

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN DURBAN**

**Case no
DA28/01**

In the matter between:

UNITRANS ZULULAND (Pty) Ltd

Appellant

and

MHAMBISENI JOHNSON CEBEKHULU

Respondent

JUDGEMENT

ZONDO JP

Introduction

[1] The appellant, a subsidiary of Unitrans Freight (Pty)Ltd, had certain contracts which it operated in Kwa - Zulu Natal in 1998. One contract was a sugar contract in Amatikulu, another, a mining contract at Richards Bay Minerals and a fuel depot run out of Empangeni. It also managed fuel distributions for Engen which, in turn, managed fuel distributions for Total. Each contract was run by a management team in a specific geographic location. The contracts related to different activities, either agricultural, mining or fuel. They were operated and managed totally separately from, and independently of, one another.

[2] The respondent was employed by the appellant as one of two assistant depot managers for the appellant's mining

contract in Richards Bay Minerals. The appellant dismissed the respondent from its employ with effect from the 31st January 1999 for its operational requirements. In due course the respondent instituted an unfair dismissal claim against the appellant in the Labour Court and sought reinstatement and the payment of backpay and costs. The appellant defended the action. The Labour Court, through Jammy AJ, found that the respondent's dismissal was substantively fair but procedurally unfair and ordered the appellant to pay the respondent compensation equal to his salary for 12 months and costs. With the leave of the Court a quo the appellant now appeals against the order for the payment of compensation. To this end the appellant is challenging the Court a quo's finding that the respondent's dismissal was procedurally unfair. The respondent has noted a cross-appeal against the Court a quo's decision not to order reinstatement. To this end the respondent is challenging the finding made by the Court a quo that his dismissal was substantively fair.

Witnesses in the trial

[3] In the trial the appellant called two witnesses, namely, Mr Hidden, who, at all material times, was the appellant's human resources manager, and Mr Wellman, the depot manager for the appellant's mining contract at Richards Bay Minerals. The appellant gave evidence and called Mr Makhathini, also an employee of the appellant at the time, as his witness.

EVENTS SURROUNDING THE RESPONDENT'S

DISMISSAL

[4] The senior management structure in the Richards Bay Mineral contract of the appellant consisted of a depot manager and two assistant depot managers. The one assistant depot manager was the respondent. The other one was a Mr Wikus du Preez. During 1997/1998 there was a severe drought in the areas in which the appellant operated. That drought had a very serious impact on the sugar cane operations of the appellant with the result that it became necessary for the appellant to review its human resources. Furthermore, the appellant was given notice by Engen that Total planned to distribute its fuel itself from the 1st January 1999 which meant that its contract relating to the management of fuel distribution for Engen would not be renewed. There had also been significant increases in the fuel price.

[6] The events referred to above and their effects on the appellant's operations were discussed at a management forum meeting of the appellant early in October 1998. The management took the view that these developments were such as to call for a review of its previous profit forecasts. The management reviewed these profit forecasts and decided to reduce them drastically. A decision was also taken to reduce staff. It was thought likely that 29 employees would be affected by the contemplated reduction of staff. The fact that the mining contract at Richards Bay Minerals had two posts for assistant depot manager was also discussed. It was decided that the post of assistant depot manager occupied by the respondent be declared redundant.

[7] Meetings were held on the 15th October and 10th November 1998. These were attended by Messrs Hidden and Wellman as well as Mr Makhathini

and the respondent. A Mr Holmes also attended the meeting of the 10th November. One Mr Khanyile, who was employed by the appellant as an industrial relations officer working under Mr Hidden, attended the meeting of the 15th October as an observer. At this stage it is not necessary to go into details about what each witness said was discussed at each of the two meetings. It suffices to say that both the respondent and Mr Makhathini agreed that at the commencement of the meeting of the 15th October Mr Hidden said that the management had taken a decision that the respondent was dismissed with effect from the 30th November as a result of drought on the sugar cane side of the appellant's operations but that he would try and find him an alternative position elsewhere. Mr Makhathini and the respondent also testified that, when asked certain questions arising from this, Mr Hidden repeatedly said that he did not know as he was only a messenger bringing this message to the respondent and refused to disclose the identity of the person who had sent him.

