

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: JS829/21

In the matter between:

SOLIDARITY obo MEMBERS

Applicant

and

SAHARA AFRICAN LIVING (PTY) LTD

Respondent

Heard: 5, 6, 7, 8 and 9 February 2024 and 25 March 2024

Delivered: 17 April 2024

This judgment was handed down electronically by circulation to the parties and/or legal representatives by email. The date for hand-down is deemed to be 17 April 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] The applicant in these proceedings is Solidarity acting on behalf of its three members (the “employees” or “individual applicants”). The claim lodged by the applicant is two-fold – the first is a claim brought in terms of section 77(3) read with sections 73A(3) and 77A(e) of the Basic Conditions of Employment Act¹ (BCEA). The applicant seeks an order declaring that the respondent (company) breached the individual

¹ Act 75 of 1997.

applicants' contracts of employment, that the respondent complies with their contracts of employment and payment of the individual applicants' outstanding remuneration for the period March 2020 to July 2021 (being the date of the individual applicants' dismissal).

[2] The second is a referral in terms of section 191(5)(b)(ii) of the Labour Relations Act² (LRA). In this claim, the applicant seeks an order that the individual applicants' dismissal in July 2021 was procedurally and substantively unfair and an award of maximum compensation. In addition, they seek an order directing the respondent to pay them their statutory monies, particularly the notice pay.

Material facts

[3] The three employees and Jannem Goussard, the union official, testified on behalf of the applicant. The respondent called Lisa Constable (Constable), the respondent's Responsible Persons Operations. Below is a summary of the material facts of the matter based on the documentary and oral evidence led during the trial proceedings.

[4] The company is in the business of leasing aircraft to airlines, non-governmental organisations and foreign state departments. It provides aircraft and crew outside the borders of the Republic of South Africa.

[5] At the start of the 'temporary' lay-off implemented by the company in mid to late March 2020, the respondent operated 2 aircraft in Comoros, 1 in Mozambique, 3 in Iraq and 1 in Sudan. It had secured a contract in Gabon and sent 2 aircraft in February 2020 to start operating, pending final approval from aviation authorities. However, Gabon closed its borders around March 2020, which delayed the approval and the start of operations until the company brought its aircraft back to RSA.

² Act 66 of 1995, as amended.

[6] The three employees, Grant Ashley Burton (Burton), Francois Burger Steyn (Steyn) and Tyler Miller (Miller) are qualified pilots and were employed as captains for type-rated E120 aircraft. Their contracts of employment contained a non-variation clause which provided that no changes to the terms and conditions of their contracts shall be of no force and effect unless placed in writing and signed by both parties. The company reserved the right to review the contract through a process of consultation.

[7] The respondent remunerated the individual applicants in accordance with a salary scale that provided for 'on-tour' and 'off-tour'. They were paid in United States Dollars (USD). The on-tour salaries for the employees were as follows Burton - \$6000.00, Steyn - \$6400.00 and Clark - \$8000.00. Their off-tour salaries were – Burton - \$2800.00, Steyn - \$3200.00 and Clark - \$5000.00. Typically, they would be rostered 8 weeks on-duty and 4 weeks off-duty, even though these periods may be extended or shortened depending on the operational requirements.

[8] On or about 15 March 2020, the President of the Republic of South Africa declared a national state of disaster in terms of the Disaster Management Act³. This declaration was in response to the Covid-19 pandemic and in an attempt to prevent and reduce the spread of the coronavirus. The national state of disaster was to take effect from midnight on 26 March 2020. One of the measures announced before the effective date was the travel ban and prohibition on commercial flights, both domestic and international, and closing South African borders and points of entry.

[9] On 16 March 2020, Trevor Brotherton, the Chief Executive Officer (CEO) of the company, posted a message on Air Maestro stating that the company's concerns during the Covid-19 period were the health and welfare of its employees. The message also stated that the company could not anticipate the full impact of the Covid-19 pandemic on its operations and that employees would be informed of any developments affecting the company.

