THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 108/2014

In the matter between:

NATIONAL UNION OF MINEWORKERS

OF SOUTH AFRICA (NUMSA) obo **First Applicant**

PERSONS LISTED IN ANNEXURE "A" AND

"B" **Second to further Applicants**

and

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD

(MERAFE VENTURE) **Respondent**

Heard: **1 and 2 August 2016, 12 – 15 December 2016**

Delivered: **16 November 2017**

Summary: The Applicants claim that their dismissal was unfair when they were retrenched subsequent to placing Horizon mine under care and maintenance. Alternative positions were available to avoid dismissal but the Applicants adopted a stance that employees would not be redeployed. Dismissal was fair. Applicants' case is dismissed.

JUDGMENT

PRINSLOO. J

Introduction

[1] The individual Applicants (employees) were employed at the Respondent's Horizon Chrome mine (Horizon or the mine) before they were dismissed on 4 October 2013. The Applicants approached this Court for relief claiming that they were unfairly dismissed for reasons related to the Respondent's operational requirements. The Applicants seek an order declaring that their dismissal was substantively unfair and to be awarded compensation.

[2] In their statement of case the Applicants cited the employees as the individuals whose names were listed in annexure "A" and "B" and they seek the joinder of the employees listed in annexure "B' to be applicants in this matter.

[3] Before I deal with the pleadings, evidence or merits of the case, the first issue to be decided is the application for joinder.

The joinder application

[4] The First Applicant (NUMSA) referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 30 October 2013, which dispute was conciliated and remained unresolved on 4 December 2013. A certificate of outcome was issued on the same date and the dispute was referred to this Court.

[5] The Applicants seek to join the individual employees listed in annexure "B" as they were excluded from the referral to the CCMA. The Applicants' case is that they were employees of the Respondent, they were dismissed, their dispute is the same dispute that was referred and conciliated on 4 December 2013 and they have a direct and substantial interest in this matter and their right to relief depends on the determination of substantially the same questions of law and the same facts.

[6] The application for joinder is opposed.

[7] The Respondent's case is that this Court has no jurisdiction in respect of the individual employees listed in annexure "B" as their dispute was not referred

for conciliation in terms of the provisions of section 191(1) of the Labour Relations Act[1] (the Act) and therefore they cannot be joined as applicants.

[8] In *Intervalve (Pty) Limited and Others v National Union of Mineworkers of South Africa* [2] the Labour Appeal Court confirmed that conciliation was a precondition before a dispute could be adjudicated in terms of the provisions of section 191 of the Act.

[9] The Constitutional Court also considered the issue of conciliation in *National Union of Mineworkers of South Africa v Intervalve (Pty) Limited and others*[3] and held that:

> "Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour law history for nearly a century. We should not tamper with it now".

[10] In my view the position is clear: this Court has jurisdiction to adjudicate a dispute where the jurisdictional pre-requisite of conciliation has been met. The dispute that was referred to the CCMA was referred in respect of the individual applicants who were listed in annexure "A" and that is the dispute that was conciliated and for which a certificate of outcome was issued.

[11] No dispute was referred in respect of the individual employees listed in annexure "B". It follows that the dispute between the individual employees listed in annexure "B" and the Respondent was not conciliated and the precondition before the dispute could be referred to the Labour Court for adjudication has not been fulfilled. The fact that they are also dismissed employees of the Respondent and that they have a direct and substantial interest in this matter and their right to relief depends on the determination of substantially the same questions of law and the same facts cannot rescue

[1] Act 66 of 1995 as amended.
[2] (2014) 35 ILJ 3048 (LAC).
[3] (2015) 36 ILJ 363 (CC).

them and does not absolve them from the requirement that they had to refer their dispute for conciliation.

[12] This Court has no power to condone non-compliance with this jurisdictional pre-condition. Absent conciliation there is no jurisdiction[4]. The individual employees listed in annexure "B" cannot be joined to these proceedings in the absence of the jurisdictional pre-requisite of conciliation and the application for joinder has to fail.

<u>The pleadings and pre-trial minute</u>

[13] In the pre-trial minute the parties agreed that the following facts and timeline were common cause:

13.1 The Respondent is Glencore Operation South Africa (Pty) Ltd (Merafe Venture), having changed its name from Xtrata South Africa (Pty) Ltd. Glencore International PLC acquired the issued share capital of Xstrata PLC, which it did not already own and consequent to this acquisition and as result of the merger, the Competition Tribunal of South Africa on 22 January 2013 issued an order.

13.2. On 18 February 2013, the Respondent informed NUMSA and its Horizon employees that it intended to sell Horizon as a going concern in terms of section 197 of the Act to a successful bidder.

13.3. On 19 June 2013, the Respondent gave a presentation at Horizon to the Future Forum and to NUMSA. The Respondent informed those present at the meeting that it was left with no other option but to proceed with a consultation process in terms of section 189 and 189A of the Act. The Respondent informed those present that it would submit documentation to the Competition Commission, which would substantiate that the process to be undertaken by the Respondent in terms of section 189 and 189A of the Act at Horizon was not as a result of the Xstrata and Glencore merger.

[4] See *Intervalve Supra* where the court held that '… the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication', and in the absence of conciliation a litigant is not entitled to refer a dismissal dispute to the Labour Court.

13.4. Following the presentation to NUMSA, the Respondent addressed a memorandum to its employees informing them that it had not been successful in selling Horizon. The Respondent also informed the employees that since the attempted sale or disposal of Horizon was not successful, the company would proceed with a consultation process in terms of sections 189 and 189A of the Act.

13.5. The Respondent issued a notice in terms of section 189(3) of the Act on 20 June 2013, which notice also informed NUMSA that the Respondent would request the appointment of a CCMA facilitator in terms of section 189A (3) of the Act.

13.6. The section 189(3) notice invited NUMSA to submit written proposals to the Respondent addressing the issues as provided for in section 189(2) of the Act by close of business on 28 June 2013. The Respondent requested NUMSA to provide a date or dates on which they could meet to begin the consultation process.

13.7. On or about 20 June 2013, NUMSA referred a complaint to the Competition Commission to the effect that the Respondent proposed to retrench employees in contravention of the Competition Commission's merger conditions.

