REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Reportable

CASE NO: **JS 491/10.**

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	First Applicant
SKOSANA, J AND OTHERS	Second and Further Applicants

and

FEDEX EXPRESS SUPASWIFT (PTY) LTD	Respondent

Heard: **18 February 2015**

Delivered: **12 February 2016**

Summary: **Test for procedural and substantive fairness in dismissals for operational reasons revisited; Employer required to proactively supply relevant financial data justifying claims of cost saving, huge losses, "for profit", where that is a ground for alleged operational requirements; Procedural lapses have substantive implications; Fair procedure serves a substantive purpose.**

JUDGEMENT

<u>MOSIME AJ</u>

Introduction

[1] The issue raised by the Applicants in the Statement of Claim, led by the South African Transport and Allied Workers' Union ("SATAWU" or "the union") concerns the dispute over retrenchment, which is alleged unfair on both substantive and procedural grounds. The Applicants aver that the Respondent failed to follow the fair procedure in accordance with the provisions of section 189 of the Labour Relations Act, 66 of 1995 (as amended) ("the LRA") in carrying out the termination of their employment on the alleged grounds based on operational requirements, which took place on or about 28 December 2009. The Applicants allege further that the Respondent failed to engage in a meaningful consensus seeking consultation with the affected employees, as well as to comply fully with the provisions of section 189 (3) *(a)* – *(j)* of the LRA. The Applicants referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation on the … In the certificate of outcome issued by the CCMA after conciliation, the dispute is characterised as *Unfair Dismissal* that relates to *Operational Requirements*. The matter is now before this court for determination in terms of section 191(5) *(b) (ii)* of the LRA. The second and further applicants ("the union members", or "employees") are all members of the First Applicant, who were all employed by the Respondent until their alleged dismissals on the date mentioned above. They were stationed at various departments at the Respondent's *Meadowdale, Paulshof/Sandton & Midrand* premises. Three of the employees worked at the company's *International Hub*, a sub-division of its export department, while the rest worked as supervisors in its various Operations departments. The retrenchment process was apparently aimed at *all* of the supervisors, and the three employees in the *International Hub*.

[2] The ten (10) employees[1] affected in this dispute[2], the departments that they worked in[3], and the premises at which they were employed are as follows:

- *International Hub/Export: Meadowdale*: Johannes Skosana, Daniel Mokoatedi and Freddy Mokwana;
- *Operations: Meadowdale*: Thapelo Masilo and Michael Moshope; and Arzon Shoyisa.
- *Operations: Paulshof/Sandton*: James Tshabalala and Jamie Semenya;
- *Operations: Midrand*: James Mashaya and Gedion Kadiaka.

[3] According to Ms Greta Cook[4] ("Ms Cook"), The People Services Director of the Respondent, testifying for the respondent in this matter, what the latter had in mind when undertaking the retrenchment exercise in question, was 'to look at ways to streamlining efficiencies by putting into place a structure that could flow and be fulfilling at the time'. The process required that **the company** should put people in the right boxes, and the Respondent was 'not contemplating retrenchment', but looking at 'restructuring' instead. She stated that, in order to achieve that, certain positions had to be collapsed. The object was to minimise job losses. This, as it will appear below, seem to have been the main trigger for the contemplation of the dismissal of the Applicants.

Notices and Reasons for Retrenchment

<u>The First Notice</u>

[4] The first notice to trigger the process, issued in terms of the requirements of s189 (1) of the LRA, is dated 12 August 2009[5]. This notice was issued to

[1] Pages 2 (para 4) and 17 (para3), Pleadings Bundle.
[2] See paragraph 2.4, Pre-Trial Minute, page 116, Pleadings Bundle.
[3] Page 4, Consolidated Bundle.
[4] Mrs Cook was "Ms Coetzer" at the time of the incidents, before she got married.
[5] Pages 6, 7 Consolidated Bundle.

specific employees who, according to Ms Cook, were performing operational functions as Supervisors, and were stationed at Meadowdale, near OR Tambo International Airport in the Operations department, and whose names appear at the top of the letter, care of their union, SATAWU. These are referred to as "ALL POSSIBLY AFFECTED EMPLOYEES"[6].

[5] The reasons for the possible retrenchment of the Supervisors at Operations: Meadowdale, were stated as follows in the first notice:

"The fact that the company has opened a Johannesburg North branch, as well as the fact that a significant number of our bigger clients are now serviced by our Pretoria branch, has led to the identification of the possibility that certain of the more senior operations positions within this business unit are superfluous".[7]

[6] According to Ms Cook, the purpose of the exercise was to address what concerns may arise as a result of splitting the operation into two branches. However, by the end of October 2009, the reasons stated in the First Notice as the need for retrenchment no longer held. She emphasised that there were new developments that necessitated a new process, which was triggered by the Second Notice, dated 21 October 2009. The reasons for retrenchment then were different to those that were present at the time of the First Notice.

[7] Some of the persons identified in the First Notice resigned from employment or took voluntary severance packages. Ms Cook testified in chief that Conrad Cannel, Sammy Malete[8] and Clayton Billings accepted voluntary packages; Tommy Maritz remained at the Domestic Hub as night shift manager; Cedrick Manamela remained; Terrance Williams was "deployed" somewhere and the employees retrenched were Debbie Steward, Mike Moshope and George Kekana. Under cross examination, however, she testified that, of the

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[6] The names of these 'possibly affected employees' in the notice were: *Conrad Cannel; Sammy Malete; Clayton Billings; Tommy Maritz; Cedrick Manamela; Terence Williams; Debbie Steward; Thapelo Masilo; Mike Moshope and George Kekana*.

[7] Page 7, Consolidated Bundle.

[88] Sammy Malete actually resigned in 2009.

supervisors mentioned in the first notice, only Mike Moshope[9] was retrenched. Another supervisor, Thapelo Masilo was also dismissed following the Second Notice of retrenchment dated 21 October 2009.

<u>The Second Notice</u>

[8] The Respondent issued the second section 189(3) notice[10] on the 21 October 2009 to *"All Affected Employees"* - a category comprising a broader section of employees, including supervisors[11], members and non-members of the First Applicant - and copied it to both the union and the then National Bargaining Council for the Road Freight Industry (NBCRFI). This notice was issued by Ms Cook, and handed individually to all affected employees. It identified a markedly different reason as the company's operational requirement for the retrenchment of supervisors. Ms Cook testified that this notice was *"not a second notice, it was a new notice"* and conceded that it contained a fundamentally different reason to the First Notice. She testified that some changes had already been resolved in August 2009, and the process triggered in the Second Notice was a separate process. In essence, the Second Notice identified *"huge losses"* and *"other factors"* as the reason or need for retrenchment. As a result of these losses, the Respondent had, prior to extending the invitation to affected employees to a consultation meeting[12], already taken *"principled"* and *"interim"* decisions to:

(a) Restructure "*the management structure at operational level"; and*
(b) Consider declaring certain positions redundant and to revisit the number of supervisor and functions performed by same.

[9] The Second Notice states:

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[9] His letter of retrenchment is attached in page 73 of the consolidated bundle.
[10] Pages 8, 9 of Consolidated Bundle.
[11] Mike Moshope and Thapelo Masilo (who were supervisors) also received the section 189(3) notice dated 21 October 2009.
[12] As required by section 189(1) of the Labour Relations Act, No 66 of 1995, as amended.