³ Act 57 of 2002.

[10] On 20 March 2020, the company addressed an email to its employees. The email notified these employees that the on-duty crew's salaries would be reduced by 30% and the off-duty crew's salaries by 20%. These reductions were to take effect from April 2020.

[11] On 23 March 2020, Constable telephoned Clark to inform him of the respondent's decision to implement temporary lay-offs for all employees and the salary reduction. This telephone discussion was followed by WhatsApp messages between the two dated 23 and 24 March 2020, where they discussed the effective date of the salary reductions and other issues.

[12] On the same day (23 March 2020), the company addressed letters to Clark and Steyn titled "*notice of temporary lay-off*". The letters informed Clark and Steyn of the company's decision to institute temporary lay-offs from 26 March 2020 and that they were placed on temporary lay-off until further notice.

[13] On 24 March 2020, the company posted another message on Air Maestro titled Covid-19 Salary Update. The message provided updates on its operations, and informed the employees that:

'We have had to take draconian measures to save the company and to this end we have unfortunately had to put certain engineers and crew members on "Temporary Lay-Off" with immediate effect (those affected have been contacted directly and letters sent to them)

- For the remaining crew, the 30% deduction for ON salaries and 20% deduction for OFF salaries will regrettably be implemented with this salary run i.e. March and not April pay run as per our previous communique.
- For the next payment period, commencing 26th March 2020, the OFF salary will cut to 50% (currently 80%)
- NB – these cuts will apply to crew who receive Fixed salaries.

We understand the huge impact that this will have on our crew, however this situation is dire and beyond our control. Our goal is to keep the company alive and to keep as

many jobs as possible so that when this crises (sic) passed we are in a position to move forward positively.’

[14] On 2 April 2020, the company posted another message on Air Maestro, informing the employees that it would register employees affected by the lay-offs on the Temporary Employer/Employee Relief Scheme (TERS). Employees were also advised that the company was available to assist them on “*matters that arise on contract or other admin related issues*”.

[15] On 27 April 2020, the company wrote a letter to Burton, who was not laid off and was on duty in Comoros, informing him that it was not able to make any predictions or provide guarantees regarding the future. The letter was preceded by a telephone enquiry from Burton to Constable about the return to normal working conditions.

[16] On 4 June 2020, the company addressed a letter to the employees providing updates regarding its operations and the TERS payments.

[17] On 12 June 2020, Clark addressed an email to Adriaan Fourie (Fourie), the Chief Pilot. Clark noted that the Covid-19 regulations were being relaxed and enquired from Fourie about the company’s plan to pay them their normal salary. In response, Fourie informed Clark that he was not involved in the decision and essentially that he did not know of any plans to go back to their normal salaries.

[18] On 10 July 2020, Clark addressed an email to Constable. Clark raised concerns about the indefinite ‘temporary’ lay-off and argued that this period cannot exceed 3 months. He then stated that the company should find a solution to the issue and communicate it to the employees. He wrote further that:

‘We understand that this crisis has caused some serious restraints within the economy and especially the Aviation industry but this does not mean that our basic rights have been put on pause and the company can do as they please with regards to our Salaries and not keep us informed as to the next move.’

[19] Constable did not respond to Clark's email. Instead, Clark received a telephone call from the CEO who according to Clark's undisputed evidence, was upset with him for writing the email and considered the email as a threat to institute legal action against the company. The CEO also informed Clark that the law did not apply during Covid-19 period.

[20] On 19 August 2020, the company issued a further update on its operations and TERS payments.

[21] In October 2020, a group of employees, including the three employees in this matter, submitted a document which they called a grievance against the company's decision to reduce their salaries and the lay-offs. The employees raised concerns that the company did not consult them before changing the terms and conditions of the contract and that this may be against the labour laws. They sought clarity on various issues, including the number of employees affected by the salary reductions and lay-offs, how long the salary reductions and lay-offs would continue for or when would the lay-offs end and their normal salaries reinstated. In response, the company could not commit to the period when it would reinstate the employees' terms and conditions of contract.

