REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1327/09

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**First Applicant**
ELSIE KUNENE and 23 OTHERS	**Second-Further Applicants**

and

CRABTREE ELECTRICAL ACCESSORIES SA: A DIVISION OF POWERTECH INDUSTRIES (PTY) LTD	**Respondent**

Heard: **27; 28; 29; 30 May 2013**

Delivered: **29 April 2014**

Summary: Retrenchments: Not sufficient for employees to merely allege that in general, the employer had no need to retrench. Employees must lay factual basis for conclusion that there was no need to retrench.

Selection criteria: The selection of employees for retrenchment purely to inflate the numbers not fair and objective

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JUDGMENT

TLHOTLHALEMAJE, AJ

<u>Introduction</u>**:**

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[1] The Second to further Applicants' services were terminated on 7 August 2009 on the grounds of operational requirements. They dispute the procedural and substantive fairness of the dismissal and seek retrospective reinstatement. In the alternative, they seek maximum compensation.

The identity of the individual Applicants**:**

[2] In its response to the Applicants' statement of claim, the Respondent objected to the jurisdiction of the Court in relation to two of the Applicants that were retrenched, viz, Diphoko Molefi (24th Applicant) and ENT Maphisa (25th Applicant). In this regard, it was submitted that the two individuals were not part of the initial referral of the dispute to the Metal and Engineering Industries Bargaining Council (MEIBC) as their names were not included in the list of Applicants attached to the referral form.

[3] The Applicants in the pre-trial minute that was signed on 15 September 2011, conceded to the preliminary point raised, and the dispute in respect of the two individuals was withdrawn. However, when the trial commenced, Mr. Motaung on behalf of the Applicants brought an application to reinstate the dispute in respect of the two individuals. Arguments were heard in this regard and the proceedings were adjourned until the next day when a ruling was to be delivered. Before a ruling could be delivered, Mr. Motaung advised the Court that the application was abandoned. To this end, this application only involves 22 Applicants.

Background and common cause facts:

[4] The Respondent is a manufacturer and supplier of electrical equipment and accessories such as sockets, switches and allied products. It had initially embarked on a restructuring process in 2007, and following inputs from NUMSA, some aspects of its operations were outsourced to service providers (SMMES) created by its former employees. These were employees who had accepted voluntary packages at the time, rather than an automatic transfer into the employ of other service providers who were at that stage operating the outsourced operations/departments on behalf of the Respondent.

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[5] Notwithstanding the restructuring process in 2007, the Respondent introduced short-time in October, November and early shut-down in December 2008 as a result of non-viability of its operations. On 28 January 2009, the Respondent issued to all affected employees and to NUMSA, a notice in terms of section 189 (3) of the Labour Relations Act (The Act). The departments that were affected were PVC Moulding, Metal Fabrication, Cover Plate, Nylon Moulding and Printing. With effect from February 2009, consultation meetings were held with NUMSA regarding the restructuring and possible retrenchments. In total, eleven consultative meetings were held between 04 February 2009 and 30 July 2009. During this period, NUMSA utilised no less than four different representatives.

[6] Following from the consultation process, 102 employees, including members of NUMSA accepted voluntary retrenchment packages. Consultations continued in respect of some remaining 38 employees who had not accepted the voluntary retrenchment packages. Some of these employees were then transferred to the Nylon Department and then later recalled back to their previous departments. Ultimately, the jobs of 16 employees were saved, leaving the remaining 24 employees. Consultations however in respect of the remaining employees collapsed around June 2009, and NUMSA through its erstwhile attorneys Routledge Modise threatened urgent action against the Respondent were it to proceed with transferring the remaining employees to the SMMES. The Respondent conceded at the time that its intended transfer of the affected employees to the SMMES did not amount to a transfer as contemplated in section 197 of the Act, and it agreed to continue with the consultation process with NUMSA in respect of the remaining employees.

[7] On 16 July 2009, the parties met with a view of concluding the consultation process. However, not much progress was made as NUMSA wanted to start the process afresh and sought further documentary information which the Respondent had provided. NUMSA was of the view that the Respondent had no compelling reasons to retrench the 24 remaining employees. The deadline of the consultation process of 15 July 2009 had passed and was extended to 30 July 2009.