"As all of us are acutely aware at this stage, the economic situation in the whole of the country is in a very negative slump. With specific reference to our industry, being the courier business, there has been huge losses sustained by all major players and unfortunately we have not been spared from this."

"As a direct result of the above, as well as other factors, we are now in the position where we have to do all in our capabilities to ensure that the business remains a viable entity during these trying times. The company has therefore taken a principle decision to consider restructuring the management structure at operational level." (My emphasis)

And, in the fourth paragraph:

"In the circumstances, the company has taken an interim decision in principle to consider declaring certain positions redundant and to revisit the number of supervisor and functions performed by same."

[10] The Respondent indeed emphasised that *"no final decision has of yet been taken in this regard, nor will any final decision be taken in the absence of full and proper consultation"* with the employees or their representatives. It states that the decision by the company has not been taken lightly and has been the subject of serious consideration by it management.

[11] It appears from the papers[13] that soon after the Second Notice was issued, the union raised an objection to it and raised some concerns, in a letter dated 23 October 2009 addressed to the Respondent. These included the *lack of relevant information* such as that required to be disclosed in writing to invited employees in terms s189 (3) (a) – (j); and also that only a *selection of employees* (union members) had received notices and others not, which suggested to the union that *"the company had already concluded on the number of issues including the criteria to be used to select the employees to be retrenched"*. The union requested to be active participant in any joint consensus seeking processes that would follow. The Respondent denies ever

[13] Page 10, Consolidated Bundle.

receiving this letter[14]. In any event, the Court takes note that the union's objections may have been actuated by the fact that, objectively viewed, it would appear that the respondent had already taken decisions *("principled" and "interim")* and that retrenchments of its members were already a *fait accompli*.

The third Notice

[12] The third notice, dated 30 October 2009, issued to the same employees as the second, and handed individually to them, states the reasons for the contemplated retrenchments as follows:

"As you may be aware, the Company has to consider all possible measures at this point in time to survive in a very tough economic situation. This would include investigating measures to not only save costs but also to improve efficiencies within our business in order to gain an advantage in a highly competitive industry."

"The company has therefore been looking at all areas of the business to try and identify the areas where we may have to consider making some structural changes to achieve our objectives. Many of our other divisions have already been looked at and some changes have been effected in certain areas of the business. One of the areas that have been identified as a division in which we may have to consider making some structural changes is the International Hub. The structural changes referred to may include possibly declaring certain positions redundant and/or absorbing certain positions into each other combining them, or possibly relocating the functions."

"Management would therefore like to invite the whole International Hub division to participate in the process to assist management in identifying means to save costs as well as improve efficiencies."[15] (My emphasis)

[13] It is quite plain that the measures taken by the Respondent were aimed primarily at 'gaining advantage in a highly competitive environment'. This objective clearly disavows a claim of *"huge losses*" that formed the reasons

[14] Paragraph 8, page 18; paragraph 8, page 35 of the Pleadings Bundle.
[15] Page 15, Consolidated Bundle.

for the second notice. De Beer confirmed in his testimony that he understood the reasons for restructuring, alternatively retrenchment, as *"for profit"*. No due to losses. Furthermore, the Respondent repeated the *"tough economic situation"* leading to *"investigating measures* <u>*not only to save costs*</u> *but also to improve efficiencies within our business in order to gain an advantage in a highly competitive industry"*.

[14] Ms Cook testified under cross examination that, in relation to supervisors, the Respondent relied on the notices issued on the 21 and 30 October 2009 only, and not the First Notice. The employees affected in the International Hub, however, were only referred to in the Third Notice. In that regard, the Respondent invited 'the whole division in the International Hub to participate in the process to assist management in identifying means to save costs as well as improve efficiencies'. Respondent also was 'not certain how many positions in the International Hub may be affected at this time' and would rely heavily on the consultation process.

[15] As it appears above, there are various, in my view, compound reasons advanced by the Respondent as the founding rationale for the retrenchments in the Notices as seen above. The discord did not end with the notices. In the first consultation meeting of the <u>6 November 2009</u>, returning to *"losses",* the following reasons are recorded[16], with regard to the International Hub:

- <u>*"Currently making losses due a couple of reasons*</u>*:*

1) Economic downturn;

2) Big Competition: lots of companies out there

3) Weights have dropped even though clients are still shipping, their bulks have dropped significantly as they are also affected by the economic downturn

- *Sales have decreased dramatically as well. There has been a lot of pressure on the sales team.*

And with regard to the Supervisors:

[16] See Minutes, page 22 Consolidated Bundle.

"This is an area of our business that has been identified as a place where restructuring / retrenchments could lead to savings"[17]

[16] The Minutes record also rather curiously that:

"… the company has made significant changes to the sales team effective 1 November 2009 in an attempt to cut costs and increase revenue as our year to year date revenue / figures is way below target. We are seeking ways to work smarter."[18]

And also (when the union asked what has been put in place to avoid retrenchments):

"The company has made some changes in several areas of the business to not only save costs but also try and stimulate business growth [Cook]"[19]

[17] It appears to this Court and noted from these statements, that the company would have already, five days before the first consultation meeting, implemented measures to improve efficiencies, with the resultant redundancy in positions, potentially leading to dismissals, without first having given the Applicants the opportunity to make representations as required in the LRA and by the Labour Appeal Court[20].

[18] The Amended Statement of Defence, moving away from the *"losses"*, contains a further statement[21] to the effect that the Respondent was looking to embark on a process that would '*ensure longevity'*, given the *'adverse trading conditions'*, and proceeded with a restructuring process, <u>*alternatively*</u> a retrenchment exercise based on operational requirements. There was plainly no statement about huge losses. De Beer testified that the object was to *"restructure the International Hub"*, relook at whether or not the supervisor

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[17] It is recorded in the Minute of the meeting held on 26 November 2009 that the company could make a saving of R12k – see page 32 Consolidated Bundle.
[18] Page 22, Consolidated Bundle, *International Hub*.
[19] Page 23, Consolidated Bundle.
[20] In *Enterprise Food (PTY) Ltd v Allen & Others [2004] 7 BLLR 659 (LAC)* it transpired that the employer only consulted with the employees after it had taken a final decision to close one of its plants. The court held that even if there was a business rationale, the employer had to consult before the final decision was taken.
[21] See paragraph 6 of the Amended Statement, page 75 of the Pleadings Bundle.

positions should stay, *"for profitability"*. The evidence of Ms Cook, under cross examination, was that during the protected strike in September 2009, the manager of the International Hub undertook an investigation to determine which employees on strike were performing all of the tasks that were associated with their job descriptions. His opinion became the reason identified by the management of the Respondent as one that triggered the retrenchment of the three specific employees involved, namely:

- Johannes Skosana who was employed as an exports clerk and whose job was re-classified as a freight processor, with a two thirds reduction in the salary;
- Daniel Mokoatedi who was employed as a supervisor and whose job was re-classified as a driver with a more than 50% reduction in salary; and
- Freddy Mokoana, who was employed as an export clerk and whose job was re-classified as a freight processor with an almost 50% reduction in salary.

[19] With regard to the retrenchment of the supervisors, the following seems to be reasons provided by the Respondent for their dismissal:

- The splitting of branches and the opening of a new Johannesburg North office[22];
- The 'in principle' decision to restructure the management structure, and the 'interim' decision to declare certain positions redundant and revisit supervisor positions[23]; and
- 'An area of our business that has been identified as a place where restructuring / retrenchments could lead to savings'[24].