[22] On 9 November 2020, the company issued a survey or examination to the employees. The employees were required to answer two questions, namely (1) "*are you willing to be rostered to fly on tour on your current COVID-19 impacted salary*", and (2) "*are you willing to be rostered to tour location Iraq – Balad Air Base*". A "yes" answer to the question was the correct answer and "no" was the incorrect answer. The pass rate for the examination was 100%. Steyn responded in the affirmative to both questions, obtained 100% and passed the examination. Clark and Burton responded negatively to the second question, obtained 50% and failed the examination. All three employees were prepared to continue working on the reduced salary.

[23] On 11 February 2021, Solidarity, acting on behalf of the employees, addressed a letter to the company. Solidarity recorded that it was mandated by the employees to engage the company in an attempt to establish an agreement on the continuation of changes to terms and conditions of the employees' contracts of employment. Solidarity raised concerns regarding the indefinite lay-offs and argued that the company has abandoned the contracts of employment and engaged the employees as independent contractors. The letter then requested the company to start a consultation process to ensure the continuation of employment on reasonable alternative employment conditions.

[24] The company and Solidarity met on 1 March 2021. On 16 March 2021, Solidarity addressed a letter to the company. The letter recorded that the measures or changes implemented in March 2020, which were understood to be short-term and were accepted 'cooperatively', have become permanent and that the continued breach of contract of the employees' contracts of employment was not justifiable. Solidarity demanded inter *alia* payment of the employees' March 2020 shortfall in salaries, restoration of the terms and conditions of employment and termination of the lay-offs with immediate effect.

[25] On 18 March 2021, the company responded to the above letter and informed Solidarity that it continued to suffer significant financial loss and that "*all employees continue to be free to seek alternative employment, whether freelance or permanent*".

[26] On 19 March 2021, Solidarity referred a dispute in terms of section 64 of the LRA to the Commission for Conciliation, Mediation and Arbitration (CCMA) and sought the company to restore the employees' terms and conditions of employment retrospectively. The dispute was conciliated on 15 April 2021 and remained unresolved.

[27] On 6 May 2021, the CCMA issued an advisory award. The company was advised to consider retrenchment and apply for facilitation. On 13 May 2021, the company completed a CCMA form requesting facilitation.

[28] On 14 May 2021, the company sent the request for facilitation form to Solidarity and the CCMA. It also sent an email titled "*Retrenchment section 189A*". The email purports to be a notice in terms of section 189(3) of the LRA. It provides that the company had no other option but to commence a retrenchment process of the pilots and engineers. The email also sets out that in the past 14 months, the company instituted "*drastic measures in an effort to ensure the company's survival*". It sets out the drastic measures as (1) the salary reduction and temporary lay-offs, and (2) the implementation of the "TERS process". Then, the names of employees who "*will be affected and was (sic) selected*" on the basis of operational requirements and LIFO were listed, which included the three employees in this matter.

[29] On severance packages, the company stated that the employees would be paid one week for each completed year at the basic salary rate prior to the salary reduction.

[30] On 19 May 2021, Solidarity addressed a letter to the company objecting to the purported section 189(3) notice on the basis that it was defective and again raising the issue of the salary reductions. Further, Solidarity demanded that the company should comply with sections 189 and 189A of the LRA, particularly section 189(3).

[31] On 29 June 2021, the company issued letters to the employees notifying them that their employment was terminated for operational requirements with effect from 31 July 2021. They were also notified of the payments they would receive, which excluded notice pay.

