

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JA 39/03

In the matter between:

**NATIONAL EDUCATION, HEALTH 1st and further Appellants
AND ALLIED WORKERS' UNION
AND OTHERS**

and

UNIVERSITY OF PRETORIA

Respondent

JUDGMENT

Zondo JP

Introduction

- [1] The first appellant is a registered trade union of which the second and further appellants are members. In this judgment I shall refer to the first appellant as “**the union**”. The second and further appellants are former employees of the respondent. The respondent is the University of Pretoria. The second and further appellants are among a large group of employees whom the respondent dismissed from its employ for operational requirements on the 30th June and

31st July 1998.

[2] The appellants disputed the fairness of the dismissals. They contended that the dismissals were unfair both substantively and procedurally. The respondent maintained that the dismissals were fair both procedurally and substantively. In due course the dispute was referred to the Labour Court for adjudication. It was heard by Revelas J. The Labour Court found that the dismissals were fair both procedurally and substantively. It, accordingly, dismissed the appellants' claim with costs but subsequently granted them leave to appeal to this Court. This, then, is an appeal from the decision of the Labour Court dismissing the appellants' claim with costs.

[3] Before the appeal can be considered, it is necessary to set out the factual background to the dismissal of the second and further appellants. I propose to do so below. However, before I do so, let me say this. For purposes of this judgment, it is not necessary to set out all the facts or events relating to the second and further appellants' dismissal, particularly those relevant to the substantive fairness of the dismissal. This is because in this appeal the appellants do not challenge the substantive fairness of the dismissal. The appellants only challenge the procedural fairness thereof. Even that challenge to the procedure is a very narrow one. It is that, when the respondent initiated the consultation process required by sec 189(1) of the Labour Relations Act, 1995 (Act 66 of 1995)(“**the Act**”), the union was faced with a fait accompli. In the light of the fact that the appellants' challenge to the fairness of

the dismissal is a very narrow one, I propose to confine the factual background to this matter to the facts and events that are relevant to the determination of whether or not the appellants were faced with a *fait accompli*.

The facts

[4] In his speech at the opening of the 1997 academic year on the 28th January 1997 Prof Van Zyl, who was the new Rector and Vice-Chancellor of the respondent at the time, set out, among other things, his vision for the respondent and its role in South Africa and, indeed, internationally. Prof Van Zyl stated, among other things, that the respondent had to meet certain challenges facing it. He enumerated certain matters which he said required particular attention. The first of the matters he mentioned was that there would have to be a thorough reconsideration of the university's core functions and the performance or execution thereof. He also stated that partnerships with the private sector would have to be investigated urgently, particularly through the outsourcing of support services.

[5] By way of a letter dated the 7th February 1997 the respondent appointed management consultants called Strategic Partners to investigate the cost-effectiveness and efficiency of certain support services within the respondent. This project was to be known as the Support Services Development Project. In the letter of appointment the respondent stated that the consultants' brief was to undertake a support services development project at the respondent. The respondent also set out in the letter the "**parameters**" of the consultants' appointment. The letter stated that the main objective of the support services development project would be "**to optimize the cost efficiency and effectiveness of support services of the university.**" The letter also identified the service areas that had

been prioritized for detailed review during 1997. These were given as:

- Building and Terrain Services
- Campus Security
- Marketing Services
- Student Services (including the Bureau for Culture and the Bureau for Sports)
- Technical services.

Under the third paragraph of the letter of appointment the respondent informed Strategic Partners that the support service development project would be carried out according to the following phases in the case of each support service area mentioned above. The phases were:

- “- The establishment and acceptance of the project’s mandate among all stakeholders in the University’s support services.**
- A factual analysis into the current levels of cost efficiency and effectiveness.**
- A participative process giving stakeholders an opportunity to jointly evaluate the current costs efficiency and effectiveness of the services concerned, the opportunities for performance improvement as well as the options and guiding criteria towards change.**
- The preparation of a project plan towards implementing the preferred change option(s)**
- Assistance towards successful implementation.”**

(Emphasis added)

- [6] In the fourth paragraph of the letter the respondent went on to make it clear to the consultants that **“(t)he evaluation of future options regarding the functioning of each support service will be carried out with proper consideration of:**
- **the interests and rights of employees, students and other service users.**
 - **financial affordability and cost competitiveness of options.**
 - **Sustainability of the options considered.”**
- [7] In the fifth paragraph the respondent pointed out that **“(t)he project for each service area will be overseen by a project steering committee comprising representatives from, inter alia, staff and unions, line management and students. The chairperson of the project steering committee will be selected by these representatives.”**
- [8] It would seem that already on the 6th May 1997 the consultants held a meeting with the union in which they briefed the union on their mandate. The minutes of that meeting reflect that, among other things, Mr Marais, who was the leader o the consultants, informed the union that his team had requested the meeting **“in order to brief Nehawu on the envisaged Support Services Development Project and to request their comment and advice on the structuring of the project.”** The minutes also reflect that,

among the things, Mr Marais told the union that the consultants had no pre-conceived ideas on the type of changes that the support services would be required to undergo in order to improve their cost-effectiveness. He also informed it that the consultants had not been asked to merely justify any stakeholder's foregone conclusion on the direction that support services would go in the future.

