REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no JS620/2011

In the matter between:

THABO MATJI AND 3 OTHERS **Applicants**

and

KAYA FM 95.9 (PTY) LTD **Respondent**

Heard: **7- 8 May and 18-19 June 2012**

Delivered: **16 January 2013**

Summary: **Dismissal on the basis of operational requirements. Dismissal was substantively and procedurally fair.**

JUDGMENT

AC BASSON J.

Introduction

[1] The applicants in this matter are Mr Thabo Matji ("Matji") Ms Nomsa Mahlaule, Mr Boas Molobi and Ms Ntokozo Tshabalala. All four individual applicants were members of the Sales Team of the respondent (Kaya FM – hereinafter referred to as "Kaya" or "the station") until their dismissal on the basis of operational requirements.

[2] The applicants challenge the substantive and procedural fairness of their dismissal.

Evidence on behalf of the respondent

[3] Mr Johnstone, Mr Mdlela, Ms Reddy and Ms Tyra Sharnock testified on behalf of Kaya. Johnston who is the Station Manager since 17 May 2010 gave extensive evidence regarding the rationale for introducing a new business model for Kaya and the necessity of creating new posts in the new business structure. His evidence in respect of the business rational was corroborated by the evidence of Mdlela, Reddy and Sharnock who confirmed the reasons for introducing the new business model.

[4] Johnstone testified that he was responsible for the day to day running of Kaya and that his duties include seeking new opportunities for the station. He testified that he invited the Sales Team to a meeting on 17 November 2010. Present at the meeting was the Managing Director, the Management Team and the Sales Team. It is the task of the Sales Team to sell advertisement opportunities to advertisers. Kaya relies on advertisements as an important source of its revenue. Mdlela (the Sales & Marketing Manager) presented the new business model to the Sales Team and explained to them, *inter alia,* the challenges in the advertising market posed by new trends such as social media platforms.

[5] Johnstone explained in detail why it was necessary to revisit the existing business model and why it was necessary to replace it with a new business model. Briefly: the changes in the radio environment and the challenges and competition faced by radio stations necessitated a new and broader strategy of doing business in the radio industry. Radio stations no longer functioned in the traditional radio environment but functioned in a digital environment which encompassed the internet, facebook, twitter and other digital applications. The world of radio has therefore significantly changed with the advent of the digital era. It is therefore necessary for Kaya to tap into this new environment in order to secure its revenue. It is also becoming increasingly necessary to offer to advertisers not only the opportunity to advertise on radio but also the opportunity to advertise by means of “interactive advertising campaigns”. The

old model of advertising does not take into cognisance the new trends offered by the various digital applications. One of the new trends in radio is the so-called "streaming" that allows for radio broadcasts via the internet. The new form of advertising also allows for an additional and powerful form of advertising through the so-called "blogging". During his presentation, Johnstone pointed out to the Sales Team that other companies such as Primedia Broadcasting have already been utilizing these new trends to sell advertising to clients and Kaya, if it fails to respond to this new digital environment, would not be able to compete with them for advertising revenue.

[6] In order to optimise revenue it became therefore increasingly necessary for the station to reconsider its strategy particularly in view of the fact that the revenue generated from so-called direct sales remained stagnant and in fact dropped over the past three years. In respect of direct sales, the shareholders and the Board of Directors became increasingly concerned about the fact that Kaya's direct sales compared poorly with the direct sales of other radio stations. Johnston explained that targets were set for the different months. These targets differed in line with "seasonable spending" in respect of advertising. The revenue brought in by direct sales was not, according to the evidence, sufficient. The problem was compounded by the fact that the Sales Team did not always reach their revenue targets. In this regard, on 15 February 2011, Matji received a letter from Kaya informing him of the fact that he did not reach his agreed targets. He was informed that he was required to attend a performance enquiry to discuss his underperformance. On 4 March 2011 he was given an ultimatum to reach his targets.

[7] Johnstone explained that the station had attempted to assist the Sales Team in the past to try and increase the revenue generated by them and that in June to August 2010 outside consultants were brought in to assist them over a period of three months. He testified that this intervention did not have the desired effect and sales continued to be below expectations. He explained that he had previous experience with other radio stations and that the revenue generated by the Sales Team was not satisfactory.