13.8. On 21 June 2013, Horizon was placed under care and maintenance.

13.9. On 02 July 2013, a meeting was held between the Respondent and NUMSA's regional officials.

13.10. On 10 July 2013, the Respondent applied for facilitation by the CCMA in terms of section 189A of the Act. The CCMA informed the parties that the first facilitation meeting would take place on 18 July 2013 at the CCMA.

13.11. On 12 July 2013 the Respondent and NUMSA's senior leadership agreed to meet at the Respondent's Head Office in an attempt to forge a way forward with the process undertaken in terms of section 189 of the Act. The parties agreed to meet at the Respondent's Waterval West mine on 17 July 2013.

13.12. The parties met on 17 July 2013 and at the meeting NUMSA requested the Respondent to withdraw its request for facilitation by the CCMA and on 18 July 2013 the Respondent withdrew its request for facilitation as requested by NUMSA.

13.13. On 01 August 2013 a meeting was held between the Respondent and NUMSA and the Respondent *inter alia* informed NUMSA that positions were available at its other operations in the Western Mines.

13.14. On 5 August 2013, the Respondent addressed a letter to NUMSA. The letter informed NUMSA *inter alia* that the Respondent would be proceeding with the section 189 process and invited NUMSA to engage in consultation in respect of the issues contained in the section 189 (3) notice.

13.15. On 6 August 2013 the Respondent requested the CCMA to reschedule the facilitation process in terms of section 189A of the Act.

13.16 On 22 August 2013 a facilitated consultation meeting in terms of section 189A took place at the CCMA. The facilitating commissioner recommended that the parties convene another meeting at the mine for purposes of consultation in terms of section 189 of the Act.

13.17. On 30 August 2013 the Respondent invited its employees employed at Horizon to apply for voluntary severance packages (VSP) from 02 - 06 September 2013. The notice indicated that the applicants for VPS's would receive 4 weeks' pay for the first year of completed service, an additional 3 weeks' pay per completed year of service from the second year to the sixth year of service and from the seventh year of completed service onwards an additional 2 weeks' pay per year of completed service plus 3 months' notice pay.

13.18. On 04 September 2013 the employees who had applied for the VSPs were provided with individual calculations of the amounts they would receive. On 05 September 2013 the Respondent provided the said employees with recalculated amounts which were less than the initial amounts provided.

13.19. Subsequent to the Respondent's announcement of application for VPS on 30 August 2013, the parties agreed to meet on 6 September 2013. The meeting was held between, amongst others, NUMSA's regional secretary Jerry Morulane, local organiser, Mere Boase and the Respondent's Arthee Naidoo and Richard Vermeulen. At the meeting the following was, *inter alia*, discussed and it was agreed that:

1. NUMSA would submit a proposal on severance packages and early retirement to the Respondent by close of business on 12 September 2013;
2. NUMSA could convene a mass meeting with its members at Horizon to consult with them;
3. The Respondent would extend the consultation process in terms of section 189A of the Act to 17 September 2013 and invited NUMSA to consult from 13 to 17 September 2013.

13.20. On 6 September 2013 NUMSA also requested the Respondent to provide information on the number of available vacancies at its other operations and the number of applications the Respondent received for redeployment to these positions. In a letter dated 9 September 2013, the Respondent informed NUMSA of the suitable positions available at its Kroondal and UG 2 operations and the number of applications the Respondent received for redeployment to these positions. The Respondent further confirmed that it would consider NUMSA's proposals to be submitted to it by 12 September 2013 and the extension of the consultation process in terms of section 189A of the Act to 17 September 2013.

13.21. NUMSA requested that the Respondent provide it with its submissions to the Competition Commission and the Respondent disclosed its submissions on 01 October 2013 to NUMSA.

13.22. On 25 September 2013 the Respondent invited NUMSA to engage in consultations in terms of section 189 of the Act on 26 and 27 September 2013.

The parties met to consult in terms of section 189 of the Act on 30 September 2013. The parties discussed, *inter alia*, the redeployment of Horizon employees and VSP's.

13.23. On 01 October 2013, the Respondent addressed a letter to NUMSA recording the following:

1. The bidding process for the sale of Horizon had been unsuccessful;
2. It intended to finalise the section 189 retrenchment process by no later than 4 October 2013 (3 days later);
3. Horizon employees had until Thursday, 3 October 2013 (2 days later) to apply for vacancies previously advertised and presented to them and to be considered for re-deployment;
4. Applications for VSPs on the same basis as previously offered by the Respondent would be re-opened and would close on 3 October 2013 (2 days later);
5. The forced retrenchment severance package would be 2 weeks' pay for each completed year of service (calculated on basic salary and housing), 1 months' notice pay (to include basic salary, housing, cash value of medical aid and provident fund for the notice period of 1 month) and a skills allowance of R2000.00 (paid directly to the service provider); and
6. Should any Horizon employee not apply to be considered for re-deployment or accept the VSP by 3 October 2013 (2 days later) they would be given notice of termination of their employment on 4 October 2013 and they would receive forced severance packages.

13.24. Ms Ruth Edmonds (Edmonds), the Applicant's attorney of record, contacted Mr Richard Ward (Ward) of the Respondent prior to the individual Applicants' dismissals on 04 October 2013. At that stage, Mr Ward agreed to discuss the section 189 process undertaken by the Respondent and the reasons for the closure of Horizon with NUMSA.

13.25. On 04 October 2013 the Respondent issued notices of termination to the individual Applicants, who had not taken the VSP or had not been redeployed and advised them that they would be paid the forced severance packages as detailed in the letter dated 1 October 2013.

13.26. NUMSA, on behalf of the individual Applicants referred to in annexure A, referred an unfair dismissal dispute to the CCMA on 30 October 2013 and it was conciliated unsuccessfully on 04 December 2013.

<u>Issues for the Court to decide</u>

[14] As the employees were retrenched in terms of a section 189A process, this Court cannot decide the procedural fairness of their dismissal, as stipulated in section 189A (13) and (18) of the Act. Section 189A assumes a firm separation between substantive and procedural fairness as it provides for a discrete procedure in respect of procedural lapses where procedural irregularities should be remedied urgently and not once the process has run its course.

[15] The only aspect that could be decided is the substantive fairness of the Applicant's dismissal.

<u>The evidence adduced</u>

[16] The Respondent called one witness, Mr Richard Francois Vermeulen (Vermeulen) who testified that he is employed as the Respondent's general manager for the Western mines.

