THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

Not Reportable

CASE NO: JS 298/12

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
ORLANDO MAWAE and 17 OTHERS	**Second to further Applicants**
and	
LONEROCK CONSTRUCTION (PTY) LTD	**Respondent**

Delivered: **29 July 2015**

Summary: (S 189 - unfair retrenchment – genuine operational need – bona fide consultation over retrenchments except in respect of selection of applicants for retrenchment – Failure to prove selection criteria were fair and objective but extent of unfairness indeterminate – compensation awarded)

JUDGMENT

LAGRANGE, J

Nature of the Dispute

[1] This matter concerns an alleged substantively and procedurally unfair retrenchment of 18 employees of the respondent. Two of the applicants, applicants 12 and 17, being Mr R Rakgoropo and Mr IE Selepe had withdrawn from the matter by the time it came to trial. A question mark was also raised about whether the 13th applicant, Mr MS Nkhumeleni was still a party to the matter, but he had reportedly been re-employed had subsequently absconded. The individual applicants are part of a group of employees retrenched in December 2011 following an initial retrenchment of three operators the previous month. The respondent is a civil engineering and construction company specialising amongst other things in roadworks, infrastructure and bulk earthworks. In 2011 the respondent's business was adversely affected by the economic downturn as a result of which it lost a number of private clients and became very dependent on government contracts.

[2] There was no dispute about the fairness of the retrenchment of the three operators which was concluded after five consultative meetings between the union and the respondent. Essentially, the disagreement between the parties concerns whether or not the retrenchment process which ended with the retrenchment of the three operators was part of an ongoing process or was concluded when they were retrenched, and whether the respondent should have consulted a fresh over the subsequent retrenchments in December. The applicants also challenge the substantive fairness of the retrenchments. The individual applicants seek maximum compensation as relief.

[3] The employer had also belatedly challenged the union's right to represent the applicants 10, 11,12,13,17 and 18 namely Mr M I Mokaiwa and Mr R Munkuli, Mr R Rakgopopo, Mr M S Nkhumeleni, Mr I E Selepe and Mr S K Morwa because it contended that they are not union members. Even when the pre-trial minute was concluded, this challenge was not stated in anything more than a general

challenge of the union's right to represent the applicants and the respondent's answering statement did not dispute the union's assertion that all the individual applicants were its members. In the end this point fell away when the respondent withdrew its objection to the union's mandate.

[4] It was also recorded by the parties in the pre-trial minute that the second, third and fifth applicants, being Mr A S Mawae, Mr T Majola and Mr R Tewukeni, were permanent employees and the remaining individual applicants were employed on a limited duration contracts. However at the start of proceedings it was contended by the applicant's counsel, *Ms Nkutha*, that apart from the fact that the pre-trial minute may not have reflected the classification of the applicants correctly, it was not a material issue because in terms of the applicable bargaining Council agreement all employees with 18 months service were deemed permanent. In fact, for the purposes of the retrenchment, all the individual applicants were treated as permanent employees and those on limited duration contracts were also paid severance pay.

<u>Outline of events</u>

[5] The timeline of events leading to the December retrenchments is summarised below.

[6] On 11 August 2011, the respondent held a consultation meeting with the union which dealt with possible retrenchment in broad terms and in particular focused on the difficulties the respondent was having in obtaining contracts it had tendered for. There was a general discussion about alternative solutions and the union requested details of employees who might be affected by any anticipated retrenchment.

[7] The minutes of a subsequent meeting of the executive committee of the respondent on 23 August 2011 record that the consultation process with NUM had started and that "… It was agreed that the retrenchment process will take place in two phases. The first phase will be at the end of September 2011 and the second

phase will follow soon thereafter." The minutes also identified "employees likely to be affected by the proposed dismissals" in these terms:

> "
>
> - *administrative employees at head office;*
> - *Foremen;*
> - *labourers;*
> - *those who may prefer to take cuts in salary/wages;*
> - *loss of overtime;*
> - *voluntary retrenchment."*

[8] The minute of the Exco meeting also records that it was anticipated at the second consultation meeting with NUM that a training layoff scheme would be discussed with them and a final list of employees to be dismissed would be given to the union.

[9] A second consultation meeting took place with the union on 26 August 2011. At that meeting, the respondent confirmed that drivers and operators would not be affected and that management was trying to avoid retrenchment and had implemented a moratorium on overtime as a cost saving measure.

[10] On 13 September 2011 a third consultation meeting took place which was facilitated by one Adv L Pienaar ('Pienaar') from a labour consultancy known as the Legal Laboratory. At that meeting a final list was not provided as anticipated but the respondent reported that it provisionally anticipated approximately 50 permanent employees and all limited duration contract ('LDC') employees would be affected. Mr I Khazi ('Khazi'), a union official said that in the absence of identifying the specific individuals, the union could not say that the group of 50 employees necessarily included in the applicants, though he agreed that applicants whose 18 month contracts were due to end shortly would have been amongst those that the company would have tried to redeploy in its efforts to prevent retrenchment.