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[8] On 30 July 2009, NUMSA was still of the view that there was no need to retrench and declared a dispute. The Respondent informed NUMSA that in the light of the latter's position, the consultation process was exhausted and that notices of retrenchments would be issued to the 24 employees. On 07 August 2009 such notices were issued, and the employees were paid out their severance packages. A dispute was then referred to the MEIBC. This resulted in a certificate of non-resolution being issued, enabling NUMSA to initiate these proceedings.

The Respondent's evidence:

[9] Pierre Northal, who is now retired and was previously the Respondent's Managing Director between 2003 and 2011 testified as follows:

Following the restructuring process in 2009, the Respondent has since 2011, merged as a division into a larger business group. From 2004, the Respondent encountered business challenges as a result of cheap imports from China and other countries. This resulted in an escalation of local costs. The factory part of the Respondent consisted of various sections including moulding shop, paint shop, metal, and assembly. The second to further Applicants were less skilled and were mainly employed as operators in the moulding shop. Between 2004 and 2005 the Respondent's financial position was relatively healthy. However, towards the end of 2005, the business faced challenges from an influx of cheap imports, high costs of raw material and increased competition. This resulted in the Respondent having to increase its prices, and thus making it less competitive. Between 2006 and 2009 the Respondent's financial position remained precarious as business had continued to decline.

[10] Amongst other measures the Respondent had taken was to introduce short time in March 2007. In May 2007, the Respondent commenced consultations with NUMSA regarding retrenchments. This process was concluded in August 2007, and also resulted in the creation of SMMES which were managed by ex-employees affected by that process. Also flowing from that restructuring process was that the relocation of the assembly portion of the factory to

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Lesotho. The Respondent also approached the National Department of Trade and Industry for assistance and intervention more specifically with regard to cheap imports. However nothing came out of these initiatives.

[11] Northal also made reference to the Respondent's financial results for the period 2005 to 2010 as contained in pp203 – 213 of the Respondent's bundle. As shareholders wanted a return on assets of 15%, this was only reached once in 2005. Thereafter this had significantly dropped over that period and by 2009, it had only reached between 3 and 3½%. Sales marginally increased in 2008. Net margins (profits after tax) declined significantly from 7% in 2005 to 2.9% in 2010. As at 2009 the figures in this regard were 2.7%. In regards to pricing comparisons with its competitors (viz, Clipsol and CBI), the Respondent could only compete in respect of four products which were below price, and this was despite competitors having dropped the price of their own products even further as a consequence of cheap imports. As competitors had targeted the Respondent's high volume products, the difference in pricing was between 35% and 50%.

[12] Northal further blamed the global economic meltdown in 2008 for compounding the Respondent's economic woes. The Respondent experienced an increase in total manufacturing costs despite taking measures to curb administration and delivery costs, overheads, and other associated costs. Contract workers were also reduced and following from the first retrenchment exercise in 2007 one unit was also merged with another company. The outsourcing exercise flowing from restructuring had also resulted in some cost saving, but still there was not much improvement in the Respondent's financial position

[13] Under cross-examination of Northal had conceded that part of the outsourcing plan was to retrench employees in order to make savings. He contended that he was not aware that the Respondent could have applied for exemptions from MEIBC in respect of wage increases or costs of labour. He further conceded that it was possible that the established SMMES could have paid their employees less. He however, did not know how those entities were

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operating as they were completely separate and independent from the Respondent.

[14] Mike Hlongwane was previously employed as the Respondent's Employee Relations Manager and was involved in the restructuring process and consultations with NUMSA from the beginning. In March 2007 he had notified NUMSA of the Respondent's decision to implement short time as a result of reduction in orders experienced by the Respondent. He confirmed that in 2007, the assembly plant was relocated to Lesotho, and that as a result of NUMSA's input, some operations were outsourced to the SMMES following a section 189 process. In October 2008, the Respondent again introduced short time with a view of avoiding retrenchments. This was for the period 24th and 31st October and 07th and 14th November. The period between 01 and 12 December 2008, and 09 January 2009 was considered as a lay off or early shut down period. In January 2009, despite the short-time, lay-offs and early shut down, the business had still not improved. On 28 January 2009 notices in terms of section 189 (3) of the Act were issued. Hlongwane had attended all eleven meetings that were held between 04 February and 30 July 2009.