- [8] Mr Hidden's version included that he had given the respondent and Mr Makhathini the background to the appellant's financial circumstances, had indicated that the appellant intended to terminate the respondent's services with effect from the 30th November, had told the respondent that he would try and find an alternative position for him in Mtubabuba but that later this could not materialize. Mr Hidden also said that he undertook at the meeting of the 10th November to look for an alternative position for the respondent in the Durban's operations of the appellant. He also said that the respondent or Mr Makhathini had asked why the respondent – not

being on the sugar cane side of the appellant's operation - was selected for retrenchment when the drought had been in the sugar cane operation of the appellant and, not on the mining side of the operations.

- [9] On the 15th October Mr Hidden also wrote a letter to the respondent. As the letter is important, I reproduce the body thereof hereunder:-

OPERATIONAL REQUIREMENTS – TERMINATION OF CONTRACT

With reference to our discussion today, the severe impact of the drought on the cane operations had demanded a review of the Company's operations and a rationalization of human resources.

Given our obligations under Section 189 of the Labour Relations Act read in conjunction with clause 15 – Retrenchment Procedure of the National Bargaining Council Agreement, we have no alternative, in terms of our operational requirements, but to notify you of our intention to terminate your contract of employment on 30 November 1998.

There are developments elsewhere in the Unitrans Group and every effort will be made to find alternative employment with the Group.

On behalf of management, I wish to thank you sincerely for your contribution to the development and success of Unitrans Zululand.

We wish you everything of the best.

Cc Depot Manager RBM – Mr K Wellmann”

As can be seen from that letter, Mr Hidden told the respondent that “we have no alternative, in terms of our operational requirements, but to notify you of our intention to terminate your contract of employment on 30 November 1998.”

[10] On the 25th November 1998 Mr Hidden addressed a letter to the respondent confirming that his contract of employment was going to be terminated on the 30th November. The respondent only received the letter on the 1st December. On the 27th November the appellant wrote a letter to the respondent purporting to withdraw the respondent’s retrenchment. That letter is important. The body of the letter read:-

On 15 October 1998 I met with you to discuss the severe impact of the drought and the country’s economic climate on the Company’s profit. I explained that it had become necessary to review the Company’s operations and to consider the rationalisation of the Company’s Human Resources. Subsequent to this meeting, I held further discussions with you to discuss the rationalization and your possible retrenchment.

During November 1998, the Company has been attempting to find alternatives to retrenchment. These include finding you alternative employment elsewhere in the Company and placing employees on

short time.

On 25 November 1998 you were given a letter advising you that your contract of employment would terminate on 30 November 1998 but that the Company would continue to make every effort to find you alternative employment within the Unitrans Group. Since receiving this letter, you have expressed certain concerns about your retrenchment. The Company has accordingly decided to retract your retrenchment and to engage in further discussions with you regarding the rationalisation and appropriate measures to avoid retrenchment. The Company wishes you to make representations regarding the rationalisation and any other issues relating to retrenchments.

As required by Section 189 of the Labour Relations Act, and in order to facilitate proper consultation, we advise you as follows:

- 1. As stated above, it has become necessary to review the Company's operations and to consider the rationalization of the Company's Human Resources as a result of the severe impact of the drought on the cane operations.**
- 2. 29 employees are likely to be affected by the rationalisation. The job categories in which they are employed are as follows:**

- 1 Assistant Workshop Foreman**
- 2 Assistant Depot Manager**
- 3 Contracts Manager**

- 4 Contracts Supervisor**
- 5 Admin Supervisors**
- 6 Driver Trainer**
- 7 Supervisor**
- 8 Admin Clerk**
- 9 Workshop Clerk**

- 3. In the event that the rationalization does take place, and the positions referred to above are made redundant, retrenchments are likely. As stated above, the alternatives already considered by the Company include placing employees elsewhere in the Company and working short time,**
- 4. In the event that there are no alternatives to retrenchment, the method for selecting which employees to retrench will be by depot and by job category, based on the principle of last-in, first-out.**
- 5. Any retrenchments are likely to take effect either in December 1998 or January 1999.**
- 6. The Company proposes paying severance pay of one weeks' salary for every completed year of service.**
- 7. The Company is committed to providing employees with**

every assistance in finding alternative employment.

- 8. The Company is prepared to offer you re-employment, in the event that you are retrenched, if suitable vacancies arise.**

The Company wishes to meet you on 8 December 1998 to commence consultations with you regarding the issues referred to above. You are required to confirm with me that you will be attending the meeting.