- [9] The minutes of the meeting of the 6th May also reflect that Mr Sehone of the union asked whether the inevitable outcome of restructuring would not be a reduction of personnel through retrenchments. Mr Marais' answer was an explanation that it was too early to think in terms of what kinds of changes would be necessary to improve the cost-effectiveness and efficiency of support services. He said that the extent of the problem and the alternatives for change had to be identified first. He likened the situation rather to that of a doctor and said that, before a doctor examined a patient, he would not be able to tell the nature of the patient's illness nor would he know what medicine to suggest. He said that the Support Services Development Project had to first investigate the current problems before deciding whether restructuring would be the right solution. He pointed out that in certain organisations better management processes or even an increase in staff had been implemented in support services.
- [10] In that meeting Mr Marais also outlined the process that the consultants intended to follow in going about executing their mandate. The minutes reflect that he said:

“- The first stage of the project (of which this meeting forms a part) involves discussion with the various stakeholders involved in support services in order to explain the envisaged objectives and process and to obtain input from the stakeholders. This stage is to result in the formation of a steering committee in each of the service areas concerned.

- These steering committees should represent all stakeholders such as workers – labour unions, line management and students. The role of the steering committees would be to consider the work of the consultancy and to participate in project workshops.
- The second stage of the project is envisaged to consist of an independent review of the current cost-effectiveness and efficiency of the services concerned by the consultancy. In the course of this review they will consider aspects such as service user satisfaction, the future need for the service concerned, the current cost of service delivery as well as management practices. The review will also consider how the nature and costs of the services at the University compare with that of other universities and other public and private sector organisations. The consultancy will present the results of their review to a workshop. The workshop will develop conclusions

on the opportunity for improving the cost effectiveness and/or efficiency of the service concerned and will list potential improvement alternatives. During the next stage the consultancy will provisionally evaluate the improvement options according to criteria developed during the first workshop. The results of this evaluation will be presented to a second workshop where the stakeholders will consider the best improvement option and its implementation implications.

- Once an implementation decision has been made, the consultancy will assist with implementation planning and with project management during implementation. Naturally, no implementation could proceed without proper consultation with all role players concerned.”**

[11] Mr Marais emphasised that the best interests of the respondent and, therefore, of all stakeholders, would be served by the participation of all stakeholders concerned including the union in the project. He then asked what the union’s suggestions were regarding participation of workers and union representatives in the process of the project. At the meeting the union representatives indicated that they would need to consult their shopsteward colleagues before they could react to the invitation to participate in the project.

[12] On the 28th May 1997 another meeting was held between the

consultancy and the union. The aim of the meeting was for the consultancy to brief the union further on the Support Services Development Project and to give the union an opportunity to ask whatever questions or raise whatever concerns they may have had about participation in the project. The minutes of the meeting reveal that the union delegation asked numerous questions. Indeed, there were even debates on certain issues. Ultimately the union delegation indicated that the union would participate in the project. It is important to highlight that in that meeting the union was informed that the aim of the meeting was to give it the opportunity to:

- “- comment on the proposed process and suggest possible alternatives**
- raise any preliminary concerns and or issues regarding the project**
- comment on the consultative approach and indicate possible alternatives and [to] know each other and develop a working relationship.”**

[13] The union confirmed its agreement to participate in the project by way of a letter from a Mr Robinson Mosebi. The letter appears to have been approved by Mrs Molefe who was the chief shopsteward of the union at the respondent. In addition to advising in that letter of its agreement to participate in the project, the union also made a proposal as to the composition of **“the structure of the Steering Committee.”** The union suggested that each steering committee

should be composed of:

- (a) one representative from the consultancy;
- (b) two representatives from supervisors/managers
- (c) three representatives of unions or employee organisations.

Mr Marais subsequently wrote to the union to welcome its decision to participate in the process or the project. He also informed the union that he was accepting its proposal of how the steering committees should be composed. He said that in fact the union's proposal on the composition of such committees was the same as his own earlier proposal. The union then participated in the project and in the steering committees. In participating in the project and being part of the steering committees, the union was free to raise whatever concerns it had, was free to make any proposals it wished to make and was free to express any views it had. It was not hampered in any way.

[14] In a letter dated 21 August 1997 the union, through Mr Robinson Mosebi, advised Mr Marais that the union was withdrawing from further participation in the project because the minutes of the various meetings that its representatives had attended did not reflect the contributions made by the union representatives' in such meetings. However, later on the union rejoined the process and continued to participate until the end of the process.

[15] In the September 1997 issue of the University's bulletin it was explained that, after the establishment of a steering committee in each one of the support services that had been prioritised, the

project team (i.e. the consultants) had undertaken an independent investigation into each of the various services. It was said that such investigation had focused on the effectiveness, client satisfaction, cost, efficiency, the opinions of staff, management practices as well as comparisons with the practices at other organisations.