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Meeting of 17 November 2010

[8] A meeting was scheduled with the sales team on 17 November 2010. Mdlela made a comprehensive presentation entitled "Business Development Business Model" to the Sales Team. From the presentation, it appears that it was discussed that the object of the presentation was to create an overarching strategy for Sales and Marketing. All the applicants also received a copy of the presentation by e-mail. Johnston explained the proposed new business model to the Sales Team and explained to them why it was necessary to introduce a new business model. He also explained to them that this model would assist the Sales Team to increase their revenue. Price Waterhouse Cooper's media outlook for 2010 -2014 was discussed with the applicants. The fact that radio has fast moved into an interactive era meant that Kaya had to be more flexible around their formats and content. It was explained that because the Sales Team was not selling these new products to advertisers (referred to by Johnstone as a "complete solution") it was necessary for them to move into this direction as proposed by the new business model in order to broaden the reach of radio to include other digital and interactive forms of advertising. It was also explained to the Court that, as a result of the recession, advertisers increasingly required maximum returns from radio stations which could only be attained if the product offered to advertisers was broadened considerably.

[9] It was specifically discussed with the applicants that Kaya proposed a strategic business model in its direct sales capability and output. The first part of the model would largely be represented in the profile of a Media Marketing Sales Consultant and that the job profile of this Media Marketing Sales Consultant would be more suitably represented by the needs of the largest commercial independent regional station in Gauteng, the growing needs of the advertisers and the ever dynamic competitive landscape in which the station operates. The existing position of Business Development Executive (held by the existing Sales Team) would therefore be replaced by this new position. As will be pointed out, Matji disputed that the new position included new attributes and testified that the existing Sales Team had already included

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as part of their functions aspects of this new business model. I do not accept that the applicants have already been doing the functions envisaged for the new position. Firstly, if regard is had to the job description contained in Matji's contract of service and that contained in the advertisement (which advertised the new position), it is clear that the new position included various other and additional functions. Secondly, the new business model clearly stipulated that the job content would change by more than 50%. The fact that this was discussed during the meeting and the fact that the Sales Team has accepted this is clear from the evidence and particularly the undisputed minutes of the meeting. Thirdly, at no stage during the presentation in November and December (or shortly thereafter) did the applicants dispute that the job contents would change. The different elements of the new position as Media Marketing Sales Consultant were also discussed with the Sales Team. More in particular, it was discussed with the Sales Team that this position requires a good understanding of how digital, electronic, mobile and print media works and integrates with radio. The specific requirements in respect of what would be required from the marketing side were also discussed with the applicants. It was also discussed with the applicants what was required of this new position in respect of sales and offering products to clients. It is instructive to point out that it was specifically recorded that there was no option that the positions would stay the same.

[10] Johnstone therefore explained that the Sales Team was not active in the new digital environment and that they were not experienced in offering a complete solution to the advertiser that would encompass not only radio but also sms, tweet, internet and blogging opportunities. He explained with reference to the new model that that was the reason why the new model was different and why the new model now proposed a position entitled "Media Marketing Sales Consultant" as opposed to the old job title of "sales manager". This position required additional skills. He explained that the station needed people who would be able to offer these services to people and that the current Sales Team were not geared to operate in this new environment that would have to be in a position to offer a complete "one stop shop" to clients in which all of the different advertising options will be available.

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[11] According to the evidence therefore, the rationale for the changes were explained to the Sales Team during the meeting in November 2010 and the fact that the current business model had to be adopted; that there would be changes in the sales department and that the job contents would change by more than 50%.

[12] On 28 November 2010, Mdlela sent an e-mail to the Sales Team to remind them that he had asked for feedback before 25 November 2010. When he did not receive any feedback, he extended the deadline to 1 December 2010. Apart from one e-mail, no member of the Sales Team responded with suggestions. Johnstone testified that retrenchment was not contemplated at that stage and that that was the reason why the section 189 notice was not issued to the Sales Team at that point in time. Tshabalala responded to the e-mail dated 29 November 2010 and requested a further meeting in which he pointed out that he was under the impression that feedback would be given at the next meeting.

