REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not Reportable

Case no: JS878/10

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING,

WOOD AND ALLIED WORKERS' UNION **Applicant**

and

ASTRAPAK MANUFACTURING HOLDINGS

(PTY) LTD t/a EAST RAND PLASTICS **Respondent**

Date of the hearing:

Date of judgment: **12 March 2012**

JUDGEMENT

MOKOENA, AJ:

Introduction

1. The Applicant has initiated these proceedings on behalf of its members who were affected by the restructuring of the Respondent's business which ultimately led to the retrenchment of the Applicant's members.

2. In essence, the Applicant contends that the dismissal of its members by the Respondent is substantively unfair as the Respondent unreasonably and unfairly sought to compel the relevant employees to accept alternative positions on terms which would have resulted in such employees agreeing to an unreasonable reduction in their pay, demotion and/or forfeiture of other benefits of employment, as well as the cancellation or variation of previous collective agreements and benefits provided in terms thereof.

3. It is common cause between the parties, as evident from the filed pre-trial minute, that the only issue for determination by this court pertains only to the substantive fairness of the retrenchment/dismissal and that the procedural aspect is not in dispute.[1]

Analysis of pleadings

Applicant's statement of case

4. The hallmark and/or centrepiece of the Applicant's case as couched in its pleadings can be summarised as follows:-

    5. The Respondent communicated that it was embarking on a restructuring exercise, which would involve a reorganisation of jobs and functions, but that no worker would face the loss of his or her employment. On the contrary, the restructuring would result in more and not fewer jobs than before.

    6. The retrenchments were accordingly not brought about by any

1 Pleadings bundle, p. 52 - 74

requirement that the Respondent reduce the size of its workforce.

7. The Respondent unreasonably and unfairly sought to compel the relevant employees to accept alternative positions on terms which would have resulted in such employees agreeing to an unreasonable reduction in their pay, demotion and/or forfeiture of other benefits of employment, as well as the cancellation or variation of previous collective agreements and benefits provided in terms thereof.

8. The affected members did not in principle reject the alternative positions offered to them, but justifiably were not willing to accept the unreasonable and unfair demands and conditions imposed by the Respondent.

9. In the circumstances, such dismissal was:-

   10. without fair reason;

   11. in violation of the rights of employees and the union in terms of existing contracts of employment and collective agreements;

   12. unfair.[2]

Respondent's statement of defence

13. During 2009, the Astrapak Group decided to respond to the recession in a positive manner by aggressively driving sales in order to trade itself out of

the recession, thereby protecting the companies in the Group and their employees.

2 Pleadings bundle, p. 3, para 9 – p. 4, para 14.3

14. As a result of the above, the demand for production in the Group rose, allowing the companies in the Group, including East Rand Plastics, to keep its machines loaded and to purchase additional machines.

15. This in turn resulted in a view being formed by the Astrapak Main Board that the companies in the Group could be operated more effectively and more efficiently by changing from a three shift system to a two shift system. The companies in the Group were therefore instructed to engage their staff in discussions with regards to this proposed change.

16. Initial attempts to engage the staff at East Rand Plastics in discussions around this change did not bear any fruit and it was placed on hold.

17. In the meantime various other companies within the Group proceeded with the change over to the two shift system where it was found to have been effective. Due to the slow progress at some of the companies within the group, an instruction was given that the issue should be finalised by June 2010.

18. A letter was therefore issued to all East Rand Plastics' employees, CEPPWAWU and Solidarity on or about 14 April 2010 in terms of section 189A and 189(3) of the Labour Relations Act ("LRA"), informing them of the possibility of retrenchment and inviting them to consultations.

19. It is evident from the analysis of the pleadings filed by the parties, that the crux of the dispute between the parties is whether the dismissals of the Applicant's members were substantively fair as envisaged in section 188(1)(a)(ii) of the LRA.

<u>The burden of proof</u>

20. Section 192 of the LRA provides as follows:-

> '(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
>
> (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

21. It is trite that in dismissal proceedings, the *onus* rests with the employees to establish and prove that they were dismissed. On the other hand, the employer has to demonstrate and/or show that the dismissal was fair. In general, this means that the Applicant must prove that the Respondent has taken some initiative to terminate the contract, and that the Respondent's action has caused the termination.[3]

22. The parties, in their pre-trial minute, were *ad idem* that the duty to begin and the *onus* of justifying that the dismissal was premised on a fair reason lies with the Respondent. There is no dispute pertaining to the fact that the identified members of the Applicant, as per annexure "B", were indeed dismissed based on the operational requirements of the Respondent.[4]

<u>Oral Evidence</u>

<u>Respondent's witnesses</u>

23. The Respondent called the following witnesses:-

    24. Mr Keith Watkins;

    25. Mr Pierre Wentzel;

    26. Ms Angela Van Der Holst.

The evidence of Mr Keith Watkins ("Watkins")

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3 *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC); See also *CWIU v Johnson and Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC)
4 Pre-trial conference minute, p. 55, para 2.14; p. 61, para 8.

27. He is the Regional Chief Executive Officer of the Cape Region and employed as such by the Respondent. At the time of the restructuring of the Respondent which led to the retrenchment of the Applicant's members, he was a Chief Operations Officer and all the units of the Respondent reported to him. East Rand Plastic is a division of Astrapak Manufacturing Holdings which, in turn, is part of the Astrapak Group.

28. The company consists of mainly two components which are the rigid divisions and the flexible divisions. East Rand Plastic was a flexible division. Furthermore, the flexible divisions were divided into inland and coastal divisions. The inland flexible divisions would be those areas such as Gauteng where East Rand Plastic is situated and the coastal region will be those flexible divisions in Cape Town, Durban, PE etc.

29. A decision was made by the Respondent to restructure its business. What motivated this restructuring is the fact that unlike the rigid divisions, the flexible division:-

    30. underperformed and was not productive;

    31. experienced low profit margins which were dropping drastically;

    32. were performing poorly.

33. It was on the basis of the abovementioned factors that the Respondent decided to restructure its business and operations. In addition, the flexible division, such as East Rand Plastics were losing customers. This was a further motivation advanced by the Respondent in deciding to sell the flexible divisions.