- [16] It was also stated in the bulletin that at that time the consultancy was presenting two workshops in respect of each service. At such workshops, continued the bulletin, the consultancy's analysis of the service, the need for change as well as the possible alternatives for the future were considered in consultation with the steering committee concerned. It was stated that, once those workshops had been concluded, the consultancy would make a recommendation to the Executive of the respondent. It was then written: **“These recommendations may coincide with or differ from those of the steering committee.”** It was stated that that was where the work of the steering committee would end.

- [17] There was a section in the September 1997 UP Bulletin which dealt with the **“road ahead.”** In this section it was stated that in October 1997 the consultancy aimed to complete the report-back to the steering committees. The following also appeared in the bulletin:

“The analyses of the project team will by then have been open to inspection by all interest groups and these groups will have been able to participate in the process for the consideration of alternatives for the future. After the steering committee process in respect of each department

has been concluded, the project team will make their recommendations, together with views expressed by the steering committee concerned to the Executive of UP. This means that the Executive may start to take principle decisions regarding the future of the various services during September and October 1997. Where personnel implications arise, management will have to consult with the parties concerned before a final decision can be made.”

During October 1997 the consultants submitted their reports in respect of some of the support services to the Executive of the respondent. In such reports the consultants inter alia identified the problems in the relevant support service areas and made recommendations on what should be done to address them. The recommendations included that the support services affected in this matter be outsourced.

- [18] The Executive of the respondent furnished copies of the consultants’ reports to all stakeholders including the union and asked them to give their reactions thereto. In a letter dated 29 October 1997 Mrs Molefe undertook to Prof Pottas of the respondent that the union would submit its response to the reports of the consultants on the 5th November 1997. This was agreed to by the respondent. In the UP Bulletin of the 7th November 1997 it was announced that on the 1st November a support centre had been installed in the Marketing Services Building **“to answer questions**

from staff about the renewal process at UP.” The investigation undertaken by the consultants was part of the renewal process at the respondent. It was further stated that the centre would also be **“part of general employees’ aid programme managed by the Labour Relations Division.”** It was stated that a team of professionals including ministers of religion, social workers, psychologists and staff of the Labour Relations Division would be available to assist staff. It was also written:

“The centre will assist staff who may be affected by rationalisation to compile a CV, find other work and will also give advice on financial matters etc. Staff members will still be able to use this one stop service for a limited time after they have left the university’s service.”

[19] The union failed to submit its response to the reports by the 5th November 1997. By a letter dated 10 November 1997 the union asked that it be given an opportunity to give a verbal reaction to the consultancy’s reports and that this be done on either 12 or 13 November 1997. By a letter of the same date Prof de Beer, who was a vice-principal of the respondent and who was the respondent’s main contact person or representative both in the Support Services Development Project and in the subsequent sec 189 consultation process that started in November or December 1997, agreed to the union’s suggestion.

[20] On the 13th November 1997 a meeting was held between the respondent and the union. Although the union had requested the

meeting for the purpose of giving a verbal reaction to the consultants' reports, once at the meeting, the union's Mr Jaftha indicated that there were a number of questions on which the union sought to have clarification. One such question was whether the process that had taken place was a substitute for the consultation process required by the Act in the case of a contemplation of a dismissal of employees for operational requirements. Prof de Beer explained that, once the Executive of the respondent had received all comments on the reports and all parties had had a chance to discuss them with a view to trying to reach a consensus, the Executive would **"take a position in terms of which the provisions of section 189 of the Labour Relations Act might come into play and will be followed to the letter."**

- [21] After asking another question which was answered, the union's Mr Jaftha submitted a proposal for redeployment to Prof de Beer. The document containing the proposal was marked: **"NEHAWU's Redeployment Proposal"**. Mr Jaftha commented that such proposal had been used as a model for restructuring at other institutions focusing on a training strategy for staff with the use of government funding earmarked for such purpose. Mr Jaftha stated that the proposal did not constitute the union's reaction to the reports and reserved the **"right"** to comment later. Prof de Beer undertook to submit the proposal to the Executive for consideration after which a follow-up meeting would be held to discuss the merits of the submission as part of the comment on the reports. The meeting ended with the union not having given the verbal reaction

to the consultants' reports as it had undertaken to. It also did not ask for an extension of time to do so.

[22] On the 18th November 1997 the respondent gave notice of consultation in terms of sec 189 of the Act and invited various unions including the union to a meeting scheduled for the 24th November 1997. There was an annexure to the notice. The annexure to the notice stated, among other things, that **“the crux of the [consultants’] recommendations, comments and proposals”** revealed that **“the respondent will have to provide for the discontinuation of service in various ways of some of its employees on the basis of the University’s operational requirements, should attempts to avoid such staff reduction by the consultation as set out in Section 189 of the Labour Relations Act not succeed.”**

[23] In the second last paragraph of the annexure to the notice it was stated that as a point of departure the management of the respondent would attempt to enter into discussions with all parties involved regarding, among others, measures to try and avoid dismissals, to minimise the number of persons who might be considered for dismissal and to mitigate the adverse effects arising from dismissal as well as information that may be required.