[13] The minutes of the meeting was sent to the applicants on 17 November 2010. The contents of the minutes were not disputed by the applicants at the time. The minutes record, *inter alia,* who was present and what was discussed. It is specifically recorded that it was discussed that job descriptions would change and that training would be given once the new model has been implemented.

[14] By the end of that presentation, the Sales Team was therefore fully aware of what the contents of the new business mode entailed; what the rationale for the new business model was and that their jobs were to change in order to execute the proposals contained in the new business model. As of 19 November 2010, the Sales Team therefore could not have been under any misinterpretation that their job contents would have remained the same. Johnston explained that Kaya discussed the model with the Sales Team in an attempt to reach joint consensus before the model was introduced.

[15] Reddy, the operations manager, also took care of financial matters and Human Resources at Kaya. She confirmed the rationale for introducing the new business model. She also confirmed that the job content of the new positions

were totally different in the new model. More importantly, she testified that the Sales Team accepted the new business model and that this acceptance is recorded in the minutes. She confirmed that the section 189 notice was not issued earlier than January 2011 because retrenchment was not contemplated at that stage. Once the job specifications were drafted the applicants were invited to apply for positions in the new structure. She also confirmed that, although the applicants did not attend the profiling exercise (see hereunder), they could have attended the interviews for the new positions and that they were then able to demonstrate to the interview panel that they indeed had the necessary skills. Reddy also testified that she had individual discussions with the applicants in January 2011. According to Reddy, Tshabalala was interviewed and was offered a position after the interview. (I will return to the position of Tshabalala hereinbelow.) The applicants on the other hand showed no interest whatsoever in the positions.

[16] Scharnock, who holds the position of sales, confirmed that she was involved with the training of the Sales Team in June/ July 2010 and confirmed that the training made no difference in the performance of the Sales Team. She also confirmed that she was involved in the meeting of November 2010 when the new model was discussed. She also confirmed that the selling function under the new business model differed vastly from the old model.

Second meeting: 6 December 2010

[17] A second meeting was held on 6 December 2010 in order to consider feedback from the Sales Team. It appears from the minutes and the evidence on behalf of Kaya that on 6 December 2010, the Sales Team had accepted the new business model without any change. Mdlela also confirmed that the team had accepted the new business model without any changes. As already pointed out, the minutes of the meetings held on 17 November 2010 and 6 December 2010 were e-mailed to the members of the Sales Team. The minutes were not disputed.

Section 189 – Notice dated 24 December 2010

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[18] After the meetings on 17 November and 6 December, the station decided to implement the new business model. The new job specifications were drafted and after that was done Kaya realised that the position of the Sales Managers had to change in line with the new business model. Johnstone was, however, adamant that it was still not inevitable that the Sales Team would be retrenched.

[19] The section 189 notice dated 24 December 2010 was issued to the applicants only on 11 January 2011. In terms of this notice, it is recorded that two meetings were held – on 17 November and one on 6 December during which the new business model was discussed. The notice further records that limited responses were received from the Sales Team and that they have been considered. In light of this, it was therefore accepted by Kaya that it was not in dispute that the sales function required a significant overhaul and improvement. The applicants were informed that Kaya was of the view that the present Sales Team lacked the necessary skills to achieve the proposed milestones and to embrace the dynamic sales and marketing effort it required. The positions of the direct Sales Teams were therefore at risk in the event the members were unable to be accommodated in the new proposed Sales Team they would be retrenched. The team was informed that new positions would be advertised and that the existing Sales Team as well as external candidates would be invited to apply. The existing Sales Term were then invited to participate in a so-called “profiling” exercise whereby an external consultant that specialised in skills assessment would conduct personality profiles where after the existing profiles of staff would be compared to the KPA’s as required for the new positions. Only following this profiling process and the application and recruitment process and, if it transpires that certain individual will become superfluous to the needs of the station, will further consultations take place with regards to the possibility of alternative employment, the timing of possible dismissals for operational reasons and severance pay. The Sales Team was also informed that if they had any questions and queries they should direct these in writing to either Mdlela or Reddy.