BCEA claim: Breach of employment contract

[32] The applicant's complaint is that the company breached the employees' terms and conditions of employment – by unilaterally reducing their salaries and implementing lay-offs. They contend that they were not consulted and did not consent to the reduction of their salaries. They want the company to comply with the terms and conditions of

their contracts of employment and pay them the outstanding salaries for the period March 2020 to the date of their dismissal, which is 31 July 2021.

Was there a unilateral change to terms and conditions of employment and a breach of contract?

[33] In terms of section 64(4) of the LRA, employees confronted with the employer's unilateral decision to change their terms and conditions of employment may refer a dispute to the CCMA or bargaining council and require the employer not to implement the new terms and conditions of employment or in the event the changes were implemented, require the employer to restore the terms and conditions of employment that applied before the changes. Subsection (5) requires the employer to comply with the demand in terms of subsection (4) within 48 hours of receipt of the referral. Should the employer fail to comply with the demand, the employees would be entitled to embark on a strike action.

[34] Although the employees in this matter could strike about the dispute, they elected not to do so. Instead, they elected to pursue a different cause of action, that of a breach of contract – and they are well within their rights to do so. They contend primarily that the company breached their contracts of employment by reducing their salaries.

[35] Section 34 of the BCEA prohibits employers from making any unauthorised deductions from the employees' salaries. It provides that:

'(1) An employer may not make any deduction from an employee's remuneration unless –

- (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
- (b) the deduction is permitted in terms of a law, collective agreement, court order or arbitration award.

(2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if –

- (a) ...
- (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
- ...

[36] In *Mazista Tiles (Pty) Ltd v National Union of Mineworkers and others*⁴, the Labour Appeal Court (LAC) made the following remarks, in the context of dismissal for operational requirements effected pursuant to the employees' rejection of the employer's proposed changes to the terms and conditions of employment:

'[48] An employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. It may so happen, as it was the position in this case, that the employees refuse to enter into any agreement relating to the alteration of their terms and conditions because the new terms are less attractive or beneficial to them. While it is impermissible for such employer to dismiss his employees in order to compel them to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue their implementation, he has the right to invoke the provisions of s 189 and dismiss the employees provided the necessary requirements of that section are met.' (Own emphasis)

[37] In *Macsteel Service Centre SA (Pty) Ltd v National Union of Metalworkers of SA and others*⁵ (Macsteel), this Court, per Prinsloo J, dealt with the unilateral change in terms and conditions of employment in the context of section 64(4) of the LRA, the right to strike. Shortly after the national state of disaster commenced in March 2020, the employer adopted measures to mitigate against the impact of the Covid-19 pandemic. Part of the measures was a unilateral decision to impose a 20% salary reduction. In response, the union referred to a dispute in terms of section 64(4) of the LRA and called

⁴ [2004] ZALAC 16; (2004) 25 ILJ 2156 (LAC) at para 48.

⁵ [2020] ZALCJHB 129; (2020) 41 ILJ 2670 (LC) at paras 69 - 73.

its members out on strike. The employer then sought to interdict the strike. The Court found as follows:

[69] In my view the question is whether the 20% salary reduction for May, June and July 2020 implemented by the applicant constitutes a unilateral change in terms and conditions of employment or whether that is simply an issue of potential short payment of salary.

[70] In *Staff Association for the Motor & Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd* the court held that s 64(4) and (5) of the LRA is aimed at limiting the managerial prerogative to vary terms and conditions of employment and/or policies unilaterally and found that:

‘To be successful under s 64(4) the employee has to show firstly unilateral changes were effected to the terms and conditions of the employment contract and secondly that there was no consent to the unilateral changes.’

[71] As to what forms part of the terms and conditions of employment, the court held that any variation to an employee’s salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally. Salary is a quid pro quo for work rendered and any change that has the effect of affecting an employee’s salary or remuneration package, constitutes a change to terms and conditions of employment.

[72] In casu, the applicant announced and implemented a 20% reduction in the salaries of its employees. It is undisputed that NUMSA did not agree to this reduction.