[24] On the 24th November 1997 the respondent held a meeting with various unions and employee organisations as well as staff who

were not members of any unions. The union had observers at that meeting but arranged to have a separate official meeting with the respondent on the 25th November 1997. The respondent and the union did, indeed, hold a meeting on the 25th November 1997. The management stated at the meeting that since receiving responses to the consultants' reports from a number of stakeholders, it had become evident to it that it would have to face realities and contemplate the dismissal of members of staff on account of operational requirements. The management stated that at that stage there was no indication of the number of employees, departments or units that could be affected by such a process. It was stated that the purpose of the meeting was to inform the union of the situation. The management set out certain measures that it thought could help to avoid dismissals or minimise the number of dismissals.

- [25] The union's Mr Jaftha expressed the hope that the management would bear the interests of the staff at heart and not treat the consultation in terms of sec 189 of the Act as a mere formality. According to the minutes he further stated that there were indications that **“this was a mere formality or so-called smoke screen for decisions that had already been made.”** The minutes of the meeting reflect that Mr Jaftha **“referred to a UP Bulletin of the 7th November 1997 in which it was indicated that a support centre was established prior to the commencement of the process.”** Mr Jaftha said that from this it appeared that the decision to dismiss staff had already been made by the management. He

also queried why, if the first phase of the Support Services Development Project had not yet been completed and all comments received, notice was given of staff reduction in terms of section 189. The minutes indicate that Mr Jaftha pointed out the distinction between restructuring and a decision to retrench and that the parties involved had agreed to a process of restructuring.

[26] Mr Jaftha also stated that the union doubted **“the sincerity, honesty and commitment of Management”** and was not confident that the ideas and proposals it would make would be meaningfully addressed. He said that for this reason the union’s intention was to **“tie the matter up by all possible means in terms of the relevant legislation.”** The union said that it had been caught off-guard as it had thought that the meeting was still to deal with the first phase of the project. Mr Jaftha stated that the union had thought that the notice of consultation in terms of sec 189 of the Act would only be given after the completion of the first phase. Mr Jaftha proposed on behalf of the union the addition of another item on the agenda of the meeting. The item is reflected in the minutes as **“mitigating the timing of dismissals.”** Mr Jaftha said that the union would argue that that was not the time to dismiss employees in the light of the approaching festive season.

[27] Mr Jaftha also requested that **“section 197 of the Labour Relations Act, regarding the transfer of contracts, also be included in the legal framework.”** The management said it was agreeable to this as it considered section 197 as part of the law of

the country to which the respondent was subject. The union reserved its comment regarding vacancies and fixed-term contracts of employment as potential measures that could be used to avoid dismissals. The union expressed approval of voluntary retirement across the board. The parties then agreed to discuss voluntary retirement and the structure of voluntary retirement packages.

[28] Mr Jaftha also proposed the addition of another item on the agenda, namely, voluntary retrenchment. Prof de Beer requested the union to provide a detailed proposal in this regard. Mr Jaftha undertook to supply such a proposal. The parties agreed to hold another meeting on the on the 8th December 1997. It was stated that such a meeting would focus on the union's proposal on voluntary retrenchments, severance packages for voluntary retrenchments and management's proposals regarding voluntary retirement, taking into account basic conditions of employment. Mr Jaftha expressed the hope that the parties would reach an agreement. Towards the end of the meeting Mr Jaftha expressed the view that the management's announcement of the commencement of consultation in terms of sec 189 of the Act could be considered premature.

[29] On the 8th December 1997 the union and the respondent held another meeting. They discussed voluntary retirement and voluntary retrenchment. They agreed on some aspects but did not on others. The respondent requested the union to submit any further proposals or alternatives with regard to the restructuring of

voluntary retrenchment and retrenchment packages.

[30] By a letter dated 7 January 1998 the respondent advised the union that the latter had not as yet submitted its reaction to the various reports submitted to the management by the consultants. It gave the union a further opportunity until 9 January 1998 to submit its reaction to the reports if it wished to. In the second last paragraph of that letter the respondent informed the union that, once all interest groups had submitted their reactions to the reports and these had been studied, a meeting would be held with all parties involved in the project for discussion of the recommendations, reactions and **“various management perspectives”**. It was stated that such a meeting was scheduled for the 21st January 1998 but that such meeting would not replace **“the statutory process which the University is obliged to follow”**.

[31] The union was invited by the respondent to the meeting of the 21st January 1998 to discuss the various reports, reactions and comments received. This was to be a day-long meeting scheduled to start at 08H00 and to go on until 16H00. It was to be attended by various stakeholders. The meeting was to provide an opportunity for discussions aimed at conducting an open debate on campus on such important matters which it was hoped would contribute to informed decision-making.

[32] On the 21st January 1998 a meeting took place between the

respondent's management and various stakeholders to discuss and debate the various reports compiled by the consultants and inputs thereon from various interest groups. The minutes of that meeting suggest that issues were discussed very thoroughly and all stakeholders had an opportunity to say whatever they wished to say.

