at para 19, where it was held;

> 'The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test'.

(SOC) Ltd (SANRAL) at the material time (between 2016 – 2018), was not issuing out tenders, and that these tenders were only advertised in 2021.

[36] The respondent had following investigations, identified loss-making branches, the sections and functions which could be outsourced in future. This meant that there were departments which were not generating an income, whilst others produced costs exceeding the income generated. These circumstances necessitated a re-evaluation of the operations in order to limit the operational costs.

[37] A re-evaluation of the respondent's operations revealed that the East London branch also faced problems as it had to compete with other businesses. The Bloemfontein branch was originally very active but then the activities slowed down, necessitating that employees be moved around. In respect of the Head Office in Germiston, the office required a manager which then resulted in the position of Administrator being rendered redundant. Those functions were subsequently outsourced.

[38] The decline also caused the reduction of work in the Stores department which resulted in fewer individual being required to perform tests and/or sampling. This was also equally applicable to the Site Investigators. The Building Maintenance Department was a non-core function which was also affected by the decline and this resulted in the retrenchment of employees, especially carpenters.

[39] Against Juckers' evidence in regards to the need to retrench, it needs to be said that very little or nothing came through cross-examination of the respondent's witnesses that was meant to challenge the commercial rationale for the decision to embark on the retrenchment exercise. Significantly, Rooplall had on 15 October sent correspondence to NACBAWU and *inter alia* further explained the respondent's financial position. NACBAWU's response was to complain about the failure to disclose information requested regarding the list. However, nothing was said to suggest that the respondent's financial position at the time was disputed.

[40] Equally without merit was Mabasa's contentions that there was no need to retrench on the basis that the positions of the individual applicants were filled in January 2018 by new trainees. Mabasa made his conclusions on the basis that as a shop steward, he knew the employees he represented and thus could see who the new trainees were during tea or lunch breaks. I have difficulties in accepting Mabasa's evidence when he could not provide any details in regards to the identity of these new trainees, or any details regarding which of the individual applicants' positions were filled. The Court should reject Mabasa's contentions if he could not place reliance on anything beyond merely looking at employees' faces to know who was new or not. Accordingly, the Court accepts that the ultimate decision to retrench was informed, and was properly and genuinely justifiable by the respondent's operational requirements.

[41] Even on the stringent test set out in *Black Mountain Mining*[14], there is no basis for a conclusion to be reached that the decision to retrench was merely a sham, or that it was not operationally justifiable on rational grounds. The decision was suitably linked to the achievement of the end goal, which in this case as stated in the notice issued under section 189(3), was to optimize efficiency and to ensure operational effectiveness of the respondent's operations.

(ii) The selection criteria and disclosure of information:

[42] The second aspect of substantive fairness is a specific question, which is whether there was a fair reason for the dismissal of the specific employees. NACBAWU alleged that the selection criteria adopted by the respondent was

[14] *National Union of Mineworkers and Another v Black Mountain Mining (Pty) Ltd* (CA22/2012) [2014] ZALAC 78 (10 December 2014) at para 37, where under the then section 189A(19), it was held that;

> 'It does not follow that just because an employer dismisses an employee due to its 'economical, technological, structural or similar need' that the [section 189A(19)] precondition has been met. An employer must first establish on a balance of probabilities that the dismissal of the employee contributed in a meaningful way to the realisation of that need. In my view, dismissals for operational requirements must be a measure of last resort, or at least fair under all of the circumstances. A dismissal can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons. The selection of an employee for retrenchment can only be fair if regard is had to the employee's personal circumstances and the effect that the dismissal will have on him or her compared to the benefit to the employer. This takes into account the principles that dismissal for an employee constitutes the proverbial 'death sentence'.

unfair; that the respondent applied LIFO principle incorrectly in that employees with longer service were retrenched instead of those with less service; and that the respondent failed to negotiate in good faith thus making the retrenchments a foregone conclusion.

[43] Section 189(2)(*b*) of the LRA requires the consulting parties to attempt to reach consensus on the method for selecting the employees to be retrenched. Where there is a dispute on whether the information requested is relevant or not, the onus under section 189(4)(*b*) is on the employer to prove that the information it refuses to disclose is not relevant for the purposes for which it is sought.