[20] I consider that, once the reasons for retrenchments are advanced, however *"foolish"*[25] they might be, it then becomes imperative for employer to support

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[22] First Notice, page 2, Consolidated Bundle.

[23] Second Notice, page 8, Consolidated Bundle.

[24] It is recorded in the Minute of the meeting held on 26 November 2009 that the company could make a saving of R120k per annum – see page 32 Consolidated Bundle.

[25] See *NUMSA v Atlantis Diesel Engineers (Pty) Ltd, (1992) 13 ILJ 405 (IC)* where it was stated:

its rationale with written details of relevant and adequate information, and supply that information to invitees to the consultation meeting, so that there will be meaning to the joint problem-solving and consensus-seeking process. The provisions of *s189 (3)* invariably place this burden on the employer.

[21] The Court also notes that, despite the testimony of Ms Cook that the supervisors were dealt with in terms of the Third Notice, there is neither specific nor general reference to supervisors in that notice. Therefore, the Court cannot ignore the fact that all these developments and statements import the understanding that decisions on retrenchments, which the Respondent also referred to as *"restructuring"*, had already been taken even before what appeared to be some endless formalistic, backward-bending, officious and laborious efforts by management to get the union to the consultation table. The discussions in the consultation meetings were seemingly "*basically to try and find ways on how to achieve this"*[26].

[22] It appears to the court that there is merit in the proposition that the motive and real reason for the retrenchment of the retrenched employees had nothing to do with "efficiencies" or "streamlining", but was based on an unidentified manager's view that the these employees may not have been performing profitably in the tasks in their job descriptions, in circumstances where neither the employees nor the union had an opportunity to be heard in respect thereof. Retrenchments are invariably infringing adversely on the right of employees to fair labour practices. This however, can be justified only through an honest, transparent and open-minded engagement in a problem-solving exercise envisaged in the scheme created by the legislature in *s189*. There is a balance of both the interests of the employer and employees in this scheme. Where the union viewed the proposed plan in the organograms for the International Hub as a unilateral change to conditions of employment, it was the duty of the employer to allay those fears through an honest engagement in the problem-solving exercise. If the employer, because it can, flexes its

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"We are somewhat doubtful… after all in business frequently not always the best, nor is the correct decision taken. Perhaps management has a right to be foolish as long as it is strictly bona fide in its deliberations."

[26] See the last but one bullet point in the Minutes, page 22 Consolidated Bundle.

economic muscle against the employees despite their protestations, like a bulldozer, the employees will be well within their rights to approach the court for assistance, and the courts must use section 23 of the Constitution to help them.

The Consultation Process

[23] It is common cause that parties subsequently exchanged numerous correspondence in which attempts[27] were made to schedule, arrange, re-schedule and ultimately agree to dates for consultations meetings to take place. An initial retrenchment consultation finally took place on the 6 November 2009[28]. It was recorded in this meeting that the issues on the table were the retrenchment or restructuring that would affect employees in both International Hub as well as Supervisors in Operations[29]. This meeting was followed by further consultations on 26 November, 4 December and 11 December 2012. The final-mentioned meeting ended abruptly as a result of a dispute between the parties regarding who should chair and take minutes of the meeting.

[24] In chief, Cook states that management considered that the management structure then - of supervisors reporting to Ops Managers, and the latter reporting to the Branch Manager - was no longer efficient. Factors such as traffic, among others, were taken into account and it was the *"then decided to split the Meadowdale office by creating a satellite at Paulshof"*. This affected the spans of control in the management structures, with the effect that the supervisors were no longer adding any value to the business and that the hierarchy was unnecessarily tall. Management *"then took a decision to collapse the structure of supervisors"*. In the Statements of Defence, the Respondent states repeatedly that the process was leaned *"more towards restructuring, and thus accommodating all affected employees, rather than*

[27] See pages 18 – 21, consolidated Bundle.
[28] Page 22, Consolidated Bundle.
[29] See section on Opening, ibid.

retrenching the Applicants"[30]. The exercise was therefore undertaken with the purposes of *"streamlining operations"*.

[25] Following the consultation meeting of the 6 November 2009, on the 24 November 2009, the Respondent completed and submitted a proposed rough draft organogram that management anticipated as the look of the future structure of the International Hub. This was submitted with a copy of the organogram reflecting the International as it looked then. Management invited comments and proposals from the union regarding their views on the proposed structure. The Minutes do not reflect any proposals on how the supervisors would be dealt with.

[26] The objective of the exercise that affected the International Hub, and its essence, according to Cook, is depicted in the diagrams of the *old* and *new* organograms attached to the papers[31]. At the apex of the Old Organogram is located the position of the Gateway Manager, *Craig Farah*; this position, the first level, is retained in the New Organogram. Reporting in a solid line to the Gateway Manager, in both organograms, are two offices of Export Customs Specialists (2 positions) in one, and PM Hub Manager (one position) in another. The two ECS's are *Michael Brytenbach* and *Oupa Malema*. The Hub Manager is *Alcon Davids*. There is no evidence that there was any change at this second level as well.

[27] The third level is composed of three offices of AM Hub Supervisors. These are *David Mokotedi* (04h00 – 14h00), *Shaun Nel* (05h00 – 14h00) and *Eric Baloyi* (13h00 – 22h00). Of the three supervisors in the Old Organogram, only Daniel Mokoatedi has no subordinate. Both Nel and Baloyi had people reporting to them. In the New Organogram, the position occupied by Mokotedi is changed to that of "Driver" and the other two are left unchanged. There are also five Route Clerks[32] (19h00 – 04h00) reporting to Alcon Davids.

[3030] Paragraph 83, page 98 Pleadings Bundle.
[31] Pages 4 and 5 of the Consolidated Bundle.
[32] These are only named Philemon, Michael, George, Ludwick and Neordine.

[28] Cook testified that Daniel Mokoatedi was no performing actual supervisor functions, in that he had no one reporting to him. His job entailed mainly driving to and from OR Tambo International Airport. It was then decided that the position would be 'changed', or *re-classified* to that of Driver.

[29] In the fourth level of the Old Organogram, are located subordinate reports to the offices of Supervisors. Among these, there are two Manifesting Clerks reporting to Shaun Nel, namely *Solomon Mmope* (04h30 – 13h30) and *Magda Venter* (12h00 – 21h00). There is also one *Export Clerk*, *Freddy Moakoana* (05h00 – 14h00) reporting to Nel. Reporting to Eric Baloyi were the following positions on the Organogram:

- Two Operational Assistants (19h00 – 04h00), *Eric Radebe* and *Dlozi Skosana*;
- One Bagger and Tagger (12h00 – 21h00), *Elphas Mudau*;
- *Export Clerk* (12h00 – 21h00) *Johannes Skosana;*
- Driver (12h00 – 21h00), *Themba Skosana*; and
- Driver (15h00 – 24h00), *Albert Cannon*.