[11] The possibility of a CCMA facilitated process under the auspices of section 189 A of the Labour Relations Act, 66 of 1995 ('the LRA') was also discussed in this meeting discussed with this option being left with the union to revert to the respondent about. The respondent proposed as an alternative to retrenchment that there should be a moratorium on the permanent appointment of LDC employees who qualified for permanent employment based on their length of service. It also undertook as far as possible that such employees would not be affected by the retrenchment, but if they were they would be treated as if they were permanent employees and not on the basis that their LDC terms had simply come to an end.

[12] The fourth consultation meeting took place on 26th of October 2011. At that meeting the discussion focused almost exclusively on three operators who had been identified for retrenchment and the union accepted that the retrenchment of two of them was justified. The minute records in conclusion that: "The situation has now changed but it appears that these may be the only three positions which are faced with the possible retrenchment." There was also an indication that this was due to alternatives to retrenchment being adopted. The union concluded its representations with a request to management to indicate when the layoff process would end as they wanted to meet with the members for them to take a decision whether they would opt for retrenchment or would continue with layoffs. It had been contended by Ms B Visagie ('Visagie'), the HR manager, that the reference to only three positions being affected was a reference to permanent employees and not to LDC employees, but Khazi pointed out that this is not what was conveyed by the minute of the meeting. Furthermore, when the union asked about the continued layoff process they did so in the context that it appeared that drivers and operators were still being affected by short time even though the company was saying that the retrenchment was concluded.

[13] A further meeting took place on 7 November 2011, which simply dealt with a follow up on the two operators who had been selected for retrenchment. Van der Walt agreed that between this meeting and the retrenchments which took place in December there were no discussions held between management and the union.

[14] However, on 9 December another meeting was convened at which the union was advised of further possible retrenchments at the head office. The union representatives expressed the view that they would have to arrange a further meeting with the employees because they were under the impression that the retrenchment process had already been concluded. They also raised their concern that there had been no communication from management since the last retrenchment phase in November. Management said that the efforts to avoid retrenchment were ongoing and they had never said that the process had been concluded and despite their efforts it appeared that retrenchments were inevitable. They requested additional time to discuss the matter before "the Company takes a final decision." The company representative at the meeting, Visagie agreed that the matter would be dealt with in a subsequent meeting scheduled for the following week.

[15] At the follow-up meeting on 12 December Visagie confirmed that the affected departments where the workshop and health and safety sections which would be downsized. She further identified seven safety officers and 10 Workshop employees who would be affected. The meeting ended on the basis that the union representatives requested a postponement until 14 January 2012, but this could not be confirmed because the request had to be tabled at the respondent's Exco on 14 December. Visagie undertook to revert to them with feedback on management's decision.

[16] The next development was that on 14 December retrenchment notices dated 12 December were issued to the individual applicants.

[17] The applicants do not take issue with the events preceding the retrenchment of the two operators most of which appear to be common cause. Essentially the dispute concerns what happened thereafter which led to the retrenchment of the applicants.

Matters arising from the evidence

[18] Mr J G Van der Walt ('Van der Walt'), the former chief operating officer and current chief executive officer of the company and Visagie gave evidence for the respondent. Khazi and Mr M I Mokaiwa testified for the applicants.

[19] Van der Walt commenced the respondent's evidence. He explained that prior to the slump in 2008 and 2009 the company had been largely reliant on private sector contractors engaged in road and other urban infrastructure projects, particularly for the city of Johannesburg. When that work started to dry up they were fortunate enough to get sub contracts with companies engaged in World Cup infrastructure projects. The company employed approximately 600 staff in 2011 and prior to that year its monthly turnover was something in the region of R40 million. This dropped to between R 25 million and R 37 million during the course of the year. By January and February 2012 turnover had dropped to the region of R10 million per month. Staff levels eventually dropped to 300 at one stage corresponding with the decline in work.

[20] An added difficulty with tendering for government work is that the waiting time for approval of tenders could be in the region of four months and the lowest tenderer did not always get the work even though the firm had tried to put in tenders at lower and lower prices. A further complication experienced by the company was the local labour force requirements of various infrastructural contracts which required the company to recruit a large component of the labour force in the district where the work was being performed. This meant that the company could no longer use all its own staff on projects and it was necessary to shrink of the company to adjust to its new role as a management company rather than a construction company, which is what it was before. This necessitated the restructuring of the head office and led to the closure of the administration department. The company had effectively become a small company compared to what it was previously. The company's fortunes had only started to recover a little by 2014.

[21] In the months before December 2011 the company attempted to avoid retrenchments by adopting measures like placing staff on short time (layoffs). They also attempted to tender more cheaply, but in the long run there was a limit to how low they could tender. Some other companies which adopted the same strategy were forced out of business.

