



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 91/2014

In the matter between:

WYNAND WILHELMUS HAVEMANN

Appellant

and

SECEQUIP (PTY) LTD

Respondent

Heard: 16 August 2016

Delivered: 22 November 2016

Summary: Dismissal of appellant on grounds of operational requirements following the transfer of business as a going concern found not automatically unfair under s 187(1)(g) by the Labour Court, with alternative claims of procedural and substantive unfairness dismissed with costs. On appeal held that dismissal not automatically unfair but with alternatives to retrenchment not appropriately considered, a process of meaningful joint consensus-seeking had not occurred and dismissal on grounds of operational requirements was substantively unfair. Compensation of six months ordered with costs.

Coram: Waglay JP, Savage et Phatshoane AJJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This is an appeal, with the leave of this Court, against the judgment of the Labour Court (Maenetje AJ) in which the appellant's claim that his dismissal was automatically unfair and his alternative claim that his dismissal on grounds of operational requirements was both procedurally and substantively unfair were dismissed with costs.
- [2] The appellant, Mr Wynand Wilhelmus Havemann, was employed by Texecom SA as its Regional Manager, Gauteng from 1 May 2004. On 1 April 2010 the business of Texecom SA was transferred to Secequip Supplies (Pty) Ltd as a going concern in terms of s197 of the Labour Relations Act (LRA). The appellant was transferred into the position of Group Operations Director and served as a member of the Secequip Board of Directors and Executive Committee. On 1 October 2011, the business of Secequip Supplies was transferred as a going concern to Greater Gauteng Alarm Networks (Pty) Ltd, trading as Secequip Supplies (Pty) Ltd (the respondent), a wholly owned subsidiary of Amalgamated Electronic Corporation Ltd (Amecor). The appellant's contract of employment was transferred under s 197 to the respondent into the same role but re-designated as Operations Manager.
- [3] During a meeting of shareholders on 25 November 2011, the appellant was requested by the respondent's managing director, Mr John Rogers, to grant Mr Rogers his proxy to vote on the acquisition of shares by the respondent from Mr Rogers and Mr Brian Anderson. The appellant refused to provide the proxy and in due course voted against the resolution.
- [4] At a management meeting on 23 January 2012 a new company structure proposed by Mr Rogers was adopted. In the new structure, which was to be implemented by 1 February 2012, the appellant retained the position of Operations Manager but Johannesburg-based staff no longer reported to him.
- [5] On 30 January 2012 the respondent gave all employees notice of its intention to rationalise operations following a 50% drop in profit over a six-month period. In an email on the same day Mr Rogers asked to meet the appellant on 1 February 2012 so as to define his role going forward.

- [6] On 31 January 2012 in a letter headed "Restructure" the appellant was informed that his reporting structure would change on 1 February 2012 and that he would report to Mr Rogers. A letter also dated 31 January 2012 and headed "Notice of Consultation" was received by the appellant in which he was informed that his position may be affected by the restructure and that the respondent sought to consult with him on 1 February 2012 so as to avoid the need to restructure and/or retrench employees.
- [7] Three meetings were held between Mr Rogers and the appellant. At the first meeting on 1 February 2012 Mr Rogers informed the appellant that Amecor had not previously employed and did not need an Operations Manager given that Mr Keith Vieira was employed as the Group Operations Director of Amecor. Mr Rogers indicated that the appellant was not being retrenched but that his package needed to be restructured from R60 000 per month to a lower basic salary of R15 000 plus commission. The appellant enquired into the selection criteria used to identify employees for salary reduction and was advised that top earners, being the appellant, Mr Chris Bell and Mr Ahmed Bhabha, had been identified together with three other employees, including contract staff.
- [8] At the second meeting with Mr Rogers on 24 February 2012 the salary restructure was again discussed, with Mr Rogers indicating that the salaries of employees earning more than R15 000 per month needed restructuring due to the company's poor sales performance. The appellant proposed as an alternative that all employees take a 10% salary cut to prevent retrenchments, indicating that he was only prepared to participate in the proposed salary reduction scheme if all employees were involved. Mr Rogers undertook to work on some numbers which he was to present to the appellant on 27 February 2012.
- [9] At the third meeting on 27 February 2012 the appellant was told that his 10% salary reduction proposal was not accepted by all employees earning more than R30 000 per month, that there was no alternative but to inform him that his position was redundant and that the only alternative position available was

a Sales Executive CCTV position based in Pretoria (CCTV position) with a monthly salary of R12 700 plus commission.