[11] In terms of the letters from Mr Hidden to the respondent dated the 15th October and 25th November 1998 the respondent's last day in the appellant's employment was meant to be the 30th November 1998. The 1st December was meant to be the first day when he would no longer be required to report for work. The respondent received a telephone call from the appellant to collect a letter from the appellant's offices. He went to the appellant's offices on the 1st December and was handed the letter from Mr Hidden dated the 27th November which has been reproduced above.

[12] The respondent testified that, after learning from the letter of the 27th November that the appellant was retracting his retrenchment, he was pleased and

thought that he was then going to be allowed to continue working. However, he said that when he telephoned Mr Hidden to enquire whether he could return to work, Mr Hidden told him not to report for duty. Consequently the appellant did not report for work for the period 1 December 1998 to 31 January 1999 but was paid his remuneration for that period.

[13] On the 10th December 1998 another meeting was held. It was attended by Mr Hidden, Mr Makhathini and the respondent. The respondent's version was that Mr Hidden was in a rush when he came to the meeting and that he wanted to confirm whether the respondent had received the letter dated the 27th November which the respondent then produced. Mr Hidden's evidence was that he used his letter of the 27th November as an agenda and went through every point raised in the letter and gave the respondent and Mr Makhathini an opportunity to deal with each point and to make proposals. Mr Makhathini corroborated this part of Mr Hidden's evidence but Mr Makhathini emphasized that Mr Hidden told them that there was nothing that was going to change and that all he could do was try and get a job for the respondent elsewhere. Mr Makhathini admitted that Mr Hidden did tell them at this meeting that he had been unable to find alternative employment for the respondent.

[14] On the 22nd December a firm of attorneys, acting for the respondent and Mr Makhathini, wrote a letter to the appellant asking the latter to clarify the employment status of the two as the appellant had initially given them letters of termination but thereafter such termination seemed to have been retracted. The response to the letter came from the appellant's attorneys initially by way of a telephone call to the respondent's and Mr Makhathini's attorneys and later by

way of a letter dated 23 December. In that letter the appellant's attorneys referred to what their client regarded as previous consultations as well as the letters dated the 15th October, 25th and 27th November from Mr Hidden to the respondent. With regard to the letter of the 27th November the appellant's attorneys said that this letter had conveyed the decision that the the respondent's retrenchment was retracted and **"our client continued to seek alternatives to the retrenchment of your client"**. The appellant's attorneys also said in the letter that Mr Hidden had encouraged the respondent and Mr Makhathini at the meeting of the 10th December to use the opportunity to look for alternative employment as they were not required to report for duty. The appellant's attorneys stated that the appellant intended holding a final consultation with the respondent on 30 December 1998 and asked that, if the respondent had any proposals prior to the meeting, they should convey those in the meantime.

[15] The last meeting was held between Mr Hidden, on the one hand, and, the respondent and Mr Makhathini, on the other, on the 30th December 1998. Mr Hidden said that the purpose of that meeting was for the appellant to explore one final opportunity to obtain proposals for alternatives to retrenchment but none was made by the respondent. In this regard Mr Hidden said that the appellant was focusing on alternative positions within the freight company. He testified further that at the end of the meeting he advised the respondent that, in the absence of proposals for alternatives to a retrenchment, the appellant would have no option but to terminate the respondent's services at the end of January 1999. Mr Hidden was asked what his attitude was to the respondent's retrenchment and to the consultation process. He answered that the appellant had provided its

thinking, rationale and proposals and, apart from a concern raised by the respondent on the method of selection and the involvement of a mining contract when the problem arose from drought in the sugar cane operation, there had been no response to the appellant's proposals and no challenge to the proposals made by the appellant. He said that it had been a disappointing process as the appellant felt that it had really tried to seek consensus.

[16] Under cross-examination Mr Hidden was asked why it had been necessary to hold a further meeting when, on his version, at the meeting of the 10th December he and the respondent and Mr Makhathini had discussed the **“same sort of issues contained in the letter of the 27th November and there was no outcome”**. His answer was that the need arose because the appellant wanted to **“provide additional time for the [respondent] to consider his situation and to provide opportunity for response”**. He said that it was frustrating that the respondent did not provide any information or proposals to avoid the retrenchment. He conceded that all along the respondent's contention was that he could not understand the rationale behind the reason for his retrenchment. Mr Hidden also conceded that the reason why the respondent did not come up with proposals on alternatives to retrenchment was that he was contesting the rationale for the decision to retrench in the first place.