34. However, due to the fact that the flexible divisions were underperforming, loosing customers and with low profit margins, they could not be sold. A presentation was then made to the shareholders pertaining to the plans of restructuring the Respondent.

35. The shareholders were reluctant to commit more funds to the company as a result of the loss which the Respondent was experiencing, as alluded to above. It was presented to the shareholders that the Respondent should adopt the World Class Manufacturing ("WCM") model which will introduce new machines, updated computer systems, advance electronic planning and to be able to control the shifts.

36. In turn, the WCM will enable the Respondent to compete with its competitors. This presentation was made in August 2010 to the shareholders. As a result of the flexible divisions not performing as expected by the shareholders, the CEO of the flexible divisions had to resign. Watkins remained as the manager of Astrapak. The executive committee of the Respondent adopted the recommendations made during the aforesaid presentation.

37. According to Watkins, the board of governors is solely responsible for the implementation of the King reports 1 and 2 and does not deal with the day to day running of the Respondent and/or any of the operational issues. The board of governors' involvement in operational issues is limited to capital investment and when it has to verify same. However, the motivation and calculation of all capital investments are done by the executive committee.

38. He was referred, during his testimony, to a document appearing on page 296 of the bundle of documents and he identified same as being the minutes of the board of directors held on 26 November 2009. He confirmed that he attended the meeting, by invitation. He confirmed the issues discussed in the meeting and his input as apparent from the minute. He highlighted that the meeting discussed the WCM and the 5 point reduction plan in order to improve the gross margins of the flexible divisions. He further explained in detail how the WCM's plan would assist the company from underperforming.

39. He planned review strategies which were incorporated within the WCM. He also described, at length, the advantages of the WCM.

40. The envisaged new shift system would benefit the company. He further testified that the introduction of the new shift system would lead to less scrap material, less repair of the machines as they would not be switched on and off. The new system would lead to continuous handover which would benefit the employees as they will be learning the new system and this will increase productivity as continuous absenteeism will also be eliminated.

41. The Respondent's target was to reduce costs by R106 000 000.00 (one hundred and six million rands). The Respondent focused at reducing overtime, salary and/or wage bill costs. This, in turn, led to even senior management having to agree to a salary reduction of 10%.

42. There was a target to reduce expenses by R68 000 000.00 (sixty eight million rands) which meant that the company had to achieve a 10% reduction of its entire expenditure.[5]

43. He confirmed his attendance and the issues discussed in the meeting which was held on 24 February 2010. He highlighted that the meeting dealt with the 10-point plan which had to be implemented from 1 October 2008. He took the court through the identified 10-point plan which was aimed at a cost reduction for the Respondent.[6]

44. He testified on a presentation which he made in order to motivate a need for a continuous shift system (4 shift system). He highlighted the reasons for the change and the benefits which could be achieved through a 4 shift

5 He was referred to a document on page 313 which he identified as the 5 point cost reduction plan which had to be implemented by the Respondent in order to achieve its goals to reduce its losses.
6 He was referred to a document on page 298 and he identified same as the minutes of a meeting of the executive committee which was held on 24 February 2010. He was also referred to documents on pages 310, 311 and 312 and confirmed same as being the versions of the 10 point plan which was discussed at the meeting of the 24 February 2010.

system.

45. East Rand Plastic had the same problems like other flexible divisions which were ultimately shutdown due to loss of profit, underperformance, loss of customers etc.

46. The General Manager (Herman Jacobs) and Operational Manager (Pierre Wentzel) were the individuals involved with the section 189 process at East Rand Plastics. He testified that both individuals were no longer employed by the Respondent.

47. He was referred to a document on page 44 and he reiterated that his involvement was limited pertaining to this document and the East Rand Plastic recovering plan. However, he confirmed the desired objective of the restructuring and the desired results should the restructuring take place.

48. He confirmed the minutes of a meeting of the executive committee held on 29 April 2010 and confirmed his attendance. He testified on the issues which were discussed in that meeting and highlighted that the board's approval was sought in order to implement the new shift structure and the cost reduction programme.[7]

49. He confirmed the minutes of a meeting of the executive committee held on 24 June 2010. He confirmed his attendance and the issues discussed at that meeting. The section 189 process was implemented in order to deal with the increased labour costs.[8]

50. He stated that the new strategic plan which was presented to the board was presented in order to address the losses which the Respondent was experiencing.[9]

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7 He was referred to a document on page 300 of the consolidated bundle.
8 He was further led through a document on page 302 of the consolidated bundle.
9 He testified about a document on page 304 and identified same as the minutes of a meeting of the executive committee held on 22 July 2010 wherein he was present.

51. The blueprint presentation identified the problems experienced in the flexible divisions, strategies to be adopted and paving the way forward towards the restructuring of the Respondent in order to avoid recurrence of the losses it suffered.[10]

52. He stated that the Respondent's shareholders sought to reduce salary and/or wage costs by 10% across the entire operations of the Respondent.[11]

53. As a result of the losses which were suffered by the Respondent, the Respondent had no option but to invoke the provisions of section 189 of the LRA.

54. Subsequent to the restructuring process, there were positive signs from East Rand Plastics and other business units of the Respondent which demonstrated a gradual recovery from the initial losses. He, however, mentioned that the other two flexible divisions, despite the restructuring being implemented, could not survive and had to be shutdown.

55. He further testified that in the event this court was to reinstate the Applicant's members, this would have devastating consequences to the Respondent as the Respondent has already invested in training the current workforce. The retrenched workforce will not be able to meet the new conditions of employment. Furthermore, the Respondent would have to retrench the entire existing workforce in order to accommodate the Applicant's members, in the event that the reinstatement is ordered.

56. The witness was cross-examined by the Applicant's counsel. In summary and paraphrasing, the cross examination revealed the following:-

    57. The employees were dismissed in June 2010 and the capital expenditure meeting took place on August 2010. This therefore

10 He testified about a document on page 316 of the consolidated bundle.
11 He further testified on a document on page 164 of the consolidated bundle.

means that the capital expenditure could not have an impact on the decision to dismiss the Respondent. The implementation of the WCM is not a reason which led to the retrenchment of the Applicant's members as the WCM could have been implemented with the same workforce that was retrenched. WCM could have been implemented on continuous basis with the retrenched employees being trained accordingly.