[10] On 1 March 2012, a written offer was left on the appellant's desk in which he was given until 2 March 2012 to inform the respondent if he intended to accept the CCTV position, failing which he would be given one month's notice of termination of his services. The appellant, who lacked a sales background and lived in Meyerton which is a distance from Pretoria, indicated that he would not accept the offer. He was not required to attend at work from 5 March 2012 until the date of termination of his employment on 31 March 2012. There is no dispute that a junior debtor's clerk was the only other employee retrenched at the time.

[11] On 17 April 2012 the appellant referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation and thereafter to the Labour Court for adjudication. He claimed that his dismissal was automatically unfair in that in terms of s 187(1)(g) of the LRA it related to "a transfer, or a reason related to a transfer, contemplated in section 197 of 197A". In the alternative, the appellant claimed that his dismissal arose as a result of an ulterior purpose and was *mala fide*. As a further alternative, the appellant alleged that his dismissal on grounds of operational requirements was substantively unfair in that it was for reasons unrelated to the respondent's operational requirements, alternatively without valid, *bona fide* or fair reason. The appellant also took issue with the procedural fairness of his dismissal on the basis that the provisions of s189(3) of the LRA had not been complied with, the respondent had not consulted with him in the *bona fide* manner required and there had not been a meaningful joint consensus-seeking process engaged in, alternatively that the selection criteria used had not been agreed between the parties and were not fair and objective.

Judgment of the Labour Court

[12] Maenetje AJ found that the appellant had failed to prove that his dismissal was automatically unfair in that the reason for his dismissal was not related to

a transfer in terms of s187(1)(g). By virtue of the operation of s197, the Court found that the appellant's contract of employment was automatically transferred to the respondent and that it was only when it became evident that cost cutting was required to improve profitability that retrenchment was contemplated.

- [13] Turning to the claim that the appellant had been victimised for refusing to provide a proxy to Mr Rogers related to the proposed acquisition of shares from Mr Anderson and Mr Rogers, the Court found that no victimisation had taken place since two other employees remained employed despite them also not supporting Mr Rogers on the issue.
- [14] Concerning the dismissal of the appellant on grounds of operational requirements, the Court found that his retrenchment was substantively fair on the basis of the evidence of Mr Bell and Mr Rogers that the increased costs of doing business and drop in profits required cost-cutting measures to be adopted. While the appellant rejected the restructured salary package offered to him, Mr Bell and Mr Bhabha who were in a similar position to him had accepted restructured packages as part of such cost-cutting measures.
- [15] The Court found that the appellant's dismissal was procedurally fair with adequate consultation for purposes of section 189 having taken place. The Court found that "(t)he counterproposal of 10% salary reduction could only imply a rejection by Havemann of the option of reducing his basic salary to R15 000.00, with the rest of his income to be derived from commission." When the 10% salary reduction option was rejected, the appellant was informed that his position would be redundant and that his retrenchment would follow unless he was willing to accept the Pretoria CCTV position available. This alternative was found not to have been unreasonable when in his operations role the appellant had worked with sales people and the respondent had offered assistance to the appellant in the position given his lack of direct sales experience. Although he would have earned less in the sales position, the Court took the view that dismissal would have been avoided in circumstances in which the appellant had presented no evidence of an acceptable alternative available to him.

[16] The appellant's claim was consequently dismissed with costs.