[44] Section 189(7)(*a*) and (*b*) of the LRA gives substantive content to this requirement by stipulating that the employer must select the employees to be retrenched according to a selection criteria that was agreed or, in the absence of the agreed criteria, the employer must apply a fair and objective criteria[15].

[45] Fair and objective criteria implies that the selection of employees must be on some justifiable objective grounds. Thus, an employer in selecting employees for retrenchment should not be influenced by mere preferences, or by some other nefarious reasons to prejudice employees who would otherwise not have been targeted for retrenchment. Fairness equally implies that the choice for selection will be in line with the finding that there was indeed a need to retrench, and that in the circumstances, the choice of one employee over the other was less unfair.

[46] In the notice issued on 3 October 2017, the respondent had outlined the criteria it proposed implementing, which included skill levels and critical job requirements, the retention of employees with specific work experience and/or specific knowledge or skills, LIFO; and financial and operational efficiency.

[47] The respondent's approach to the mixed criteria was informed by the nature of its operations, and the highly specialised and technical services it provided to its clients. Juckers further testified that the respondent's operations are

[15] *Van Rooyen and Others v Blue Financial Services (South Africa) (Pty) Ltd* [2010] ZALC 80; [2010] 10 BLLR 1119 (LC) ; (2010) 31 ILJ 2735 (LC) at para 16.

labour intensive which required a wide range of skills *albeit* it was not a requirement that all employees be in possession of tertiary qualifications. It was against these factors that selection of employees had to be in accordance with whether they were multi-skilled, competent, and had supervisory skills. These factors took precedence over LIFO.

[48] In applying LIFO in conjunction with a combination of other criteria, Juckers and Rooplall testified in regards to the needs of each branch, department or section that was affected. Evidence was led in regards to how employees were moved around departments where vacancies were available, before each of the individual applicants from affected departments were selected, according to the mixed criteria. Juckers testified that all of this information and a list of employees was provided to NACBAWU. After he and responsible section managers in the affected areas had compiled that list.

[49] In regards to specific departments, in the Lab Hire/Stores department, two employees were selected taking into account their competency and the functions that needed to be fulfilled. The respondent’s approach was that the Stores was a non-core function. Another employee Mr Maharaj, was selected on the basis that he was not in good health and could not lift heavy equipment, whilst a more younger and able bodied employee who was a trainee, was retained, even though he had less service.

[50] The Building Maintenance department was also considered as part of non-core business and not costs effective to maintain. The respondent intended to outsource its functions. Two of the individual applicants (Messrs Davies Chitsime and John Meleme) who were a builder and carpenter were said to be not multi-skilled, and thus could not be retained as they were not optimally utilised. The respondent contended that the two could not be retained since they further could not be placed in any other position.

[51] Three employees were selected on the basis of LIFO in the Site Investigation Department since there was not enough work and was deemed unsustainable. The three could not be placed at any other department, and only members of the core team were retained.

[52] The technician section was also found to be overstaffed when there was not enough work. LIFO was equally applied in the Investigations department. In the Health and Safety department, one admin person as already indicated was found to be redundant and also not having been registered as per the OHS Act[16].

[53] It is apparent from the consultations and correspondence exchanged between the parties that the respondent had explained its stance on LIFO and given reasons why a mixed criteria was more suitable to its operational needs. Central to NACBAWU's complaints is that the respondent failed to meaningfully consult on the selection criteria as it did not provide the relevant information requested. This is in circumstances where the respondent had refused to provide the information in respect of all of its employees on the basis that only some departments and branches were affected, and also since NACBAWU was only recognised at the Germiston Head Office and in Centurion.

[54] What was apparent from the evidence was that NACBAWU was more concerned with the implementation of LIFO over anything else, hence it sought all the information of employees, inclusive of those who were not in the areas that were affected. Inasmuch as it is accepted that the application of LIFO is generally deemed to be fair and objective, it is however trite that its application ought not be the be all and end all, as other factors such as retention of special skills need to be taken into account, especially where such skills are crucial for the sustainability of the employer's business[17]. In essence, and to the extent that the parties could not agree on the selection criteria, there is nothing that statutorily prevents an employer from applying LIFO with a combination of criteria such as skills, experience, adaptability, performance, personal circumstances and family commitments[18].

[55] To the extent that NACBAWU complained about non-disclosure of information, is accepted that this is an important component to a joint

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16 The Occupational Health and Safety Act 85 of 1993

17 *NUM & others v Anglo American Research Laboratories* (Pty) Ltd [2005] 2 BLLR 148 (LC).