[17] Vermeulen testified that in February 2013 NUMSA and the Horizon mine employees were informed that the Respondent intended to dispose of Horizon and that the Respondent was in the process of selling the mine to a successful bidder.

[18] The reasons why the Respondent wanted to dispose of Horizon were *inter alia* that the demand for chrome reduced globally and that Horizon was a high cost operation. On 19 and 25 February 2013 a meeting was held with the Future Forum members and shop stewards and the purpose of the meeting was to inform them that the Horizon operation was no longer viable and that the

Respondent was looking for a buyer to take over Horizon as a going concern. At the end of the meeting held on 25 February 2013 six issues were agreed to, *inter alia* that the next meeting would be convened once the new owner had been identified.

[19] Vermeulen explained that the process to look for a buyer for Horizon lasted almost four months and by June 2013 the Respondent realised that it was unable to sell Horizon and it had no option but to embark on a section 189 process. On 18 June 2013 the Respondent gave a presentation to the employees to inform them that the Respondent was unable to find a buyer for Horizon and to give them feedback.

[20] Vermeulen testified that during the presentation employees and NUMSA were informed that Horizon had been and continued to make extensive losses. The financial position of Horizon in June 2013 was dire as it made a loss, no matter what the Respondent did as at the time they had more product than what the demand was.

[21] Vermeulen also explained that the geology of Horizon was another relevant factor that was discussed. At Horizon the mining methodology was conventional and labour intensive opposed to other mines where mining was mechanised and less expensive. The cost implication to mechanise mining at Horizon rendered it an uneconomical option.

[22] In 2012 Horizon made a loss of R 250 million and in 2013 the loss was R 150 million. The Respondent considered alternative solutions to save Horizon but it was evident that it could not be saved. The Respondent considered the possible expansion of the mine, which was implemented but this was not viable as there was a surplus of ore with a lowered demand globally and notwithstanding the expansion, Horizon still made losses as the chrome ore market was depressed. The Respondent also considered a system to change from the conventional to mechanical mining, but this proved to be too expensive. The Respondent further attempted to find a buyer who could take over the mine as a going concern, but that also failed. Vermeulen testified that Horizon was value destroying and even if the market price increased with 40%, it would leave the mine in nothing better than a break even position.

[23] The employees and NUMSA were advised that the Respondent would proceed with a consultation process in terms of section 189 and 189A of the Act. The Respondent also advised them that it would be attending to the activities required in terms of the Mineral and Petroleum Resources Development Act[5] (MPRDA) in order to place the mine under care and maintenance. The Respondent indicated that while the mine is placed under care and maintenance, it would still attempt to sell Horizon. The Respondent also indicated that it would prepare documentation to be submitted to the Competition Commission to the effect that the process is not due to the Glencore merger.

[24] On 19 June 2013 the Respondent issued a letter to the employees providing feedback on the presentation that was done and in summary it communicated to the employees that the mine was making losses and that it was a high cost mine. The letter also sets out the process which the Respondent followed up to that stage and that the Respondent would commence with a section 189 process.

[25] On 20 June 2013 a letter was issued to the NUMSA local organiser, Mr Mere Boase (Boase) and others giving notice that the Respondent would commence with a section 189 process as Horizon reached the point where it was no longer financially viable to operate under the current circumstances. It was evident that from 2004 until 2013 the mine made a loss and the Respondent was unable to carry the loss any longer. NUMSA was invited to make representations and to submit written proposals by 28 June 2013 and to provide a date to convene a meeting to start the consultation process.

[26] The Respondent received no response from NUMSA and proceeded with the section 189 process and meetings were held on 2, 12 and 17 July 2013.

[27] On 26 July 2013 the Respondent issued a letter to all Horizon employees wherein feedback was given regarding the placement of the mine under care and maintenance. Vermeulen explained that 'care and maintenance' means that when operations at a mine cease, the mine cannot simply be switched off as it has to stay safe in respect of its duties under the Mine Health and Safety Act and it must remain ready to operate. Horizon was placed under care and

[5] Act 28 of 2002.

maintenance and was no longer producing and due to safety reasons employees were withdrawn from underground on 18 July 2013. With effect from 1 August 2013 employees, except those performing essential services, were rostered for day shift from 06:00 – 14:30 and they were paid accordingly. Terms and conditions of employment remained unchanged.

[28] On 30 July 2013 a letter was addressed to NUMSA's regional secretary, Mr Jerry Morulane (Morulane), Mr Stephen Nhlapo (Nhlapo) and Boase. The letter referred to a prior meeting and correspondence and indicated that there was an urgent need to commence with discussions on the re-deployment of Horizon employees into existing vacancies in the company. There were various vacancies available at the Lion Smelter, Eastern Limb in the Steelpoort area and Western Chrome Mines that needed to be filled as a matter of urgency. NUMSA was invited to consult about the redeployment of employees on 1 August 2013 or to suggest an alternate date. Vermeulen testified that the Respondent wanted to afford the Horizon employees an opportunity to be redeployed and to remain employed. At the time there were between 130 and 140 employees at Horizon and Vermeulen testified that there were sufficient vacancies to accommodate all the Horizon employees and it was the Respondent's intention that not one of the employees should lose their jobs.

[29] Vermeulen testified that since the meeting held on 17 July 2013 and on 1 August 2013 Boase adopted an attitude that no-one would be redeployed, he was uncooperative to find alternative placement for the Horizon employees and insisted that redeployment would not happen. Vermeulen testified that NUMSA was consulted about redeployment and it was evident that Boase was against it from the onset.

[30] Vermeulen testified that at no point did NUMSA or Boase make any proposals to keep Horizon operational or were any alternatives put forward, but instead Boase insisted that meetings take place with the Department of Mineral Resources, the Competition Commission and other State Departments, which was not a requirement the Respondent had to comply with and this was only done to prolong and frustrate the process. Vermeulen made it clear that Horizon could no longer operate, but the Respondent's intention was to keep the employees employed in alternative positions.

[31] Vermeulen explained that in May 2013 a merger took place between Glencore and Xstrata, which merger was approved by the Competition Tribunal. The Competition Tribunal specified conditions for the merger. According to the Respondent the said conditions did not apply to the section 189 process at Horizon, but NUMSA was of the view that it applied to the said process.