Issues in the appeal

[17] The appeal against the judgment of the Labour Court turns on whether that Court erred –

17.1 in finding that there was no merit in the appellant's claim that his dismissal had been automatically unfair in terms of s187(1)(g) of the LRA;

17.2 in finding, in respect of the appellant's alternative claim, that his dismissal had not been based on ulterior motives under the guise of operational requirements;

17.3 in finding, in respect of his further alternative claim, that his dismissal on grounds of operational requirements had been both procedurally and substantively fair; and

17.4 in imposing costs against the appellant when he had acted neither vexatiously or frivolously in prosecuting his claim.

Discussion

Automatically unfair dismissal

[18] A dismissal is automatically unfair if the reason for the dismissal is, in terms of s187(1)(g), a transfer or a reason related to a transfer as contemplated in s197 or 197A. The applicant is required in such a claim to prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of s197. To do so requires that the applicant adduces some credible evidence that shows that the dismissal is causally connected to the

transfer. This is an objective enquiry to be conducted with reference to all of the relevant facts and circumstances.¹

[19] The evidence before the Labour Court was that the respondent embarked upon a restructuring and cost-cutting exercise in order to improve its profitability and reduce its costs following a drop in profits over the previous six-month period. This six-month period spanned both the period before and after transfer of the business, with the difficult trading conditions that existed before transfer continuing to exist after transfer. While the proximity of the dismissal to the date of the transfer is a relevant factor, it is not determinative. Having regard to the evidence put up, the Labour Court cannot be faulted for its conclusion that the appellant's dismissal was not causally connected to the transfer. The evidence showed that the true reason for the appellant's dismissal was the respondent's operational requirements. There was no indication that the dismissal would not have taken place but for the transfer; nor that the transfer was the main, dominant, proximate or most likely cause of the dismissal.

[20] It follows that the Labour Court found correctly that the dismissal of the appellant was not automatically unfair under the provisions of s187(1)(g).

Dismissal on account of ulterior motive or mala fide reasons

[21] In his statement of case, the appellant claimed in the alternative that his -

'...dismissal was substantively unfair in that the Respondent terminated the Applicant's employment on account of an ulterior motive or ulterior motives or for mala fide reasons under the guise of a dismissal for operational requirements of the Respondent'

[22] The ulterior motive relied upon related to the appellant's refusal to provide Mr Rogers with a proxy in relation to proposed resolutions concerning the acquisition of shares from Mr Brian Anderson and Mr Rogers. While the appellant testified that he "felt victimised" and was "walloped" and "nailed" by

¹ *SA Chemical Workers Union and Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at 1726E; *Kroukam v SA Airlink (Pty) Limited* (2005) 266 ILJ 2153 (LAC) at paras 102-103 and 26 – 28; *Van der Velde v Business & Design Software (Pty) Ltd and another* [2006] 10 BLLR 1004 (LC).

Mr Rogers, no facts were put up by him to substantiate his allegation of victimisation.

[23] The Labour Court's finding cannot be faulted that the evidence before the Court did not show that the appellant was victimised as a result of his conduct in relation to the proposed resolutions or that his dismissal was motivated in this regard by ulterior purpose or *mala fides*. It was of direct relevance that two other employees, Mr Shaun Kaplan and Mr Vaughn Tempelhoff, who had taken a similar stance to the appellant did not share a feeling of victimisation and were not dismissed with Mr Kaplan in fact promoted. No evidence placed before the Labour Court indicated that any other ulterior purpose or *mala fides* existed or that an occupational impediment had been suffered by the appellant as a result.

[24] It follows that the Labour Court did not err in rejecting the appellant's alternative claim that his dismissal was motivated by ulterior motive or *mala fide* conduct under the guise of a dismissal on grounds of operational requirements.

Dismissal on grounds of operational requirements

[25] Turning to the fairness of the appellant's dismissal on grounds of operational requirements, the appellant's further alternative claim was that his dismissal was unfair in that "the Respondent had no valid and/or fair and/or bona fide reason to terminate [his] employment".