18 *National Union of Metalworkers of South Africa and Others v Columbus Stainless* (Pty) Ltd [2016] ZALCJHB 344 (30 March 2016) at para 10.

consensus seeking process. In *Solidarity*, it was held that during the consultation process, the obligation of an employer to disclose sufficient information does not extend to information that is not of relevance to the consultation process, is not available, and/or could harm the employer's business interests if disclosed, such as trade secrets and other confidential information[19].

[56] On Kekana's version, NACBAWU was reluctant to consult without the information it had requested, especially to the extent that LIFO was applied. The respondent on the other hand held the view that the information requested was not relevant in the light of only a few branches being targeted, and also since it was of the view that the information requested was confidential.

[57] A worrying feature of NACBAWU's approach to consultations was that there was nothing further that it did in obtaining the information it sought, and had on the contrary, attended consultations without the information it had requested. To the extent that the notice was issued in terms of section 189 of the LRA, and further to the extent that the respondent had persistently refused to provide the information that NACBAWU had requested, it is trite that section 189(4)(*a*) refers to disclosure of information stipulated in section 189(3). It provides that the provisions of section 16, read with the changes required by the context, apply to the disclosure of information in terms of that sub-section. Section 16(6) of the LRA provides a self-contained process for compelling an employer to disclose relevant information. This entails a referral of a dispute to the CCMA, which will attempt to resolve the dispute and when conciliation fails, the dispute may be referred for arbitration.

[58] NACBAWU despite its complaints since 5 October 2017, omitted to refer a dispute to the CCMA under section 16 of the LRA. The same conclusions equally apply to the extent that NACBAWU contended that it was entitled to the information in accordance with the provisions of the Recognition Agreement. Equally so, to show commitment and good faith towards the consultations, NACBAWU could have referred the section 16 of the LRA

[19] At para 43.

dispute, and conditionally consulted on the other substantive issues while it simultaneously fought the issue of disclosure at the CCMA[20]. In these circumstances, nothing much turns on the applicants' persistent complaints that the respondent refused to provide information when they had throughout the process remained supine in relation to their rights.

[59] On the opposite scale, there is merit in the respondent's contention that the applicants not merely intended to adopt an obstructionist approach to the consultation process, but also sought to prolong it as possible as they could. Kekana had conceded that the respondent had made four requests to the union for a consultation meeting, but that there was always an outstanding issue of disclosure of information.

[60] Other than the issue of the disclosure of information, significant with the applicants' case is that notwithstanding the contention that they were not afforded an opportunity to engage meaningfully in the aspects of selection criteria, this is not borne out by their pleadings. In the statement of case, NACBAWU specifically raised concerns with the implementation of LIFO as it was not properly applied. This was in view of some of the individual applicants with long service having been selected whilst other employees with less service were not affected. On these grounds, inclusive of the evidence on behalf of the respondent, the Court can accept that consultations were held in regard to the implementation of LIFO as NACBAWU had proposed, and which the respondent had considered, and furnished reasons why that criteria could not be the only one to be applied. Furthermore, under section 189(6)(b) of the LRA, if consulting parties make representations in writing the employer must respond in writing. This is what the respondent had done in in this case in the light of the various correspondence referred to elsewhere in this judgment, pertaining to the implementation of the selection criteria.

[61] It follows that even on the common cause facts as outlined elsewhere in this judgment, combined with the documentation and an exchange of emails and other correspondence between the parties, there is no basis for a finding that

[20] See *Association of Mineworkers and Construction Union and Others v Shanduka Coal (Pty) Ltd* (2013) 34 ILJ 1519 (LC).

there was no consultation on the mixed selection criteria as adopted by the respondent. The Court accepts that given NACBAWU's posture to the consultation process, on the whole, the respondent was entitled to implement the mixed selection criteria.

[62] Notwithstanding my conclusions as above, it needs however be pointed out that the mere fact that proper consultations were held in regards to the criteria does not imply that it necessarily follows that the criteria was fair or objective, especially in circumstances such as these, where there was no agreement. This is so in that it can only be reiterated that fair and objective criteria implies that the selection of employees must be on some justifiable objective grounds.