[33] There were three unions in the university which had members who were affected by these processes. Apart from the union, the others were SAWU and UPWO. These three unions established a structure which they called the Combined Labour Forum (**“the CLF”**). In a letter dated 12 February 1998 to the respondent's Rector and Vice-Chancellor, the Combined Labour Forum advised the respondent that the three unions had established the Combined Labour Forum because the respondent was reluctant to comply with **“fair labour practice in relation to the proposed retrenchments”**.

[34] The Combined Labour Forum also pointed out in the letter that the sec 189 of the Act consultations had only commenced in December 1997 because, prior to that, the management had insisted that it had not taken any decisions to embark upon a retrenchment process even though the trade unions had already found evidence that the management and the Board of the respondent had decided on retrenchments as a *fait accompli*. In the letter the CLF accused the respondent of trying to create the impression that it was consulting **“whereas it is clear that the University has already accepted**

retrenchments as a *fait accompli*". It also alleged that the respondent had failed to reach consensus on appropriate measures as required by sec 189(2)(a) of the Act "**since management has throughout concentrated only on retirement and/or voluntary retrenchment to the detriment of other alternative measures as required in sec 189(2)(a).**" It further accused the respondent of failing to comply with sec 189(3) or (4) of the Act and to justify the need for retrenchments.

[35] The CLF then called upon the respondent "**to immediately rectify the above by,**

Consulting with the Combined Labour Forum in order to attempt to reach consensus on all aspects required by sec 189(2)(a);

Consulting with the Combined Labour Forum in an attempt to convince the Forum that substantively the University has no other alternative but to embark on a retrenchment exercise;

Complying in full with sec 189(4) should it after consultation be found that there are no other alternatives but to embark on a retrenchment exercise." The CLF also requested certain information. From this, it seems that the CLF was saying that, if the respondent did the things that it was being called upon to do, it would have rectified the things that the CLF accused it of having done wrong.

[36] Under cover of a letter dated 16 February 1998 the Rector and Vice-Chancellor of the respondent sent to the CLF "**the**

management's proposals in respect of the Support Services Development Project and in respect of voluntary retrenchment packages" for its perusal and comment. In that letter the Rector said that the management's proposals dealt with, inter alia,

- (a) reasons for contemplated dismissals;
 - (b) measures to avoid contemplated dismissals;
 - (c) measures to minimize the number of contemplated dismissals;
 - (d) measures mitigating the adverse effects of contemplated dismissals;
 - (e) the timing when voluntary packages were likely to take effect, and;
 - (f) the contents of the proposed packages.
- The proposals included comprehensive outsourcing of the functions of Campus Control, Technical Services, Cleaning Services (university residences) and other building and grounds services. Services such as Student Affairs, Marketing Services, the Sports Bureau and Bureau for Cultural Affairs were to be restructured fundamentally. That message was contained in the UP Bulletin of 25 February 1998.

[37] On the 2nd March 1998 another meeting was held between the respondent's management and the CLF. Prof de Beer indicated at that meeting that he would disclose in writing the information that the CLF had previously requested. However, he emphasised that some of the information that the CLF had requested had already been disclosed. He also indicated that he would like to reach an agreement with the CLF on a time frame for the CLF to study the

information provided in accordance with sec 189(3) of the Act, for the opportunity for the CLF to propose alternatives as part of the consultation process in terms of sec 189(5) and for the management to consider and respond to such proposal made by the CLF in terms of sec 189(6).

[38] On the 20th March 1998 another meeting was held between the management and the CLF as part of the consultation process. Mr Jaftha stated at this meeting that the sec 189 consultation process had been marred by distrust but said that the letter from the union to the respondent of the 16th March 1998 and the respondent's letter of the 17th March 1998 were accepted **“as a renewed commitment to bona fide consultation.”** A member of the CLF delegation enquired from Prof de Beer whether the management would be prepared to retain and fund the support services internally if efficiency levels were increased and effectiveness was upgraded to the required levels. He said that the staff had the impression that the management did not want to retain the non-core business. Prof de Beer replied by saying that he would like to consult with the Rector before he could give a reply to that question.

[39] Prof de Beer was also asked to what extent the respondent would be prepared to develop and promote entrepreneurial skills within the affected departments. Prof de Beer's reply was that the respondent would provide assistance in this regard wherever possible in order for such skills to be deployed on campus at the

required levels of efficiency. He added that the respondent would closely consider all proposals. After a caucus, Prof de Beer indicated that the respondent did not in principle oppose the rendering of non-core services by members of staff of the respondent but that ultimately the multi-dimensional matter of efficiency would need to be addressed. However, he made it clear that the management's preferred position was to outsource the services. He said that only if the required levels of efficiency could be obtained, taking into account all dimensions in this regard, would the respondent consider not to opt for the preferred position.