58. He disagreed that the company conflated the cost cutting measures and insisted that the company did try separating these issues before but they could not assist the company in cost cutting. Infact, he suggested that even the introduction of the new shift system itself could not have been sufficient to address the problems which were being encountered by the Respondent and that the shareholders had already placed preconditions which had to be implemented, at once.

The evidence of Mr Pierre Wentzel ("Wentzel")

59. He was employed by the Respondent in February 2009 after the Chief Operations Officer of the flexible division had resigned. At the time when he started at the East Rand Plastic, the Respondent was experiencing low profit margins, huge scrap off materials, inefficiencies and other factors which made the Respondent to even lose customers.

60. He was tasked to deal with all issues which were making the Respondent to lose profits. There was a task team established which included him and Herman Jacobs to initiate and implement the 5 and 10 point plans. He testified that subsequent to the 5 and 10 point plans being introduced, the Respondent had to engage the employees in order to discuss these plans and to implement them in order to meet the required targets and to assist the Respondent to cut costs.

61. He stated that the shareholders required that the profit margins should be improved from 7% to 12% in order for the Respondent's operations to be endured and sustainable.

62. He testified about the minutes of the meeting of 29 June 2009 which discussed the cost cutting measures of which the Respondent had to implement. These, *inter alia*, included the 4 shift system, operational issues and reporting structures, absenteeism keeping the machines running and other factors of concern which had to be identified and addressed in order to avoid further loses experienced by the Respondent.[12]

63. The outcome of the meeting was to engage the employees with these planned strategies and operational issues. Employees were engaged and this led to the employees protesting against the 4 shift system. There was no consensus reached on these issues.

64. He was referred to a document on page 13 of the bundle and identified same as a document despatched by the Applicant wherein it was indicating that it would embark on a strike action.

65. It was the Respondent's desire to implement the 4 shift system by no later than June 2010. The discussions around the 4 shift system had already embarked in March 2010.

66. He was referred to a document on page 14 of the bundle, with particular reference to the last paragraph on page 16 and gave his interpretation on that paragraph as being a threat which was made by the Applicant that the strike would also be spread to other departments of the Respondent.

67. The Respondent inviting the employees to embark on consultations as envisaged in section 189 of the LRA. He testified about the background

12 He was referred to page 6 of the bundle.

facts as set out in the letter,[13] reasons for the proposed dismissal as envisaged in section 189, alternatives considered by management, severance pay for the proposed dismissals and the purpose of the consultations.

68. He testified about the minutes of the first meeting pursuant to section 189A which was held on 4 May 2010 at the Respondent's premises wherein all the relevant parties were present and duly represented. His evidence was led on point 5(d) of the minutes of the meeting and stated that according to the CCMA's facilitator it was agreed that there should be 4 meetings to be held during the section 189 process. He further testified on point 10 of the minutes which was an explanation proffered by the Respondent pertaining to the shifts. This explanation was also amplified on paragraphs 15 and 18 of the minutes where the Respondent indicated its desire to cut costs. He confirmed the entire minutes and the contents recorded therein.[14]

69. He testified on the minutes of the second session of the section 189 meeting held on 17 May 2010. All the parties were duly represented at this meeting. He identified the 4 suggestions and/or proposals made by the union during the aforesaid meeting. He confirmed the entire contents of these minutes. These minutes are not in dispute and are common cause between the parties.[15]

70. He stated that in all the proposals which were made by the Applicant, the Respondent did accommodate the Applicant and acceded to those proposals and/or demands. The only point of disagreement was whether or not Mr Hollard should be dismissed. He testified that even if he was dismissed, in the bigger scheme of things, this could not have made any difference to cut the costs which the shareholders envisaged.

13 He further testified on a document on page 18.
14 He was referred to a document on page 34.
15 He was referred to a document on page 55.

71. He emphasised that Solidarity Union agreed to all the proposals made in the third meeting and this is apparent from paragraphs 50 to 54 of the minute. However, the Applicant wanted the discussions to take place at a national level. Furthermore, it is indicated in paragraphs 59 to 61 that the Applicant did not agree to anything as it simply echoed its sentiments that it was against the section 189 process.[16]

72. It was accordingly recorded by the CCMA facilitator that there was no agreement on the issues discussed by the parties. He was then going to report accordingly that the section 189A consultations were held and being exhausted. The parties were advised on the available remedies should they wish to deal with the issues further.

73. He testified that in all these three consultation meetings which were held, nowhere did the Applicant indicate and/or object to the process on the basis that the Respondent was conflating the issues.

74. He was referred to a letter dated 2 June 2010 despatched by the Respondent to the Applicant inviting the Applicant to a further consultation. This was done despite the fact that, according to the CCMA facilitator the section 189A consultations were exhausted. In this letter, the Respondent confirmed that it intended to discuss different alternatives which were made to the Applicant and furthermore that should the Applicant's members unreasonably not accept this alternative, the Respondent will not pay them any severance pay.[17]

75. On 3 June 2010, the Applicant despatched a letter to the Respondent wherein the Applicant indicated that retrenchment has never been an issue during the section 189A consultation. Furthermore, that the Applicant has not yet received a report from the Commissioner who facilitated the section 189A consultation and will only be in the position to

16 He was referred to a document on page 67 which he identified as the minutes of the third meeting pursuant to section 189A which was held on 28 May 2010 at the Respondent's premises.
17 He was referred to a document on page 74.

respond to the Respondent once it was favoured by such a report from the Commissioner.[18]

76. On 4 June 2010, the Respondent despatched a letter wherein it invited the Applicant to a further consultation in terms of section 189A. Paragraph 11 of the aforesaid letter records that:-

> 'Your input on employees accepting the changed terms and conditions of employment and/or alternative positions that would be available which would then ultimately avoid retrenchments, would also be appreciated during this meeting.'[19]

77. Eventually, the Applicant acceded to the proposed further consultation meeting which was held on 8 June 2010 as evident from page 85 of the bundle of documents. The witness emphasised that as apparent from the minutes of the meeting, there were no proposals which were made by the Applicant. Furthermore, no representations were made pertaining to severance payment. He further testified that no further communication and/or correspondence were received from the Applicant.