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[20] A meeting was scheduled to conduct the profiling. It was common cause that none of the individual applicants attended the meeting. (I will return to the profiling exercises in more detail hereinbelow.)

Letter by Mdlela dated 19 January 2011

[21] Mdlela responded to this notice in a letter dated 19 January 2011 in which he complained about the process followed by Kaya. He, *inter alia*, suggested that there were not operational requirements.

Letter of 25 January 2011

[22] The Sales Team wrote a letter dated 25 January 2011. In this letter, they queried how they could be assessed in the absence of a fair performance management system. The applicants also wrote that they intended approaching the Labour Court for a “prohibitory (sic) interdict”. It is instructive to note that the applicants did not challenge the economic rationale for the new business model in this letter. It is common cause that the Labour Court has not been approached.

Letter of 27 January 2011

[23] Kaya responded to the letter on 27 January 2011. The process followed up until that time was summarised in the letter. In this letter Kaya disputed that the rights of the applicants were adversely affected. More in particular it is stated in the letter that Kaya wished for the team to participate in the process of recruitment and although the deadline for applications exclusive to internal applicants has passed and external applications were not yet invited, Kaya still wanted the current team to apply. The letter further records that no one has yet been interviewed or appointed to the new positions. In respect of the profiling exercise it is recorded in the letter that the purpose of the assessment process was not to conduct and *ex post facto* profiling, but merely to ascertain the suitability and skills of those employees who wished to be absorbed into the new structure. The applicants were informed that if they did not accept the invitation to apply for positions, Kaya would regard that as a waiver of their rights and that the consultation process would then continue.

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The letter ends with a statement that it is recorded that during the meetings of 17 November and 6 December 2010 and the latest correspondence, the applicants have not challenged the fundamental business rationale for the desired change to the sales and marketing model.

[24] Despite the invitation to participate in the recruitment process, none of the applicants did so except for two of the Sales Team members who did engage the respondent and were appointed to positions in the new structure.

Letter dated 28 January 2011

[25] The attorneys on behalf of the applicants responded to the letter on 28 January 2011. In this letter it is recorded that the applicants attended the meeting on 17 November 2010 but that they understood the presentation to be a "proposal" to improve the way the station does business. It is further recorded that the applicants at no stage understood that their positions would be placed on risk. The letter ends of by stating that Kaya had not engaged in a consultation process.

Profiling exercise

[26] Johnstone explained to the Court that the station decided to conduct a profiling exercise in order to assess the skills of the Sales Team. The Sales Team was invited to a meeting held on 26 January 2011. As already pointed out, an outside consultant was hired to objectively assess the skills that the Sales Team had. Despite the fact that the Sales Team had already received a 189 notice, they refused to participate in the profiling assessment. Johnstone explained that even if it did transpire that the Sales Team did not have the necessary skills, that did not necessarily imply that they would be retrenched. Since the applicants had refused to attend the profiling exercise, Kaya was not in a position to assess their skills.

[27] Johnstone in an e-mail to Mdlela and Reddy confirmed that only Heather Mendes attended the assessment session. It is recorded in the e-mail that there was an agreement on 6 December 2010 that the Sales Team would attend the meeting. Johnstone testified that they needed the skills

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assessment because that was the only way in which the station could consider whether it was necessary to train the staff.

Advertising of positions

[28] Kaya internally advertised vacancies within the station. Although the positions were advertised before the consultation process commenced, any prejudice that may have been suffered by the applicants were cured by the conduct of Kaya by offering the positions to the applicants on various occasions even after they have refused to apply for the positions.

[29] It is common cause that except for Tshabalala, none of the applicants had applied for the vacancies despite the fact that they have repeatedly been invited to do so (see hereunder). It is further common cause that a certain Thami Malatsi (hereinafter referred to as “Thami”) was interviewed for a position and appointed to a new marketing decision. It is important to point out that Tami was successful in her appointment despite the fact that she also initially refused to participate in the profiling exercise. Johnstone testified that Thami currently performs exceptionally well and that she also received training.