[15] Hlongwane further testified that during these consultation meetings, NUMSA did not at any stage raise any objections about outsourcing, nor did it challenge the Respondent's financial reports. He further contended that NUMSA did not at any stage propose any alternative to retrenchments even though it held the view that there was no need to retrench. The fact that NUMSA also utilised four different representatives did not add to progress and this had further prolonged the consultation process. In the fourth consultative meeting held on 31 March 2009, the focus had shifted to the issue of severance package. Consensus was reached on the voluntary severance packages. More than a hundred employees had accept voluntary severance packages. The rest of the employees had refused to even consider a transfer to the SMMES that came about as a result of the 2007 restructuring process.

[16] Under cross-examination, Hlongwane conceded that his knowledge of the commercial rationale for the retrenchments was limited. He was, however, aware that the Respondent's products were between 30% to 40% more

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expensive than those of competitors. He conceded that the Respondent's other products such as cables, cords and multi-plugs were less expensive than those of competitors. He denied that the assembly part that was relocated to Lesotho was still part of the Respondent and contended that it was an entity on its own. Hlongwane further testified that short-time could not have been implemented indefinitely in order to save jobs, and furthermore, this measure would not have in the long term turned the business around.

[17] With regard to employees or areas that were to be affected by the retrenchment, Hlongwane had testified that mainly operators were identified. Thus employees in the "C" category who were machine setters were not to be affected by the exercise. It was put to him during cross-examination that the 4th, 14th and 21st applicants, viz, Messrs Joseph Tyomane, Esau Thulani Hlatshwayo and Fanuwu Mlotshwa were employed as setters and yet they were retrenched. Hlatshwayo had denied that these Applicants were employed in that capacity at the time of the retrenchments. He however, conceded that if they were indeed setters at the time, it would have been a mistake to retrench them.

<u>Evidence on behalf of the Applicants:</u>

[18] Nothing turned on the evidence of Sifiso Msibi, who is currently employed by the Respondent as a stores assistant and who is also a NUMSA shop steward. He he had merely confirmed that the SMMES that came into place in 2007 were still in operation, and they had employed about 120 of the Respondent's former employees following the retrenchments.

[19] Esau Hlatshwayo is the fourteenth Applicant and was previously employed as a machine setter since 20 July 1995 until his retrenchment. His position was at grade C and he was employed in the Respondent's Metal Fabrication and Cover Plate Cell unit. His main functions entailed setting and operating machines. Under cross-examination, he conceded that at the time that he was retrenched, he had been moved to the Nylon Moulding unit, and further that he was not performing duties of a setter. He had maintained his grade C status and was paid at that level even though he no longer performed

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functions of a setter. He was moved to the other unit in early August 2009, and conceded that it was not unusual for the Respondent to move employees within units.

[20] The evidence of Matli Joseph Tyomane followed a similar pattern as that of Hlatshwayo. He is the Fourth Applicant and also testified that he was initially employed as a setter. He was however moved to the position of operator in the Moulding unit before some three weeks prior to the retrenchments. He denied under cross-examination when it was put to him that the machines in his previous department were obsolete hence he was moved. He contended that those machines were still functional, as the products it produced were still in demand.

[21] The testimony of Fanuel Mlotshwa, the Twenty First Applicant also followed the same pattern as that of the last two witnesses on behalf of the Applicants and it is not worth repeating.

The legal framework:

[22] Where an employer dismisses employees on account of its operational requirements, the provisions of section 188(1) of the Act obliges the employer to prove that the reason for the dismissal was fair. The burden of proof on the employer is also imposed by the provisions of section 192 (2) of the Act. In emphasising the question of onus, Tlaletsi JA in *Super Group Supply Chain Partners v Dlamini and Another*[1] restated that it is expected of the employer to discharge the onus of proving that that the dismissals of the employees were fair. In doing so, evidence was to be presented to show that there was a need to retrench, there was a fair reason to retrench the employees, the selection criteria was fair; and the dismissals were effected in accordance with the requirements of a fair procedure.