[32] On 5 August 2013 the Respondent addressed a letter to NUMSA's Boase, Morulane and Nhlapo wherein the history of the process and the engagement between the Respondent and NUMSA had been outlined. The Respondent made it clear that the downscaling of the operations at Horizon was not due to the Glencore merger, but indicated that the merger document stated that retrenchments do not include voluntary separation agreements, voluntary early retirement packages or refusal to be redeployed. This was in clarification of NUMSA's attitude that the Competition Commission should be involved and that Horizon employees would not be redeployed. The Respondent made it clear that it would be proceeding with the section 189 process and once again invited NUMSA to engage in consultation.

[33] On 23 October 2013 the Competition Commission issued a letter wherein the complaint lodged by NUMSA regarding the breach of the merger conditions in respect of Glencore and Xstrata was addressed. The Competition Commission indicated that it has conducted an investigation into the complaint it received from NUMSA and concluded that the section 189A process at Horizon was not in breach of the merger approval conditions.

[34] On 19 August 2013 the Respondent addressed a letter to all Horizon employees and Boase informing them that the Respondent would be proceeding with the section 189 process as the meetings with NUMSA proved fruitless and that the CCMA has been requested to continue with the facilitation process as provided for in section 189A(3) of the Act. The facilitation meeting was scheduled for 22 August 2013 and they were invited to engage in the consultation process.

[35] The facilitation process at the CCMA indeed took place on 22 August 2013 and was attended by the Respondent's management and a number of NUMSA shop stewards and Boase. It is evident from the transcript of the meeting held on 22 August 2013 that Boase was opposed to the CCMA

facilitation process and he made it clear that the matter should rather be dealt with by the Competition Commission as it was a term of the merger that the Respondent would not retrench employees within two years of the merger. The Respondent's Mr Perry then explained that they tried to make Horizon profitable since 2008 and the Respondent could not continue with the operations any longer and he made it clear that the section 189 process was not a result of the merger and that it is not in breach of the merger conditions.

[36] Vermeulen testified that NUMSA's attitude to the process was destructive and intended to delay the process. NUMSA never challenged the need to retrench but rather harper on the Competition Commission. On 22 August 2013 the Respondent made it clear that nothing could be done to save Horizon but the Respondent could accommodate the employees and NUMSA needed to get to the table to accommodate the Horizon employees. Vermeulen testified that on 22 August 2013 it was possible to accommodate all the Horizon employees through a process of redeployment and that redeployment would have been on the same terms and conditions. The outcome of the meeting was that the parties agreed that NUMSA would communicate a date for a meeting with the Respondent by 23 August 2013 and that the parties would have a meeting within 15 days to take the process further. It was placed on record that the Respondent had difficulty to arrange a meeting with NUMSA as it was impossible to arrange a date with NUMSA as NUMSA was never available to meet.

[37] NUMSA failed to provide a date for the meeting, as per the agreement of 22 August 2013, and on 26 August 2013 the Respondent addressed a letter to Boase and the CCMA stating that the Respondent made attempts to obtain a meeting date from NUMSA but without success and that it would be proceeding with the redeployment of employees into existing vacancies and voluntary severance offers. Vermeulen testified that the Respondent offered VSP's as some employees indicated that they would be interested to accept a VSP.

[38] On 30 August 2013 the Respondent issued a letter to all Horizon employees, the Future Forum members and shop stewards indicating the details of the VSP's the Respondent offered. The severance pay offered was four weeks' pay for the first year of completed service, three weeks' for year 2 – 6

completed service, two weeks' pay for seven years and more completed service and 3 months' notice pay.

[39] Vermeulen explained that the section 189A process commenced on 20 June 2013 and the 60-day period for consultation expired on 19 August 2013. No input or response had been received from Boase or NUMSA and on 4 September 2013 the Respondent issued VSP calculations to employees. However, a calculation error was made in the calculation of the individual packages, which error was corrected on 5 September 2013. The error related *inter alia* to the calculation of the employee's 13th cheque in that it was multiplied by the years of service.

[40] The next meeting with NUMSA was held on 6 September 2013 and the minutes of the meeting reflected *inter alia* that NUMSA undertook to submit proposals to the Respondent by close of business on 12 September 2013, that NUMSA requested information on the number of vacancies and the number of applicants and requested that the VSP process be stopped and noted that the Competition Commission issue had not been resolved.

[41] The minutes further showed that the Respondent *inter alia* encouraged NUMSA to forward proposals by 12 September 2013, that it would submit information on the number of vacancies and applications and that the VSP process would not be stopped but that the closing date for applications be extended from 6 September 2013 to 13 September 2013.

[42] Vermeulen testified that the Horizon employees were still paid their salaries since the mine was placed under care and maintenance in June 2013.

[43] In a letter dated 9 September 2013, the Respondent provided NUMSA with the requested information and indicated that at Kroondal there were 65 positions advertised and 9 applications received and at UG 2 there were 11 positions with 9 applications received. It was reiterated that the Respondent would consider proposals made by NUMSA and that such should be forwarded by 12 September 2013. The Respondent further stated that it agreed to extend the consultation period beyond the 60-day period that ended on 20 August 2013 to 17 September 2013 and invited NUMSA to consult from

13 – 17 September 2013 and the closing date for VSP applications was extended to 13 September 2013.

[44] NUMSA did not make any proposals by 12 September 2013 and the consultation meetings as proposed by the Respondent did not take place.

[45] On 16 September 2013 Morulane addressed an electronic mail to the Respondent wherein certain issues between the parties were placed on record. No proposals were made by NUMSA.

[46] On 17 September 2013 Boase forwarded NUMSA's proposals in respect of VSP's and early retirement. NUMSA proposed 4 weeks' severance pay for employees with 0 – 12 months' service, from one year service onwards NUMSA proposed 4 weeks' severance pay per year worked, 4 months' notice pay, a bonus incentive of R 2000, long service pay, shares, housing, full payment of a 13th cheques, 4 months' medical aid contribution, educational assistance, provident fund and UIF.

[47] Vermeulen testified that the difficulty with this was that NUMSA had to make proposals by 12 September 2013 and the closing date for VSP applications was 13 September 2013. Proposals made on 17 September 2013 were of no assistance to any of the parties and it left the Horizon employees in a position where they were unable to apply for VSP's.