[30] According to Cook, the Route Clerks were actually performing the job functions of Export Clerks. Therefore, in the New Organogram, the job function of the five Route Clerks was renamed *Export Clerks*. The job functions of the two old style Export Clerks, Skosana and Mokoana, were reduced to one position, renamed Freight Processor, now reporting to Eric Baloyi's office. This meant that one position of the erstwhile Export Clerk would be redundant on the structure. The functions of the Route Clerks, now re-classified Export Clerks, remained the same as they were when the Respondent inherited them from the previous company. The positions of the two drivers remained, except that one driver was placed next to the Export Clerks' office, reporting to the Hub Manager. An additional single Manifesting Clerk position (08h00 – 17h00) was created.

[31] On the 27 November 2009, the Respondent provided the Applicants with proposals regarding, inter alia, the suggested job descriptions and monthly salary ranges for certain job positions proposed to be created during the

process of a restructuring exercise (namely Manifesting Clerk; Export Clerk; Freight Processor-International Hub; and Driver-International Hub). The Respondent reiterated that they intended to eradicate the entire supervisory band throughout its departments and branches.

[32] There were some expressions of dissatisfaction by the union, at the job profiles so proposed as it considered them a “demotion” of employees at the International Hub. It appears indeed that the change proposed by the company was a mere reclassification of jobs where the tasks, or the work content remained the same. Daniel Mokoatedi, for example, was earning R8 850.00 per month as an Export Clerk. Cook testified that this job function was the same as the Route Clerk, and yet when the Route Clerks were re-classified Export Clerks their proposed salary range reduced to between R5 000.00 and R7 000.00 per month. Mokotedi was not performing actual supervisor functions in that he had no one reporting to him, and this was supposedly the reason for his retrenchment. It is plain to the court that the Respondent was looking to the reduction of the salary bill, and would then contrive a scheme through which it can achieve the objective of reducing the salaries and benefits of employees in the International Hub. It seems that, in order to avoid having to change terms and conditions of employees unilaterally, and the consequences thereof, the Respondent chose the retrenchment route.

[33] Cook testified as follows, under cross examination:

> *“… it would have been foolish for Fedex to impose a change in the structure by forcing employees to accept new job titles; new salaries; and new job designations if there were no consensus … Such imposition would have amounted to a unilateral change to conditions of employment which most likely would have caused a pertinent intervention either by way of a strike in terms of Section 64(4)(a) and (b), alternatively the unilateral imposition of the aforesaid may have invoked an urgent application to this Honourable Court resulting in an interdict.”*

[34] They also opposed the intended collapse of the supervisory positions at Operations. They asked for more information as they were in the dark as far as reasons for the changes were concerned. With regard to supervisors likely to be affected, the union made proposals that the management explore the

possibility of examining the number of senior managers employed, and consider reducing that figure as an alternative to removing the supervisor positions completely.

[35] It also raised a concern that the company was unnecessarily employing external agencies and consultants, for placements and dealing with disciplinary processes;[33]

- It opined that the selection criteria used for supervisors was wrong, and that the Respondent must look at other ways of saving money, as for example, relooking at funds spent on polygraphs and Christmas parties[34].
- The union was also of the view that there was a shortage of staff at the international Hub, and proposed that the status quo be left as it were.

[36] At the third consultation meeting of the 4 December 2009, management respondent to the union's proposals[35] and denied the claim that there was any individual earning *"very low salaries"*, as well as rejected the proposal to reduce the number of managers identified by the union, claiming that such would lead to serious problems in the business and would cause operations to collapse; management also claimed that they do make 'every effort not to make use of services of temporary employment services so as to avoid unnecessary expenses and fees coupled thereto and to rather make use of internal staff'. However, during peak times, it becomes inevitable to resort to external services for this purpose [36]. It is plain to this court that these responses begged for more particulars to be supplied to the employees, so as to bring them to speed with the rationale that was relied on by the employer.

[37] The Court notes that during the currency of the consultation process, a number of vacancies became available in various offices of the respondent in Johannesburg, Meadowdale, Midrand, OR Tambo, Durban and Cape Town[37].

[33] See pages 7 – 9; 101 – 102, Pleadings Bundle.
[34] See page 33, pages 40 - 41, and pages 43 -45, Consolidated Bundle.
[35] Pages 43 – 44, Consolidated Bundle.
[36] Page 47 - 48, Consolidated Bundle.
[37] Pages 62 – 72 of the Consolidated Bundle.

All these positions were advertised internally. It is common cause that the union had made a proposal that consideration be made to offer these positions to employees likely to be affected. The union pleaded that the Second and Further Applicants were capable of performing a number of these advertised positions, but these were not placed on offer during the consultation process as alternative measures that could be taken to avoid the retrenchment of the Applicants. The Respondent's answer to this pleading is not cogent enough to form a constructive response to the proposal by the union. The gist of it is simply that these positions were advertised (during the consultation process), and that the Applicants were free or entitled to apply for these positions but they did not.

[38] The *"final consultation"* took place on Friday 11 December 2009. In that meeting, which indeed convened on the date proposed but did not proceed, the union was represented by a fifth union official, Mr Molefe. The reasons for the collapse of the meeting of the 11 December was a dispute over who would chair, and take minutes of, the proceedings. No other meeting took place after that abortive meeting. The court does not accept that the scuppering of this meeting by a dispute over the chair and minute taker could be taken as the collapse of the consultation process.

[39] On 28 December 2009 the company issued final notices of retrenchment to all affected employees individually, including the second and further applicants. The notices stated that management had reached a decision to restructure the International Hub and to declare certain of the supervisory positions redundant. On the 29 December 2009, the day immediately after the retrenchment of the applicants, the Respondent employed Thulani Zwane, Victor Mudau and Daniel Mokoatedi on fixed term contracts as export clerks/processors. They are essentially performing the same function as those that were performed by Johannes Skosana, Daniel Mokoatedi and Freddy Mokwana.

Disclosure of information

[40] Following the deadlock that was apparent during the meeting of the 4 December 2009, the union, through a letter dated 5 December 2009[38], requested disclosure of the following information:

1) Audited financial records,
2) The Business Plan,
3) The reasons for the contemplated retrenchment, and
4) The measures that the company put in place in order to minimise the impact of the retrenchment.

[41] The Respondent answered to the Applicant's request for disclosure of specified information by letter[39] dated 9 December 2009. The latter stated that it could not provide a business plan[40] as there was none formal formulated. With regard to reasons and appropriate measures, the Respondent referred the Applicant to Minutes of previous meetings (6 and 26 November, and 4 December 2009) and the Second Notice (21 October 2009).

[42] The respondent attached a one-page document to the answering letter, purporting to be an 'Income Statement'. There is nothing in this document that identifies it as a formal, official document that makes representations with regard to the Respondent's financial matters. It is far from being a semblance of an audited financial statement requested by the union. Nowhere does the give any explanation as to the reasons the audited financial statement requested by the union was not given. In their written argument[41], they make an issue of the fact that the Applicants requested a *"statement"* and nothing else. It is argued that the unpretentious document provided to the applicants by the respondent, to the extent that it purports to be a statement (profit and loss account), as it calls itself, is sufficient to meet the request, as it is *"an accurate and true reflection of the financial position of Fedex at the time"*[42].

[38] Page 46, Consolidated Bundle.
[39] Page 49, Consolidated Bundle.
[40] *Ibid*, para 9 of letter, page 50.
[41] Page 51, Consolidated Bundle.
[42] See paragraph 51, page 28 of the Respondent's Heads.