78. On 14 June 2010, the Respondent addressed a further letter to the Applicant. In this letter, the Respondent intimated that it remained committed to ensure that no employees, <u>alternatively</u>, as fewer employees as possible be retrenched, which is why it was offering the alternatives to retrenchment to the Applicant's members.

79. The employees were afforded until 21 June 2010 to react to the alternatives offered to them by the Respondent. Furthermore, that should the employees not accept the alternatives offered to them, they would not be paid any severance pay, as the Respondent views the alternative employment offered to them to be reasonable and accordingly their refusal

18 He testified on a document on page 79 and identified same as a letter dated 3 June 2010.
19 He was further referred to a document on page 81 which he has identified as a letter dated 4 June 2010.

to accept same would be considered unreasonable.

80. These letters were despatched to the Applicant's regional offices. The same letter was also despatched to individual employees affected by the section 189 process. It was recorded in this letter as to how the changes will affect each individual as recorded on page 95, paragraph 9 of the bundle of documents, to be read with a document on page 97 which contains the annexure explaining the plan presented during the section 189A consultations, of which plan was to be implemented by the Respondent. These letters should also be read with the letter on page 100 demonstrating that it was despatched to each and every employee affected and not only to the Applicant as a trade union representing those members.[20]

81. The witness also testified that despite all the efforts which the Respondent has made in despatching the letters to the Applicant and to the respective individual members who were affected by the section 189 process, there was never any feedback received from the Applicant and/or the respective members pertaining to the restructuring process embarked upon by the Respondent. He further testified that the members of Solidarity Union and other non-union members did accept the alternatives.

82. He testified about the letter appearing on page 16 of the bundle and identified same as a letter from the Applicant which was addressed to the Respondent dated 18 June 2010. In this letter, the Applicant was requesting the Respondent to extend the deadline which was given to the members of the Applicant to react to the offers made by the Respondent. This letter was despatched at 15h52 on 18 June 2010.

83. The Respondent did respond to the aforesaid letter as evident from page 117 of the bundle. In that letter, the Respondent adopted an attitude that it has provided the Applicant with more than sufficient opportunity to react to

20 It is evident from pages 92.

its section 189 proposals and to make a meaningful input, however, the Applicant has failed to do so. As a result, the Respondent indicated that it would continue to notify employees of their dismissal based on operational requirements.

84. This is also evident from reading the document on page 114, of which the witness was referred to, wherein the Respondent despatched a notice of termination to the employees based on operational requirements. As the employees were on strike and their strike action became violent, the Respondent obtained interdicts against them. The employees werereferred to different court orders obtained against the Applicant's members as appearing on pages 158 to 163 of the bundle of documents.

85. The witness testified that after the Applicant's members were retrenched, the Respondent went ahead to implement its restructuring plan and achieved the results which are indicated on page 164 of the bundle. According to the witness, the company was able to cut costs on wages and salaries.[21]

86. He identified the different sets of organogram of the Respondent which were discussed with the Applicant during the section 189 proceedings.[22]

87. He testified about the letters which were sent to different employees after the restructuring process and those employees having accepted the alternative employment offered to them by the Respondent.[23] He testified that all employees were treated the same. The same letters and contracts despatched to employees subsequent to the restructuring process also appears on page 247 and page 261 of the bundle. He stated that it would not be practical to reinstate the retrenched employees, as they will not be able to adapt to the new employment conditions due to the fact that most of them lacked the necessary level of education to be trainable.

21 He was led through a document on page 164.
22 He was also led through a document which appears from page 165 to page 223.
23 He was referred to the documents appearing on pages 224, 229 to 234.

88. In respect of annexure “B” he confirmed those employees who were properly before this court and those which were in dispute. In relation to annexure “C”, he confirmed the contents thereof as it pertains to current job titles of employees and the proposed job titles subsequent to the restructuring process.

89. Under cross-examination, he was referred to a document on page 19 and confirmed that he had a limited input towards the drafting of the aforesaid document and/or the contents contained therein. It was put to him that in that letter, there is no reference about any positions becoming redundant and he confirmed same. It was emphasised to him that as at April 2010 the Respondent did not envisage any posts becoming redundant and he confirmed same. He later disagreed with the proposition, however, he could not explain why if the Respondent had envisaged that some of the positions would become redundant, why was this not canvassed in the aforesaid letter.

90. He was referred to the minutes of the first consultation on page 34 and it was put to him that even at that meeting, except the tea ladies and those other positions identified, there was no mention of further posts being declared redundant.

91. For the purpose of my judgment, it is evident that these issues pertaining to redundancy of positions are issues which ought to have been addressed during the consultation process. It is evident from the consultation process that the Applicant never objected to the process and/or issues canvassed therein pertaining to redundancy of positions. Infact, it was common cause between the parties that the Applicant was not challenging the consultation process.

92. It was put to him that if one has regard to the document on page 75, the Respondent has indicated that 93 positions will be declared redundant, while during the consultation process only 4 positions were indicated to be

redundant.

93. The witness was referred to the documents on pages 102 and 106 of the bundle which depicts the new industry wage. It was put to the witness that had the members of the Applicant accepted the alternative employment they would have been entitled to the new wage rates and/or structure as depicted in those documents and they would have been entitled to the increments as indicated therein. This was conceded by the witness.

94. It was put to the witness that by accepting the alternative offer of the Respondent, the Applicant's members wages could have been reduced to a lower scale and the increase, if any, by the industry would be realised based on the lower salary/wage scale as per the alternatives offered by the Respondent.

95. It was put to the witness that the introduction of the 4 shift system would have resulted in the total scraping of the overtime which was worked by the Applicant's members prior to the restructuring. This was conceded by the witness. Furthermore, that this would result in the members of the Applicant taking home low wages compared to prior the restructuring process when they worked a great deal of overtime.

96. It was put to him under cross-examination that by restructuring its business operations, the Respondent sought to achieve three main objectives, to wit:-

97. The introduction of the continuous shift system.

98. The removal of wage disparities and the reduction of salaries so as to accord with the minimum standards of the industry.

99. The doing away with those positions which were regarded as being redundant.

100. In re-examination, he testified that during the section 189 process there was indeed mention of the posts which were going to be redundant as clearly indicated in a document appearing on page 44 and also in the organogram structures which were discussed with the union as evident from the documents in the bundle.