[17] The respondent testified that Mr Hidden told him and Mr Makhathini that up to that stage the appellant had failed to find alternative jobs for him in the Group. The respondent said that Mr Hidden wanted to know from them whether they had anything to say to him. Their response, continued the respondent, was to request to see the person who had sent him to them and he said that they

could not see the person. The respondent said that at that stage Mr Hidden asked them to wait outside his office. He said that after about 30 to 40 minutes Mr Hidden called them in and gave them letters of dismissal dated the 30th December 1998 to the effect that they were being dismissed with effect from 31 January 1999.

[18] In the letter of the 30th December addressed to the respondent, the appellant informed the respondent that the rationalisation of its human resources had been done on a depot by depot basis and job category by job category and the method of selecting which employees would have their contracts of employment terminated was the “**Last in First out**” rule. Under cross-examination the respondent was asked whether he had been of the view that it would serve no purpose to discuss the issues relating to the retrenchment with Mr Hidden at the meeting of the 30th December. He answered in the affirmative and said that was so because Mr Hidden had said that he knew nothing and he was simply a messenger sent by someone else. Mr Makhathini’s evidence was that at the meeting of the 30th December Mr Hidden said that he had failed to find alternative jobs for him and the respondent and that the two were then on their own.

The Court a quo’s finding and the basis therefor

[19] The Court a quo’s finding that the respondent’s dismissal was procedurally unfair was based on its view that the adequacy of the consultation process had to be determined only on the basis of what occurred after the appellant had withdrawn the notice of retrenchment of the respondent by the letter dated the 27th November. The Court a quo concluded that the appellant’s

decision to retract the retrenchment and, in the appellant's own words, to **"commence"** consultations was made because it had itself concluded that its prior attempts to consult had not complied with the provisions of sec 189. The Court a quo held that there was nothing unfair or improper about the appellant retracting the respondent's retrenchment and seeking to commence the consultation process afresh provided that its conduct in so doing was motivated by a genuine acknowledgment of its inadequacies **"and sincere and genuine intention, made in good faith, to remedy the situation on an equitable basis."**

[20] The Court a quo went on to say that it was not convinced that the appellant had acted genuinely and in good faith. It found that after the 27th November the appellant had tried to **"paper over the cracks"** in its conduct prior to that date by merely going through the motions of compliance with the relevant statutory requirements. This accorded with the submission that had been made on the respondent's behalf. In paragraph 35 of its judgement the Court a quo found that **"(t)he compelling impression which emerges from the testimony as a whole, was that having, at a much earlier stage, immutably decided that the [respondent] should go, its purported compliance with fair procedure in that context, was superficial, insincere and misleading."**

[21] In paragraph 34 read with paragraph 33 of its judgement the Court a quo said, among other things, that the appellant had not been motivated by a genuine acknowledgment of the procedural inadequacies of the dismissal and a sincere intention to remedy the situation on an equitable basis. It said that the picture which the appellant sought to present of a total commitment to the consultation

process was not one it could accept unreservedly **“in the fact of the consistent and mutually corroborative evidence of the [respondent] and Mr Makhathini.”**

[22] The Court a quo found that the respondent had been justified in his conclusion that no purpose would be served by his engagement in what he regarded as a flawed exercise. The Court a quo preferred the respondent’s version that Mr Hidden had said he was simply a messenger who had been sent to convey the message of retrenchment to the respondent as opposed to the appellant’s version that Mr Hidden had not said that and had in fact fully engaged the respondent in the consultation process.

[23] Mr Pillemer, who appeared for the appellant, submitted that the Court a quo misdirected itself in assessing the fairness of the consultation process only with regard to the period 27 November to the dismissal of the respondent. He submitted that the Court a quo ought to have had regard to the discussions and other interactions between the parties that took place prior to 27th November. The reason why the Court a quo took that view was partly, if not mainly, that in its letter of the 27th November the appellant had itself said that it was going to **“commence”** consultations. This suggested that it itself took the view that what had happened up to that stage had not been consultations.

[24] It is now necessary to consider the issues on appeal. It is convenient to deal first with the cross-appeal because it relates to the substantive fairness or otherwise of the dismissal and, thereafter, I shall consider the appeal which relates to the procedural fairness of the dismissal.