[23] The Labour Appeal Court has over time adopted different approaches when evaluating the substantive fairness of dismissals related to operational requirements. The exposition of these various tests is to be found in *PAK Le*

[1] *(2013) 34 ILJ 108 (LAC)* at para 27

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Roux's article in Contemporary Labour Law [2]*.* These test, adopted within the context of the now repealed Labour Relations Act 28 of 1956 included firstly, that the decision to retrench must be taken in a *"bona fide and business-like manner"* approach[3]. The second test adopted in *National Union of Metalworkers of South Africa v Atlantis Diesel Engines (Pty) Ltd*[4] was the '*Dismissal as the last resort',* in terms of which an element of fairness was added to the first test. Thus in terms of this test, it was not merely the correctness or otherwise of the decision to retrench, but the fairness thereof, and whether the decision to retrench was the only reasonable option given the circumstances. Thirdly, the *"Rationality"* test, which found favour in *SA Clothing and Textile Workers Union and Others v Discreto – a Division of Trump and Springbok Holdings* [5]*.*The essence of this test is to enquire into whether the decision to dismiss was genuine and not a sham. In deciding whether this was the case, the court would assess whether the ultimate decision was operationally and commercially justifiable on rational grounds. The fourth and last, "Fairness/reasonableness" approach, was *obiter*, mentioned in *BMD Knitting Mills (Pty) Ltd v SACTWU* [6] within the context of the Labour Relations Act 66 of 1995. The approach looked at reasonableness of both the decision and the way in which it is given effect to.

[24] The introduction of section 189A (19) in the 2002 amendments to the Act placed a requirement that the courts must be interventionist and decide whether retrenchment was "operationally justifiable on rational grounds". Coincidentally, the same phraseology was used by Davis AJA (as he then was) in *BMD Knitting Mills (Pty) Ltd* [7]. A court must enquire whether there was in fact a genuine reason behind the decision to reduce operating costs. However, due to the prescriptive nature of section 189A (19) of the Act, the drafters of the anticipated amendments to the Act have seen it fit to remove it from the Act (See clause 33 (b) of the Labour Relations Amendment Bill, and

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[2] *(Vol 21 No.6 January 2012).*
[3] (See *Morester Bande (Pty) Ltd v NUMSA and Another (1990) 11 ILJ 687 (LAC)* and *Seven Able CC t/a Crest Hotel v HARWU and Others (1990) 11 ILJ 504 (LAC*
[4] *(1993) 14 ILJ 642 (LAC*
[5] *[1998] 12 BLLR 1228 (LAC)*
[6] *[2001] 7 BLLR 705 (LAC)*
[7] *(supra)*

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also the Memorandum of Objects on Labour Relations Amendment Bill, 2012).

[25] In his closing arguments, Mr. Malan on behalf of the Respondent had made reference to *Van Rooyen and Others v Blue Financial Services (South Africa) (Pty) Ltd* [8] in which Van Niekerk J had referred to the objective enquiry enunciated in *BMD Knitting Mills (Pty) Ltd (supra)*. In this case, Davis AJA (as he was then) formulated the principles as follows;

> '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 affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements 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' .

[26] Recently, the Labour Appeal Court in *Super Group Supply Chain Partners (supra)* endorsed its earlier decision in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* [9]. In *Kotze (supra)* the Labour Appeal Court, per Mogoeng AJA (as he then was) stated the following;

> 'The final decision to retrench must be informed by what transpired during consultation. That is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but it also has a substantive purpose. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by a commercial or business rationale.'

> And

[8] (2010) 31 ILJ 2735 (LC) at para 15.
[9] *(2000) 21 ILJ 129 (LAC*) at para 18(h)-(i)

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> 'The function of the court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process. '.)

Evaluation

[27] An evaluation of the above Labour Appeal Court decisions, more specifically those in favour of the hybrid between the "rationality" and "fairness/reasonableness" approach, indicates that in applying the provisions of section 189A (19) of the Act, an assessment of the substantive fairness of a retrenchment, requires a court to adopt an objective approach based on the information available to it and to enquire whether from the consultations that took place, it can be said that the decision to retrench was not a sham but was based on genuine economic rationale.

Were the retrenchments "operationally justifiable on rational grounds"?