[73] I cannot but find that the 20% reduction in the salaries of its employees across the board constitutes a unilateral change to terms and conditions of employment.’ (Own emphasis)

[38] The company relied on different passages of the *Macsteel* judgment. In paragraphs 81 to 84 of the *Macsteel* judgment, the learned Judge dealt with the employer’s failure to distinguish between employees who rendered services and those who did not. The Judge commented that the principle of ‘no work no pay’ would normally be implemented where employees did not render services due to no fault on the part of the employer and that where employees rendered full time services, they are

entitled to their full salaries and any reduction would constitute a unilateral change in terms and conditions. The learned Judge concluded that insofar as the employer was not prepared to guarantee the full salaries to employees who rendered full time services, the employer had not restored the terms and conditions of employment. The company contends that these paragraphs of the judgment are not just remarks but constitute the *ratio* of the judgment.

[39] The *Macsteel* judgment, insofar as it deals with the question of whether the employer restored the terms and conditions of employment, is irrelevant to the present matter. Therefore, whether what the learned Judge said was *obiter* or *ratio* is immaterial because whether or not the company restored the terms and conditions of employment is not the question this Court has to determine. The question before this Court is whether there was a unilateral change in terms and conditions of employment and consequently a breach of contract.

[40] That the company changed the terms and conditions of employment is not contested. It is also not contested that the changes were effected unilaterally without consultation with the employees and their consent.

[41] Although the company conceded that it unilaterally imposed the changes to the terms and conditions of employment by reducing the employees' salaries and implementing lay-offs, it contends that the employees subsequently tacitly consented to the unilateral changes or they acquiesced with the company's unilateral decision. The company refers to the subsequent conduct of the employees, their queries, failure to expressly object to the new changes and their oral evidence which confirmed that they did not expressly raise objections to the unilateral decision.

[42] The Appellate Division in *McWilliams v First Consolidated Holdings (Pty) Ltd*⁶ made the following observation regarding the defence of acquiescence:

⁶ 1982 (2) SA 1 (A); [1982] 1 All SA 245 (A).

'I accept that "quiescence is not necessarily acquiescence" (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when an unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.'⁷

[43] I have considered the judgment in *Solidarity obo members v Sahara African Aviation Operations (Pty) Ltd*⁸, which dealt with a similar issue. This matter was decided by Nkutha-Nkontwana J (as she then was). On the facts of that matter, the learned Judge found that "*the applicant employees conducted themselves in a manner that gave rise to the inescapable inference that there was, in fact, consensus ad idem to the temporary implementation of COVID-19 impacted salaries and lay-offs*".⁹

[44] Did the employees in this matter tacitly agree or acquiesce to the new terms and conditions of employment? If so, was the tacit agreement or acquiescence for permanent or temporary duration? If temporary, until when? The company did not state the duration of the salary reduction and lay-offs. Could the employees have accepted the new terms and conditions and set their own period of the existence of the new terms? Or, could the acceptance have been permanent? If permanent, why would they enquire about when they would revert to their normal salary - as evidenced by the email of 27 April 2020 from the company to Burton (which was preceded by a telephone discussion) and the emails during June and July 2020?

⁷ Ibid at 10D – G.

⁸ (JS720/21) [2024] ZALCJHB 83 (22 February 2024).

⁹ Ibid at para 80.

[45] Having considered the documentary and oral evidence of the employees in this matter, which in my view established the employees' vulnerability during the period, I am not persuaded that the employees evinced clear and unambiguous intention to work on the unilaterally amended terms and conditions of employment. I am also not persuaded that the conduct of the employees could lead a reasonable person to believe that they intended to so work. The employees did not tacitly consent to nor did they acquiesced themselves to the company's unilateral decision. The fact that they understood the reasons for imposing the measures is not tantamount to an acceptance of the new terms and conditions, more so without them being afforded an opportunity to engage and decide.