[40] At that meeting it was decided that the CLF would submit its **“informed, constructive counter proposals”** in writing on 20 April 1998 and the management would submit its response thereto to the CLF on 23 April 1998. It was also agreed that the 25th April 1998 would be the deadline for the finalisation of voluntary packages. The second week of May 1998 was given as the deadline for applications for voluntary packages. The 30th June 1998 was given as the deadline for the termination of services of the affected employees. It was also agreed that the CLF's counter-proposals and the management's reaction thereto would be discussed at a meeting scheduled for 23 April 1998. Another meeting was to be held on 1 April 1998 to have further discussions on the structuring of voluntary packages.

[41] On the 1st April 1998 the management and CLF held a meeting to

discuss the structuring of voluntary packages. As no finality was reached, it was agreed to have a further meeting on the 9th April 1998. It is not clear whether the meeting scheduled for the 9th April did take place. However, a meeting was held on the 23rd April 1998 between the management and the CLF. At this meeting Mr Lehone, representing the union, indicated that the union's proposals on alternatives would be submitted the following day. On the 24th April 1998 the union declared a dispute **“over privatisation that took place at the Technical Service Fire Extinguisher Section without proper consultation”** and said that, because of this, its proposal on alternatives would be delayed until that dispute was settled.

- [42] On the 24th April 1998 the management and one of the unions, UPWO, concluded an agreement pursuant to the consultation process in terms of sec 189 of the Act. In due course the management reached an agreement with the remaining two members of the CLF, namely the union and SAWU on voluntary severance packages. A further meeting was held on the 28th May 1998 between the management and the CLF. Mr Jaftha did not attend that meeting but Mr Mabizela attended it in his stead. There were other representatives of the union as well. However, Mr Mabizela said that, although they would participate fully in the discussions, they would not commit the union until they had consulted with Mr Jaftha. It was agreed at this meeting that all outstanding issues in terms of sec 189(2) of the Act would be

discussed. In particular, it was agreed that severance pay, selection criteria, support for affected staff or measures to mitigate effects on staff and means to minimise the number of dismissals would be discussed.

[43] On the 29th May 1998 the respondent addressed a letter to the union in which it responded to all the proposals and requests that had been made by the CLF at the meeting of the 28th May 1998. The management also indicated the decisions that the management had taken in regard to such proposals and requests. In the UP Bulletin of the 1st June 1998 it was written among other things that:

- it had been agreed that in cases where services would be outsourced, the unions would be given the opportunity to give input in regard to the compilation of tender documents; in this regard trade unions would also take part in the process where tenders would be evaluated although the final decision to award or not to award a tender would rest with the management.
- staff would be able to submit tenders for services that the respondent would be outsourcing; in this regard it was written that the respondent had undertaken to play a facilitating role through the Transitional and Development Centre “**LOOS**” to support staff in the preparation of tender documents and to this end a limited budget had been made available.

[44] For all intents and purposes this marked the end of the consultation process before the letters of dismissal of the second and further appellants were issued. Accordingly, as stated earlier, in due course the respondent issued letters of dismissal in respect of some employees with effect from the 30th June and in respect of others with effect from the 31st July 1998. Some of the second and further appellants fall into the group dismissed with effect from the 30th June whereas others fall into the group dismissed with effect from the 31st July 1998. A dispute then arose about whether such dismissal was fair and, as stated earlier, the dispute was referred to the Labour Court for adjudication.

Proceedings in the Labour Court

[45] As already stated above when the Labour Court adjudicated the dispute about the fairness or otherwise of the dismissal of the second and further appellants, it found that the dismissals were fair both in terms of the reason for the dismissal as well as in terms of the procedure that was followed by the respondent. It, accordingly, dismissed the appellants' claim.

The appeal

[46] The appellant's Counsel contended that the dismissal of the second and further appellants was procedurally unfair. In support of this contention he presented argument at two levels. Both levels were directed at showing that the union was faced with a fait accompli by the time that the consultation in terms of sec 189 of the Act commenced and that such state of affairs rendered the dismissal procedurally unfair. Of course, Counsel for the respondent disputed the correctness of this contention and submitted that the dismissal of the second and further appellants in this matter was procedurally fair.

The first level argument.

[47] With regard to the first level argument, Counsel for the appellants submitted that the respondent had a predisposition or an a priori commitment towards outsourcing and that its attitude was that outsourcing was the way to go unless the union could convince it otherwise. In this regard Counsel for the appellants drew our attention to a number of areas in the record, including minutes of meetings of the senior management and Strategic Partners which he submitted were indicative of such a predisposition or a priori commitment. I do not propose to refer to all the areas in the record that Counsel relied upon. However, I have had due regard to those areas of the record that Counsel referred us to in this regard.

[48] I do not think that, when regard is had to all of the evidence in this matter, it is justified to say that the respondent had an a priori commitment to outsourcing. There can be no doubt that from a certain point in the entire process which began in February 1997 to the end of May 1998, the respondent can be said to have shown an inclination towards outsourcing.

[49] In considering this matter it must be borne in mind that the appellants did not call any witnesses to testify in support of their case. In particular within the context of the narrow challenge to the procedural fairness of the dismissal in this appeal, it is significant to bear in mind that the union officials were not called to testify about the consultation process and the meetings between the parties nor were they called to contradict the evidence of the witnesses called by the respondent about the procedural fairness of the dismissal.