[28] In the parties' pre-trial minute, the Applicants had made numerous allegations including *inter alia* that the meetings held between January and July 2009 did not constitute proper consultations; that the voluntary packages were offered outside of the consultation process; that the short-time was implemented to unprocedurally and unfairly prejudice union members and shop-stewards; that the decision to retrench was a foregone conclusion and the identity of possible retrenches was unilaterally predetermined. Despite making these serious allegations, no evidence was however tendered by the Applicants during these proceedings to substantiate them, and this is apparent from the above summary of their witnesses' testimony

[29] The Applicants had further alleged that in general, there was no need to retrench as the Respondent was still in active business, and profitable. The Applicants' contention as per their statement of claim was that the Respondent merely sought to "berid" itself of its workforce by this alleged

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retrenchment. They had further alleged that their transfer to a third party service provider was a sham as these providers were merely an alter ego of the Respondent. Mr. Motaung on behalf of the Applicants had in his closing submissions, further argued that NUMSA's position has always been that the retrenchments were merely a ploy to bring in the SMMES to run the Respondent's operations.

[30] It needs to be pointed out at the onset that despite Northal's elaborate testimony in regards to the need to retrench in the light of the Respondent's finances since 2005, the Applicants did not deem it fit to call upon any witness to rebut such evidence. The Applicants' best shot at attempting to dispute the state of the Respondent's finances was merely through a belaboured cross-examination of Northal. Curiously for the Applicants, the only evidence that was adduced on their behalf was merely in respect of the selection of the three individual Applicants that had testified in these proceedings in regards to their positions at the time of retrenchments.

[31] The Respondent's evidence through Northal in particular was that despite having embarked on a retrenchment exercise in 2007, it had continued to be faced with substantial economic problems. The source of the problem was rationally analysed and was linked to a variety of factors. These included cheap imports from China, the pricing of its products as against competitors, the cost base, particularly pertaining to labour, raw material, manufacturing, and delivery costs. The Respondent's financial position as further evinced by the factory results can be gleaned from page 209 of its bundle. Various measures were taken in order to contain the situation, and when all else had failed, a large number of employees were retrenched in August 2007. After these retrenchments, and in early 2008, the financial position of the Respondent had marginally improved. However with the global economic meltdown of 2008, the Respondent's financial position had deteriorated despite pro-active measures being taken in respect of administration costs, overheads, delivery costs, and slashing of contract workers.

[32] Northal had during his cross-examination, made concessions that before the retrenchments, some of the Respondent's products were over-priced as

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against those of its competitors. In early 2008 there was a marginal increase in the volume of sales and there was a slight improvement in containing costs. However on the whole, the Respondent was not in a position to compete or to make profits.

[33] In my view, the purpose of the cross-examination of Northal and Hlongwane was merely to nitpick rather than to counter the factual reality that there was a need to retrench. In this regard, the Respondent's witnesses were asked at length about the reason the Respondent had not sought exemptions or extensions from the MEIBC in respect of lay-offs and wage increases. It was not in dispute that with a view of avoiding retrenchments, the Respondent had over 2007 and into 2009 before the retrenchments, implemented lay-offs, introduced short time and early shut-downs. The issue of exemptions at the time was governed by Clause 23 of the MEIBC Consolidated Main Agreement (For the period 01 July 2008 to 30 June 2011). As was correctly pointed out by Mr. Malan on behalf of the Respondent, an application for exemption was a matter that should have been jointly agreed to by the Respondent and NUMSA. Furthermore, exemptions were not guaranteed by the MEIBC, and even if granted, there was no suggestion from the Applicants that they would have alleviated the Respondent's financial problems in the long term. I further did not understand it to be the Applicants' case that this was one of the alternatives they had proposed to the Respondent in any one of the 11 consultative meetings held between February 2009 and July 2009. In effect, this issue came up as an afterthought during cross-examination of the Respondents' witnesses. This can only add credence to Hlongwane's contentions that NUMSA did not come up with tangible alternatives to retrenchment during the consultation process.