101. He testified that had the members of the Applicant accepted the alternative, most of them would have been in far much more better salary structure than before, others would retain the same salary structure while others would receive lower wages than before. However, that all employees would be entitled to the increase which was due within 9 days of the proposed alternatives.

The evidence of Ms Angela Van Der Holst ("Van Der Holst")

102. She was employed by the Respondent at the East Rand Plastic as the HR Manager from October 2009. She was referred to annexure "B" to the bundle of documents and confirmed that it contains the names of the Applicant's members who were retrenched including their severance payment.

103. She confirmed that those employees who were placed in dispute as not being members of the Applicant properly before this court should not be entitled to any relief. She confirmed that the majority of the members of the Applicant were not paid severance pay and only five employees were paid , as they were not offered alternative employment. She testified that the members of the Applicant were not paid severance pay as they considered their refusal of the alternative employment offered to them by the Respondent as being unreasonable.

104. She testified that having regard to the alternative employment offered by the Respondent to the respective members of the Applicant, most of the Applicant's members would have been in a better position, while others

would have remained on the same salary scale and others would have been paid lower wages/salaries. She testified that all the employees would have been entitled to the increase which was due in July almost 9 days after the alternative employment offers were made to them.

105. She testified that even though a document on page 75 was referring to the concept of redundancy, there was no redundancy in an actual sense of the word as most of those positions would have been transferred to the newly proposed structure.

106. She was cross-examined on a document on page 19 and asked whether she had any input towards the letter. She testified that she had some input on the contents of the letter. It was put to her that as at that time, the Respondent had considered paying severance pay to the employees who were affected by the restructuring process.

107. Furthermore, that there was no reason why the Respondent failed to pay severance payment to the members of the Applicant. It was put to her that the reason why the members of the Applicant were not paid severance pay was a punitive measure on the side of the Respondent to demonstrate its dissatisfaction in the manner in which the Applicant's members conducted themselves during the section 189 consultation process.

108. It was further put to her that the new 4 shift system would do away with overtime and this would mean that the members of the Applicant would take home lesser wages than before. Furthermore, that even though there was an increase to be implemented in July, this increase would be on the new wage and therefore it was not unreasonable for the Applicant's members to refuse the offers.

109. In re-examination, she maintained that it was indeed unreasonable for the members of the Applicant to have refused to accept the alternative employment.

110. No evidence was led on behalf of the applicant's members.

Contentions/arguments advanced on behalf of the parties

Applicant's oral submissions

111. During oral argument it was contended on behalf of the Applicant that the dismissal of its members was substantively unfair. The submissions were premised on the following grounds:-

112. The Applicant realised the value of the four shift system and that the Respondent was entitled to introduce it;

113. It is apparent that the four shift system, on its own, was going to introduce significant cost savings and greater productivity, thereby having a significant impact on the profitability of the respondent;

114. The Applicant accepts that the introduction of WCM would also impact positively on productivity;

115. The Respondent should have sought, in its restructuring exercise, only to address the shift system. The impact of this may have been sufficient to render the need for reducing of wage bill and the declaring of posts redundant was unnecessary;

116. The Applicant accordingly submits that the Respondent has not demonstrated a proper consideration of alternative employment as required by the LRA;

117. The Applicant submits that as a result of conflating three operational issues into one, the Respondent sought to compel the Applicant's members to accept changes to terms and conditions of employment, not all of which were dictated by the Respondent's operational circumstances;

118. Furthermore, the Respondent has provided no evidence at all to operationally justify the conflation of the three exercises into a single restructuring. On the contrary, this restructuring took place against the backdrop of a Group reporting enormous profits;

119. The Respondent has placed no evidence before the Court in relation to the redundant posts other than a general contention that these were not essential to manufacturing. In the absence of specific evidence in relation to these posts, it is impossible for the Court to assess whether the dismissal of employees as a result of alleged redundancy was fair.

120. On the basis of the above summarised submissions advanced on behalf of the Applicant, the Applicant seeks relief that its members be reinstated on the existing terms and conditions applicable at the Respondent.

121. In the event that this court finding reinstatement to be impractical, then in the alternative, the Applicant seeks compensation of twelve months salary on behalf of its members.

122. Further in the alternative, the Applicant seeks that its members be paid a severance pay as envisaged in the Basic Conditions of Employment Act.

<u>Respondent's written submissions</u>

123. The Respondent's main contention can be summarised as follows:-

124. ERP was faced with a situation where its profit was only 7% and it would have decreased through time to come as a result of, amongst others, changing markets, high overheads / cost structure and outdated equipment causing slower production and longer lead times to deliver.

125. In addition thereto, the view taken by the shareholders was that such companies within the flexibles division would face closure due to their businesses not being viable which would not even have enabled the group to sell them.

126. In order to ensure the long-term survival of ERP, amongst others, the shareholders indicated their willingness to invest money in ERP and the other companies to buy 7 new machines at a cost of R106m, on condition that their profits be increased to 12%, their salaries and wages across the group be cut by 10% and further cost saving measures be implemented.

127. Two other companies within the group were, despite the cost cutting exercises, ultimately closed down, as even the cost cutting measures could not ensure their survival.

128. As a result of the indication from the shareholders, ERP was party to cutting costs in terms of the 10-point plan, also developed their own unique 5 point costs savings plan and proceeded with restructuring and ultimately retrenchment exercises to ensure an effective system for purposes of WCM and to cut costs.

129. At the end of two retrenchment exercises (one for the wages employees and one for the salaried employees), employees were retrenched.

130. With the exception of 5 of the 287 Applicants, all of them were retrenched when they did not accept reasonable alternatives to retrenchment that were offered to them. The remaining 5

employees were not offered alternatives.

131. The Respondent submits that these alternatives that were offered to them were reasonable in the circumstances and that the Applicants unreasonably refused the offers. I intend elaborating on this issue herein below when the issue of severance pay is addressed.

132. In total, 282 Applicants were therefore retrenched as a result of their own actions, alternatively, the actions of their union, CEPPWAWU. Was it not for such, they would still have been employed by the Respondent.

133. The Applicants were not even prepared to accept only the change with regards to the overtime as alluded to by their counsel during the trial. They made it abundantly clear during the third consultation meeting that they do not agree to any of the proposed changes (including cutting overtime as a result of implementing a 4 shift system) and stated that they were completely against the whole Section 189 process.