[50] In my view the respondent's management's inclination towards outsourcing

did not begin to exist before the commencement of the sec 189 consultation process. However, even if it existed before, that would not render the sec 189 consultation or the resultant dismissal procedurally unfair. This is because such an inclination or pre-disposition is not in conflict with sec 189 of the Act. I deal below with the provisions of sec 189 in so far as they relate to this point.

- [51] Section 189 of the Act does envisage that the employer may come to the first consultation table with a proposal that can be said to be not only his preferred proposal but, indeed, one that he strongly views as the solution to the problem. The obligation placed upon the employer to consult only arises in terms of sec 189(1) of the Act when a situation has been reached where he “**contemplates dismissing one or more employees**” for operational requirements. In other words, before he reaches such stage, he is under no obligation to consult and is within his rights to try and deal with the problem on his own with such assistance and advice as he may in his discretion feel he needs which need not be that of the consulting parties envisaged in sec 189(1). This is because the employer is entitled to deal with the problems of his business without consulting the parties envisaged in sec 189(1) as long as he is not contemplating the dismissal of any employees for operational requirements. It would be natural for him to form a view or even a strong view about one or other possible solutions to the problem out of all those that he might have applied his mind to while trying to solve the problem before contemplating the dismissal. Section 189(1)(b),(c),(3)(c) and (g) refer to “**employees likely to be affected.**” The frequent reference in those provisions to “**employees likely to be affected**” is an indication that it is

permissible for the employer to have already grappled with the problem to the extent that he has in mind “**employees likely to be affected by the proposed dismissal.**”

[52] Section 189(3) requires the employer to disclose the reason for the proposed dismissals, the alternatives that he considered before proposing the dismissals and the reasons for rejecting each one of those alternatives, the number of employees likely to be affected and the categories in which they are employed, the time when or the period during which the dismissals are likely to take effect. The content of what sec 189(3) requires the employer to disclose suggests quite clearly that the employer is allowed to initiate the consultation process after he has done a lot of work to try and resolve the problem on his own. He is permitted to have done so much work that :-

- (a) he is in a position to propose dismissal because in his view there are no other acceptable alternatives that can address the problem satisfactorily without dismissals.
- (b) he has reasons for proposing dismissals as opposed to other alternatives.
- (c) before proposing the dismissal, he has considered other alternatives and has rejected

them.

(d) he has reasons for rejecting other alternatives and is ready to articulate them.

Section 189 contemplates that, when the employer initiates the sec 189 consultation process, he contemplates the dismissal of one or more of his employees for operational requirements; that is why already in paragraph (b), (c) and (d) of sec 189(1) there are references to “**proposed dismissals**”. So what sec 189(1) contemplates is that the employer is already proposing a dismissal or dismissals when he initiates the sec 189 consultation process.

- [53] The fact that sec 189(3)(b) contemplates that, when the employer initiates the consultation process in terms of sec 189(1) of the Act, he has already considered alternatives to dismissals which he has rejected for certain reasons and requires him to disclose the reasons why he rejected such alternatives does not mean that such alternatives cannot be revisited in the consultation process. Of course, they can be because the other consulting party or parties may view them as potentially viable solutions. Obviously, the employer may have strong views on such alternatives because he will have had an opportunity to consider them already and will have already rejected them before. For the employer to pretend as if he has no views on such alternatives would be dishonest because he will already have formed some or other view on them. However, what will be required is that the employer should consider honestly and properly whatever the other consulting party may have to say

on such alternatives and change its mind or view on them if the other consulting party comes up with sufficiently persuasive arguments for the employer to change. Before considering such alternatives, the employer may have found it necessary to launch some or other research or investigation into the viability of such alternatives and may, therefore, seem to have strong views on them because it has considered them properly and thoroughly.

[54] Where an employer has had an opportunity before the sec 189 consultation process to consider certain possible alternatives or suggestions or ideas and has rejected it or them prior to such consultation process and one or other consulting party raises such proposal or idea or suggestion during the sec 189 consultation process, the employer needs to be alive to the fact that the other consulting party has not had or may not have had a similar opportunity to consider such alternative, idea, suggestion or proposal. The employer must not be unduly impatient with the other party but must listen carefully and consider the arguments or suggestions properly and, where necessary, give the other party more time to also look into the matter in the same way that he has already done.

[55] In the light of the above I conclude that there is nothing wrong with an employer coming to the consultation table with a predisposition towards a particular method of solving the problem which has given rise to the contemplation of dismissal of employees for operational requirements. What is critical is that the employer

should nevertheless be open to change its mind if persuasive argument is presented to it that that method is wrong or is not the best or that there is or may be another one that can address the problem either equally well or even in a better way. He should engage in a joint problem-solving exercise with the other consulting party or parties.