[22] A consultation meeting was held with the union on 11 August 2011 in which Management canvassed the difficulties it was having in securing future contracts in view of the moratorium placed on tenders which meant that employment in the forthcoming months might be jeopardised. Both parties placed on the table suggested alternatives to avoid retrenchment which included retraining staff to be laid off, reviewing the number of staff to be retrenched and minimising working hours. Severance pay and re-employment opportunities were also discussed. The company emphasised that without any contracts it would be in no position to keep employees on because there would be no funding to remunerate them. Under cross-examination, Van der Walt conceded that this initial consultation meeting had not been preceded by a notice inviting the union to consultations and setting out the details stipulated in section 189 (3) of the LRA. He also agreed that at that stage, the company did not provide the union with a list of affected employees and advised the union that at that stage it was not intending to retrench drivers and operators. The only conclusion of that meeting was that retrenchment might take place. Visagie emphasised that none of the applicants were drivers and operators and by implication it should have been clear at the meeting on 11 August that they might be amongst those affected by the retrenchment. The union also presented certain alternative proposals and the company responded to these in the meeting. In her evidence, Visagie gave an explanation why the company was not able to adopt the proposals except for one relating to a number of employees on the layoff at any one time. The union requested three lists containing the names of employees with skills, those the company would like to retain and those who were to be retrenched, but nothing was provided that stage.

[23] A letter dated 17 and August 2011 addressed to salaried personnel and administrative wage earners was issued by the company. It was a matter of

dispute whether this was received by wage earners such as the applicants. Khazi claimed that the ordinary wage earners had not received it. The letter warned the recipients that retrenchments would become inevitable if the company did not obtain four to five new contracts soon that would allow it to maintain its current level of activity and expressed deep regret that the company found itself in the current situation.

[24] Van der Walt also testified that at the Exco meeting held on 23 August it was decided that the retrenchment process would be effective immediately and that the retrenchment process will take place in two phases the first of which to be completed at the end of September and the second phase to follow "soon thereafter". Khazi testified that his understanding was that there was a two phase retrenchment process and that is what happened. The meeting also envisaged the closing down of certain administrative departments at head office as part of the procedure. Other issues the meeting decided concerned a four-week notice period of the retrenchment, the application of LIFO as a selection principle, the attempt to retain employees falling within the skills development program and the non-viability of a salary cut as an option because it would not save costs. The meeting also discussed how to operationalise the union's proposal at the last meeting to make use of the training layoff scheme facilitated by the CCMA. In that meeting the clear intention of issuing the union with a final list of all employees "to be dismissed" was also recorded. However, Visagie testified that the company avoided drawing up a list because senior management was trying to find work at other sites all the time to keep people busy.

[25] At the next consultation meeting on 26 August, the meeting commenced with a review of the status of current and anticipated contracts presented by Van der Walt. It was further emphasised that management was constantly searching for new smaller jobs despite the moratoriums on larger projects associated with government tenders in an effort to sustain and the company and to secure employment. Van der Walt had explained earlier that at that stage drivers and operators of equipment would not be affected and the retrenchment process for the labourers/wage employees had not been confirmed because management was

able to continue to assign employees work in the current projects of the company. As far as possible the company was seeking to use them to complete current jobs and to start on any new small drops that might materialise. Under cross-examination, Visagie also reaffirmed that at that juncture the company could not identify members of the general labour force who might be affected and could only say that at that stage no retrenchment was envisaged. In relation to salaried employees six engaged at the office had been identified for retrenchment as well as nine Foreman and shift supervisors. The meeting concluded on the basis that retrenchment consultations would take place weekly until further notice. Once again, the union raised the question of the company providing it with a final name list of the labourers who would be affected and indicated that they have their own list to compare with companies list. However, they were advised that no final list was available because the company was still trying to find alternative employment for labourers within the existing projects. Khazi testified that the meeting was not "very conclusive" because as in the previous meeting management conveyed that it was doing everything in its power to which retrenchments. They understood the process was still at an early stage and that management had not yet identified those categories of employees who would be retrenched.

[26] Although a meeting was scheduled for 8 September 2013, the next meeting took place on 13 September. At that meeting Van der Walt once again gave a detailed breakdown of the status of current contracts. He confirmed that office retrenchments were complete and that overheads had been cut and turnover halved as a measure to sustain the company until the end of 2013. It was reported that currently there were no contracts available in the private sector and that even if possibilities might arise from new Toll road projects, retrenchment remained a current reality. Pienaar presented a flowchart of the steps to be followed when retrenchment occurred and explained the process in some detail. An opportunity was given for clarification and questions. The union asked for a list of labourers who might be affected but was told that there was no final list because the company was still finding employment for labourers was in the existing projects. The prospect of following a facilitation process under section 189A was also

discussed. When the union asked how many people were earmarked for retrenchment the company's response was that approximately 50 permanent employees and all limited duration contract workers would be affected but the number could increase or decrease. Visagie reiterated that at that stage the company could not come up with a list of specific names for the reasons previously mentioned. The union requested lists of LDC employees who had become permanent and lists of current employees employed on the same contract irrespective of their length of service. Visagie agreed that this meeting might be considered to be the commencement of the formal consultation process. As with the previous meetings, the union was under the impression that the process was still unfolding as management was trying to get new work to keep people employed. Khazi agreed that because they had good relations with the company they did not see the need to follow the facilitation envisaged in section 189A.