[43] The Respondent did not complain that any of the information requested by the union could not be supplied because it was either irrelevant[43] or was outside the bounds of adequacy for the purposes of the consultation process.[44] The union in this case did not set any conditions for their participation in the consultation process. Instead, even after the last botched consultation meeting, the union still wrote[45] to the employer and made impassionate pleas for the process to continue, which request was rejected by the Respondent. It is this court's view, therefore, that the information requested by the union was 'germane' to the proposed retrenchment of its members. This information was requested during the time when the vacillation of the Respondent regarding the true rationale for dismissal was becoming confusing, even to the reader of the documents. The respondent persistently raised a mosaic of reasons, including aspects of *"restructuring"*, *"streamlining"*, *"huge losses"*, *"new offices"*, *"for profit"* and *"economic conditions"* interchangeably, without actually providing the union with concrete information that formed the rationale for its contemplated action. Rather, the minutes show that De Beer was in fact constantly requiring *the union* to request for clarity in writing. (In fact, in the Minute of the 26 November 2009, out of the five recorded comments he made, three of them are solely made of solicitations of written questions/concerns from the union, instead of the employer, on its own accord, providing the union with relevant information that forms the rational basis of their intentions.) The Applicants submitted that they sought this information in order to establish whether the restructuring was in fact necessary in the International Hub and the company more generally.[46]

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[43] Section 189(4)*(b)* imposes an onus on the employer to prove that any information not disclosed in a s189(3) notice is not relevant to the dismissal or any dispute as to its fairness or lawfulness.

[44] In this regard, the Respondent cannot rely, as it sought do, on the decision of <u>*Simelane and Others v Letamo Estates*</u>[44], where this court held as follows: "*[31] It is apparent that despite being repeatedly told that the financial statements were not germane to the proposed retrenchment, the union stuck to that before it would consult. The question of course is, were they justified in that stance? In the court's view not. Section 189(3) refers to disclosure in writing of all relevant information. Therefore the determinative phrase therein is the relevant information. (See UPUSA and Others v Grinaker Duraset (1998) 19 ILJ 107 (LC); [1998] 2 BLLR 190 (LC), NUMSA v Comark Holdings (Pty) Ltd (1997) 18 ILJ 516 (LC); [1997] 5 BLLR 589 (LC) and NUMSA v Atlantis Diesel Engines (Pty) Ltd (1994) 15 ILJ 1257 (A).*"

[45] Page 56 Consolidated Bundle, letter from Local Chairperson of SATAWU, Khathu Mvhungu, addressed to Human Resources Manager, Ms Cook, dated 11 [December] 2009; and page 60 Consolidated Bundle, email dated 11 December 2009, from J Skosana, addressed to Senior Management.

[46] Page 44, Consolidated Bundle, discussions in the Minute of the meeting of the 4 December 2009, Point 2.

[44] From the outset I think it ought to have been mentioned that the peremptory speak of *s189(3)* must be purposefully aimed compelling the employer to proactively supply all information that is relevant to the other parties to consultation. This procedural step serves a substantive purpose. It allows the union to be fully *au fair* with the issues, so that it can be placed in the speed that will enable it run along with the employer, along the tramlines set in the items *(a)* to *(j)* in identifying all matters and details that needs to be identified and dealt with. The union is left in the dark when the employer invites it to a meeting and then say: 'please provide us with a written request for particulars so that we can supply you with the relevant information'. That not only reverses the burden imposed on the employer, but it also defeats the whole purpose of the LRA, and s189 in particular.

[45] The importance of the disclosure of relevant information by the employer to the affected employees was highlighted by Murphy AJ in *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare*[47] as follows:

"A critical, if not the most central ingredient of the consultation process, is the requirement of written notice and the disclosure of information. Effective consultation requires employees to have an opportunity to prepare for consultation by being given sufficient advance notice, an agenda and adequate information. Without this, the joint consensus-seeking process mandated by the legislature is hardly likely to be "meaningful" . . .

The failure of employers to fulfil this obligation meaningfully, invariably leads to disputes, misconceptions, a breakdown in trust and the delegitimizing of the joint consensus-seeking process mandated by the statute."

[46] The cross examination of Skosana went at some length into the theory that the managing executives of employer knew better about what is good for the company than the employees would. It is also plain from the discussions in the consultations, as well as in the correspondence, that the union was in the dark regarding the real reasons for the proposed dismissals. The statement that despite all the diverse aspects raised by the Respondent as reasons, *"the process was leaning more towards restructuring than retrenchment"*, just rang

[47](2005) 26 ILJ 889 (LC) paras 5, 34.

hollow in the absence of all relevant information that should have been proactively supplied by the employer as required by s189(3)[48].

[47] The Labour Appeal Court, in *SACWU & Others v Afrox Limited*[49] has laid a position that:

"It is implicit in terms of section 189(2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative:

- *to take appropriate measures to avoid dismissals;*
- *to mitigate the adverse effects of the dismissals;*
- *to change the timing of the dismissals;*
- *to select a fair and objective method for the dismissals, and*
- *to provide appropriate severance pay for dismissed employees.*

What is appropriate will depend on the facts each case, and on the evidence presented about the steps taken, if the matter proceeds to court[50]."

[48] The ubiquitous requirement in the Minutes that the union should raise its concerns in writing, or 'request for further particulars in writing', leads to a conclusion that because it was unable to do so, management was left in the dark as to what information would have been required by the union for the purposes of consultation, or that because the union did not request information in writing, then, as I understand, it may not entitled to any. It also says, because the union did not request for further particulars of what was mentioned in the notices, then the employer is exonerated from supplying that information on its own. As already mentioned above, this reversed the burden placed on the employer by the LRA to proactively supply the union with that information before the consultation takes place. The union is not precluded from seeking further relevant and adequate information, but it has to be brought to speed before it can be able to do so. This was the space that was supposed to be filled by the supply of all information to the union, including the factors that were taken into account in concluding that dismissal was indeed in the business interest. This is not rocket science.

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[48] *SACWU & Others v Afrox Limited* (1999) 20 ILJ 1718 (LAC)
[49] (1999) 20 ILJ 1718 (LAC)
[50] At para 36.

[49] I find that Respondent was not correct in complaining that the employees, or their union, are incapable, as this court understood the cross examination of Skosana, of comprehending the machinations of business operations, a province that supposedly only company management can master. The union was left in the dark, and therefore, in the circumstances, adequate consultation was impossible.

Substantive Fairness

[50] Indeed the employer may take provisional decisions to consider retrenchments on their own[51]. But, as the LRA instructs, no final decision may be taken without consulting meaningfully in a joint consensus seeking meeting with the employees likely to be affected by that decision. The reason for this is that the provisional decision may be obviated partially or completely by genuine, good faith effort by the parties in the consultation sessions. Instances abound, where such decisions were completely changed, overturned or modified in attempts to minimise or eliminate the adverse consequences of job losses.

[51] The requirements for a fair consultation were dealt with in *NEHAWU v University of Pretoria*[52], in which the court concluded that there was nothing wrong with the employer coming to the consultation table with predispositions towards a particular method of solving the problem which has given rise to the contemplation of dismissals for reasons based on operational requirements.