[34] Mr. Motaung had argued that the SMMES were a sham, and were created merely to off-load employees in order to alleviate the Respondent's labour costs. It was common cause that the SMMES to which some of the Respondent's operations were outsourced came into being as a direct result of consultations with NUMSA in 2007 in order to minimise the effects of retrenchments at the time. They were set up by ex-employees with the

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assistance of the Respondent. For the purposes of the retrenchment exercise embarked upon in January 2009, I fail to appreciate how the creation of these SMMES in 2007 is pertinent in establishing fairness or otherwise of those retrenchments. It was common cause that the proposals to invoke the provisions of section 197 of the Act in order to transfer the employees to these SMMES in 2009 during consultations were abandoned as NUMSA was of the view that their transfer would not have been within the prescripts of that provision. Some of those employees that joined these SMMES after accepting voluntary retrenchment packages in 2009 did so out of choice. There is thus no merit in the submission that there was a causal connection between the creation of the SMMES in 2007 and the retrenchment of the employees in 2009. Other than mere conjecture and unsubstantiated allegations from the Applicants, the evidence of Northal pointed to these entities as being independent from the Respondent. The SMMES were only provided with financial and logistical support in their initial stages when they came into being. Otherwise for all intents and purposes, they were and are independent entities.

[35] A further argument raised on behalf of the Applicant by Mr. Motaung was that the real reason the Respondent had retrenched the employees was in order to reduce its large employee salary bill and to increase its profit margins. Northal conceded that labour cost was one of the considerations when the decision to retrench was contemplated. However these costs were looked at as a whole in conjunction with other costs already alluded to above. It is common knowledge that the global economic meltdown of 2008 had devastating effects on all modern economies. Employers and employees alike were not spared, and the effects of the melt-down differed in scale from business to business. Some businesses were so affected that they had to close down completely, whilst others the effects of the melt-down were only in respect of their profit margins.

[36] The question whether a restructuring was necessary in order to increase the business' competitiveness or to increase efficiencies by cutting labour costs

was also considered in *General Food Industries Ltd v FAWU* [10]*.* The Labour Appeal Court, per Nicholson JA (Zondo JP and Jafta AJA (as they were then) concurring), held that the Act recognises the right of an employer to dismiss employees for a reason based on its operational requirements without distinguishing between a business struggling to survive and a profitable business wanting to increase its profits . To this end, the Labour Appeal Court accepted that an employer was entitled to retrench employees in order to increase its profits rather than to avoid losses. This is to be expected in capitalist and modern economies where the main aim of any business is to generate profits. Notwithstanding this principle, the overriding consideration in cutting labour costs by way of retrenchments in order to make a business more profitable will always remain that of fairness.

[37] In this case, I am satisfied that the Respondent has discharged the onus of proving that its decision to retrench was to give effect to requirements based on its economic needs as they prevailed at the time. That decision was based on a genuine commercial rationale and there is no contrary evidence to suggest that the decision was a sham. In also coming to this conclusion, regard is had to previous similar exercises in 2007, the Respondent's failure to remain commercially viable thereafter, and the demands from its share-holders. The Applicants could not dispute the clearly perilous financial status of the Respondent as gleaned from the evidence of Northal which was supplemented by documentary evidence. I am further satisfied that the Respondent had more particularly in 2008, taken measures with a view of preventing the retrenchments, and that there were no guarantees in the measures pertaining to exemptions, which in any event, the Applicants did not deem fit to propose during the consultation process. The Respondent had considered and implemented alternatives available to it at the time and its decision to ultimately retrench cannot be faulted.

[38] An observation needs to be made in respect of how the Applicants, more particularly NUMSA had approached the consultation process. Section 189 (2) of the Act enjoins the employers and other consulting parties to engage in

[10] [2004] 7 BLLR 667 (LAC)at para 52.

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meaningful joint consensus-seeking process and to attempt to reach consensus on items listed in sub-sections (a) to (c). In my view, logic dictates that in such consultations, the starting point would be for the parties to reach agreement that the employer has indeed a genuine need to retrench. This would obviously be after consideration of all reasonable measures taken to avoid retrenchments. Furthermore, once the parties have passed that hurdle, and then in earnest start consulting over the method of selection, the timing of the dismissals, and severance packages, an inference should be drawn that consensus was reached on other prior issues, more particularly the employer's need to retrench. This is even more apposite where the Union as in this case, had proceeded to consult with the Respondent over retrenchment packages as evidenced from the fourth consultative meeting held on 31 March 2009 (Vide p79 of the Respondent's bundle). In the absence of evidence to suggest that the parties had during consultations agreed to reserve discussions surrounding whether there is a need to retrench, and to therefore discuss other aspects of the retrenchments, it becomes a contradiction for a Union to consult over other issues including severance packages, and when a group of its members refuse to accept the packages, to then claim that there was no need to retrench in general.