[63] The above issue is raised in view of an essential consideration when faced with retrenchments, which is that if there is work available which the affected employee can perform, then fairness would require the employer to offer such a position to the affected employee. In a case where a position is available but the employee lacks skills to perform in that position, the employer is obliged to consider any additional training that may assist the employee in achieving the level of performance required[21]. This approach is premised on the trite principle that a retrenchment should be a measure of the last resort.

[64] Equally so, where an employee is selected on the basis that he/she is physically unable to perform the tasks due to ill-health or similar considerations, there is an obligation to accommodate that employee. Thus, a retrenchment cannot be justified when clearly the provisions of items 10 and 11 of the Code of Good Practice in Schedule 8 of the LRA would ordinarily have found application in the circumstances.

[65] In this regard, Mr Maharaj, one of the individual applicants, was selected from the Lab Hire/Stores department simply on the basis that he was not in good health and could not lift heavy equipment, whilst a younger and able-bodied employee who was a trainee, was retained. Other than this consideration, it is not known what else was done in merely selecting Maharaj, i.e., whether an assessment was done if he could be accommodated somewhere else; or

[21] See *Andre Johan Oosthuizen v Telkom SA Ltd* (2007) 28 ILJ 2531 (LAC) at para 4.

whether his health might have improved over time. There does not seem to be any evidence indicating what else was considered other than dismissing him. *Prima facie*, this cannot amount to an objective selection criteria having been adopted. Thus his selection was unfair.

[66] It was further the evidence of the respondent that at least four of the individual applicants, viz, Dloko, Chitsime, Meme, and Shayi, were dismissed on account of lack or insufficient skills to cross-function. Again, the issue is whether prior to ultimately dismissing them, the respondent had in accordance with the above principles, considered any additional training that may assist the four in achieving the level of performance, skills or cross-functionality required. This was in circumstances where the respondent's testimony was that it had ABET programmes at its head office to assist employees grow and upgrade their skills. If any of the mentioned did in fact benefit from this programme is however unknown. Clearly where there is no evidence in that regard, it cannot be said that the selection of the individuals mentioned was on the whole fair.

Issue of lay-off scheme:

[67] Lay-off schemes may be used as an alternative to retrenchments where there is an agreement in that regard. The implementation of lay-offs is suitable in instances when the employer is temporarily unable to provide work for the employees. The concept of lay-off contemplates that work would become available in the short term. It does not suggest as contended for by Kekana, that employees would be allowed to work on a rotational basis, rather than being dismissed. It simply means that the employees would not be dismissed because there is no work to be allocated to them. The employees would remain employed without rendering any service, or receiving remuneration, until work was available.

[68] The applicants contended that the respondent failed to honour an agreement of November 2017 that it would implement a lay-off scheme until June 2018. Kekana's testimony was that at a meeting with the respondent on 23 November 2017, bumping was never discussed as an alternative as

NACBAWU took the view that there was an agreement with Rooplall on the issue of the lay-off scheme.

[69] It is correct that in one of the consultations, NACBAWU had proposed to the respondent that a lay off scheme should be implemented. On 22 November 2017, Rooplall in an email to Kekana had confirmed discussions in that regard, and indicated *inter alia* that the respondent agreed that the scheme could work until June 2018 to see whether more work was received. In the same email, Rooplall's view was that retrenchment packages were a better option.

[70] Juckers and Roopall however testified that the alternative of lay-off scheme was not viable in that it was difficult to lay off employees with an undertaking that they would be recalled in the near future, and when it was uncertain whether the business would improve. This was so in that it was uncertain whether in particular, work could be received from SANRAL and other contractors.

[71] Both Juckers and Roopall denied that there was an agreement on the issue of lay-offs as an alternative. To the extent that NACBAWU relied on Roopall's email of 22 November 2017 as constituting an agreement, that email ought to be read in context. Its plain reading does not lead to a conclusion that Rooplall's response constituted an agreement to have the scheme implemented. The email merely indicated that the scheme *could* work. Furthermore, in circumstances where as already indicated the applicants could not dispute the need in general to retrench, and where Rooplall's response to lay-off scheme was not definitive, there could not have been any binding agreement to implement the scheme.

[72] In the end, the lay-off-scheme as proposed by the applicants was considered, and was not found viable in the light of uncertainties whether the respondent could obtain more work in the near future. This conclusion is further premised on the respondent's uncontested evidence that it had retrenched 10 employees in the past 12 months before the retrenchments, and also where it was not in dispute that the respondent also embarked on a similar exercise

after the individual applicants were dismissed. The mere fact that the scheme was not agreed to does not imply that it was not considered, nor can an inference be drawn that that the respondent merely paid lip service to overall consultations in that regard.