[26] Section 192(2) requires the employer to prove, on a balance of probabilities, the fairness of its decision to dismiss. S188 read with s189 recognises the employer's right to dismiss on grounds of its operational requirements where there is a fair reason for the dismissal and the dismissal is undertaken in accordance with a fair procedure. This requires that an employer prove on a balance of probabilities the cause or reason for the dismissal; the defined operational requirements that the dismissal was based on; the facts upon

which a finding that the dismissal was substantively fair can be made; and that a fair procedure in accordance with s 189 had been complied with.²

- [27] The term “operational requirements” is defined in s 213 to mean “requirements based on the economic, technological, structural or similar needs of an employer”. Item 1 of the Code of Good Practice makes it clear that “(a) general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise”.³
- [28] A fair reason is one that is *bona fide* and rationally justified,⁴ informed by a proper and valid commercial or business rationale.⁵ The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair.⁶
- [29] The respondent’s evidence was that its profits had declined over the previous six-month period, spanning both before and after the transfer of the business which required cost-cutting measures to be implemented in order to improve profitability. The appellant did not dispute or challenge this evidence and there was nothing before the Labour Court to suggest that the restructure and possible retrenchment process embarked upon was not based on a *bona fide* rational commercial and operational need to cut costs so as to improve profits. It follows that considered objectively on the evidence before the Court this decision was reasonable, *bona fide* and informed by a proper and valid commercial rationale.

² SACWU v Afrox Ltd [1999] 10 BLLR 1005 (LAC) at para 38.

³ Code of Good Practice on Dismissal Based on Operational Requirements (GenN 1517 in GG 20254 of 16 July 1999).

⁴ Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC).

⁵ CWIU and Others v Algorax (Pty) Ltd [2003] 11 BLLR 1081 (LAC); Kotze v Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ 129 (LAC) at para 36.

⁶ BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 (LAC) at para 19.

[30] Section 189(1) requires that the employer, when contemplating the dismissal of one or more employees for reasons based on the employer's operational requirements, consult the employees likely to be affected.⁷ S 189(2)⁸ requires a meaningful joint consensus-seeking process with the parties engaging constructively in an attempt to agree on appropriate measures *inter alia* to avoid and minimise dismissals; and identify the employees to be retrenched. This requirement has both a procedural and a substantive content. The proper approach of the Court is to ascertain whether the purpose of the section, being the occurrence of a joint consensus-seeking process, has been achieved.⁹

[31] Consultation must be genuine and may not be a sham with the purpose of seeking alternatives to dismissal being to avoid dismissal if reasonably possible.¹⁰ Doing so requires that alternatives put forward by consulting parties should be appropriately considered, with the employer obliged by s189(6) to respond to those alternatives to dismissal proposed by an employee or consulting party. In *SACWU v Afrox Ltd*,¹¹ it was stated that:

'If an employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it chose a particular course and not another. If an employee wishes to challenge that evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer's position, it will have a material effect on the final assessment of fairness . . . As assessment on

⁷ Section 189(1)(d).

⁸ "(2)... engage in a meaningful joint consensus-seeking process and attempt to reach consensus on

—
(a) appropriate measures-

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees".

⁹ *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) para 29.

¹⁰ *SA Clothing and Textile Workers Union and Others v Discreto A Division of Trump and Springbok Holdings* (1998) 19 ILJ 1451 (LAC) at para 8; *Supergroup Trading (Pty) Ltd v Janse van Rensburg* [2012] ZALAC 7 (25 April 2012) at para 20.

¹¹ [1999] 10 BLLR 1005 (LAC).