The cross-appeal

[25] It was contended on behalf of the respondent that the Court a quo erred in finding that the respondent’s dismissal was substantively fair. The basis

advanced in support of this contention was that the substantive and procedural fairness of the dismissal were so intricately linked that, once the Court a quo had found that the dismissal was procedurally unfair, it could not find that it was substantively fair because it was impossible to decide whether dismissal was the only option available when alternatives thereto including bumping had not been properly considered in the consultation process. This contention cannot be upheld. In relation to a dismissal, procedural fairness relates to the procedure followed in dismissing an employee. Substantive fairness relates to the existence of a fair reason to dismiss. In relation to substantive fairness the question is whether or not, on the evidence before the Court, and not on the evidence produced during the consultation process, a fair reason to dismiss existed. With regard to procedural fairness, the question is not whether a fair procedure was followed in Court. The question is whether, prior to the dismissal, the employer followed a fair procedure. The result hereof is, therefore, that, if the evidence placed before the court establishes a fair reason to dismiss which was present at the time of the dismissal, the dismissal is substantively fair. It does not matter, for purposes of determining the substantive fairness of the dismissal, that such reason was not the subject of discussion during the consultation process. The fact that the reason for dismissal was never a subject of consultation matters only at the level of procedure because in terms of sec 189 of the Act, it should be a subject of consultation.

[26] There was also an attempt made on behalf of the respondent during argument to argue that the dismissal was substantively unfair because there were employees who had shorter service periods in the appellant's employment than the respondent who were performing work that the respondent could perform and who were not retrenched. The difficulty with this argument is that Mr Hidden's evidence to the effect that the respondent was not suitable for the work that those other employees did was never challenged nor was it contradicted by the respondent. When this was pointed out to the respondent's

attorney during argument, he conceded that no such contradictory evidence had been led. In those circumstances the cross-appeal cannot succeed and it falls to be dismissed.

The appeal

[27] The Court a quo found that the respondent's dismissal was procedurally unfair. This was based on the view taken by the Court a quo that the process which the appellant had embarked upon prior to the 27th November was to be disregarded and the procedural fairness of the dismissal had to be assessed only with reference to the process that was followed after the retraction of the respondent's dismissal by the letter of the 27th November. For its approach the Court a quo relied on the last sentence in the appellants' letter of the 27th November in which the appellant itself said to the respondent that it was seeking **"to commence consultation"** on the issues referred in the letter. It was submitted on the appellant's behalf that the Court a quo erred in adopting such an approach.

[28] The appellant's letter of the 27th November is very critical to the assessment of the procedural fairness of the respondent's dismissal in this matter. One reason why the letter is significant is that the evidence established quite clearly that the decision to make the respondent's position redundant and to choose him as the one who would not continue as assistant depot manager was made before the 15th October and, therefore, before there was any discussion of any kind with him. The result hereof is that there can simply be no doubt that, to the extent that it can be said that the meetings of the 15th October and 10th November were consultations, the consultation which took place

before the 27th November was fundamentally flawed. So flawed was the process that, had the appellant not written the letter of the 27th November seeking to retract the respondent's retrenchment, there could have been no doubt that the respondent's dismissal was procedurally unfair because the consultation did not precede but it followed the decision to choose the respondent for dismissal. There can also be no doubt that the reason why the appellant wrote the letter of the 27th November purporting to withdraw the respondent's dismissal was that it realised that there had not been a proper consultation.

[29] Another reason why the appellant's letter of the 27th November is significant is that, if the appellant was entitled to withdraw the dismissal and then seek to commence or continue with the consultation process, then it may well be that the appellant was able to rectify what otherwise was a flawed consultation process. It was not argued on behalf of the respondent that the appellant was not entitled to withdraw the dismissal since it had already conveyed to the respondent its decision to dismiss him. See **University of the North v Franks & others (2002) 23 ILJ 1252 (LAC)** where it was decided that an employer has no right to unilaterally withdraw a dismissal once the dismissal has been conveyed to the employee. It, would, therefore, be inappropriate to consider that issue. What will, therefore, determine whether the respondent's dismissal was or was not procedurally fair is whether it can be said that the interaction between Mr Hidden, and the respondent between the 27th November and the 31st January 1999 constituted a fair procedure despite the fact that the interaction prior to the 27th November was demonstrably unfair. I now turn to consider this question.