[48] On 17 September 2013 the Respondent replied to NUMSA and stated that the VSP the Respondent offered was very generous and reasonable and that the closing date was 13 September 2013. The Respondent communicated its offer going forward as 2 weeks' severance pay for each completed year of service, one month's notice pay, skills allowance of R 2000 to be paid to a service provider, pro rata 13th cheque, medical aid benefits up to date of termination and assistance with UIF applications. The Respondent once again offered redeployment to employees into existing vacancies with no change to terms and conditions of employment.

[49] NUMSA did not respond to this letter and another letter was addressed to Morulane, Boase, shop stewards and Horizon employees on 25 September 2013. In this letter the Responded recorded that NUMSA has not responded to the letter of 17 September 2013 and has not attempted to engage in any

further consultation. The Respondent once again extended an invitation to NUMSA to engage in consultation and reserved 26 and 27 September 2013 for purposes of consultation. The Respondent once again offered redeployment to employees with no change in their terms and conditions of employment.

[50] The Respondent made it clear that should NUMSA not accept the offer of further consultation, it intended to issue employees with notification of termination of service by 30 September 2013 as the process was far beyond the 60-day period, in fact it was over 90 days since the process commenced.

[51] NUMSA did not respond to this letter and no consultation meeting took place on 26 or 27 September 2013.

[52] On 30 September 2013 a meeting was held between the Respondent and NUMSA. Vermeulen testified with reference to the transcript of the meeting that NUMSA tried to delay the process further as they wanted to go back to the same old issues with no interest to consult on the relevant issues, for instance the Competition Commission issue was laboured again and NUMSA indicating that they would refer a dispute to the CCMA regarding the disclosure of information.

[53] In respect of redeployment Morulane requested information and Vermeulen testified that Morulane approached the issue of redeployment as if it was a new process that only started on 30 September 2013, whereas it was proposed as far back as July 2013. In the meeting Morulane made it clear that there was no buy-in from the NUMSA leadership into the proposed redeployment of employees and that culminated into the reality that the NUMSA members were also not interested in redeployment as the member employees believe and rely on the information NUMSA shares with them. Morulane said that at this point it might be wise to get the information and communicate it with members to make sure that those who qualify for positions and are interested apply so that they could be redeployed. The Respondent requested timeframes as it was under pressure from the mines where the vacancies existed as those mines were told not to fill the vacancies until the Horizon employees were afforded the opportunity of redeployment to those vacancies. Vermeulen testified that redeployment was a positive

proposal made by the Respondent to avoid dismissal and as at 30 September 2013 the option of redeployment was open for almost 100 days.

[54] Morulane responded to the Respondent's request for time frames in a very vague manner and stated that he was unable to be specific and that it would be 'either this week or latest next week'. This concerned Vermeulen as NUMSA previously agreed to timeframes which they did not keep and constantly tried to delay the process. The Respondent's Ms Naidoo emphasized that it would be worth it for the Horizon employees to look at the available vacancies as all the vacancies could be filled by Horizon employees.

[55] The Respondent did not issue notices of termination on 30 September 2013, as was indicated in the letter of 17 September 2013, but instead met with NUMSA. The meeting ended with an undertaking that NUMSA would speak to their members and the Respondent would revert to NUMSA on the issue of severance pay / VSP and vacancies and the deadline was set at 'next week Wednesday.'

[56] After the meeting with NUMSA, Vermeulen reported back to the task team and the task team was of the view that the process was prolonged as it was ongoing for almost 100 days and the history showed that NUMSA was not committed to and adhering to dates and was delaying the process. Vermeulen was given a mandate to tell NUMSA that the process could not carry on indefinitely and that the process would be concluded by 4 October 2013, where after the employees would be retrenched. Vermeulen explained that the process was ongoing since June 2013 and on 30 September 2013 NUMSA indicated for the first time an intention to consult, resulting in another delay and further timeframes, whereas at that stage the process was at its end.

[57] On 1 October 2013 the Respondent addressed a letter to Morulane, Boase, the shop stewards and Horizon employees wherein the Respondent provided feedback in respect of the meeting of 30 September 2013. The Respondent informed them that the section 189 process commenced on 20 June 2013, that it was well beyond the 60-day period and exceeded 100 days and that NUMSA had been afforded every opportunity to engage with the Respondent. The Respondent recorded that Horizon was not in operation, yet the Respondent paid the employees' salaries without receiving any returns which

resulted in huge additional costs for the Respondent. The Respondent could not prolong the process any longer and it had to be finalised by 4 October 2013. The Respondent attached a list of available vacancies and requested NUMSA to communicate with its members as a matter of urgency. The vacancies were offered to the Horizon employees again and they had to apply for those by 3 October 2013 if they wanted to be considered for redeployment.

[58] The Respondent further opened the VSP process again with the same offer as previously made with closing date for applications being 3 October 2013. The Respondent made it clear that should employees not take up the opportunity to be redeployed or to apply for a VSP by 3 October 2013, notices of termination of service would be issued on 4 October 2013.

[59] Vermeulen testified that he spoke to Morulane telephonically and informed him that the process was ending on 4 October 2013 and that the letter would set out the details of the offers made by the Respondent. Morulane indicated that there was nothing else to be done and NUMSA did not respond to the letter of 1 October 2013.

[60] Vermeulen testified that the VSP process that was closed on 13 September 2013 was opened again with closing date being 3 October 2013. The Respondent received only one application for VSP after the process was opened again. In respect of redeployment, the Respondent received very few applications after it was opened until 3 October 2013.

[61] On 4 October 2013 the Respondent issued notices of termination of employment to the Horizon employees who did not apply for a VSP or redeployment. Morulane and Boase were notified of the termination of services. NUMSA did not respond to the termination of services of the Horizon employees.

[62] It is common cause that subsequent to the termination of services, NUMSA's attorney of record, Ms Ruth Edmonds, contacted the Respondent's legal representative and attempted to resolve the issues. On 11 October 2013 the Respondent addressed a letter to Ms Edmonds recording that it agreed to re-open the application process in respect of redeployment and that the affected individuals could apply for redeployment into available vacant positions by

close of business on 14 October 2013. It was further recorded that should a minimum of 60 of the alternative positions be filled by affected Horizon employees, those employees who have been granted a forced retrenchment package would be compensated an additional 20% of the total forced retrenchment package amount. The Respondent also sought confirmation that NUMSA would not institute any legal action relating to the retrenchment of employees.

[63] No written response was received from NUMSA, but a subsequent meeting was held with Ms Edmonds.