134. The Respondent therefore submits that 282 Applicants were offered reasonable alternative employment which they unreasonably refused. Even Applicants' whose wages would ultimately have remained lower than their old wages, were unreasonable when they did not accept the only viable alternatives available at the Respondent to them.

135. As a result of the submissions made above, the Respondent submitted that the retrenchment was premised on a fair reason and as a result, the Applicant's application should be dismissed with costs.

136. In the alternative and only in the event this court finding that the retrenchment was unfair, then this court should not order reinstatement as it will not be reasonably practicable for the Respondent to reinstate the retrenched employees based on the evidence of the Respondent's witnesses.

137. Further in the alternative, should this court order compensation, then this court should take into account the delays occasioned by the Applicant in prosecuting this matter.

<u>Analysis of the facts, contentions advanced on behalf of the parties in relation to the law (applicable legal principles)</u>

<u>Substantive fairness</u>

138. As evident from the papers that were filed on behalf of the parties in these proceedings, the oral evidence adduced and the submissions advanced on behalf of the parties, there is no dispute pertaining to the procedural aspect of the section 189 process. In order words, the Applicant do not challenge that the dismissal of its members were procedurally unfair. As a result, the only question which I have to determine is whether or not the dismissal of the employees (Applicant's members) was substantively fair.

139. Section 213 defines the term "operational requirements" to mean requirements based on economic, technological, structural or similar needs of an employer. The code of good practice, states as follows:-

> 'As 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.'[24]

140. In *SACWU v Afrox Ltd*[25], the Labour Appeal Court held that:-

> 'it can no longer be said that the court's function in scrutinising the consultation process in dismissal for operational requirements is merely to determine the good faith of the employer . . . The matter is now one of proof by the employer, on a balance of probabilities, of:
>
> (a) the cause or reason for the dismissal . . .;
>
> (b) the defined 'operational requirements' that the dismissal was based on . . .;
>
> (c) a fair procedure in accordance with section 189 . . .;
>
> (d) the facts upon which a finding of a substantively fair reason for the dismissal can be made.'

141. This therefore means that it is not sufficient for the court to merely find that an employer has acted in good faith but the court should be satisfied that on a balance of probabilities, the employer has discharged its *onus* pertaining to the factors alluded to above.

142. In the matter of *BMD Knitting Mills (Pty) Ltd v SACTWU,*[26] the Labour Appeal Court found that:-

> 'The word 'fair' introduces a comparator …. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the fair to the affected party, namely the employees to be retrenched. To this

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24 Item 1 of the Code of Good practice on dismissal based on operational requirements at 347, see also *Associated Biscuits (a division of National Brands Ltd) v Munsamy* [1997] 9 BLLR 1121 (LAC).

25 [1999] 10 BLLR 1005 (LAC).

26 [2001] 7 BLLR 705 (LAC).at para {19E-F]

> extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, … is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

143. In the matter of *CWIU v Algorax (Pty) Ltd,*[27] the Labour Appeal Court held that:

> 'The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair . . . Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic.'

144. As already stated above, in discharging its *onus*, the Respondent relied on the evidence of Mr Watkins, Mr Wentzel and Ms Van Der Holst. These witnesses' evidence complimented and corroborated each other in the following material respects:-

145. The Respondent was experiencing loss of profit.

146. The performance of the flexible divisions of the Respondent was causing the Respondent serious losses as compared to its rigid divisions.

147. The situation in the flexible divisions were of such a nature that they would ultimately be forced to be closed down.

148. The shareholders of the Respondent were not willing to invest any further funds to the flexible divisions unless the costs cutting

27 [2003] 11 BLLR 1081 (LAC).at paras [69]-[70]

methods were implemented in order to demonstrate and to realise increase in profits.

149. There was a condition stipulated by the shareholders that the Respondent's profit margins must increase from 7% to 12%.

150. It was not feasible to sell the flexible divisions of the Respondent as they were experiencing serious losses and there could not have been potential purchasers to be attracted to purchase an entity which was trading at a loss.

151. The Respondent was required to implement the WCM. This in turn required that the Respondent should adapt to new shift operations and in this regard, it had to implement a 4 shift system as this was beneficial to the Respondent.

152. East Rand Plastics, in terms of the new operational systems, was required to cut its salaries and wages by R800 000.00 per month.

153. The shareholders of the Respondent also required that salaries and wages be cut throughout the group by 10%.

154. The abovementioned evidence adduced by the Respondent was not contradicted and/or challenged by any evidence adduced on behalf of the Applicant. I am aware and alive to the fact that the Respondent bears the *onus* of demonstrating that the dismissal was substantively fair, as already mentioned above. However, without any contrary version, disputed fact and/or contradictions from the evidence of the Respondent's witnesses, I am left with no other option but to accept the evidence of the Respondent and assess it through the legal tests, alluded to above.

155. I am satisfied, having regard to the bundle of documents placed before me and the uncontradicted oral evidence of the Respondent's witnesses, that the Respondent has on balance of probabilities discharged its *onus* in

respect of proving that:-

156. There was indeed a cause and/or reason for the dismissal.

157. There were substantive grounds upon which the dismissal based on operational requirements was premised.

158. There were indeed facts upon which a finding of a substantively fair reason for dismissal can be made.

159. Having regard to the losses which were being experienced by the flexible divisions of the Respondent, there was indeed a commercial rationale decision for the Respondent to invoke the provisions of section 189, read with section 189A.

160. Indeed, the Respondent's witnesses were vigorously and in the most able way cross-examined by the Applicant's counsel. The theme of the cross-examination was to demonstrate that the Respondent conflated the three exercises into a single restructuring means in order to achieve the reduction of costs.

161. This cross-examination should be viewed in the light of the unchallenged evidence of the Respondent's witnesses when it was stated that there were two flexible units of the Respondent which were closed despite the costs cutting measures having been implemented. In other words, in order to convince the shareholders to commit more funds to the flexible divisions, the Respondent had to demonstrate a comprehensive approach which will ensure that the profit margins are improved from 7% to 12%.