Was the procedure followed after the 27th November fair?

[30] Mr Pillemer submitted that the respondent's dismissal was procedurally fair and drew attention to the various meetings that the appellant's Mr Hidden held with the respondent on 15 October, 10 November, 10 December and 30 December 1998. He also drew special attention to the letter of the 27th November that Mr Hidden wrote to the respondent. He submitted in effect that it was difficult to see what more the appellant could have done because meetings were held at which the respondent had ample opportunity of making representations and proposals.

[31] The attorney who appeared for the respondent argued that no weight could be given to the purported consultation process that the appellant attempted in this case. He submitted that this was because it was clear from the evidence that the appellant made the decision to dismiss the respondent even before the latter could be consulted. It was submitted on the respondent's behalf that the appellant had first decided to dismiss the respondent and then he consulted with him. The argument was that the appellant simply went through the motions. It was submitted that the attempt by the appellant to legitimize the consultation process by retracting the respondent's retrenchment did not make any difference. In this regard the respondent's attorney submitted that the appellant did not withdraw its decision to declare the respondent's post redundant. He persisted in the submission that the dismissal was procedurally unfair.

[32] The first question to decide is what role the interaction between the appellant and the respondent before the 27th November must play in deciding whether the respondent's dismissal was procedurally unfair. As already

indicated above, the Court a quo took the view that any consultations which took place during that period should be disregarded. As I have already indicated above, such consultation as may have taken place prior to the 27th November was, in my judgement, without any doubt, completely flawed. By the time the appellant had its first discussion with the respondent on the retrenchment, it had already made its decision to dismiss him. That this is what happened is supported by the respondent's evidence that, when he entered the office where Mr Hidden was present on the 15th October to have a meeting with the latter, Mr Hidden told him that he was sorry to inform him that his services would be terminated on the 30th November. It is also supported by Mr Makhathini's evidence that, after he had arrived at the meeting of the 15th October, Mr Hidden said precisely that. Further support for this is to be found in Mr Wellman's evidence. Mr Wellman was asked the question: **"So, in short, Mr Wellman, if I understand you correctly, the purpose [of the meeting of the 15th October 1998] was to tell [the respondent] about the decision which had been taken. Is that so?"** Mr Wellman answered: **"correct"**. The respondent's attorney also put a similar question to Mr Hidden and got an affirmative answer. The record reflects the questions and answers between the respondent's attorney and Mr Hidden thus: **"So in other words this was just merely to inform him as to what was about to happen?... That is correct.**

And at that stage had it already been decided that he was one of the candidates for retrenchment? ... That is correct." Of course, the letter which Mr Hidden wrote to the respondent on the 15th October 1998 also made it clear that the decision to dismiss him with effect from the 30th

November had been taken already.

[33] Mr Hidden tried at some stage during his evidence to suggest that no decision had been made by the 15th October to dismiss the respondent but that the appellant only had an intention to terminate his contract of employment and wanted to discuss that intention with him. I do not think that this makes much, if any, difference. An employer should not form an intention to terminate an employee's contract of employment for operational requirements before consultation takes place with the employee concerned or his representative. In any event it is clear from the last paragraph of Mr Hidden's letter of the 15th October that the appellant had made its decision to dismiss the respondent. That is why in that paragraph Mr Hidden even thanked the respondent for his contribution to the development and success of the appellant and wished him everything of the best.

[34] In fact Mr Hidden was confronted with this question during his cross-examination. It was put to him that in effect what had occurred before the 27th November did not constitute consultations and that, if there had been consultations prior to the 27th November, he would not have written in the last paragraph of that letter about commencing consultation. He was then asked whether he disputed what was being put to him. His answer made little, if any, sense in relation to what had been put to him. Indeed, he did not dispute what had been put to him. His answer was:

“... M'Lord, my expectation of the issue of consultation is that it is a two-way process, and certainly my experience up to the meeting of the 10th December was that the amount of response was extremely

limited from the [respondent]”

[35] With regard to the appellant’s criticism of the Court a quo’s decision to disregard the consultation process before 27 November 1998, it needs to be pointed out that, in the last paragraph of Mr Hidden’s letter of the 27th November withdrawing the respondent’s retrenchment, Mr Hidden pointed out on behalf of the appellant that the appellant would now “**commence**” the consultation process. What the appellant was conveying through that was effectively that what had happened before was not to be regarded as consultation and that the consultation was the one that would commence after that letter. When the Court a quo held that the purported consultation that took place before the 27th November had to be disregarded, it referred to the fact that the appellant had stated in the letter of the 27th November that it would “**commence**” consultations with the respondent. In these circumstances I do not think that it is open to the appellant to criticise the Court a quo for disregarding the purported consultation that occurred prior to the 27th November when it itself gave the impression that it was starting the consultation process afresh after the 27th November.