[64] On 14 October 2013 the Respondent communicated with the retrenched employees via sms to apply for redeployment and the employees were informed that they had until 15 October 2013 to apply for redeployment. More sms communication was sent to the employees between 15 and 18 October 2013 to advise them of vacancies they could apply for to be considered for redeployment. Vermeulen testified that all the employees had to do was to apply for the positions so that the Respondent was able to know who was interested in redeployment. He testified that notwithstanding the invitations sent to employees there were almost no applications for redeployment. Vermeulen confirmed that every employee that applied for redeployment, was absorbed and remained employed.

[65] Vermeulen testified that there was an agreement reached that NUMSA would not institute any legal action. This goes to the Respondent's point *in limine* that the dispute between the parties has been settled by compromise and that there was a full and final settlement of the unfair dismissal dispute and therefore the Applicants are not entitled to bring their unfair dismissal dispute before Court.

[66] There was no evidence placed before me to show that there was a binding agreement in terms of which the dispute between the parties was settled by agreement and that the right to proceed with litigation was waived.

[67] There is no merit in this point and the point *in limine* in respect of compromise is dismissed.

[68] In cross-examination propositions were put to Vermeulen to the extent that the available vacant positions were not suitable for the job categories or levels of the Horizon employees and that they could not be accommodated at other mines in the positions they occupied. Vermeulen was also questioned as to why the VSP's were not offered to employees at all the Respondent's mines. Vermeulen responded that every mine is seen as a separate business unit and Horizon was the mine that could no longer operate. Vacancies were however considered and offered at all the mines. Vermeulen further responded that if NUMSA was of the view that the VSP's should be offered in all the Respondent's mines. It should have been raised as a proposal but was never raised.

[69] In my view these questions did not assist the Applicants' case for a number of reasons. Firstly, it was not the Applicants' pleaded case that they could not be accommodated in the vacancies identified for redeployment and secondly the undisputed evidence was that NUMSA took the stance that no employee would be redeployed and there was at no point any consultation on the suitability of the available vacant positions. This trial does not constitute consultation as required by the Act and the court room is not a consultation venue. It is not open for the Applicants to put propositions and proposals forward to the Respondent on issues they should have consulted on and which they were invited to consult on but failed to do so. If the vacant positions were not suitable or if the VSP's had to be offered to all employees, it should have been raised and ventilated during the prolonged consultation process and it cannot be raised as an afterthought and for the first time at trial.

[70] The need to retrench employees at Horizon mine was not seriously disputed in cross-examination.

[71] The Applicants called two witnesses. The first witness was Ms Arthee Naidoo (Naidoo), the Respondent's labour relations manager. In 2013 Naidoo was the Respondent's human resources manager for the Western Chrome mines, including Horizon. She assisted Vermeulen in the section 189 process in 2013 and her duties were to attend meetings, prepare paperwork and actioning the decisions of the task team.

[72] Naidoo testified that when the section 189 notice was issued on 20 June 2013 it was evident that it was no longer viable for Horizon to operate under the current circumstances and the expectation was that NUMSA would engage and enter into discussions to come up with solutions to keep Horizon operational. The purpose of the process was to explore all options and NUMSA was specifically invited to make proposals and representations.

[73] Naidoo testified that the Respondent never believed that the employees would lose their jobs due to the number of available vacancies and the possibility of accommodating the employees in those positions.

[74] Naidoo disputed the Applicants' version that the decision to place Horizon under care and maintenance and not to re-open the mine denied them the opportunity to consult about proposals to keep the mine operational. Naidoo testified that NUMSA never participated in the process and made no proposals on how to keep Horizon operational or any other relevant aspect.

[75] Naidoo further disputed the Applicants' version that the Respondent's position about redeployment rendered discussions on how to make Horizon operational unnecessary. Naidoo testified that the Respondent approached the CCMA twice to urge NUMSA to participate in the process and the Respondent believed that no employee would lose his or her job as they could all be redeployed. Naidoo testified that NUMSA was stuck on the merger issue and held the view that the Respondent could not retrench any employee for a period of two years and this was the main reason why NUMSA failed to participate in the process.

[76] Naidoo testified that every employee who applied for redeployment was accommodated but NUMSA refused to engage in the process of redeployment and those employees who did not apply for redeployment, were eventually dismissed. Naidoo emphasized that retrenchment could have been avoided if the employees were prepared to be redeployed but NUMSA took the stance that no employee would be redeployed. After 30 September 2013 the Respondent opened the process of redeployment once again and even after the employees were retrenched, the process was re-opened again until 18 October 2013 and those employees who applied, were all redeployed and employed.

[77] Boase testified that he is employed by NUMSA as a local organiser in Rustenburg, which included Horizon. Boase confirmed that he received the section 189 notice on 20 June 2013 and that the parties ended up at the CCMA. NUMSA raised the issue about the merger and the Competition Commission and the fact that the Respondent could not retrench any employees for a period of two years after the merger.

[78] Boase testified that NUMSA made proposals and did raise issues in the meetings that were held with the Respondent. Boase confirmed that NUMSA took the stance that there would be no redeployment of employees and he provided reasons for that, which reasons were not communicated to the Respondent in any correspondence during the retrenchment process and are not evident from the transcripts of the meetings. Boase conceded that positions were indeed available, but testified that they were not suitable for the Horizon employees.

[79] In cross-examination Boase testified that his understanding of a section 189 process is that parties should do their best to avoid dismissals and the primary objective is to save jobs. The process is for the parties together to find solutions and save jobs.

[80] Boase conceded that he and NUMSA were of the view that the Respondent could not retrench employees for a period of two years after the merger that took place on 1 May 2013 and when he received the section 189 invitation to consult, his view was that there can be no retrenchment at Horizon. He conceded that NUMSA's reaction to the retrenchment was that it could not happen as it was a contravention of the Competition Commission's merger conditions.

[81] Boase conceded that during the period 20 June 2013 until 30 September 2013 NUMSA was opposed to the redeployment of employees and NUMSA only changed its mind on redeployment on 30 September 2013. It was put to him that there is an obligation on the parties to save jobs and that was the intention of the Respondent to save jobs and it was able to do so as all the Horizon employees could have been redeployed in other existing positions. Boase conceded that the employees who applied for redeployment, were accommodated and their jobs were indeed saved.