[30] Johnston testified that at no stage did Kaya decided not to appoint any of the present sales people to the new positions. He explained that they had decided on a job description and that the candidates would have been measured against the job descriptions. If a candidate did not measure up, Kaya would have trained the individuals or would have offered them an alternative position. If this was not possible, the option of retrenchment would have been invoked. Johnstone was adamant that the process that was followed was not a sham and that the applicants were invited to participate in the process.

[31] It is common cause that Tshabalala had applied for a position and that he was interviewed and was offered a position. It is further common cause that Tshabalala had rejected the offer of employment. At this juncture it must be pointed out that Tshabalala did not testify at the hearing and therefore offered no explanation whatsoever to this Court as to why he had rejected the offer. This Court has therefore not been placed in a position to consider why it

should find the dismissal of Tshabalala unfair. In the event it is this Court's finding that Tshabalala's claim should be dismissed at the outset.

[32] Johnstone testified that, because none of the applicants had applied for positions in the new structure, he assumed that they did not apply because they did not want to participate in the process. He testified that the section 189 process therefore had to continue. Johnstone, however, testified that, despite the fact that the Sales Team elected not to apply for positions, they continue to persist that they were still the Sales Team.

<u>Letter dated 1 February 2011</u>

[33] The attorneys acting on behalf of Kaya responded on 1 February to the letter by the applicants' attorneys dated 28 January 2011. In this letter, it is reiterated that there were various interventions to change the business modes structure and that those interventions had not borne fruit. As a result, Kaya had decided to consider a more structural approach to sales which approach was discussed on 17 November 2010. The letter further confirms that the business model was emailed to the Sales Team and that at the meeting of 6 December 2010, the Sales Team accepted the new business model without any changes. The letter further records that the applicants have not applied for the positions and despite the fact that the positions have now been advertised externally and that there had been more than 200 applications. Despite the fact that they did not apply, Kaya again extended an invitation to the current Sales Team to apply for the media marketing consultant positions that were advertised. Kaya further undertook not to interview external applicants until close of business on Friday 4 February 2010. However, should the applicants fail to apply, Kaya will accept that they have waived their right to seek roles within the new sales and business marketing. It is specifically disputed in this letter that Kaya had already taken a decision to retrench the individual members of the Sales Team.

<u>Letter dated 31 March 2011</u>

[34] On 31 March 2011, Matji (and the applicants) received a letter giving them notice of a further consultation in terms of section 189. The letter sets out the

procedures that have been followed up to date. The letter refers to the fact that an undertaking was given in February 2011 that no positions would be filled provided that the applicants applied for the Media Marketing Consultant position before 4 February 2011. The letter further records that the applicants had declined an invitation to apply for the position. However, despite the fact that they have declined on various occasions to apply for a position in the new structure, they were once again invited to apply. They were also, once again informed, that should they fail to seek a position in the new structure, their services might be terminated for operational requirements. Matji (and the others) was specifically informed that an attempt was made to utilise his skills within other areas of work but that Kaya concluded that his skills were limited to the sales environment. He was further informed that there was currently a vacancy available within marketing and that he was free to apply for that position. Lastly, Matji was also informed that the fact that he did not avail himself of the opportunity to participate in the profiling opportunity should not be regarded as a prohibition on seeking accommodation within the new structure.

[35] On 10 May 2011, Tshabalala rejected Kaya's offer of alternative employment.

<u>Letter dated 16 May 2011</u>

[36] On 16 May 2011, the applicants were given notice of a "Final Consultation in terms of section 189". The letter refers to the consultations held on 17 November 2010, 6 December 2010, an individual consultation on 13 January 2011 and a consultation meeting held on 27 January 2011. The applicants were informed that their positions were likely to be filled by the end of May 2011. The applicants were invited to consult with Kaya on alternatives to redundancy, the timing of their retrenchment if applicable and severance pay. A consultation meeting was scheduled for 17 May 2011.

<u>Further consultation meetings</u>

[37] Individual consultations with the old Sales Team were held on 17 May 2011 and a further consultation meeting was held with Matji on 23 May 2011.