[46] The Court is not oblivious to the greater social and economic power that employers, including the company in this case, enjoy. In the current matter, with borders closed and commercial flying halted in many countries, the company was acutely aware of the vulnerability of the employees in the aviation industry. To impose such a decision, without any form of consultation, during the Covid-19 pandemic and later argue that the employees tacitly agreed and/or acquiesced to it is, in my view, disingenuous and unfair.

[47] The crux of the matter is whether there was unilateral change to terms and conditions of employment and a breach of their contracts of employment. The *Macsteel* judgment, bar the cause of action pursued by the trade union in that matter, is on all fours with the present matter. In *Macsteel*, the employer unilaterally imposed the changes to terms and conditions of employment and the employees were entitled to strike after following section 64(4) and (5) of the LRA. In *casu*, the company unilaterally imposed the changes to terms and conditions of employment and the employees elected to pursue a breach of contract claim. The unilateral decision is in breach of the employees' contracts of employment, which expressly required that any alteration or variation be signed by both parties after a process of consultation. The conduct of the company is also in breach of section 34 of the BCEA which requires that any deduction

to the employee's salary must be consented to by the employee and after following a fair procedure and providing the employee a reasonable opportunity to show why the deductions should not be made. The deductions were not authorised by the law, collective agreement, court order or an award. In the final analysis, the company effected salary reduction without the employees' consent.

[48] To conclude, the decision to reduce the employees' salaries was taken and implemented unilaterally, which is in breach of the contract of employment and section 34 of the BCEA. The employees' subsequent conduct did not undo the breach already committed, nor did the employees acquiesced to the unilateral decision. At best for the company, the conduct of the employees may be relevant to the enquiry on the appropriate remedy.

Remedy

[49] The employees seek payment of outstanding salaries from March 2020 to the date of their dismissal. The company has conceded to payment of the shortfall in salaries for the month of March 2020.

[50] In terms of section 77A(e) of the BCEA, this Court may make an order including: 'making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation.'

[51] This Court therefore has discretion in determining the appropriate remedy following a finding of breach of contract. I have considered the circumstances that prevailed during the period. The employees conceded that they worked significantly fewer hours during the period when they were called to render services.

[52] It is common cause that the borders remained closed for at least 6 months and commercial flights only resumed in October 2020. Until the end of September 2020, the employees, even if they were ready and willing to work, could not render any service.

[53] When commercial flying resumed in October 2020, the company had already lost some of its contracts and could not immediately operate at the pre-March 2020 or pre-Covid-19 level. Other than the arbitrary and unfair survey on 9 November 2020, the company did not really communicate with the employees or provide any updates on its operations.

[54] In March 2021, the company informed Solidarity that it was still operating at a significant financial loss. Not much information was provided. The company could have communicated better during this period. It was unfair to keep the employees on its payroll for this prolonged period without providing them with work and allowing them to earn a living. It is not of any assistance to the company that it had allowed the employees to seek alternative employment.

[55] The company conceded that it should not have reduced the employees' March 2020 salaries. Accordingly, the company must pay the employees their shortfall in salaries for March 2020.

[56] Regarding the claim for outstanding salaries from April 2020, I am of the view that compensation to each of the employees in the amount equivalent to 3 months' remuneration, payable at their off-tour salary, is reasonable.

Retrenchment

Was the dismissal fair?

[57] Section 189(1), (2) and (3) of the LRA prescribes a process to be followed by employers who contemplate dismissing employees for operational requirements.

Subsection (1) deals with the relevant party or parties to be consulted. In this case, the company was obliged to consult with Solidarity. Subsection (2) requires the employer and trade union to engage in a meaningful joint consensus-seeking process and attempt to agree on selection criteria, severance pay and appropriate measures to avoid dismissals, minimise the number of dismissals, change the timing of dismissals and mitigate the adverse effects of dismissals.