[82] In his testimony Boase responded to many questions in a vague manner, claiming that he could not recall or that he was unaware or he testified to a version that was not supported by any other evidence such as letters or transcripts. In my observation Boase had a tendency to avoid answering questions and he was unable to answer pertinent questions.

Closing arguments

[83] Ms Baloyi for the Applicants argued that the employees' dismissal was substantively unfair because when the Respondent advised the Applicants on 26 July 2013 that Horizon was placed under care and maintenance, it eliminated consultation over the future of the mine. NUMSA was invited to engage and make representations on how to avoid dismissals. Vermeulen said in August 2013 that Horizon would not open again.

[84] Ms Baloyi argued that the Respondent placed Horizon under care and maintenance without consulting NUMSA and the reasons put forward by the Respondent in respect of Horizon indicated that there was no scope for the parties to get together to discuss any improvement at Horizon. The Respondent's position was that it did not want to consult and engage on the improvement of Horizon, but it wanted to consult on measures to avoid dismissal.

[85] Mr Masher for the Respondent submitted that the provisions of section 189(2)(a)(i) are clear that the parties should consult on measures to avoid dismissal. He submitted that the Respondent tried for years to make Horizon profitable but it was not possible. NUMSA never disputed the operational cost, the financial losses or Horizon's financial position. If that was disputed, NUMSA should have said so and should have asked for the financial statements, which was never done.

[86] Horizon was bleeding and it was stopped by ceasing production and the Respondent had to deal with the employees. NUMSA delayed the consultation process and there was no progress on how to save jobs as NUMSA's view was that the Respondent could not retrench in view of the merger and NUMSA was hoping that the Competition Commission would come to their rescue. NUMSA attended meetings but acted in an uncooperative manner playing for

time and believing that the Competition Commission would agree that the Respondent could not retrench employees.

[87] NUMSA provided no explanation as to why it was opposed to redeployment from June to 30 September 2013 and why it changed its stance only at the end of September 2013.

[88] A section 189 process is ultimately about saving jobs and *in casu* the Respondent indicated that all the Horizon employees could be accommodated in alternative positions on the same terms and conditions of employment. There was a proper attempt to save jobs and everyone who applied for redeployment, was accommodated. The Applicants were not interested in redeployment and they cannot claim relief form this Court.

<u>Analysis of the issues this Court has to decide:</u>

<u>*Substantive fairness*</u>

[89] I have already dealt with the issues regarding joinder and compromise and the remaining issue to be decided by this Court is whether the Applicants' dismissal was substantively fair.

[90] In respect of the challenge to the substantive fairness, the Applicants' case in the main is two-fold. There is a challenge to the need to retrench and the consultation process.

<u>The need to retrench</u>

[91] The Applicants' case is that the Respondent has not shown that their dismissal was for a substantively fair reason.

[92] Ms Baloyi submitted that it is not sufficient for this Court to merely accept the justification of the Respondent and to defer to the Respondent, but this Court has to scrutinize the validity of the reasons provided by the employer and examine the content of the reasons given by the employer. This is to be done by considering the evidence that was placed before the Court.

[93] The evidence placed before me demonstrates that the Respondent's Horizon mine operated under difficult conditions caused *inter alia,* by the low levels of demand for chrome in the global market and expensive conventional mining

methods. This state of affairs is borne out by losses which ran into millions of Rands over a period of years and the Respondent's unsuccessful attempts to make the mine profitable and to turn it around.

[94] In summary the Respondent showed that Horizon operated at a loss, its geology played a significant role in the expensive mining process, production was higher than demand and the global chrome market was depressed. The Respondent attempted to save the mine by adopting a hybrid mining method and to look for a prospective buyer, but none of these attempts were successful and Horizon functioned as a value destroying operation.

[95] In June 2013 the Respondent gave a presentation to its employees wherein the position of the mine was explained and the section 189(3) notice issued to employees indicated *inter alia* that Horizon made substantial financial losses from 2004. It is significant that these issues were not disputed during the consultation process and notwithstanding the fact that the Applicants dispute the need to retrench, the rationale for placing the mine under care and maintenance, the losses made, the state of the global chrome market and the expensive running of the mine were not seriously challenged or disputed during the trial.

[96] It is not for this Court to second guess the commercial and business efficacy of the Respondent's decision to retrench, more so where the reason to retrench was not challenged during the consultation process and was not seriously disputed in Court. What this Court has to do is to decide whether the Respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale[6].

[97] In view of the evidence placed before me, I am satisfied that the Applicants' dismissals were operationally justifiable as the Respondent was able to show that there was a need to retrench at Horizon on the basis of high operating costs and continued and prolonged financial losses, which I accept to be commercially justifiable and based on the employer's economic reasons and financial position.

The consultation process

[6] *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC), [2000] 2 BLLR 138 (LAC).

[98] Ms Baloyi submitted that the Applicants' case is that in making the decision and in fact placing Horizon under care and maintenance before consultation with the Applicants, the Respondent subverted the consultation process to consider any means or proposals that would keep the mine in production and avert closure and this renders the dismissal substantively unfair. She further submitted that if the Court finds that the decision and conduct of the Respondent to place the mine under care and maintenance was with the intention that it would never be re-opened, the dismissal of the employees was substantively unfair.

[99] The evidence shows that placing the mine under 'care and maintenance' was done to cease operation but to preserve the mine in a condition to start production at any stage. This is also evident from the notice to the Minister of Mineral Resources in terms of section 52 of the MPRDA wherein the Respondent recorded that the mine was placed under care and maintenance and that operations ceased temporarily and that the Respondent remained committed to recommence mining operations once economic conditions improve and the mine could be operated profitably. It is evident that even though the Respondent was of the view that the mine could not be saved and had to be closed, the intention was not to close the mine permanently. This is also supported by the fact that the Respondent did not abandon its efforts to find a buyer for Horizon and the fact that the mine was under care and maintenance from June 2013 until it was subsequently sold at the end of December 2015 and is now operational.

[100] The question, at the time the mine was placed under care and maintenance and operations at Horizon stopped, was what the Respondent had to do with its Horizon employees. The Respondent embarked on a section 189 retrenchment process.