Letter dated 27 May 2011

[38] The applicants' attorneys sent a letter to Kaya on 27 May 2011 in which attorneys conceded that their clients have refused to apply for the new positions as they were of the view that the station has interviewed external candidates despite the fact that they have achieved their targets. It is further stated that the applicants viewed the section 189 process as a sham. The letter further states that the applicants were willing to attend any training "in order to fully embrace the proposed model".

[39] Kaya's attorneys responded to the letter on 31 May 2011. In the letter it is pointed out that Kaya had a fundamental problem with the conduct of the applicants throughout the process and the fact that the applicants continued to convolute the distinction between the broader restructuring process that commenced in November 2010 and the performance management process which was necessitated by the general failure of the applicants to reach their targets. It is further pointed out in the letter that the applicants have continued to refuse to participate in the section 189 process and that, despite various invitations to apply for a position, the applicants had failed to do so. The letter lastly emphatically disputed the allegation that the applicants have in fact reached their targets.

Letter dated 31 May 2011

[40] On 31 May 2011, Matji (and the other applicants) was informed by the station that a decision had now been taken to retrench. They were further informed that they had declined to participate in any meaningful way and that they have declined to make counter-proposals, to participate in the skills assessment, refused to apply for any position, propose any alternatives employment and that they had only criticized the process and not the substance. Matji was informed that his insistence to be considered for the head of sales position was simply "disingenuous" as the position was not vacant. Furthermore, an interview for that position was conducted and Tyron was appointed as head of sales. Matji, on the other hand, had never applied for the position.

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Evidence of Matji

[41] Matji's evidence was that the Sales Team realised in January 2011 that they were going to lose their jobs. He admitted that he knew that their positions would be renamed but testified that he was not worried as they were already selling advertisement on line. According to him, there were no changes in his duties in terms of the new business model but conceded that they did not use social networks as part of their duties. When pressed in cross-examination about what exactly the job contents were, Matji became argumentative and vague. He however, later conceded that they did not reject the new business model and that they did "embrace it".

[42] To a question why he did not apply for positions, Matji responded that he was of the view that Kaya had already made up its mind. When pressed why he did not apply he gave a rather convoluted argument that he did not apply because the positions were already advertised externally. He, however, conceded that he received the letter of 27 January 2011 in which it was clearly stated that the Sales Team could apply. He however, denied that there was a meeting with him on 13 January despite the fact that his personnel file records that a meeting was held with him. In respect of the minutes of the meetings held in November and December 2010 he testified that they disputed the minutes but conceded that they did not dispute the minutes at that time.

[43] I have evaluated the evidence of Matji. In cross-examination he became increasingly argumentative and evasive. Questions that clearly posed a difficulty to him were merely ignored and met with answers that were completely unrelated to the question. Matji could also not explain why crucial aspects of his evidence, such as that they were promised training, were never put to the witnesses of Kaya. Matji's evidence as to why they did not apply for the advertised positions was also vague. His answer as to why he rejected the profiling process was equally vague He also could not explain why they were surprised when they were called to a profiling meeting especially in light of the fact that they were invited to the meeting. His only explanation was that they should have been given an agenda in advance. Matji could also not explain

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why they refused to be assessed particularly as it had been agreed on 6 December 2010 that there would be an assessment and particularly in light of the fact that the business model expressly pointed out that the job content would change more than 50%. Even to a direct question by this Court as to why he did not apply particularly as this could have saved his job, Matji could not give a proper answer. He also could not give a proper answer to the question why he simply could not have attended the interview and asked all the questions he still had about the position. He conceded that one of the reasons why he did not apply for the position was because he was of the view that the section 189 process was not properly followed.

[44] Matji also refused to accept that the section 189 process that was being followed was a different process to the one also followed by the employer during that stage in respect of his failure to reach his targets.

[45] It appears that Matji was of the view that Kaya did not endeavour to correct the non-compliance with the section 189 processes and that they were “tricked” to attend the profiling meeting and that they were “surprised”. It appears that Matji is blaming Kaya’s management for not conducting the consultation process in the manner he thought was fair.