[58] Subsection (3) requires the employer to issue a written notice inviting the trade union or any consulting party to consult with it. In this written notice, the employer is obliged to disclose certain information, including alternatives considered and the reason for rejecting them, the number of employees likely to be affected by the dismissals, the proposed selection criteria, the proposed date of dismissal, the proposed severance pay, the assistance offered by the employer to the employees and the prospect of future re-employment.

[59] In *Super Group Supply Chain Partners v Dlamini and another*¹⁰, the LAC affirmed the employer's right to dismiss for operational requirements. However, employers who want to do so successfully are:

'[24] ... obliged to have a bona fide economic rationale for the dismissal and to comply with the provisions of s 189 as well as s 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimize the effect of the dismissal. The consultation envisaged by the Act is a 'meaningful joint consensus-seeking process' in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.'¹¹

¹⁰ [2012] ZALAC 25; (2013) 34 ILJ 108 (LAC).

¹¹ Ibid at para 24.

[60] The LAC referred to its earlier decision in *Kotze v Rebel Discount Liquor Group (Pty) Ltd*¹², where it observed as follows:

'[18] A fair retrenchment process imposes an obligation on the employer to disclose to the employees all relevant information and that obligation has since been codified in the terms set out in s 189(3) of the Labour Relations Act 66 of 1995 (the Act) ... the duty to engage in meaningful and genuine consultation is owed to all employees from the lowest to the executive level, ... the process's fairness to the employee finds expression in the recognition of its prerogative to make the final decision to retrench ... the final decision 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 commercial or business rationale... The function of the court in scrutinizing 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.'¹³ (Own emphasis)

[61] To further expand on the section 189 procedure also contemplating a substantive purpose, this Court in *Ndhlela v SITA Information Networking Computing BV (Incorporated in the Netherlands)*¹⁴, said the following:

'[45] Although as a matter of practice, we tend to separate process from substance, there are no bright lines distinguishing process from substance in the area of dismissals for operational requirements. The procedure mandated by s 189 has a substantive purpose. Its purpose is to save jobs. This is done by considering alternative means by which the operational problem identified by the employer can be addressed without resorting to dismissals. In a case such as the present, where the proffered substantive

¹² (2000) 21 ILJ 129 (LAC); [1999] ZALAC 25.

¹³ Ibid at para 18.

¹⁴ [2014] ZALCJHB 64; (2014) 35 ILJ 2236 (LC).

justification is the need to reduce operating costs, the issue to be discussed at the consultations is whether there are no other areas of the employer's business where the costs can be reduced without affecting employment security.'¹⁵

[62] In the present matter, it is common cause that there was no consultation, which means that there was no joint consensus-seeking process (whether meaningful or not) nor were there discussions on alternatives, the method of selecting the employees, the timing of the dismissal and future plans. The company could not rely on the 9 November 2020 survey as a method of selecting the employees to be dismissed in June 2021. The fact is that there was no consultation.

[63] Courtrooms are not boardrooms. This Court must guard against employers who flagrantly disregard the section 189 retrenchment process and attempt to comply with that process for the first time court proceedings. It is too late to consult and provide the necessary information after the dismissal of the employees. The Court's duty is to scrutinise the retrenchment process that led to the dismissal of the employees, not to chair or facilitate the retrenchment process.

[64] Employers who do not consult with the relevant parties in accordance with the LRA must know that their failure to comply with these provisions is not just a breach of a procedure. It is also a breach of the employees' express or implied terms of their contracts of employment and consequently, a breach of the fundamental rights of the employees enshrined in section 23 of the Constitution¹⁶. Such flagrant breach manifestly results in the dismissal being substantively unfair.

[65] The company has not consulted the employees. The result is that it deprived the employees of the opportunity to know and understand the basis for the retrenchment, to discuss the alternatives to retrenchment, the selection criteria, severance packages, and make representations about any matters relating to the retrenchment. The

¹⁵ Ibid at para 45.