[36] In the light of the above the purported consultation that the appellant embarked upon between the 15th October and the 27th November was, in my judgement, so fundamentally flawed that it could not assist the appellant in any way on the question whether the dismissal was procedurally fair.

[37] In my judgement, the critical question, as far as the procedural fairness of

the dismissal is concerned, is whether the consultation that the appellant embarked upon between the 27th November and 30 December constituted a fair procedure. It was contended on the respondent's behalf that the consultation that took place after the 27th November was also a farce and still left the dismissal procedurally unfair. The argument was still that the appellant had made its decision to dismiss the respondent and it was simply going through the motions. It was submitted in effect that, even though the appellant withdrew the retrenchment that was to be with effect from the 30th November, this was meant to create an appearance of a bona fide process. It was pointed out that the appellant did not withdraw its decision to declare the respondent's post redundant and that that decision continued to stand during the consultation process after the 27th November.

[38] It would seem from the paragraph just below the list of positions in Mr Hidden's letter of the 27th November that, at least on paper, the respondent contemplated that the positions referred to which included the respondent's position were yet to be declared redundant. I shall assume in the appellant's favour that by implication it had withdrawn its decision to declare the respondent's position redundant.

[39] There are, however, at least two matters that, in my view, support the Court a quo's finding that even during the period after the 27th November the appellant was going through the motions and was seeking to "**pepper over the cracks**" in its consultation with the respondent. The one matter is that the appellant did not call a meeting of all the employees who could potentially be

affected or their representatives and consult them but simply identified the employees that it wanted to dismiss, took the decision to dismiss them, retracted that decision and thereafter consulted the employees and proceeded to give effect to its decision to dismiss them. What the appellant should have done was to issue a notice to employees generally and indicate that it was contemplating a retrenchment and invite them or their representatives to a consultation process. That would have entailed that the other assistant depot manager who was the respondent's colleague and others would also be part of the consultation process. There is no suggestion at all that the appellant ever had a consultation with the other assistant depot manager and other employees other than the ones it sought to dismiss. The respondent as well as the other assistant depot manager ought to have been regarded as having been potentially at risk for dismissal. It is only an agreement reached on who would be retrenched or the implementation of either agreed or fair and objective selection criteria (decided upon after consultation) that would have dictated who in the end was retrenched. That is not what the appellant did. The appellant first identified which employees it sought to dismiss, sought to consult with them and ultimately dismissed them.

[40] The other matter that, in my view, supports the Court a quo's finding that, even after the 27th November the appellant was going through the motions when it purported to consult the respondent is the appellant's decision preventing the appellant from reporting for duty from the 1st December onwards and the reason for such prevention. The respondent's attorney took this issue up during the cross-examination of Mr Hidden and asked why, if the dismissal was for operational requirements, the appellant was not required to work but was paid. Mr Hidden's answer was that the appellant's intention in not allowing the respondent to work during the period was **“to provide him with every**

opportunity to find alternative employment himself in that period.” Mr Hidden confirmed that this was during a period when consultations were still continuing.

[41] The appellant’s conduct in keeping the respondent away from work so that he could look for alternative employment during that period despite the fact that consultations were still to commence reveals that in the appellant’s plans the respondent remained dismissed after the 30th October despite the purported retraction of that dismissal but only the date of dismissal was changed. Otherwise, there is no explanation for the appellant’s decision that the respondent should look for alternative employment even before the commencement of fresh consultations. In any event that attitude and conduct on the appellant’s part are consistent with the evidence given by both the respondent and Mr Makhathini that Mr Hidden told them that there was nothing they could do which would make the management change their decision. This is evident from the following of Mr Makhathini’s evidence under cross - examination:

“Mr. Alexander Now at that particular meeting on the 10th of December, Mr Hidden gave evidence in this Court that he used the contents of that letter as an agenda and that he moved through all the issues contained in that letter. Is that correct? Ja, he did go through.