[46] I am in agreement with the submission that the evidence of Matji was generally unsatisfactory. He was an evasive witness who often failed to answer simple questions that were put to him in an attempt to evade the difficulties that these questions posed for his case. One of these difficulties was his failure to explain why the Sales Team had accepted on 6 December 2010 that the new model needed to be implemented over a period of time whilst at the same time insisted that there was hardly any difference between what he had been doing in sales and the new position. Furthermore, in his evidence in chief he was adamant that no consultations whatsoever took place as required in terms of section 189 yet he changed his story when he was confronted with the minutes of the meeting on 17 November. Now he claimed that it was Kaya that was refusing to engage with him. He further insisted that applying for a position in the new structure can never be equated to a consensus seeking process yet the LRA requires parties to attempt to

reach consensus on appropriate measure to avoid dismissing the affected employees.

Substantive fairness of the dismissal

[47] In terms of section 188(1)(a) of the Labour Relations Act ('the LRA'),[1] a dismissal is substantively unfair if the employer fails to prove that the reason for dismissal is unfair based on the employer's operational requirements. Section 213 defines operational requirements to mean requirements based on the economic technological structural or similar needs of an employer. Retrenchment is a no fault dismissal. Consequently, the LRA provides for very specific procedures to be followed prior to a dismissal on the basis of operational requirements. The Courts, however, do not expect of an employer to follow a checklist approach in conducting a consultation process in terms of the LRA.[2] The process commences with the issuing of a section 189 notice. Once the section 189 notice has been issued the law requires the employer to approach the consultation process with an open mind and with an attempt to reach consensus on the issue prescribed by section 189(2) of the LRA. An employer may not confront the employee with a *fait a complit*. It was suggested on behalf of the applicants that a decision had been taken to retrench before the process commenced. The evidence of Johnston is, however, clear. The section 189 notice was only issued once it was realised that the positions of the Sales Team were in danger. Furthermore, the applicants were given various opportunities to apply for positions. They have steadfastly refused to apply for positions. The applicants have also been afforded an opportunity to be assessed. They refused this opportunity. Even after they have refused, Kaya urged them to apply for positions notwithstanding the fact that they have not been assessed. They have declined to do so. The deadline for external applications had been placed on hold to afford the applicants an opportunity to apply for positions in the new structure. They still steadfastly refused to apply. I am therefore not persuaded that the applicants have been faced with a *fait a complit.* In fact, it appears

[1] Act 66 of 1995.
[2] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Unino* (1999) 20 *ILJ* 89 (LAC) at para 29.

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from the evidence that, had they applied for positions, they would, in all probability have been appointed to the positions particularly if regard is had to the fact that one employee (who originally was part of the group) was in fact appointed notwithstanding the fact that she also initially formed part of the group who refused to participate in the assessment exercise.

[48] The applicants tried to persuade this Court that there was no necessity for the new structure and that they effectively have been doing the additional tasks envisaged by the new business structure. I have already pointed out why I reject this evidence. Moreover, no reliance could be placed on the evidence of Matji who, as already indicated, was an obstructive and evasive witness. I therefore accept the evidence that Kaya had an operational rationale to introduce the new business model. I also accept the evidence that the applicants have in fact accepted the new business model. The applicants have also been consulted on the proposed model and that they have accepted the economic rationale and the proposal contained in the business model. It is further accepted that only once the model has been accepted and the job descriptions have been finalised, did Kaya contemplate retrenchment. Matji also accepted in his evidence that they have accepted the need for the new business model in order for Kaya to become more competitive in the radio advertising market and to improve its revenue in this regard. His evidence in this regard contradicts his other evidence that the new Media Marketing Sales Consultant was merely a change in title and that there was hardly any difference between what he had been doing and what was required of the new Media Marketing Sales Consultant in the new business model. Moreover, the minutes of the two meetings, that were not disputed, record that the applicants have accepted the new business model without any changes.