'moral' considerations not based on evidence led at the trial will be impermissible.'¹²

- [32] A key purpose behind consultation is the protection of employment, with security of employment being a core constitutional value protected through the LRA.¹³ In *Supergroup Trading (Pty) Ltd v Janse van Rensburg*¹⁴ this Court criticised the consultation undertaken by an employer as a "charade" and "purposeless insofar as it deprived the Respondent of a chance to save his post or avoid his being selected for retrenchment. His representations on that score were to be fruitless because restructuring was a *fait accompli*." It was emphasised that –

'...the purpose of consultation is to try and save a job or position. If this cannot be done the next aim is to avoid dismissal by placing the person, whose post has become redundant, elsewhere. And if avoidance is not possible consultation concerns the extent to which the consequences of the retrenchment can be mitigated.'¹⁵

- [33] In *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*,¹⁶ this Court distinguished between fairness in a general and specific sense in asking whether there was a fair reason for the dismissal of any employees and for specific employees in particular. While a retrenchment process may be legitimate insofar as there exists a *bona fide* commercial rationale to restructure, where alternatives to the dismissal of an employee exist these are to be considered in a meaningful fashion by the consulting parties. These are to be judged on their merits based on the evidence before the Court. Fairness dictates that the solution which preserves jobs is to be preferred over the one that does not.¹⁷ This is so in that it is unfair to choose retrenchment where another rational solution exists which can satisfactorily address the operational need to retrench.

¹² At para 43. See also *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC); *General Food Industries (Pty) Ltd v FAWU* [2004] 7 BLLR 667 (LAC).

¹³ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

¹⁴ [2012] ZALAC 7 at para 20.

¹⁵ [2012] ZALAC 7 at para 4.

¹⁶ (2006) 27 ILJ 292 (LAC) at para 55.

¹⁷ *Enterprise Foods (Pty) Ltd v Allen* [2004] 7 BLLR 659 (LAC) at para 17.

[34] The respondent gave written notice on 30 January 2012 to all employees of its intention to rationalise operations following management approval of a new organisational structure on 23 January 2012. On 31 January 2012 the appellant received a letter headed "Restructure" in which he was informed that:

'As per the restructure discussed at the Management Meeting on Monday, 23 January 2012, your reporting structure will change as of tomorrow, 1 February 2012, reporting to John Rogers...Our immediate challenge is to get sales and GP's back up to expected levels...'

[35] The second letter headed "Notice of Consultation" received by the appellant on 31 January 2012 informed him that his position may be affected by contemplated restructuring and/or retrenchment and that he was to be consulted in this regard. This letter constituted written notice inviting consultation as envisaged by s 189(3). It referred to the letter of 30 January 2012 and continued that –

'As mentioned the economic downturn and poor trading climate requires that we introduce changes in Secequip in order to improve the financial position of the company. It appears as though we may have to cut down on employee numbers and/or restructure.

Although no final decisions have been made yet you and the position you currently occupy may well be affected. We, however first wish to consult you with a view to either avoiding the need to restructure and/or retrench or alternatively minimizing the number of possible retrenchments, changing the timing thereof as well as mitigating the effect on those affected.

The following will be dealt with at the consultation:

- The reasons for the need to reduce costs by rationalization, restructure and/or retrenchment.
- Alternatives.
- Method of selection.
- Severance pay (where applicable).

- Proposed assistance to retrenchees (where applicable).
- Possibility of future re-employment (where applicable).
- Number of employees affected.
- Past retrenchments...'

[36] The letter assured in conclusion that "the meeting will be held in a spirit of joint problem-solving".

[37] During the ensuing consultations between Mr Rogers and the appellant on 1, 24 and 27 February 2012, three alternatives were discussed. The first was advanced by Mr Rogers who informed the appellant that his retrenchment was not contemplated but that "we just need to restructure your package to a lower basic and a higher commission". This option sought the appellant's consent to a salary reduction from R60 000 per month to R15 000 per month plus commission. (In due course it became apparent that two other employees, Mr Bell and Mr Bhabha, had agreed to a pay reduction although in respect of at least one this reduction was not implemented, while the other in due course resigned.) As an alternative to the first option, the appellant advanced a second option on 24 February 2012 that all employees accept a 10% salary reduction. The third option took the form of an offer made to the appellant of an alternative position in Pretoria, a distance from his Meyerton home, as Sales Executive CCTV earning R12 700 per month plus commission.