[27] It was also at this meeting that the company canvassed the proposal that there should be a six month moratorium on confirming the permanent status of LDC employees with 18 months service. Although the minutes did not reflect that this was agreed to by the union, Van der Walt conceded that it was correct that the union had acceded to this, but she would not agree that the minutes were necessarily inaccurate because it would normally happen that the union would have to consult with its members before reverting on a proposal like this. Khazi confirmed that the union had agreed to the moratorium on permanent employment at the meeting and it had not responded to a subsequent letter from the respondent seeking confirmation that are of because an agreement had already been reached. Under cross-examination, Khazi said that if they had not agreed to the moratorium then the union would have complained to management if the respondent had implemented it notwithstanding the lack of agreement.

[28] On 19 September 2011 the company sent a letter to the union which dealt with two issues: whether the parties should proceed to consult under a section 189A facilitation process or simply continue dealing with the matter at plant level without assistance from the CCMA and a proposed six-month moratorium on the permanent employment of LDC employees who would normally qualify for

permanent employment status. In addressing the first issue, the company expressed its difficulties in being able to populate a list of employees who might be affected by retrenchment because it was still hopeful of avoiding or minimising the number of affected employees. Visagie said that she believed management was finding it very difficult to make a decision to retrench anyone. The company proposed that the parties should continue with discussions at plant level because the company could not foresee whether the number of retrenchments would exceed the threshold for invoking facilitation under section 189A and also could not carry the wages of employees for a period of 60 days if they were not engaged in gainful work. Khazi testified that it was important for the union to obtain a list of names of those likely to be retrenched together with their skills in order to identify possible alternative positions for such people, but at the time management said it was doing everything in its power to ensure that nobody was retrenched the union accepted that a list was not necessary at that juncture. However, Khazi believed that the letter clearly gave the impression that a full consultation process would still take place before any retrenchments occurred. He agreed that at that stage the retrenchment process had not been concluded is and was an ongoing one. However, he did not accept that because the company had stated that operators and drivers would not be affected this implied that those affected would necessarily include the applicants because they were part of the remainder of the workforce. At that stage the union was simply confronted with an overview of what was happening in the company and was not dealing with the specific reasons for the retrenchment of a specific number of persons.

[29] Unlike the previous meetings, the next meeting on 26 October was only attended by Visagie. According to the minutes she recapitulated what had transpired in the previous meetings "to ensure that everyone has the same understanding of the process thus far." A discussion then focused on three machine operators who had been identified for retrenchment. Van der Walt explained that in the course of operators working short time these three individuals had been identified as candidates for retrenchment but were not part of the broader exercise. The individuals were operators of plant that was redundant and, up to that point, the

company had been able to use them on other machinery while such work was available. Two of the machines were rollers which were not used any more and the other was a recycling machine which was too small for the kind of work the company was doing. Van der Walt's evidence was that these retrenchment discussions took place apart from the prior discussions which had taken place in the earlier meetings. Khazi said that the discussions at that meeting and the proposals made by the union had focused exclusively on the three affected operators.

[30] In management's conclusion of the meeting it was recorded that "…so far, the retrenchments process amongst the labour force was never actually implemented" (*sic*), owing to the application of alternatives to retrenchment. It was also recorded that "(t)he situation has now changed, thus, it appears that these may be the only three positions which are faced with a possible retrenchment." The three positions in question obviously relate to the three operators discussed above. Van der Walt could not explain why there had been an impression that a phase of the retrenchments had been completed at that point, nor could he understand why it was stated that the situation had changed given the actual state of the company's turnover and workload at the time. Visagie also testified that management had never announced the end of the retrenchment process so there could not have been a belief that it had ended with the retrenchment of the three operators. Consequently, the union could not claim that the applicants had been given false hope in this regard. Nevertheless, Khazi claimed that the union understood that the retrenchment of the three operators concluded the entire retrenchment process. As far as the union was concerned the retrenchment of the applicants constituted a second phase of retrenchments. The first phase had been concluded with the retrenchment of the two operators.

[31] It was also not true that only two operators were retrenched at that time because nine other persons in site supervision posts were also retrenched then, as well as administrative staff. It was correct that there were no further retrenchments after the operators were retrenched until the retrenchment of the 17 individual applicants in December 2011. However, Van der Walt emphasised under cross-

examination that over the whole period from August until December 2011, approximately 160 people left the company and not just the individual applicants. Between December 2011 and January 2012, the size of the workforce further decreased from approximately 625 to 440. A number of these were LDC employees whose contracts had come to an end

[32] Van der Walt conceded that a certain amount of overtime had continued in the workshop despite the union's proposal but overtime should be cut. That had been an unavoidable necessity because machinery would only frequently be brought in for repair overnight so that it could be used on a site the following day. If the repairs were not done overnight then operators would be standing idle the following day. He denied that the operators were all fully occupied all the time: there were occasions when they would be at the workshop but engaged in non-productive work such as cleaning the workshop floor. Khazi testified that there were sites where overtime was being worked, though this claim was only put in the most general terms to Van der Walt.