[101] The Applicants' case is *inter alia,* that the Respondent did not make any proposals that it considered to preserve the mine in production to NUMSA and did not inform them that it sought proposals to improve the economic situation of the mine so that Horizon remained in production profitably. The only information the Respondent provided was that the mine was not profitable, that it had been and continued to make extensive losses and was the highest cost mine in the group. Ms Baloyi further submitted that the Respondent made

the decision to close the mine before it consulted the Applicants when it placed the mine under care and maintenance and in doing so the Respondent closed its mind to being persuaded and to finding alternatives that could result in the continued operation of Horizon with the consequence that employees were displaced from the position they previously held for unknown and possibly inferior positions.

[102] The only evidence before this Court in respect of alternative positions was that the Respondent was able to accommodate all the Horizon employees in existing vacant positions and that the employees would be redeployed on the same terms and conditions. The Applicants did not consult on this issue and any allegation that the positions were unknown and possibly inferior is nothing but speculation and not supported by evidence.

[103] In my view the Applicants lost sight of the purpose of a section 189 process and the objective of consultation.

[104] It is evident from the provisions of section 189(2)(a) of the Act that the employer and other consulting parties must consult and engage in a meaningful joint consensus seeking process to attempt to reach consensus on appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing and to mitigate the adverse effect of the dismissals. NUMSA was invited to consult on these issues.

[105] The main objective of consultation before a final decision on retrenchment is taken must be to avoid retrenchments altogether, alternatively to reduce the number of retrenchments and to mitigate the consequences[7]. The objective is not to ensure that the mine remained operational or that the *status quo* be maintained.

[106] Boase testified that his understanding of a section 189 process is that parties should do their best to avoid dismissals and the primary objective is to save jobs. The process is for the parties together to find solutions and save jobs. Boase's understanding is quite correct, the way he applied his own understanding of the process is however deplorable and lamentable.

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[7] *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A).

[107] It is evident from the common cause facts I fully set out *supra,* that a number of meetings took place between the parties and there can be no doubt that the Respondent was willing and prepared to meet with NUMSA and to consult on the relevant and pertinent issues.

[108] The evidence adduced however shows that NUMSA was of the view that the Respondent could not retrench employees for a period of two years and when the section 189 invitation to consult was issued, the attitude was that there can be no retrenchment at Horizon and NUMSA's reaction to the retrenchment was that it could not happen as it was a contravention of the Competition Commission's merger conditions. In my view this approach motivated NUMSA not to participate in the consultation process.

[109] The evidence showed that NUMSA was informed about the problems Horizon experienced in respect of its mining operations and when the section 189 notice was issued in June 2013, NUMSA was not concerned about the reasons provided for embarking on such process and at no stage did NUMSA request information from the Respondent on the reasons for the retrenchments. At no point did NUMSA provide any proposals on how to keep Horizon operational or how to avoid or minimise dismissals. NUMSA suggested no alternatives and it is evident that NUMSA was stuck on its view that the Respondent was unable to retrench any employee for two years and any attempt to do so, would be in contravention of the Competition Commission's merger conditions.

[110] The true reason for NUMSA's failure to engage with the Respondent in a meaningful joint consensus seeking process was due to its belief that the Respondent was precluded from retrenching employees in terms of the Competition Commission merger conditions.

[111] The evidence further shows that the Respondent gave proper consideration to alternatives to dismissal and that it offered redeployment as an alternative to retrenchment.

[112] Boase conceded that during the period 20 June 2013 until 30 September 2013 NUMSA was opposed to the redeployment of employees and NUMSA only changed its mind on redeployment on 30 September 2013.

[113] The undisputed evidence was that there were sufficient vacancies available at the Respondent's other operations for all the Horizon employees to be redeployed and the employees who applied for redeployment, were accommodated on the same terms and conditions and their jobs were indeed saved. This is compliant with the primary purpose of a section 189 process namely to save jobs and to avoid dismissals.

[114] NUMSA was invited to engage in a section 189 process and to make representations. NUMSA had a duty to engage and participate in the section 189 process and the Respondent made all reasonable attempts to engage the Applicants in consultation, but NUMSA failed to do so. Only on 30 September 2013, more than 100 days after the section 189 notice was issued and at the 11th hour, NUMSA changed its position on the possibility of redeployment. Notwithstanding the intervention of Ms Edmonds on behalf of the Applicants and the Respondent's willingness to open the option of redeployment after 4 October 2013, when the retrenchment process was concluded, the employees did not apply for redeployment. The few who did, were redeployed.

[115] NUMSA did not engage in a meaningful joint consensus seeking process, despite the fact that it was invited to do so over the period June – September 2013. NUMSA and more particularly Boase acted in an unreasonable and ill-advised manner and did so to the utmost detriment of the Horizon employees.

[116] NUMSA and Boase have a lot to answer as the dismissal of the Horizon employees could have been avoided had they acted differently, reasonably and responsibly with the interest of the workers in mind.

[117] The issues the Applicants want to raise and challenge in this matter, are the issues that ought to have been dealt with by NUMSA during the consultation process. Unfortunately, and despite many attempts from the Respondent's side to consult, NUMSA adopted a stance that the Respondent could not retrench any employee for a period of two years due to an earlier merger and this view motivated NUMSA to approach the Competition Commission with a complaint and inspired the attitude that no employee would be redeployed. This cost the individual Applicants dearly and left them unemployed.

[118] In *Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd*[8] the Labour Appeal Court held that:

> "Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place."

[119] *In casu* the general question whether or not there was a fair reason for the dismissal of any employee was already considered and answered.

[120] The specific question is whether there was a fair reason for the dismissal of the employees. The Respondent wanted to redeploy the Horizon employees and they were all invited to apply for the existing vacant positions. Horizon was no longer operational and the employees had to be accommodated elsewhere. Those who applied were redeployed and those who did not, were retrenched. In my view this constitutes a fair reason for the dismissal of the individual Applicants.

<u>Costs</u>

[121] Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness. This Court has a very wide discretion in awarding costs.

[122] In my view this is a matter where a cost order would be justified, however both parties referred to the existing relationship between NUMSA and the employer and as there is an ongoing relationship between the parties that may be damaged by a cost order, a cost order may not be warranted.

[123] In the premises, I make the following order:

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[8] (2006) 27 ILJ 292 (LAC) at para 55.

Order

1. The Applicants' case is dismissed;

2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant: Advocate M S Baloyi

Instructed by: Ruth Edmonds Attorneys

For the Respondent: Mr D Masher of Edward Nathan Sonnenbergs Incorporated Attorneys