[52] However, the court pronounced an important rider that gives a profound expression to the spirit of s189, as follows:

[51] This approach was endorsed by the Labour Appeal Court in *General Food Industries Ltd v FAWU [2004] BLLR 667 (LAC)* where the Court held as follows: "*An employer is entitled to take the provisional decision to consider the possible retrenchment of employees on his own, without any input from the employees or the union. But he is not allowed to make a final decision before consulting with the trade unions or employees involved. In practice an employer will first sense the need to retrench at managerial level and the decision in principle will be taken. However, the employer must consult once it contemplates the dismissal of employees for operational requirements.*"

[52] (2006) 27 ILJ 117 (LAC).

"What is critical is that the employer should nevertheless be open to change its mind if persuasive argument is presented to it that the method is wrong or is not the best or that there is or may be another one that can address the problem either equally or even in a better way. He should engage in a joint problem-solving exercise with the other consulting party or parties".

[53] Our courts have also pronounced widely on the meaning and scope of *"operational requirements"* in the context of dismissals, drawing largely from the Code of Good Practice on Dismissal Based on Operational Requirements ("the Code")[53]. In general, s 213 of the LRA defines *"operational requirements"* as:

[R]equirements based on the economic, technological, structural or similar needs of an employer."

[54] Article 2 of the Code elaborates as follows:

"As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."

[55] In general however, the courts have aimed to strike an appropriate balance between the right of employers to regulate and determine the manner in which their business operate, and the rights of employees not to be subjected to arbitrary dismissals[54]. An additional primary consideration in this regard is not just the reason cited by the employer for the dismissal, but also the proof thereof. Froneman DJP noted in *SA Chemical Workers Union & others v Afrox Ltd*[55],

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[53] Code of Good Practice on Dismissal Based on Operational Requirements GN 1517, *GG* 20254 of 16 July 1999.
[54] Thompson and Benjamin *South African Labour Law* (Service No 48, 2006) at AA1-473.
[55] (1999) 20 ILJ 1718 (LAC)

"It follows that it can no longer be said that the court's function in scrutinizing the consultation process in dismissals for operational requirements is merely to determine the good faith of the employer (compare SACTWU & others v Discreto (A Division of Trump & Springbok Holdings) [198] 12 BLLR 228 (LAC); (1998) 19 ILJ 1451 (LAC) para [8]). The matter is now one of proof by the employer, on a balance of probabilities of –

- *The cause or reason for the dismissal;*
- *The defined 'operational requirements' that the dismissal was based on . . .;*
- *A fair procedure in accordance with s 189 . . .;*
- *The facts upon which a finding of a substantively fair reason for the dismissals can be made..."*

Furthermore, the court added[56]:

"The presiding officer's assessment of the fairness or otherwise of the dismissal will also be dependent on the evidence presented before him or her. An assessment on 'moral' considerations not based on the evidence led at the trial will be impermissible. (All this is not new. It happens every day in all courts, in relation to all sorts of different kind of issues. It is the very stuff of litigation and adjudication.)"

[56] The reasons for the dismissals in this case, or the rationale for retrenchment, is one based at best, on *cost-saving*, or better still, on *huge losses*, or at the very least, as a result of the need to *streamline* or *restructure* the business. The judgement in *Ndlhela v Sita Information Networking Computing BV (Incorporated in the Netherlands)*[57] by this court, is on point. Counsel for the employer in that matter argued to the effect that it was sufficient for the employer that it had its basis for dismissals on an economic rationale (cost saving) to reduce its staff as a result. It was also argued that a court is not entitled to enquire into the reasons which informed the employer's decision to reduce costs[58]. The court expressed its disapproval to being wooed to this deferential approach, particularly in the light of the judicial mandate conferred in the Constitution and the LRA[59]. In the judgement of *BMD* case, Davis AJA had earlier posited that: *"viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit the enquiry is not directed to whether the*

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[56] *Afrox Limited*, *supra*, at para 38.
[57] [2014] 35 ILJ 2236 (LC)
[58] At para 32.
[59] In this regard, the court made reference *to BMD Knitting Mills v SA Clothing & Textile Workers Union (2001) ILJ 2264 (LAC)*, where the *'various terms had been employed to articulate the test for assessing the substantive fairness of an employer's decision to dismissed based on operational grounds'*.

reasons offered is the one which would have been chosen by the court, farness, not correctness is the mandated test"[60].

[57] I therefore align this court with findings made in the *Ndlhela* decision, as follows:

> *"This does not entitle the court to decide if the reasons given by an employer are the best reasons available. The Labour Court is constitutionally and statutorily required to supervise the fairness of reasons given by employers where they dismiss employees on operational grounds. This cannot happen in vacuo. Where an employer contends that the operational justification for its decision to dismiss is reduction of operating costs, it must at least put forward evidence showing the actual operating costs which it sought to reduce. This can be done by producing financial information which demonstrates the relevant operating costs. This should not been an onerous task. Any sensible employer wishing to reduce costs must first know what costs are to be reduced."*
>
> *"In addition, where an employer wishes to cut operating costs by reducing its headcount, it must at least produce evidence of the costs associated with the headcount and how this will meet the overall target of cost reduction. In the absence of this information, it is not possible for a court to decide if the decision is not arbitrary or capricious. Nor is it possible to decide if the decision is a rational or reasonable one, based on the information which was available to an employer at the time it decided to embark on a restructuring exercise."*[61]

[58] The company acknowledged, with regard to substantive merits on which supervisors were dismissed, that the hierarchies throughout its various departments generally took the same form, with differences dependant on the particular functions of each department. This structure comprises a clerical band of employees, overseen by management. The decision to collapse the supervisor band – which appears to have been located between the other mentioned bands – is alleged to have been applicable throughout the company, but with a particular focus on the International and Domestic Hub departments, located within the broader Operations department.

[59] Despite this collapse and the resultant retrenchments, it was not disputed that the Respondent employed "team leaders" as the intermediary band between

[60] *BMD Knitting Mills* at para 19.

[61] *Ndlhela*, at paragraphs 43 and 44.

the clerical and management positions, which employees are thus effectively fulfilling the functions of the retrenched supervisors. In fact, in cross-examination Cook conceded that the retrenched supervisors were sufficiently skilled to occupy the team leader posts. In fact, not all supervisors were retrenched in the course of the restructuring exercise described above. I find that such conduct, in fact, calls into question the efficacy of and justification for the exercise as a whole.

[60] Notwithstanding that this was the purported basis for the retrenchments, at the hearing the employer's evidence was to the effect that the primary basis for the restructuring of the International Hub was that a "disconnect" existed between the job descriptions of the various positions therein, and the actual functions performed by the employees.[62] As a result, it was contended that a streamlining exercise was necessary to ensure that employees were performing adequately the duties required of their particular positions, thereby ensuring efficiency in the division's operations. This was put forward despite the fact that it was acknowledged that no consultation was had on the nature of the affected employees" job descriptions and requirements, whether current or proposed.

[61] It is thus apparent that the reason for the retrenchment of the affected applicants is not that stated in their s 189(3) notice, and is thus not that on which the company purportedly sought to consult with them throughout November and December 2009. I accept the argument by the applicant's counsel that the resultant inability of applicants to prepare adequately for the consultations or address any concerns of the company that might have led to their being retained, and thus any consultations were rendered meaningless.