[33] Van der Walt referred to a handwritten letter from the shop stewards addressed to Visagie dated 2 December 2011. The letter proposed a meeting on 6 December 2011 to discuss four items, only two of which are relevant to this matter. The relevant items were stated as:

> *"…2) Lay-offs – Just an alternative to retrenchment – jobs are limited.*
>
> *3) Retrenchments/Termination of Temp employment contracts…"*

Khazi testified that the main reason for requesting a meeting was that one of the union members had been given a letter notifying her of the termination of her LDC contract, which was contrary to the agreement reached with the company that any employees with 18 months or more service with the company would not have their contracts simply terminated but would be retrenched after following a section 189 process. They were also surprised to hear of this because they understood that the retrenchment process had in fact been concluded.

[34] The request had been prompted by a notice of termination received by a union member on a limited duration contract who had received a notice of termination on 30 November 2011. Visagie responded on 7 December proposing a meeting two days later on 9 December. According to Van der Walt, the termination notices, which had been erroneously issued to the LDC employees, were withdrawn and retrenchment notices issued in their place.

[35] A meeting as requested by the union did take place on 9 December. It was attended only by two shop stewards, Mr S Subere and Kazi, and Visagie for management. In that meeting there was discussion about further possible head office retrenchments. The union representatives said they needed to arrange another meeting with members because they were under the impression that the process was concluded. They also complained that there had been no communication from management since the "last retrenchment phase" which took place in November 2011. Visagie is recorded as replying that the company had made them aware of the ongoing attempts to avoid retrenchment and the process was not yet concluded. The meeting then went on to deal with the three operators identified for retrenchment and with a list of workshop and office personnel who had also been identified for retrenchment on 7 December 2011. It was clear that the union representatives accepted the two operators who had been identified for retrenchment. Visagie testified that it was at this meeting that the list of the applicants' names identifying them as employees to be retrenched was given to the union, but later she retracted this claim saying that she could not be absolutely certain it was issued at that meeting. The table containing the names in fact confirms the retrenchment as having been determined on either 7 or 8 December, the day before the meeting. Van der Walt conceded that she had been told by management to consult the union over the list of those identified for retrenchments, but could not say when she intended to do this and she agreed that it was the union and not the company which had called for the meeting on 9 December. Van der Walt could not explain why it was not sensible to postpone the process given the issues which needed to be discussed and did not have any discussion with Visagie about the merits of the union's request to delay the

retrenchment, though she did express a view that the union's request could have been viewed as a delaying tactic.

[36] Although it was not reflected in the minute of the meeting, Khazi claimed that the union had directly challenged the company to follow the normal section 189 process before it retrenched any of those identified in the meeting for retrenchment and that Visagie confirmed that the effective date of the retrenchments would be 14 December 2011. He also claimed that Visagie had agreed to respond to their concerns by SMS after speaking to Van der Walt. It must be said that Visagie was not expressly confronted with this version during her cross-examination. Khazi also commented that it was apparent from the list of applicants received, on which it was stated that retrenchments were confirmed on 7 or 8 December, that management had already made up its mind to retrench the applicants at that stage. Visagie had undertaken to raise the matter at the Exco meeting scheduled for 14 December 2011 but she never came back to them.

[37] A further meeting was convened on 12 December. Again Visagie was the only management representative present and the union official was also absent. The minutes of the meeting follow the topics identified for discussion by the union in the handwritten letter. In relation to lay-offs it was recorded that workers were complaining about it and Visagie reiterated that it was the only viable alternative to retain all employees. The union is also recorded as complaining about the termination of the service of employees with continuous service of 18 months in the Health and Safety department. Visagie reported that they had been paid severance pay as if they had been permanent employees and they could not be accommodated as Health and Safety representatives because of the limited projects available. The names of employees identified for retrenchment in the workshop and Health and Safety departments were noted in the minute of the meeting. Visagie agreed that the rectification of the severance payments to retrenched LDC employees did not rectify the lack of consultation once the union had been notified of the persons identified and that the company had not followed the same process of consultation in relation to the individual applicants which they had followed in the case of the operators. She also agreed that the company had

already decided that 14 December would be the date of the retrenchment and accordingly there was nothing that she would need to revert back to the union on despite what the minute stated.

[38] The concluding passages of the minute read as follows:

> *"4.2 The union members confirmed that they understand that the company at the end of the day, has to follow a process. They added that they also had to have their own process to follow.*
>
> *4.3 Ms Visagie informed him that she will give them feedback on management's decision."*

Visagie said she understood the shop stewards response to have meant that the company should go ahead with the retrenchment and they would do what they needed to do. Visagie's memory of whether or not the matter was referred to the executive management after this meeting was vague. All she could recall was that she had referred the matter to Van der Walt and he had made the decision to continue with the process.