[38] Fairness requires that the alternatives to dismissal proposed in good faith by consulting parties are reasonable having regard to the employer's operational requirements.¹⁸ An employee is not required to accept a change to terms and conditions of employment simply because a change to employment terms and conditions is advanced as an alternative to dismissal.¹⁹ In the context of a meaningful joint consensus-seeking process, a change to terms and conditions proposed as an alternative to dismissal must be reasonable when

¹⁸ See *Entertainment Catering Commercial and Allied Workers Union of SA and Others v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 ILJ 1347 (LC) at para 28.

¹⁹ *Forecourt Express (Pty) Ltd v SATAWU* (2006) 27 ILJ 2537 (LAC) at paras 28 and 39.

judged on its merits based on the evidence before the Court. If it is not, the risk arises that the conclusion may be drawn that meaningful consensus has not been sought with appropriate alternatives to dismissal overlooked.

[39] While both Mr Bhabha and Mr Bell faced a salary reduction, the respondent provided scant rational basis for singling out three employees from a number of senior employees for such a dramatic change to their terms and conditions of employment or for the proposal that the appellant accept a dramatic 75% salary cut. Furthermore, with the profit constraints faced by the respondent the suggestion that the loss in salary could be made up by commission earned was unsubstantiated. The 75% salary reduction option was a dramatic change to terms of employment. Judged on its merits from the evidence before the Court *a quo* it was not shown to be a rational and *bona fide* alternative aimed at trying meaningfully to save the appellant's position, as opposed to one which sought to force his hand. This conclusion is bolstered by the respondent's attitude to the appellant's proposal of an across the board 10% salary reduction. The evidence showed that the respondent provided a bland rejection of the appellant's 10% proposal, without evidence that it had engaged meaningfully with this proposal as a reasonable alternative.

[40] The third option of the CCTV position, while the only vacant position on the respondent's infrastructure, required the appellant to accept an even greater reduction in salary with the hope that the remainder of his salary loss would be made up by commission from sales. This position too would have resulted in a very substantial change to the appellant's terms and conditions of employment. While it constituted an alternative to retrenchment, it was not a rational or reasonable one on the facts given that the post was substantially junior to his own and when regard is had to further considerations of practicality and expertise required for the position.²⁰

[41] While it is permissible to retrench in order to cut costs so as to improve profitability,²¹ or as a consequence of the reorganisation of a business,²² the

²⁰ See *Viljoen v Johannesburg Stock Exchange Ltd* [2016] ZALCJHB 361 at para 92; *Arthur Kaplan Jewellery (Pty) Ltd v Van De Venter* [2006] ZALAC 7 at para 18.

²¹ *Fry's Metals (Pty) Ltd v NUMSA and Others* [2003] 2 BLLR 140 (LAC) at para 33 and *Mazista Tiles (Pty) Ltd v NUM and Others* [2005] 3 BLLR 219 (LAC) at para 57.

dismissal must accord with the requirement of fairness contemplated in s189. The proper approach is to determine whether the purpose of the section, being meaningful joint consensus-seeking, has been achieved.²³ This required the respondent to show that it appropriately considered alternatives to dismissal so as to avoid and minimise the effects of retrenchment.²⁴

[42] While the fact that the Court would have preferred a particular alternative to dismissal does not in itself render the dismissal unfair, the dismissal risks being unfair where consensus has not been sought in a process which considers reasonable alternatives in an appropriate and meaningful manner.

[43] The evidence showed that the consensus-seeking process engaged in by the respondent was flawed. This is so in that the respondent failed to engage in a meaningful manner with the appellant concerning reasonable alternatives to dismissal. It relied on alternatives, which considered on their merits, were not reasonable given that they were premised on a dramatic amendment to terms and conditions of employment, while rejecting the reasonable alternative proposed by the appellant without further engagement. The result was that the respondent failed to prove that meaningful joint consensus-seeking had occurred. This coupled with the failure to produce sufficient evidence to justify the selection of the three employees singled out for salary reduction resulted in the respondent's failure to prove that the dismissal of the appellant was substantively fair.