[62] In my view, the Respondent has not discharged its burden to prove that the cause or reason for the dismissal was one based on fair grounds; the defined 'operational requirements' that the dismissal was based on were not established. The

[62] It is notable that the company, through Cook, testified that this "disconnect" was identified during a strike by employees in September 2009. The strike apparently enabled the management band to identify the particular duties and functions of each striking employee in their absence, and thereby understand which functions – and thus employees – were in fact unnecessary to the smooth performance of operations.

decision in the judgement of *Ndlhela* had also, following a line of others, held that *"there is no bright light separating procedural fairness and substantive fairness in retrenchment matters because s189 has a substantive purpose – to save jobs"*[63].

[63] This finding flows also from the concession by the Respondent that in any event not all supervisors were retrenched in the course of the restructuring exercise. This places a higher burden on the company to justify not just its decision to collapse the supervisor band throughout its operations, but the specific retrenchments of each of the second and further applicants. This is done by way of the identification and application of selection criteria as provided for in s 189(7) of the LRA. I find that the Respondent patently failed to do.

[64] It is also a common fact that, in casu, the employer had decided to engage the services of additional employees after the retrenchment of the Applicants had taken place. This demonstrate to the court that this is not a case where it can be said that there were operationally justifiable or rational grounds for the dismissals.

[65] The substantive fairness of retrenchments, which commences when contemplation of dismissals materialises, finds its profundity in the material compliance with the provisions of sub-sections *189(2)* and *(3)*. These provisions clearly *oblige* the employer to consult on issues specified in *ss189(2)* and to disclose the specified information as required in *ss289(3)*, and thus enjoins it to supply the all relevant information on its own initiative, by providing it in writing to the other parties, 'before proposing the dismissals', including:

- The reasons for the proposed dismissals;
- The alternatives that *the employer considered before* proposing the dismissals, and the reasons for rejecting each of those alternatives;
- The number of employees likely to be affected and the job categories in which they are employed;

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[63] At para 45.

- The proposed method for selecting which employees to dismiss;
- The timing of the retrenchment;
- The assistance that the employer proposes.

[66] The rights of the employees not to be unfairly dismissed would be contravened if the employer failed to engage in a meaningful joint consensus-seeking process with the union whose members were likely to be affected by the proposed retrenchments and agree substantially on the matters specified in *items (a)* to *(j)* of *ss189(3)*, including agreement on alternatives to dismissals and on selection criteria[64] that is fair and objective[65]. The language of these provisions make it mandatory for the parties to the consultation to explore certain issues from this menu, to the extent that they are capable to mitigate or avoid the adversity of job losses. The reasons for dismissals in this case, the method of selecting candidates for retrenchment, and the lack of consideration for alternatives, some of which presented themselves during the consultation, show lack of commitment and good faith on the part of the employer. This has led this court to making the findings that:

1) There was no fair reason for the second and further applicants to be retrenched ahead of those employees who had fewer years of service and less experience than them;
2) The company's decision to engage the services of additional employees, namely Thulani Zwane, Victor Mudau and Daniel Mokoatedi on fixed term contracts as export clerks/processors after the retrenchment of the second and further applicants indicates that the retrenchments were not operationally justifiable on rational grounds;
3) The company did not offer the vacant internal positions that arose during the process to the second and further applicants who were capable of performing those functions. The company accordingly did not consider and take all viable alternative steps to prevent the retrenchments or to limit the numbers to a minimum.

[64] S189 (7) *(a)* of the LRA.
[65] S189 (7) *(b)* of the LRA. See also Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 (LC), where the ultimate purpose of section 189 is explained.

[67] Counsel for the Respondent argued unconvincingly that the alternatives considered *"ranged between the introduction of the organogram as well as the proposed organogram"*[66]. But the organogram, as this court has observed, amounted to nothing more that moving chairs to different decks in the same vessel. It proposed reclassification of jobs without changing the job specifications. It was an attempt to derive a consent from employees for a change in their conditions of employment, which amounted to accepting demotions. It did not constitute a fair reason for the dismissal of the second and further applicants.

[68] I find that, as a result of the murkiness in the saga, alternatives were never considered adequately, and no relevant information as to the reasons for the proposed retrenchments was supplied to either the affected applicants or the union. Viewed alone, and as indicated above, the organograms do not provide reasons for the restructuring exercise, but simply outline the proposed new structure in which jobs would be reclassified downwards. By itself this is clearly insufficient. Moreover, none of the affected applicants or their union were informed through collective bargaining platforms that the actual performance of their functions was inconsistent with their job description (as alleged), nor were they given an opportunity to rectify this "disconnect". A dismissal that occurs in such circumstances, without employees being given opportunity answer on their alleged inadequacies or deficiencies on their performance, is recognised by our courts as unfair[67].

Procedural Fairness

[69] The Respondent sought to make a stupendous issue out of the fact that the union had engaged no less than four representatives in the consultation process, and that this caused delays and ultimately led to the collapse

[66] Page 39 para 66 of Respondent's Heads.

[67] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC), at para 78. See also SA mutual Life Assurance Society v Insurance & Banking Staff Association & Others 92001] 9 BLLR 1045 (LAC) for an example where the courts frown at the use of retrenchments for ulterior purposes.

thereof. But both Cook and De beer conceded in the hearing that this did not on its own, account for any delay or collapse of the process. They also conceded that management has also delayed the process and issued varying notices to different categories of employees, with different reasons for the proposed dismissals. The fact is that when the union raised an objection to the respondent's lawyer, Mr de Beer, chairing the meeting on the 11 December 2009, and proposed that the chair and the scribe be chosen openly in the meeting, a dispute arose, and though there are differing version on what transpired later, security was ultimately called in to remove the union delegation, who were still in the boardroom and calling for management to continue with the consultation.

[70] This court cannot find that the collapse of the meeting of the 11 December 2009 signalled the end of the consultation process owing to the belligerence of the union. The admissions made during the examination of the employer's witnesses are indications that the employer had already made up its mind to reduce the status of supervisors to that of team leaders, and to reclassify the jobs of employees in the International Hub to lower categories, in order to save costs. Whilst there is nothing wrong with the employer taking any measures to save costs, the legislature had gone to lengths in finding, through the LRA, a balance that would safeguard both the interests of the employer and employee in such circumstances. Employers must take this into account when taking valid business decisions that would potentially affect the rights of employees not to be unfairly dismissed. In other words, you can retrench for operational reasons, but what matters is *what* those reasons are and *how* you do it. The LRA expressly requires[68] that the dismissal must be both substantively and procedurally fair. In this case, no regard was had to that requirement.

[71] The question in the determination of procedural fairness in retrenchments loses clarity in that, as in this case for instance, failure to consult on and consider alternatives, and explore a fair selection criterion, invariably has substantive implications. There is greater probability that, had the employer

[68] At s188.

seriously considered alternatives, vacancies that arose during the consultation process could have been offered and accepted by the applicants, and thus consequently, there could potentially have been no need for dismissals. It is for this reason, among others, that this court in the *Ndlhela* case above has concluded that *"there is no bright light separating substance from procedure in retrenchments"*.

[72] I therefore find that the respondent has not discharged the onus of showing that the dismissals of the second and further applicants was for a fair reason based on operational requirements. The dismissal of the second and further applicants are therefore declared substantively and procedurally unfair.

REMEDY

[73] Both counsel have made submissions in this regard. The respondent's counsel has referred me to the decision in *Robbertze v March (SA) (Pty) Ltd*[69]*, where* the Court, in interpreting the provisions of s194, as it stood prior to the amendments in 2002[70], held as follows:

"*[70] This court is required to exercise a discretion as to whether to grant the compensation sought,* ***or to grant no compensation at all****."* (Counsel added the emphasis).