162. There was no evidence adduced to the contrary demonstrating that it was not necessary for the Respondent to adopt and implement the 5 and 10 point strategy in order to realise the objectives set by the Respondent in order to increase the profits from 7% to 12%, to cut the salaries and wages by 10% and to reduce the salaries and wages of the East Rand

Plastics by R800 000.00 per month.

163. Furthermore, should the Respondent opted to cut wages in isolation to other measures which were implemented, this would inevitably have led to strike action. It could have exacerbated the unhappiness pertaining to the anomalies which the Applicant was complaining about within the Respondent. Accordingly, I am persuaded that there was a substantively fair reason to implement the retrenchment process and to dismiss the Applicant's members.

<u>Section 189A (19)</u>

164. Section 189A (19) provides as follows:-

> "(19) In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if —
>
> 165. the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
>
> 166. the dismissal was operationally justifiable on rational grounds;
>
> 167. there was a proper consideration of alternatives; and
>
> 168. selection criteria were fair and objective."

169. In my view, this section does not establish a test which is different from the test which is normally applicable in analysing and/or interpreting the provisions of section 189 of the LRA. The authorities which I have alluded above, are equally applicable to the provisions of section 189A.

170. What requires special attention in my judgment, is whether or not there was a proper consideration of alternatives by the Respondent. I have already found above, that there was indeed a fair reason justifying the retrenchment and the subsequent dismissals. I still maintain what I have stated above.

171. However, due to the lucid argument advanced by the Applicant's counsel pertaining to the issue of conflation and that the Respondent has failed to properly assess and consider alternatives which could have led to few members being retrenched and/or the retrenchment being avoided at all, I had to address this aspect separately.

172. In *Mamabolo and Others v Manchu Consulting CC,*[28] Van Niekerk AJ (as he was then), held that:-

> 'The first issue that the court is required to determine is the substantive fairness of the applicants' dismissal. Section 188 of the Labour Relations Act 66 of 1995 (the LRA) requires an employer that dismisses an employee for reasons relating to operational requirements to establish a fair reason for the dismissal. The approach adopted by this court is to require the employer to provide substantive proof of a need to retrench in the form of a commercially rational and sustainable reason, but not to question the commercial imperatives that underlay that decision, unless some ulterior motive is established. In other words, it is not the function of the court to second-guess the employer's decision to retrench. It is not appropriate to intervene only because the decision taken by the employer was not the one to which the court would have come in same circumstances. See *SACTWU & others v Discreto - A Division of Trump and Springbok Holdings* (1998) 19 ILJ 1451 (LAC); [1998] 12 BLLR 1228 (LAC) at 1230E.'

173. There was no evidence adduced before me challenging the 33 points which were listed in the recovery plan of the Respondent. Furthermore, there was no evidence, as stated above, challenging the substance and/or

28 (1999) 20 ILJ 1826 (LC) at para 18.

content of the Respondent's 5 and 10 point systems which were to be implemented in order to cut costs and to increase the profit margins of the Respondent.

174. In addition, the entire strategies implemented by the Respondent cannot be criticised as the evidence demonstrates that once they were implemented, the Respondent did not have to close any of its operations and furthermore the profit margins increased to the satisfaction of the shareholders.

175. The decision of the Respondent was not in any manner commercially irrational. There was no evidence adduced demonstrating that the Respondent acted in bad faith and/or to serve an ulterior motive. It was in fact common cause, that the flexible divisions of the Respondent were experiencing profit losses. One cannot criticise the Respondent for adopting the strategies which it did in order to save the Respondent from possible closure which would impact to the entire division.

176. Furthermore, these methods which were adopted by the Respondent, in their entirety and/or simultaneously, were not in any meaningful manner challenged by the Applicant during the consultation processes.

177. As evident from the record, the Applicant to the detriment of its members, decided to adopt a passive approach during the section 189 process which required it to meaningfully engage with the Respondent. It was not placed in dispute that all the proposals which the Applicant advanced during the consultation process were indeed considered by the Respondent except for the one which was calling for the dismissal of Mr Hollard of which dismissal could not have addressed the serious losses which the Respondent was experiencing, having regard to the bigger scheme of things.

178. Furthermore, the evidence demonstrates that it was not the intention of the

Respondent to dismiss any of its employees, but to implement measures which will ensure that no one should lose his/her employment and that the company should cut its costs and increase its profit margins.

179. In the case of *Kotze v Rebel Discount Liquor Group (Pty) Ltd,*[29] the Labour Appeal Court found that:-

> '[35] It is common cause that the respondent was trading under difficult and recessionary conditions as at the time of the appellant's retrenchment. This state of affairs is borne out by the profit losses which ran into millions of ands over a period of two successive financial/trading years. Having perceived this situation the appellant identified and suggested the retrenchment of employees from the level of store manager and below as the appropriate remedial measure. His suggestion was endorsed by the top management of the respondent. The appellant was charged with the responsibility to identify 30 of the 60 employees to be retrenched at the beginning of 1993 and he carried out that responsibility. Furthermore, the appellant admitted under cross-examination that retrenchment in general was a necessary and fair option as at January 1993. He also admitted that as a matter of business planning or commercial rationale retrenchment was a fair decision to make as at the beginning of 1993. He only had reservations about retrenchment in so far as it affected employees at the executive level.
>
> [36] I have considered Mr Rogers' submission that there should have been a moratorium on salary raises, bonuses, promotions etc as an alternative cost-cutting measure to the appellant's retrenchment. This suggestion effectively ignores that the subject was previously raised with top management and rejected because of its potentially demoralising effect on employees. The appellant had also suggested that the GDV throughput policy, which required of the respondent to give prominence to the GDV products in its trading, be abandoned. He believed that such a move would improve the respondent's trading and therefore its profitability. This suggestion was also previously discussed with the top

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29 [2000] 2 BLLR 138 (LAC) at paras 35 and 36.

> management and it was rejected. These so-called alternatives do not only fly in the face of the appellant's own admission that retrenchment was fair and necessary but also the correct approach that this Court has to adopt in scrutinising the consultation process. The appellant now wants this Court to second-guess the commercial and business efficacy of the employer's decision to retrench. He also wants us to decide whether the employer made the best decision under the circumstances. This we cannot do. What we have to do is to decide whether the respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry even if it might not have been the best under the circumstances. In the present case, I am satisfied that there was a genuine commercial rationale for a staff reduction.'