‘Bumping’:

[73] The principles applicable to bumping as an alternative to retrenchments were considered in *Porter Motor Group v Karachi*[22] and reiterated in *Mtshali v Bell Equipment*[23] . Bumping is based on the LIFO principle. It is ideal that in adopting this criteria, an employer should first attempt to bump employees horizontally before bumping them vertically, in that the latter criteria should only take place where there is no suitable candidate to bump horizontally into another position.

[74] Further considerations in adopting this criteria as pointed out in *Karachi* and *Mtshali* include *inter alia*, geographical limitations; the mobility and status of the employees involved; prejudice to employees; the grades, status of employees, competence, technical or professional knowledge or experience, skills and specialised services needed; the independence of departments or branches, and general feasibility of interdepartmental bumping. Crucially however is that the employer retains managerial prerogative to ‘bump’ employees, depending on the reasons for restructuring and its operational needs.

[75] It however needs to be pointed out that in *Mtshali*[24], the LAC in reliance on *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU and Others*, accepted that if employees had not explored the possibility of bumping during consultations, this did not mean that they were precluded from challenging the fairness of their selection during the trial. It equally needs to be appreciated as stated in *Karachi,* that since the LRA requires both parties to attempt to reach consensus on alternative measures to retrenchment, there is also a duty on employees to raise bumping as an alternative.

[22] [2002] 23 ILJ 348 (LAC) at para 16.
[23] [2014] ZALAC 37 (22 July 2014) at para 22.
[24] At para 23.

[76] NACBAWU as already indicated, relied on a non-existing agreement in respect of the lay-off scheme, and thus failed to pursue any discussions in regards to the alternative of bumping. However, the duty was still on the respondent to consider bumping as an alternative in the course of applying LIFO.

[77] Juckers under cross-examination when asked whether bumping was considered did not even know what the concept meant. Upon it having been explained to him, his response in not considering it was that even though all the branches of the respondent had a similar structure and departments, positions could only be offered as and when they became available. This response however does not address the essence of bumping, which is not only dependent on available vacancies but on whether incumbents of posts can be bumped off when applying LIFO. This was particularly so since on Jucker's version, the respondent's commercial facilities had the same departments and sections, with a few exceptions depending on the services and products. Such a scenario was clearly ideal for consideration of interdepartmental bumping, especially where LIFO was a consideration.

[78] Bumping is ordinarily intended to protect long serving employees where a retrenchment process is ongoing, especially where there are other departments, branches or business areas of the employer that may not be affected by the restructuring. There has to be comparable positions occupied by employees with substantially shorter service. Thus, to the extent that the respondent had applied LIFO in respect of five of the individual applicants, viz, Michael Weymers, Yvonne Ndevu, Tshepo Mahlo, Xolani Tembo and Bongumusa Tibe without properly considering bumping before deciding on a dismissal, it is found that their dismissals could not overall have been substantively fair. This is so based on the principles articulated in *Mtshali v Bell Equipment*[25] as follows;

> 'It is clear from the authorities referred to above that bumping forms part of LIFO as a method for selection of employees to be retrenched. It was therefore incumbent on the respondent to have consulted on its

[25] At para 30.

application to determine whether its application would have been appropriate in the circumstances of this case. It was not for the respondent to decide unilaterally that it would not be appropriate to apply bumping especially where it was not specifically prohibited in the collective agreement. Reasons why the respondent considered the application of bumping inappropriate or unfair should have been tabled for consideration by the consultation parties before a final decision could be taken.'

[79] To the extent that on the facts the respondent did not consider the alternative of bumping, and further to the extent that it did, but had unilaterally decided that it was not feasible for reasons unknown, it follows that the respondent was found wanting in this regard.