¹⁶ Section 23(1) of the Constitution of the Republic of South Africa, 1996 provides that "*Everyone has the right to fair labour practices*".

inevitable conclusion is that the dismissal is procedurally and substantively unfair and I find accordingly.

Appropriate remedy

[66] The employees seek maximum compensation, that is, 12 months each. Sections 193 and 194 of the LRA empower this Court to award compensation to an employee whose dismissal for operational requirements was found to be unfair up to 12 months' remuneration calculated at the employee's rate of remuneration at the date of his dismissal. The amount of compensation must be just and equitable.¹⁷

[67] The company was aware of its obligation to consult, per its request for facilitation dated 13 May 2021 and email dated 14 May 2021. It was advised by a labour consultant. However, it elected to flush the LRA down the drainage and act in a lawless manner. In its CEO's words, the law did not apply during Covid-19 pandemic. After Solidarity recorded its objection to the 'defective' referral to the CCMA and demanded that the company should comply with section 189(3) of the LRA, the company did not respond to Solidarity nor did it make any attempt to call for a consultation in terms of section 189(3) or follow up with the CCMA to enrol the matter for facilitation. Instead, it went ahead and dismissed the employees.

[68] Just as there was no evidence of the company's financial record in May 2021 when it contemplated retrenchment, there was also none regarding its unaffordability to pay what the employees seek. The company was aware that the employees sought payment of 12 months' compensation each.

[69] Having considered the above factors, I find that it would be just and equitable for the company to pay each of the employees 8 months' compensation. This payment will be made at the rate of the employees' off-tour salary.

¹⁷ See: sections 193(1)(c) and 194(1) of the LRA.

Notice pay

[70] The notice of termination issued on 29 June 2021 informed the employees that their services were terminated with effect from 31 July 2021. The company did not pay the employees notice pay.

[71] Section 37(1)(c) of the BCEA provides that an employee who worked for the employer for one or more years is entitled to four weeks' remuneration on termination of the employment by the employer. The employer may pay the employee in lieu of notice.¹⁸

[72] The employees had, at the time of their dismissal, worked for the company for more than one year each. They are therefore entitled to four weeks' notice pay. There is no reason to deny them what is due to them in terms of the law. The company is therefore liable to pay the employees four weeks' notice pay, payable at their off-tour salary.

Costs

[73] Insofar as the dismissal dispute is concerned, section 162 of the LRA is applicable. The principle in LRA disputes is that costs do not follow the result. The factors set out in section 162(2) are not present in this matter. Accordingly, there is no reason for this Court to deviate from the principle that costs do not follow the result.

[74] Regarding the contractual claim, both parties are in my view successful in that whilst there was a finding that the company breached the employees' contracts of employment, the employees were not awarded the relief they sought, which is payment of the outstanding payment from April 2020 to date of their dismissal. Regardless, this Court retains the overall discretion to award costs. In my view, I am not persuaded that

¹⁸ See: section 38(1) of the BCEA.

this is a matter that warrants a cost order being awarded against any of the parties. Accordingly, there shall be no order as to costs.

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

Order

1. The company has breached the individual applicants' contracts of employment by unilaterally amending the terms and conditions of employment.
2. The dismissal of the individual applicants by the company is declared substantively and procedurally unfair.
3. The company is ordered to pay each of the individual applicants the following:
 - a. 3 months' compensation for breach of their employment contract, at an off-tour salary rate.
 - b. 8 months' compensation for their unfair dismissal, at an off-tour salary rate.
 - c. Their shortfall in salaries for March 2020.
 - d. Four weeks' notice pay at an off-tour salary rate.
4. Payment in paragraph 3 above must be made within 14 days of receipt of this judgment.
5. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. C. Dames

Instructed by:

Serfontein Viljoen and Swart Attorneys

For the Respondent:

Adv. J. Withaar

Instructed by:

Richard Spoor Incorporated