[56] The Court a quo gave an extensive exposition of the appellants' first level argument from paragraph 3.1 to par 3.33 of the judgment. Whereas the appellants complained in their heads of argument that the Judge in the Court a quo did not accurately record their second level argument, no such complaint has been expressed in regard to the first level argument. I do not propose to record the details of the argument here. I have considered the reasons given by the Court a quo for its rejection of the appellants' first level argument and I am unable to fault it. Indeed, I agree with those reasons. It is not necessary to repeat them herein.

[57] It seems that at some stage the union did propose various alternatives to the respondent's management because on the 22nd May 1998 Prof de Beer wrote to Mrs Molefe a lengthy letter which represented the respondent's response to such proposals. I do not propose to deal with the contents of that letter. It seems sufficient to state that in the letter the respondent responded to the argument or proposal about internal restructuring, the proposal or view that management positions alone should be outsourced, the union's reliance on sec 197 of the Act and the union's redeployment

proposal. The union cannot complain that its views or proposals were not considered or that where they were rejected, no reasons were given for their rejection.

The appellants' second level argument

[58] The appellants' argument on the second level is that the investigation of the problems and possible solutions which was embarked upon as the Support Services Development Project prior to the consultation in terms of sec 189 of the Act was work that should have been done as part of the sec 189 consultations between the respondent and the unions. The appellants submit that that was a very important process and that by the time the sec 189 consultation process began in November 1997, the result was a formality. The appellants contend that the respondent must have contemplated the dismissals much earlier than November 1997 and that, therefore, the sec 189 consultation process should have begun much earlier. Indeed, as early as February 1997, so runs the argument.

[59] There are at least two answers to the appellants' second level argument. The first one is that they cannot be heard to raise this complaint because the union was invited to take part in the process that occurred from February to November 1997 and in fact did take part in that process. The union representatives who took part in that process were free to raise any issue that they wished to raise. In fact at the first two meetings which Mr Marais held with the union, he told the union that he wanted to get the union's views on the process and on how the process should be conducted. Indeed, the effect of what Mr Marais said at that meeting to the union was: whatever you wish to raise, please raise and let us talk about it! It seems to me that this approach was in line with the consultants' mandate from the senior management of the respondent which was

that it was a condition of their appointment that they had to ensure that the unions were part of that process. The union has not suggested that there is any proposal or view that it advanced or made which the respondent or the consultants refused to take into account.

[60] The fact that the union participated in the process that took place between February and November 1997 and that it was free to suggest or to propose whatever it wanted to suggest or propose means that, since the union did not suggest at the time that the process be conducted any differently, it cannot now be heard to complain that the process should have been dealt with differently.

[61] Secondly, the union cannot be heard to say that the process which occurred from February to November 1997 was not consultation. I say this fully aware that the respondent did say that the sec 189 consultation process only commenced in November 1997. However, the fact of the matter is that, by any standards and objectively speaking, that process cannot be said to have been anything less than consultation. Indeed, nothing can be pointed out in that process which rendered it less than a consultation. In my view it was very much a joint-problem solving exercise in the sense that all stakeholders took part to investigate what the problem was and to look into what possible solutions existed to address the problem. It is true that to a very large extent it was driven by the consultants. But the result of that work was given to the senior management. And, before the senior management could

take a decision on the recommendations emanating from that process, they gave all the stakeholders, including the union, copies of the relevant reports and asked them to comment thereon. Various stakeholders submitted their comments and the union failed to submit its comments over a long period even when it had been granted extensions of time to do so. In fact during the consultation process that took place after November 1997 the union, through Mr Jaftha, accepted the respondent's commitment to a bona fide consultation process. Furthermore, there was a full and proper consultation from November 1997 to the end of May 1998 during which the union accepted the respondent's commitment to bona fide consultations.

[62] In any event, if the union felt that too much work had been done during the pre-November 1997 process which should have been done during the post-November consultation process, it was always open to it to ask for more time to either carefully examine such work or to undertake its own investigation to contradict the result of the pre-November investigation. It did not do so and cannot be heard to complain.

[63] In the light of all of the above I am of the view that the appellants' second level argument also falls to be rejected. With regard to costs, the matter was argued on the basis that costs should follow the result. I propose to make an order of costs on that basis.

[64] Before I conclude this judgment I need to point out that, after the

delivery of the judgment of this Court in **SA Municipal Workers Union & others Rand Airport Management Co (Pty)Ltd and others. (2005) 26 ILJ 67 (LAC)**, the parties in this matter were asked to deliver supplementary heads of argument on what the effect of that judgment was on this matter and whether sec 197 of the Act applied. Both parties indicated that they did not rely upon sec 197 and requested that this matter be decided on the basis on which the trial had been conducted, namely, as a retrenchment matter. I have, accordingly, dealt with the matter on the basis requested by both parties.

[65] In the result the appeal is dismissed with costs.

ZONDO JP

I agree.

Mogoeng JA

I agree.

Jafta AJA

Appearances:

For the appellant : Adv K Tip SC, (with Adv K Pillay)

Instructed by : Cheadle Thompson & Haysom Inc

For the respondent : Adv H Woudstra SC

Instructed by : Hlatswayo, Du Plessis Van der Merwe

Date of Judgment : 26 October 2005