Summary:

[80] It was held in *National Union of Mineworkers v Anglo American Platinum Ltd and Others*[26] that generally , it is not open to employees or their representatives to claim unfairness in retrenchments, on *inter alia* the basis only that the employer consulting party rejected proposals made by the employees. Several factors debunk NACBAWU's contentions that the retrenchments were pre-determined. In this regard, the notice in terms of section 189(3) did not indicate the number of employees to be affected, as it had stated that this was to be determined during consultations. As the consultations progressed, 25 employees or posts were identified, but in the end, only 12 were retrenched. It will also be recalled that in the notice, the respondent had contemplated that the consultation process will be completed by 31 October 2017. Notices of termination were however issued on 13 December 2017. From these factors, clearly an inference cannot be drawn that the respondent had a pre-determined outcome when approaching the consultation process, or that it paid lip-service to that process.

[81] Furthermore, there is no merit NACBAWU's contentions that the respondent did not overall, properly consult with it on any of the issues for consideration

[26] [2013] ZALCJHB 262; (2014) 35 ILJ 1024 (LC); [2013] 12 BLLR 1253 (LC) at para 24.

prior to the dismissals. The notice in terms of section 189(3) that was issued on 3 October 2017 was not forwarded to NACBAWU on the same day. Notwithstanding, NACBAWU chose to engage the respondent on the issues in that notice from 4 October *albeit* it had complained about not having been furnished with that notice until this was done on 16 October 2017. At that time, it had already engaged the respondent on the issues for consultations. Even though it might be argued that the failure to furnish NACBAWU with a notice constituted a procedural irregularity, this consideration on its own cannot in my view render the overall consultation process to be procedurally unfair.

[82] Equally so, the respondent had considered the alternatives proposed by NACBAWU and furnished reasons why the proposals were not viable. On the facts, it cannot be said on the whole that the respondent did not meaningfully seek to engage NACBAWU in the consultation process inclusive of engaging it on the rationale behind the retrenchments and the mixed selection criteria it had adopted.

[83] NACBAWU had adopted an obstructionist approach to the consultation process, by repeatedly refusing to engage meaningfully on the issues for discussions based on repeated requests for information that was not coming, and also in circumstances where the remedies under section 16 of the LRA remained available to it. Its proposals regarding LIFO, lay-off scheme, short-time, transfers, and rotational work, were considered by the respondent and reasons were given as to why they were not feasible. In the absence of an agreement on any of these issues, and other than the unfairness related to the application of the selection criteria in regards to some of the individual applicants, it ought to be concluded that the respondent had adopted a criteria which on the whole, was fair and objective, taking into account its operational needs. I am therefore satisfied that with the exceptions pointed out, that the provisions of section 189 (1), (2), (3), (5) and (6) of the LRA were complied with.

Relief:

[84] To the extent that it was found that any unfairness related to the selection of some of the individual applicants, and the failure to consider the alternative of bumping, it is my view that any relief should be limited to compensation rather than reinstatement. The nature of the unfairness pointed out cannot by any stretch of imagination call for the ultimate remedy of reinstatement in the light of the overall conclusions arrived at in this judgment, and in particular, the fact that the respondent had since implemented another restructuring exercise after the dismissal of the individual applicants.

[85] To the extent that the Court accepts that the selection of the following individual applicants, Maharaj, Dloko, Chitsime, Meme, and Shayi, Michael Wemers, Yvonne Ndevu, Tshepo Mahlo, Xolani Tembo and Bongumusa Tibe was not fair for reasons pointed out elsewhere in this judgment, it is deemed that compensation equivalent to three months' salary to each of these individual applicants calculated at their rates of pay as at the date of dismissal, would be fair and appropriate.

[86] I have further had regard to the requirements of law and fairness in regards to the question of costs. Having had regard to the facts and circumstances of this case, I am of the view that each party must be burdened with its own costs.

[87] In the premises, the following order is made:

<u>Order:</u>

1. The dismissals of the following individual applicants, *viz*, Devanand Maharaj, Zolisile Dloko, Davis Chitsime, John Meme, Macdonald Shayi, Michael Wemers, Yvonne Ndevu, Tshepo Mahlo, Xolani Tembo and Bongumusa Tibe, was unfair based solely on their selection.

2. The Respondent is ordered to pay to each of the individual applicants identified above, compensation equal to three months' salary calculated at their rate of pay as at the date of their dismissal.

3. The dismissal of other individual applicants not mentioned above and as listed in Annexure 'A' to the applicants' Statement of Case is deemed to have been procedurally and substantively fair.

4. Each party is to pay its own costs

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: W. Coetzee, instructed by Geyser & Coetzee Attorneys.

For the First Respondent: C. Grant, instructed G.J. Brits Attorneys.