[49] Kaya furthermore made various attempts to reach consultation on appropriate measures to avoid dismissals. The applicants were invited to participate in a profiling exercise to be conducted by an independent body to assess their skills and aptitudes and to compare these to the KPS's required for the new positions. The applicants refused to attend the profiling exercise. Despite

them having refused to do so, Kaya still kept the offer to apply for positions open. The applicants still refused to apply. I am further also persuaded that the applicants were fully aware that the contents of the jobs differ under the new business model. I am further persuaded that the station had a sound financial rationale to implement the new business model that aims to adopt the new digital environment. I should also point out that I do not accept the applicants' evidence that they were already doing the tasks envisaged by the new business model. If that had been so, they would have applied for the new positions they have steadfastly refused to do. The applicants' recalcitrant attitude gave the station the right to take a decision to retrench: The applicants clearly did not want to participate in the process. In fact the impression gained from the evidence is that the applicants tried to delay the process as long as they can.[3]

[50] I am of the view that in light of the fact that the applicants have accepted the new business model and in light of the fact that the applicants have steadfastly refused to avail themselves of the opportunity to apply for other positions, Kaya had a valid and economic rationale to dismiss and that it had exhausted the options to avoid dismissing the applicants.

[51] In respect of Tshabalala, I have already pointed out that he had elected not to give evidence and inform the Court why he rejected the offer of employment. It is trite that a failure to give evidence in circumstances where the witness is available naturally leads to the inference that he fears that such evidence will be unfavourable to him especially where evidence is available and would elucidate facts.[4] Why Tshabalala is not before Court is therefore not explained. He was offered a position in the new structure. Why did he refuse the position and why should he now be allowed to challenge his dismissal? His claim is therefore dismissed on these grounds.

[52] Accordingly, I am of the view that there was a fair reason to dismiss and in the event the dismissal was substantially fair.

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[3] See in this regard: *Chester Wholesale Meats (Pty) Ltd v NIWUSA and Others* (2006) 27 *ILJ* 915 (LAC) and *NUM & Others v Crown Mines l.td (*2001) 10 LAC 5.2.22 at paragraph [40].
[4] *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 749.

Was the dismissal procedurally unfair?

[53] I am satisfied having regard to all the facts that the dismissals of the applicants were procedurally fair. An aspect that stands out from the evidence is the fact that the applicants have refused to properly participate in this section 189(3) consultation processes.

[54] Section 189(2) of the LRA imposes a correlative duty on both the consulting parties to engage in the 189 process. The process is not one sided. The impression gained from the evidence is that the applicants sought unreasonably to delay the *bona fide* redeployment or placement process and thereafter the retrenchment process.[5] I am persuaded in light of the evidence that at the time Kaya took the decision to retrench the applicants Kaya had tried for months to persuade the applicants to apply for positions in the new structure. They steadfastly refused to do so. They have only themselves to blame for the fact that they were dismissed.

[55] I have considered the fairness of the procedure that was followed. Fairness extends to both parties.[6] I am persuaded that Kaya has attempted to follow a fair procedure but that its attempts were frustrated by the steadfast refusal of the applicants to participate in the process. Their lack of co-operation in my view cannot be blamed on Kaya. In the event, I am of the view that the dismissal was procedurally fair.

Costs

[56] In respect of costs, I have considered the circumstances leading to the dismissal of the applicants and their conduct throughout the retrenchment

[5] See in this regard: *Chemical Workers Industrial Union of SA v Lennon Ltd* (1994) 15 *ILJ* 1037 (LAC) and *NEHAWU v University of Fort Hare* [1997] 8 BLLR 1054 (LC).
[6] See *FAWU & Others v SA Breweries* [2004] 11 BLLR 1093 (LC): '[48]I pause to mention that in considering issues of fairness, the court is obliged to have regard to fairness to both parties. There is no room for any suggestion (and Mr Kahanovitz for the applicants did not argue this) that fairness is confined to its effect on employees only (*National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (A) at 589C–D; *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) at 559F; *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) at 112C–E).'

process. I am satisfied that this is a case in which fairness dictates that costs should follow the result.

[57] In the event, the applicants' claim is dismissed with costs.

AC Basson J.

Judge of the Labour Court

LABOUR COURT

APPEARANCES:

FOR THE APPLICANTS:	Advocate B Matlejoane
	Instructed by DMS Attorneys
FOR THE RESPONDENT:	Advocate E Myhill
	Instructed by Crawford Attorneys

LABOUR COURT