[39] Despite all the explicit references to phases of retrenchment, Van der Walt said he was surprised that the process was viewed as a phased one because in fact it was a continuous one in which the first people retrenched worker departmental heads, contract managers and site foreman, but when it came to the general labour force a formal list was not provided to the union because the timing of the retrenchments was contingent on the variable availability of work which made it difficult to predict in advance who would not be needed. As he expressed it:

> *"So during the month of November, the three people, that was operators and drivers, materialised out of group and they took the time to try and justify but why are they now all of a sudden on the list and I think the labour force, which was ultimately being affected all the 16 or 17 people was almost forgotten in the process going forward but the fact that the retrenchment was a reality was real thing never thought that there was a process that is now finished.*

...

During this very same process, in excess of 100 LDC people lost their jobs, which came to a normal event, so you must now go and compile a list where there is other 100 people involved, where a site gets closed where people get switched between sites and foremen. So it becomes very difficult to create a list and I think that is why ultimately there was only a list of 15 or 17 people part of a group of 400 or 500 people because of the people that were on LDCs completed their tasks at the same time and we could terminate their employment and save some of our permanent people."

Van der Walt was also unclear about what might have constituted a first phase of retrenchments except in the sense that the first batch of retrenchments involved salaried staff and site supervisors, but the retrenchment process itself was a continuous one. The retrenchment of the first group did not signal the end of the retrenchment exercise. However, under the latter part of her cross-examination, Van der Walt agreed that a completed phase of retrenchment would entail consultation on the affected employees as well, which is what occurred in the case of the three operators.

[40] Van der Walt conceded that a list of the individual applicants had not been provided to the union beforehand and that until they had received the erroneous termination letters the union would not have been aware that they might be affected. He also agreed that there was never any consultation with the union on the individual applicants who were finally identified by the company for retrenchment and it was only at the meeting held on 9 December that their names were mentioned for the first time as candidates for retrenchment. Initially, Van der Walt did not agree that this was the first occasion that further retrenchments were discussed because it was part of an ongoing process and only the identities of those affected had not been dealt with. However, towards the end of her cross examination she agreed that this was the first occasion since the last retrenchments had taken place that the union was informed of further

retrenchments. In a similar vein, Visagie denied that the failure to disclose the identity of those ultimately retrenched prevented meaningful consultation over retrenchments as alleged by the applicants: this was because everyone was potentially affected by the retrenchments. She herself had only started with the company shortly before the retrenchment process began in August 2011 and she also received a letter warning her of the possibility of retrenchment. Van der Walt also insisted that it had been known that the retrenchments would take place in 2011 so the timing was not an indeterminate issue. Van der Walt could not comment on whether the union was consulted about the criteria used to identify those selected for retrenchment either. Van der Walt said that the request to postpone matters to January 2012 was seen as a delaying tactic by the union and the company did not want to send people away on leave only to face retrenchment on their return-it was better that they left at the end of the year with money in the knowledge that they would have to look for new work in the New Year than to return in the New Year without money and only learn of their retrenchment then. He conceded that the decision on the timing was purely the company's decision and was imposed without consultation but it was the correct decision even if the company had been wrong in not consulting about the list. Khazi rejected Van der Walt's rationale for deciding the termination date unilaterally and pointed out that the applicants should have been treated as adults and given time to prepare for the retrenchment, the timing of which should have been discussed with them. The alleged consultations on issues set out in the retrenchment notices issued to the applicants did not take place and no opportunity had been provided for consultation because management had refused to postpone the retrenchments. Khazi also denied that it had been agreed that retrenchments would probably take place during the months of October, November and December 2011 as reflected in the termination letters to the applicants.

[41] Visagie reluctantly conceded that by giving the union the list only three days prior to the retrenchment hampered its ability to effectively consult over the persons selected for retrenchment. Nevertheless, she said it was incorrect to characterise the retrenchments of the applicants as having arisen because the situation had

changed because nothing had changed since August 2011. The deterioration in the turnover spoke for itself.

[42] In relation to the question of the union's mandate to represent all the applicants, Van der Walt confirmed that the respondent was disputing the union's role in representing all of them, some of whom were not members, but conceded that during the consultation process the union had represented all of them. Visagie said that at the time of the consultations she did not concern herself whether or not the union was consulting only on behalf of its members or on behalf of nonmembers as well. Effectively it seems it was a nonissue at that stage. Khazi testified that the union would normally hold meetings with all the employees at the compound where some of the applicant near the respondent's head office, which would be attended by union and non-union members. When the individual applicants were dismissed, a meeting was convened with all of those who appear on the list provided by the respondent and a mandate was obtained for the union to pursue a case on their behalf. When challenged on the letter written by Mr Rakgoropo, in which he withdrew as a party from the matter and denied that he had authorised the union to proceed on his behalf, Khazi testified that he understood that this letter had been written at a time when the company had offered to reemploy Rakgoropo as a safety officer, but did not dispute the proposition put to him under cross-examination that the letter had been written after Rakgoropo's re-employment. The union had no difficulty with him withdrawing at that point but when the case was initiated he was happy to be represented by it. However, despite vigorously contesting the issue, on the last day of the trial proceedings the respondent finally abandoned its objection to the union's mandate.