And did he discuss the various issues contained in the letter with both you and Mr. Cebekhulu? Yes, he did.

And did he give you an opportunity to make representations

regarding all those issues?..... Ja, the only thing he says, he says this thing is final and management has decided these are just formalities, as I understand it”.

[42] When Mr Makhathini was thereafter asked under cross - examination whether Mr Hidden had given him and the respondent an opportunity to make representations at the meeting of the 10th December, he replied: **“Ja, the only thing that he said, he also said there’s nothing going to change but he can try maybe to get us a job somewhere else. That’s what he said. So it was not an input from our side, it’s”**[inaudible].

[43] In the light of all the above, I conclude that the appellant was simply going through the motions when it purported to consult with the respondent both before and after the 27th November. It had made its decision that the respondent would be dismissed unless it found an alternative job for him. It was unfair for the appellant to first decide to declare the respondent’s position redundant, to make the decision to dismiss the appellant and only thereafter to consult with him. I, accordingly, also find that the respondent’s dismissal was procedurally unfair and there is no basis to interfere with the finding to that effect by the Court a quo. Accordingly, the appeal falls to be dismissed.

[44] On the issue of costs, the position is that argument on the cross - appeal took so negligible an amount of time that costs relating to it should follow the costs of the appeal because the appeal took up virtually the whole time of argument.

[45] In the premises the appeal is dismissed with costs. The cross-appeal is also dismissed and any costs arising from the cross - appeal will be costs in the appeal.

Zondo JP

I agree.

Davis AJA

Appearances:

For the Appellant:
Instructed by

Mr M. Pillemer SC
Deneys Reitz Inc.

For the Respondent:
Instructed by:

Mr Z.E. Buthelezi
Buthelezi Attorneys

Date of judgement:

23 May 2003

Date of hearing:

3 September 2002

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT DURBAN)**

In the matter between:

UNITRANS ZULULAND (Pty) Ltd

Appellant

and

MHAMBISENI JOHNSON CEBEKULU

Respondent

JUDGMENT

Du Plessis AJA:

1. I have read the judgment of my colleague Zondo JP and I agree with the order he proposes. My reasons for dismissing the cross-appeal differ from those of my colleague however.
2. As is pointed out in paragraph 25 of my learned colleague's judgment, counsel for the respondent contended that the respondent's dismissal was substantively unfair because the substantive and the procedural fairness of the dismissal "were so intricately linked that, once the Court *a quo* had found that the dismissal was procedurally unfair, it could not find that it was substantively fair..." My learned colleague rejects the argument in principle. In my respectful view it should not be rejected in principle, but only on the facts of this case.
3. The Labour Relations Act, 66 of 1995 (the Act) makes a distinction between "unfair dismissals" and dismissals that are "unfair only because the employer

did not follow a fair procedure” (Section 193(2)(d); s 194(1)). In my view this distinction does not justify an inference that substantive fairness and procedural fairness will always fall into separate, impermeable compartments. There may be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure.

4. The procedure prescribed in section 189 of the Act is relevant in this case. The section obliges employers who contemplate dismissing one or more employees for reasons based on operational requirements, to follow the consultative process prescribed in the section (Section 189(1)). The purpose thereof is to endeavour to achieve consensus as to, among others, appropriate measures to avoid the dismissals (Section 189(2)(a)). The consultative process is a measure aimed at ensuring that the dismissals themselves are fair. An employer who decides to dismiss an employee for operational reasons without consulting in terms of section 189, may find it impossible to prove that nothing the other consulting party could have said could have changed the decision as to the need to dismiss. To hold otherwise will reduce the consultative process to a mere formality that can be ignored at the risk only of paying compensation as provided for in section 194(1) of the Act.
5. In this case the evidence established that the appellant was facing difficult business conditions that adversely affected its profitability. The respondent did not seriously challenge the appellant’s decision to retrench. The respondent’s attack was aimed at the decision to retrench him and not other employees whom the respondent identified. The appellant proved that the respondent was not suitable for the work that those other employees did. There is no basis in the evidence to hold that a proper consultative process would have affected the decision to retrench the respondent.
6. In the result I agree with the order proposed by the learned judge president.

BR du Plessis AJA

Date of judgment: 23 May 2003