180. Based on the above quoted authority and the evidence adduced before me, I am satisfied and persuaded that there was indeed a valid commercial and business rationale for the Respondent's decision to retrench the Applicant's members. The method which was adopted by the Respondent in arriving at this decision, was not challenged. The strategies which were implemented by the Respondent and discussed with the Applicant during the consultation processes were never placed in dispute by the Applicant. This court, cannot as an afterthought by the Applicant seek to reintroduce the consultation process through the ably and lucid argument advanced by the Applicant's counsel. The issues which were argued by the Applicant's counsel, ought to have been dealt with by the Applicant itself during the consultation process, but the Applicant did not avail itself to this opportunity to the detriment of its members. This court cannot therefore second-guess the commercial and business efficacy of the Respondent's decision to retrench while such challenge was not mounted by the Applicant during the consultation process.

181. It was further argued on behalf of the Applicant that the entire restructuring exercise undertaken by the Respondent ought to be placed in the context of a group which made profits of R267 761 000.00 in 2010. Even the

ostensibly struggling division of flexible plastics, within which the Respondent fell, made a profit of R66 567 000.00 in 2010.

182. However, it was not disputed by the Applicant that the flexible divisions would eventually close down unless the shareholders committed further investment as they were experiencing loss of profit.

183. In the case of General Food Industries Ltd v FAWU,[30] the Labour Appeal Court held that:-

> ‘[47] Mr Wallis indicated that, as a result of the recent judgment of this court in *National Union of Metalworkers of SA v Fry's Metals* (2003) 24 ILJ 133 (LAC); [2003] 2 BLLR 140 (LAC), he was unable to defend the finding of the court a quo that the dismissals were automatically unfair. In that case this court held that the argument that an employer cannot dismiss employees for operational requirements in order to increase profits, but can only do so to ensure its survival, is not supported by the provisions of the Act.
>
> ….
>
> [60] The first substantive issue really is whether a company is prevented from effecting economic adjustments in an already profitable region in order to increase its national profits.
>
> [61] The question of outsourcing had been engaging the attention of the company and the union for some years. Retrenchments had occurred at a number of mills prior to that in the Cape. That the shop stewards demanded that it be dealt with at national level admits of no dispute. The suggested measures to decrease costs (in the region of R20 000) were directed at the Salt River Mill itself and came nowhere near satisfying the amount that outsourcing would save.
>
> [62] I am of the judgment that a natural consequence of the Fry's

30 (2004) 25 *ILJ* 1260 (LAC) at paras 47, 52, 60 - 65.

> Metals judgment is that, all things being equal, a company is entitled to insist by economic restructing that a profitable centre becomes even more profitable. It is also clear from the evidence that the appellant required flexibility on the part of the employees' terms and conditions of employment in order to be competitive. The respondent did not offer such flexibility. In my view that need of the appellant also provided a fair reason to dismiss the employees when they were not able or prepared to offer such flexibility to the appellant. Accordingly, I am of the view that the dismissal of the employees concerned was substantively fair."

184. I am therefore satisfied that an entity such as the Respondent is entitled to retrench in order to make more profit and to avoid closure of those entities which their profit margins has drastically dropped.

Severance pay

185. It was common cause during these proceedings that five employees were paid severance pay. These employees were not offered alternatives to retrenchment.

186. The Respondent contends that the Applicant's members who refused to accept the alternative employment offered to them acted unreasonably, in that, those employees were either offered a higher basic wage or the exact same wage that they earned prior to the retrenchment process. Others, their wages could have been cut by 3%.

187. Accordingly, the Respondent contends that 282 members of the Applicant were offered reasonable alternative employment which they unreasonably refused. Even those Applicant's members whose wages would have ultimately remained lower than their older wages, they acted unreasonably when they did not accept the only viable alternative available at the Respondent for them.

188. On the other hand, it was contended on behalf of the Applicant that the

non-payment of severance pay is in violation of section 41 of the Basic Conditions of Employment Act ("BCEA"). In this regard, it was contended on behalf of the Applicant that the implementation of the 4 shift system alone would have resulted in lesser money being paid to the employees due to the loss of overtime.

189. The evidence demonstrates that the members of the Applicant were indeed used to earning more money through overtime. Even though they are not entitled as a matter of right to work overtime, however, this is a factor which one would have to consider in assessing whether or not having worked overtime over a long period of time and having planned and budgeted their lives from the money received for overtime, they acted unreasonably by not accepting the alternative employment offered by the Respondent.

190. The difficult issue which this portion of the judgment raises is in relation to a number of correspondence which was despatched by the Respondent to the union and attempting to engage the union (the Applicant) in an attempt to avoid job losses and to discuss, where possible, severance pay. There was a concession made by the Applicant that this correspondence was never responded to by the Applicant.

191. The members of the Applicant who were ultimately dismissed, relied on the expertise and/or knowledge of the Applicant as a trade union to protect their interest during those testing times where they were faced with a possibility of losing their employment. Most of the correspondence was despatched to the Applicant who had to advise its members as to how to proceed during this consultation processes.

192. On the basis of the above, I do not find that the members of the Applicant, individually acted unreasonably by not accepting the alternative employment offer advanced to them through the Applicant.

193. The severance pay, as the evidence demonstrates, was offered to these individuals, at some point by the Respondent. It was only as a result of the Applicant as a union having failed to meaningfully engage with the Respondent on behalf of its members, that the Respondent decided to withdraw the offer to pay severance pay. On this basis, I find that the failure by the Respondent to pay the members of the Applicant is in violation of the provisions of section 41 of the BCEA.

194. Accordingly, I find that the members of the Applicant, agreed upon as the Applicant's members properly before these proceedings, should be paid the severance payment.

195. I therefore make the following order:-

    196. The dismissal of the Applicant's members based on operational requirements is substantively fair.

    197. The Respondent is to pay the members of the Applicant severance pay, to be computed in terms of section 41 of the BCEA.

    198. Each party to pay its own costs.

MOKOENA AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv C. Orr
Instructed by:	Cheadle Thompson & Haysom Inc
For the Respondents:	Adv L. Erasmus
Instructed by:	Du Randt Du Toit Pelser Attorneys