[43] When Visagie was asked to confirm the assertion in the pre-trial minute by the company that it had applied the LIFO principle as a selection criterion, she gave a circuitous answer which did not clarify why this assertion was made or whether in fact it was applied. Later under cross-examination she also agreed that the selection criteria for choosing the individual applicants had not been an issue on which the union had been consulted. Khazi said that the union expected that when retrenchments ultimately took place the union would engage the company on the

reasons therefore, discuss alternatives to avoid retrenchment and other issues such as how such employees could be assisted, when retrenchments should take place and selection criteria. It was put to him that at the time of their retrenchment many of the applicants were not actively engaged at the company, but Khazi was adamant that they were all engaged on other sites or in the workshop. No contrary evidence was presented by the respondent in this regard, though the persistence of layoffs was common cause. Khazi readily conceded that retrenchments were a definite possibility if other means of addressing the company's situation were not successful. He further agreed that there had been consultation over the reasons for the need for retrenchment and over alternatives to retrenchment starting in August 2011.

Evaluation

Substantive Fairness

[44] The applicants dispute the need for retrenchment on the basis that the operators had been retrenched and there were no additional costs imposed on the respondent and because they had been assured that there would be no further retrenchments. The respondent set out a dire picture of the decline in turnover that occurred in 2011, which was not arrested in 2012 either. The applicants did not dispute the respondent's efforts to retain employees as long as it could and accepted that the respondent was acting in good faith in attempting to preserve the employment and that its reluctance to provide a list of proposed retrenchees at an earlier stage in the discussions over retrenchment was not a devious strategy on its part but a result of a sincere unwillingness to take the final step prematurely. This was also evidenced by its willingness to implement layoffs even though this proved unpopular over time. By December 2011 the point had been reached where the union was clearly suggesting that the time had come to reconsider whether or not layoffs were a viable alternative to retrenchment on a prolonged basis. It stands to reason that if layoffs were still in effect, that there was insufficient work to keep the remaining workforce busy after the previous batches

of retrenchments. There was no reason to believe anything had improved by the beginning of December. Moreover, the union did not pursue its claim that the company had effectively curtailed its costs sufficiently in cross-examining either of the management witnesses. In general terms, I believe that the respondent did establish a genuine operational need for retrenchment.

[45] However, what was less clear is whether the individual applicants selected for retrenchment were selected in accordance with objective and fair selection criteria. The respondent claimed it had applied LIFO as a selection criteria but provided nothing substantive by way of evidence to verify this claim. On the other hand, the union gave little indication of why it believed the actual selection process had been unfair. On the evidence the most that can be said is that the method of selection was indeterminate and consequently the respondent failed to establish that it did apply fair and objective criteria. However, this is not a case where the court is in a position to assess how far the respondent might have strayed from an acceptable method of selection in the absence of more extensive interrogation of this issue during cross-examination.

Procedural fairness

[46] The crux of the applicant's case relates primarily to the lack of further consultation over the retrenchment of the applicants once the respondent had identified them for retrenchment. Much was made of the issue about whether or not the retrenchment of the two operators constituted the end of the retrenchment process initiated in August or whether it simply represented one stage in the process. There is little value in getting into a semantic analysis of what constituted a phase of the retrenchments. The real issue is whether or not in relation to the individual applicants the consultation process was satisfactory and fair.

[47] It is evident from the respondent's economic circumstances that no new contracts came online to replace those which were ending in 2011. As previously mentioned, the situation in early 2012 proved even worse. It is true that at the meeting of 26 October 2011 that management gave an impression that they had managed to avoid retrenchments amongst the general labour force thus far and that it indicated

that the operators might be the last persons who would be retrenched. This was also consistent with the respondent's earlier statements that it would only retrenched operators and drivers as a last resort. On the other hand, layoffs persisted during the month of November and neither the union for the shop stewards questioned the need for continued layoffs during that month, which could only mean that they were aware that things had not returned to normal. It was only when the erroneous termination notices were issued to the LDC members that the union also raised the issue of the prolonged layoffs which members were enduring.

[48] When it became apparent as a result of the meeting on 9 December 2011 that indeed the applicants' were facing imminent retrenchment, the main complaint made by the union at the time concerned the lack of an opportunity to consult over the particular circumstances of the individuals affected by this latest round of retrenchments. The haste with which the company sought to proceed with the individual applicants retrenchments contrasted starkly with the deliberations held with the union over the retrenchment of a few operators. Even if the general imperative to retrench could not be avoided, the union and the applicants were entitled to proper consultations over the selection process, which would also have included a discussion over the reason for ultimately identifying that number of employees for retrenchment and entertaining any proposals for alternative methods of selection and the like.