[44] In his statement of case the appellant detailed that his dismissal was procedurally unfair in that:

5.3.1 The Respondent failed to comply with the provisions of section 189(3) of the LRA, either substantially or at all.

5.3.2 The Respondent failed to consult with the Applicant on the redundancy of his position, as it was obliged in law to do.

²² *Plaaslike Oorgangsaad van Bronkhorstspuit v Senekal* (2001) 22 ILJ 602 (SCA) at para 27.

²³ *Johnson (supra)* at para 29. *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 464.

²⁴ *County Fair Foods (Pty) Ltd v OCGAWU* [2003] 7 BLLR 647 (LAC).

5.3.3 The Respondent failed to engage with the Applicant in a meaningful joint consensus-seeking process in an attempt to reach consensus with the Applicant in a bona fide manner or at all in respect of the issues as contemplated in section 189 of the LRA, particularly in respect of:

5.3.3.1 the reasons for the retrenchment;

5.3.3.2 appropriate measures to avoid the retrenchment and alternatives to the retrenchment considered by the Respondent before proposing the retrenchment and its reasons for rejection each of those alternatives;

5.3.3.3 the proposed method of selecting employees to be retrenched;

5.3.3.4 the timing of the retrenchment;

5.3.3.5 the possibility of future re-employment;

5.3.3.6 severance pay;

5.3.3.7 measures to alleviate the adverse effects of the dismissal.

5.3.4 The Respondent did not allow the Applicant any or sufficient opportunity to make representations about the matters set out in 5.3.3 supra.

5.3.5 The Respondent failed to consider the representations made by the Applicant and/or failed to state the reasons for rejecting them.

5.3.6 The meetings held between the Applicant and Rogers did not constitute consultation meetings as envisaged by section 189 of the LRA.

5.3.7 The Applicant's retrenchment was presented as a fait accompli.

5.3.8 The Respondent selected the Applicant for retrenchment without any selection criteria alternatively the selection criteria used by the Respondent in selecting the Applicant for retrenchment was neither agreed upon by the parties nor fair and objective.'

[45] A mechanical, “checklist” approach to a determination as to whether s189 has been complied with is inappropriate.²⁵ While the letter of 31 January 2012 did contain the reasons for the proposed restructure and/or retrenchment in general terms, it is so that it did not contain written information regarding alternatives to dismissal, the number of employees likely to be affected, their positions, how it is proposed they are selected or issues of timing, severance pay, assistance or possible re-employment in future. Instead, consultation on these issues was invited. While it is apparent that there were clear shortcomings in the s189(3) notice provided to the appellant, these were not of such a nature as to render the process unfair in circumstances in which the appellant was given notice of contemplated restructuring and retrenchment and had the opportunity to engage with the respondent regarding the issues set out in s189.

[46] It follows for these reasons the dismissal of the appellant was substantively unfair. I am not persuaded that the maximum compensation should be granted in this matter on the facts and given the commercial rationale which existed to justify operational restructuring. The appellant did not seek reinstatement into his employment with the respondent. In the circumstances, I consider an order of six months compensation to be fair and appropriate.

[47] Having regard to considerations of law and fairness, given that the appellant has been successful in this appeal it is appropriate that the respondent bear the costs of both this appeal and of the proceedings before the Labour Court.

Order

[48] In the result, the following order is made:

1. The appeal succeeds with costs.
2. The order of the Court *a quo* is set aside and substituted with the following order:

²⁵ *Johnson (supra)* at para 29.

'(1) The dismissal of the applicant on grounds of the respondent's operational requirements was substantively unfair.

(2) The respondent is to pay to the applicant six (6) months' compensation within 14 days of the date of this judgment.

(3) The respondent is to pay the applicant's costs.'

Savage AJA

Waglay JP and Phatshoane AJA concur in the judgment of Savage AJA.

APPEARANCES:

FOR THE APPELLANT:

Mr P Grundlingh

Instructed by Nothnagel Attorneys.

FOR THE RESPONDENT:

Mr B M Jackson

Instructed by Tricker Inc.