<u>The selection criteria</u>*:*

[39] The crux of the Applicants' case appeared to be the selection of Esau Hlatshwayo, Matli Joseph Tyomane and Fanuel Mlotshwa for retrenchments. It was common cause that the procedural fairness of the dismissal was not placed in dispute, and to the extent that the selection of these individual Applicants was in dispute, Mr. Malan had argued on behalf of the Respondent that the court was precluded from making any determination in that regard.

[40] Section 189 (19) (a) of the Act provides *inter alia* that the Labour Court must find that the employee was dismissed for a <u>fair reason</u> (my emphasis) if –

> (d) – selection criteria were fair and objective.

It is apparent from this wording that the legislature acknowledged that issues of procedural fairness are intrinsically linked to those of procedural fairness in

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retrenchments, and to that end, the selection of employees for retrenchment must also be based on a fair reason. Within the context of a retrenchment falling under s 189A of the Act this Court in *Perumal and Another v Tiger Brands* [11]found that the employee was barred by s189A(18) from contesting the procedural fairness of her dismissal. Nevertheless, the court went on to find that the issues of procedural fairness could not neatly be severed from those of substantive fairness and took certain procedural failings into account when assessing whether the retrenchment had been substantively fair. In dealing with a similar issue, Van Niekerk J in *Van Rooyen and Others* [12]held as follows;

> ‘The application of fair selection criteria is the second component of substantive fairness. There is a procedural component to the enquiry – s 189(2) (b) requires the parties to consult and to attempt to reach consensus on the method for selecting the employees to be retrenched. Section 189(7) gives substantive content to this requirement by stipulating that the employer select the employees to be retrenched according to selection criteria that have been agreed or, in the absence of agreed criteria, fair and objective criteria must be applied’.

[41] When an employer ultimately decides to retrench, it is important to point out that all its employees are equally entitled to be considered on the basis of criteria that are both “objective” and “fair”. Objectivity implies that the selection of employees for retrenchment is not influenced by mere preferences or based on the whims of the employer. Such a selection must also not be based on nefarious reasons to prejudice employees who would otherwise not have been targeted for retrenchment. Fairness in my view would imply that the choice for selection will be in line with the finding that there was indeed a need to retrench, and that in the circumstances, the choice of one employee over the other was less unfair. Ultimately, the objectivity or fairness of the selection criterion must be causally linked to, and be operationally justifiable on rational grounds.

[11] (2007) 28 ILJ 2302 (LC)
[12] *(supra)at para 16*

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[42] In respect of the three individual Applicants in question, it was common cause that their positions prior to the retrenchments were those of Setters. The Moulding Division had been targeted for retrenchments long before the consultation process started. The three individual Applicants were moved to this unit some few weeks prior to the final decision to retrench being taken. Mr. Malan had argued that at the time that they were retrenched their positions had become redundant as Setters hence they were transferred to the new department.

[43] Hlongwane in his evidence on behalf of the Respondent had conceded that if indeed the three individual Applicants were Setters at the time of retrenchments, then they should not have been retrenched as their grade and unit had not been identified for retrenchments. There was no evidence proffered to indicate the reason the three were selected from their original unit amongst other employees in that unit other than that their machines were allegedly obsolete. This allegation was refuted by these employees during their cross-examination, and Hlongwane's contention that at the time they were not performing the functions of setters is not sufficient for a conclusion to be made that their selection was fair. Furthermore, there was no evidence tendered on behalf of the Respondent as to the reason the removal of these individuals was so proximate to the date of the final decision to retrench.