[49] It was suggested by the applicants that what transpired was on a par with ***NUMSA and others v Precious Metal Chains (Pty) Ltd***.[1] However, in that case there was an interval of six months between the meeting with the affected employees and their retrenchment and the employees had not been represented by a union at the time of the initial meeting but were union members by the time they were retrenched. There was also no suggestion in that case that retrenchments might take place in a series of phases, nor were there extended consultation meetings between the first meeting and the ultimate retrenchments. There was also no

[1] [1997] 8 BLLR 1068 (LC)

evidence that management kept saying it was still engaged in ongoing efforts to avoid retrenchment, which would have indicated that the issue of retrenchment was not yet finalised. In that instance there was much less reason for the company to have presumed a continuity of the retrenchment process between the first meeting and the time of the retrenchments. Nevertheless, it is evident that the company witnesses were unable to explain why it had not engaged the union on the timing and selection of the individual applicants even if the circumstances giving rise to the need to retrench had not changed. Retrenchment consultations were not concluded in respect of the applicants and the respondent was not entitled to short circuit the final phase of the consultation process even if it believed it made more sense to bring matters to a head by the year end than to address it in the new year.

[50] In the circumstances I am satisfied that the second to further applicants' retrenchment was procedurally unfair in that they were deprived of an adequate opportunity to consult over the timing of the retrenchments and the selection process.

Relief

[51] In considering the amount of compensation payable to the individual respondents I am mindful of the fact that the company had done what it could to extend employment for as long as practically possible. However, that did not entitle it to act abruptly and unilaterally when the point had been reached where it could not prolong the employment of all the remaining workforce indefinitely. It ought to have taken the union and the applicants into its confidence at an earlier stage and it should not have been for the union to have initiated the meeting in which the respondent's intentions only became plain at what was already an advanced stage of the company's own decision-making process. It was also disingenuous for Visagie to have represented to the union that its submissions would be considered and the company would revert to it before taking any final step. There is also the matter of the lack of evidence of the application of fair and objective selection

criteria, but also no yardstick to measure to what extent the respondent did fall short on this substantive issue.

[52] Taking all factors into account I believe that three months' wages is sufficient compensation for the procedural inadequacies and the lack of demonstrably fair selection criteria being applied. As the respondent abandoned the objection to the union's mandate to act on behalf of the individual applicants, except in relation to the twelfth applicant, Mr R Rakgopopo, there is no basis for assuming that any of the remaining individuals abandoned their claim of unfair dismissal, even if they subsequently were re-employed by the company. Consequently, they should all obtain relief except Mr Rakgopopo.

[53] On the issue of costs, I believe the procedural merits of the applicants' case, which constituted the greater part of the matter, were demonstrably good even though it only related to part of the consultation process. It should not have been necessary to pursue this case to trial on that issue and it is just and equitable they be paid their costs.

Order

[54] The respondent failed to prove it had selected the individual applicants for retrenchment on a fair and objective basis and to that extent their dismissals were substantively unfair.

[55] The respondent failed to consult over the timing and selection of the individual applicants and their retrenchment was procedurally unfair.

[56] The respondent must pay the second to eighteenth applicants, excluding the twelfth applicant, compensation equivalent to three months' remuneration, calculated at rate of pay they were each receiving at the time of their retrenchment in December 2011, within 21 days of the date of this judgment, as follows:

Applicant	**Name**	**Monthly Wage (Rands)**	**Compensation (Rands)**

2	A S Mawae	2,297.27	6,891.81
3	T Majola	3,077.65	9,232.95
4	T A Makgowe	3,173.16	9,519.48
5	R Tewukeni	3,772.00	11,316.00
6	E T Setlhangu	2,878.71	8,636.13
7	G Lemisoni	2,997.27	8,991.81
8	J G Sibiya	3,327.48	9,982.44
9	P M P Moleofane	2,949.84	8,849.52
10	M I Mokaiwa	4,436.64	13,309.92
11	R Munkuli	3,090.15	9,270.45
13	M S Nkhumeleni	2,748.33	8,244.99
14	J R Macheli	3,358.26	10,074.78
15	J N Subere	3,127.41	9,382.23
16	N L Seanego	3,315.60	9,946.80
17	I E Selepe	2,969.46	8,908.38
18	S K Morwa	4,225.50	12,676.50
		Total	**155,234.19**

[57] In the event there is any dispute about the determination of the rate of remuneration in paragraph [56], any of the parties may approach the court on application to determine the same.

[58] The respondent must pay the applicants costs.

R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the applicants:	**P Nkutha**
Instructed by:	**Finger Phukubje Inc.**
For the respondent:	**J W Pienaar of Louw Pienaar Attorneys and J Orschman**
Instructed by:	**GVDB Inc.**