[74] Counsel also referred me to the decision in *De Bruyn v Sunnyside Locksmith Suppliers (Pty) Ltd*[71]*,* in which Van Niekerk AJ – as he then was – in *De Bruyn supra* the proceeded as follows:

"*[35] I am of the view that the degree of unfairness in relation to the company's conduct is not such that an award of the equivalent of twelve months remuneration is warranted. The company has paid an amount equivalent to five weeks remuneration in compensation, and that in my view is a fair and adequate sum to compensate De Bruyn in the circumstances of the case. In the words of the formula of Johnson and*

[69] (2002) 23 ILJ 1448 (LC).
[70] See s48 of [the LRA Amendment] Act 12 of 2002.
[71] (1999) 20 ILJ 1754 (LC), where the court held that it may, in deciding to award compensation where it was found that dismissal was procedurally unfair, consider the manner in which the union representatives conducted themselves during the consultation process, and the extent of their culpability in influencing the employer's failure to comply with the provisions of s189.

Johnson, sufficient redress has already been made. Furthermore, the process of consultation was to come [sic] extent frustrated by the applicant. Although this was insufficient to warrant a finding that De Bruyn's dismissal was procedurally fair, I am entitled to take into account for the purpose of exercising a discretion concerning compensation the fact that Mr De Bruyn, who was authorised to act and who acted on De Bruyn's behalf, conducted himself in a manner that was not conducive to constructive consultation. A degree of blame can therefore be attributed to the applicant for the failure of the consultation process, and for the failure of the purpose underlying s 189. In all the circumstances, I exercise the discretion conferred on me by s 194(1) not to award compensation to De Bruyn. "

[75] The court notes that these two decisions were handed down at the time when the judges or arbitrators had no discretion but to award compensation either to the full extent or not at all, thus giving rise to the *'all or nothing'* principle[72]. Since the amendments introduced in the year 2002[73] the requirement that judges and arbitrators now have the discretion to award compensation that is *"just and equitable"* subject to the 12-month ceiling, has been restored. I find that the court has the discretion to find that the 'all or nothing' principle' may not be appropriate in this matter.

[76] Mr Venter, for the Respondent, has also urged this court to find that the union's conduct had also contributed materially to the lapse, if any. The facts indicate nothing to suggest that SATAWU acted in any other manner than as would be expected from any union in the Republic. The change of representatives, admittedly, did not cause any delay or disarray. The fiasco that scuppered the meeting of the 11 December 2009 can also not have been the contributed to the failure by the Respondent to supply relevant information and advance consistent and credible reasons for the proposed retrenchments. The inability of the parties to explore appropriate alternatives and agree on a fair selection criteria, was due to the fact the consultation process was not a genuine consensus seeking effort.

[77] Ms Gaibie, for the Applicants, submitted that the reinstatement of the Applicants was the only just and equitable remedy available to the Applicants.

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[72] *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LC) and *Chothia v Hall Longmore & Co (Pty) Ltd (1997) 18 ILJ 1090 (LC)*.

[73] Labour Relations Amendment Act 12 of 2002.

She submitted, however, should the court not be inclined to order reinstatement, that the remedy of re-employment, as per s193(1) (b) of the LRA is an appropriate alternative remedy in the circumstances. This, I am inclined to do. In this event, the LRA stipulates that such re-employment be

"[*E*]*ither in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal . . . .*"

[78] In this regard, she referred the court to the two decisions of the Constitutional Court in *Billiton Aluminium SA t/a Hillside Aluminium v Khanyile*[74] and *Equity Aviation Services (PTY) Ltd v Commission for Conciliation Mediation and Arbitration & Others*[75].

[79] The Respondent in this matter, like the employer in *Billiton Aluminium* sought to raise a constitutional argument about the onerous and cumulative effect of a reinstatement order in matters that may sometimes take up to eight years before the matter is finally determined by the Constitutional Court. The employer in that matter raised the issue of "systemic delays" in the determination of labour disputes that commence with the arbitration process, is thereafter dealt with in review proceedings by the Labour Court, and thereafter in appeal proceedings in the LAC, the SCA (which was applicable at the time) and finally in the Constitutional Court. By the time the matter was heard by the Constitutional Court, eight years had passed, and it was contended by the employer before that court that the LAC is obliged to make orders that are just and equitable, and that confirmation of an award that had the effect of backdating an employee's reinstatement for eight years was neither just nor equitable and it breached the employer's constitutional rights. Apart from the fact that the employer in that matter had raised this issue for the first time in the Constitutional Court, and that Court was disinclined to give it leave to appeal to that court on that basis, Froneman J made pertinent findings about an order of reinstatement, its effect and the risk of an appeal process on such an order.

[80] In articulating the nature of a reinstatement order, Froneman J cited the decision of the Constitutional Court in *Equity Aviation Services (Pty) Ltd v*

[74] [2010] 5 BLLR 465 (CC).
[75] [2008] ZACC 16; (2009) 1 SA 390 (CC).

Commission for Conciliation, Mediation and Arbitration & Others, and confirmed that the judgment in that matter achieved clarity about the nature and inter-relationship between the remedies of re-instatement, re-employment and compensation provided for in section 193 of the LRA. He indicated that after the *Equity Aviation* judgment, there can be no doubt not only that reinstatement is the primary remedy in unfair dismissal disputes but quoted the following dicta from that judgment in support of the proposition that the remedy of reinstatement is granted by virtue of an arbitration award or an order of court:

"The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers" employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the Court or arbitrator . . . The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly".

[81] It is apparent, in citing the dicta in the *Equity Aviation* matter, that the Constitutional Court in the *Billiton* matter reinforced the notion that the reinstatement order arises from the confines of the Labour Relations Act and must be ordered where the dismissal is found to be substantively and procedurally unfair. To the extent that the employer or the company contests the dismissals, it does so with the risk that the order of reinstatement may be a distinct possibility when its actions have been determined to be unfair. This court finds the Respondent's conduct to be unfair. I find the Respondent's conduct to be unfair.

[82] In the premises, I find that the Respondent:

1) Failed to follow the fair procedure in accordance with the provisions of section 189 of the Labour Relations Act, 66 of 1995 (as amended)

("the LRA") in carrying out the termination of their employment on the alleged grounds based on operational requirements, which took place on or about 28 December 2009; and also that,

2) The Respondent failed to engage in a meaningful consensus seeking consultation with the affected employees, as well as to comply fully with the provisions of section 189 (3) *(a)* – *(j)* of the LRA.

ORDER

I make the following order:

[1] The dismissals of the Second and Further Applicants for reasons based on the Respondent's operational requirements was both procedurally and substantively unfair;

[2] The Respondent is ordered to re-employ the Second and Further Applicants, in the work in which they were employed before the dismissal or on reasonably suitable work, from the date of this judgement.

[3] The reinstatement of the Applicants shall be on the same terms and conditions that applied to them as they would have been to date had they not been dismissed.

[4] The Respondent is ordered to pay the costs of the applicant, on a party and party scale, such costs to include the costs of the trial.

MOSIME AJ

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicants: Ms S Gabie, Attorney
Cheadle Thompson & Haysom Inc

For the Respondents: Adv. F Venter
Johannesburg Bar

Instructed by:
Johanness de Beer Inc.