[44] In my view, the timing of the removal of the three individual Applicants to the unit affected by restructuring process was not a mere coincidence or as a consequence of their machines having become obsolete. I am satisfied that their transfer given its timing was simply to make up the numbers of employees to be retrenched. A selection of employees for retrenchment simply to make up and inflate the numbers of retrenchees cannot be said to be based on fair or objective criteria, and to this end, it follows that the selection of the individuals concerned was unfair.

<u>Relief:</u>

[45] The Applicants sought retrospective reinstatement in the event that the court found that their dismissals were substantively unfair. In the light of the finding

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that the dismissals were substantively unfair only in respect of Messrs Esau Hlatshwayo, Matli Joseph Tyomane and Fanuel Mlotshwa and only on the basis that a fair and objective criteria for their selection was not proven they are entitled to some relief.

[46] Section 193 (1) of the Act provides, *inter alia*, that if the Labour Court or an arbitrator finds that the dismissal of an employee is unfair, it may order the employer to reinstate the employee from any date not earlier than the date of dismissal, order re-employment, or order the employer to pay compensation to the employee. Section 193 (2) enjoins the court to require the employer to reinstate or re-employ unless (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.

[47] In view of the conclusions that the retrenchments of the three individuals were only unfair on account of their selection, and further in view of the principles enunciated in *Van Rooyen and Others (supra)* and *Perumal and Another (supra)*, it is my view that any form of relief to be awarded to them should take account of the exception in section 193 (2) (d) of the Act. The fact that section 189(7) of the Act gives substantive content to the requirement of fair and objective selection criteria, does not in my view imply that the primary remedy should necessarily follow. To this end, the appropriate remedy to be considered is that of compensation as contemplated in section 194 (1) of the Act.

[48] When assessing the appropriate amount of compensation to which these three individual applicants are entitled to, the court must arrive at an amount that is fair to both parties. This implies the court must have regard to *inter alia*, the magnitude of the unfairness found. In this case, despite the Respondent's main contention that these three individuals' machines were obsolete, no evidence was tendered in that regard. Secondly, other than making these allegations, no effort was made by the Respondent to indicate on what other

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basis these individuals were selected amongst other setters. Thirdly, Hlongwane had conceded that if they were indeed setters at the time of retrenchments, it would have been a mistake to retrench them. To the extent that no discernible objective and fair criteria was applied in selecting them, the Respondent acted in a grossly unfair manner towards them. On the other hand, the three individual applicants remain unemployed since July 2009, and nothing further was advanced on their behalf insofar as the alternative remedy was concerned. Taking these factors into account, compensation equivalent to six months' remuneration is deemed to be fair and equitable.

Costs:

[49] Mr. Malan sought a cost order against the Applicants more specifically in view of their ill-considered application brought on the first day of trial to pursue the dispute in respect of the 24th and 25th Applicants. This was after the Applicants had correctly conceded in the pre-trial that the two individual Applicants were not properly before the court. For the Applicants to nevertheless have somersaulted by bringing and thereafter withdrawing that application was vexatious in the extreme. This was even moreso in light of the well-known principle that a pre-trial minute constitutes a binding agreement between the parties[13]. To this end, considerations of law and fairness dictate that a cost order should follow in respect of that application. Other than these costs, no further order of costs shall be made in view of the Applicants' claim being partially successful.

[50] Order:

50.1 The dismissals of the individual Applicants except in respect of Matli Joseph Tyomane (4th Applicant), Esau Hlatshwayo (14th Applicant), and Fanuel Mlotshwa (21st Applicant), were substantively fair.

50.2 The Respondent is ordered to pay to each of the individual Applicants, mentioned in 50.1 above, compensation in the amount equivalent to six

[13] See *Filta-Matix (Pty) Ltd v Feudenberg and Others* 1998 (1) SA 606 (SCA) and also *South African Transport and Allied Workers Union and Others v Collett Armed Security Services* (JS 1280/09) [2013]).

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months' remuneration calculated at their individual rate of pay as at 09 July 2009.

50.3 The Applicants are ordered to pay the costs in respect of the application brought on 27 May 2013 and subsequently withdrawn on 28 May 2013 in respect of the 24th and 25th Applicants.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

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<u>Appearances:</u>

For the Applicants: Mr. P Motaung of Nomali Tshabalala Attorneys

For the Respondent: Mr. F Malan of Edward Nathan Sonnebergs Inc

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