



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JS 148/16

In the matter between:

ASSOCIATION OF MINeworkERS

AND CONSTRUCTION UNION

MASHIANE & 30 OTHERS

And

TANKER SERVICES (PTY) LTD

1st Applicant

2nd & further Applicants

Respondent

Hearing: 21 May 2018

Heads of argument filed: 4 June 2018

Judgment delivered: 7 June 2018

JUDGMENT

VAN NIEKERK J

- [1] The respondent operates a fleet of vehicles in the road transport sector, transporting chemicals and other specialised goods. In September 2015, the respondent retrenched 29 employees, including the second and further applicants (the employees). The applicants contend that the employees' dismissal was substantively and procedurally unfair.
- [2] The consultation process that preceded the disputed dismissals commenced on 1 July 2015, when the respondent issued a notice in terms of s 189(3) of the Labour Relations Act (LRA) advising the first applicant (the union) and two other trade unions (SATAWU and MTU) of a contemplated retrenchment. The notice stated, amongst other things, that the respondent was
- ... currently in the process of re-assessing and reviewing its operational structure and considering how best to improve and adapt its business structure to meet the company's operational and business needs and requirements. As part of this process, the companies contemplating restructuring its business due to various compelling reasons...
- [3] The notice goes on to record that the reasons for the proposed restructuring:
- The respondent has experienced huge reduction volumes during the 2014/15 financial year. Revenue generated and profit has been affected negatively by this trend;
- The respondent has further lost big share on its H & K contract coupled with low volumes that have been experienced; and
- The unfavourable market condition in South Africa has consistently made it hard for the respondent to achieve its financial budget is approved and demanded by the shareholders.
- [4] It appeared at that stage that 31 employees may potentially be affected as a result of the proposed restructuring. These employees were employed in various positions in both the Germiston and Durban regions, most of them working either

in the wash bay or maintenance departments. Further, the parties agree that the notice states that *'it is intended that the consultation process will commence on 1 July 2015 and will be finalised by 31 July 2015 and it is proposed that any notice of termination of employment be given with effect from 1 August 2015'*.

- [5] Letters of termination of employment dated 28 September 2015 were issued to the affected employees. The union contested the fairness of the dismissal and referred a dispute to the CCMA. The dispute was conciliated on 8 January 2016 and a certificate of non-resolution issued on the same date.
- [6] The pre-trial minute lists the facts in dispute. In summary, these relate to the substantive fairness of the dismissal (the need to retrench) and procedural fairness in the form of what might be referred to as the quality of the consultation process. Specifically, the court is asked to decide whether the consultation meetings on 12 July 2015, 22 July 2015 and 26 August 2015 concerned only purely administrative matters, whether the consultation process complied with the requirements of s 189, whether the respondent furnished the union with documentation that had been requested, whether the decision to dismiss the employees was a *fait accompli*, whether the respondent failed or refused to allow the union an opportunity to make representations on topics on which the parties ought to have consulted, and whether the union was provided with a sufficient opportunity to present proposals on alternatives to retrenchment, selection criteria and the like. In essence, the respondent's defence is that there were substantively good reasons to retrench and that it consulted properly with the union as required in terms of the Act.
- [7] The respondent's first witness, Mr Lucky Kolobe, the human resources director for specialized freight, testified that consequent on the issuing of the s 189(3) notice, the respondent's intention was to conduct separate consultation meetings in Durban and Germiston. At the first consultation meeting, held in Germiston on 13 July 2015, the union's representative made a proposal that a single consultation process be conducted in respect of both operations. The management team agreed and the meeting was adjourned.

- [8] The second consultation meeting was held in Durban on 22 July 2015. The minute of that meeting records an agreement that the consultation processes be combined and further, that the respondent was requested by Mr Albert Masuku, the union's regional organiser, to approach the CCMA and to request that a facilitator be appointed. Although this is not reflected in the minute, Kolobe says that he explained that the proposed retrenchment was of a small scale and that the CCMA would not appoint a facilitator since the proposed retrenchment did not trigger the provisions of s 188A. Nevertheless, on the same day, Kolobe addressed a request to the CCMA to appoint a facilitator.
- [9] To this extent, the first two meetings largely concerned matters of an administrative nature. Further, substantive information was provided by Kolobe who testified that he advised the meeting that 17 employees from the KwaZulu Natal region and 14 from Germiston were likely to be affected by the proposed retrenchment. He stated that he would also be in consultation with group companies to seek alternative employment for affected employees and that the respondent was planning to finalise the consultation process by 31 July 2015.
- [10] Kolobe testified further that after the second consultation meeting, he drafted a letter, sent to union officials on 5 August 2015, in which the state of affairs as at that date was captured. The letter records what transpired at the meeting held on 22 July 2015. The letter further records that the meeting decided that AMCU and SATAWU had agreed that the consultation processes ought to be combined and the meetings held in KZN, because most of the employees affected by the proposed retrenchment were based there. Further, the letter records that the unions proposed that the respondent invite the CCMA to facilitate the process and that a request was duly made. The letter records that both unions agreed that the respondent could engage employees likely to be affected by placing them within the company or group in an attempt to reduce the number of employees affected by the proposed retrenchments and to this end, group companies would be informed. Finally, the letter noted that a response had been received from the CCMA on 30 July 2015 stating that the CCMA had declined to

provide a facilitator, on the basis that s 189A did not apply to the proposed retrenchment. The next meeting was proposed for 11 August 2015 in Durban.

- [11] Kolobe testified that the union did not respond to this letter and at 21h00 on the night of 10 August 2015, he sent an email recording this fact and advising the unions that to avoid fruitless expenditure, he had cancelled his flight to Durban. There was some criticism of Kolobe that he had cancelled the meeting on short notice, but the reality was that not having a response to his proposal, there would have been little point for him to travel to Durban for an unconfirmed meeting.
- [12] A further meeting date of 14 August 2015 was proposed. That date was not suitable for parties concerned and on 17 August 2015, union officials were advised that Kolobe had proposed 24 August 2015 for a 'final consultation meeting', to be held in Durban. On 18 August 2015, SATAWU confirmed that it would attend the meeting.
- [13] The third consultation meeting duly took place on 24 August 2015, in Durban. The meeting commenced late, on account of a work stoppage at the depot. Kolobe testified that he handed out a pack that contained the minutes of previous meetings, the letter from the CCMA and a summary of the consultation to that point. He noted that after having circulated these documents to union officials via email, no response had been received from either SATAWU or AMCU. Only one shop steward, a Mr Sengane, is recorded as having stated that he had not received the documents and was unaware of the of the proposed meeting date. Kolobe testified that he advised the meeting that he was under pressure to finalise the consultation process. It was finally agreed that a consultation meeting would be held on 26 August 2015 in Germiston 'to resolve the issue' and logistical arrangements for attendance at the meeting were agreed.
- [14] On 26 August 2015, the fourth consultation meeting was held at the Germiston depot. Kolobe testified that the minutes of previous consultation meetings were distributed. Thereafter, Kolobe stated that he advised the meeting that he confirmed that only two departments were affected, those being watched by maintenance, and that of the company's 929 employees, only 31 employees

affected. He stated further that the reasons for the proposed retrenchment were reiterated and that the reason for retrenchment in so far as the maintenance and wash bay departments were concerned were elaborated on by line managers. He advised the meeting that managers would also be affected by the proposed redundancy. Kolobe testified that he advised the meeting that the respondent had hoped to have completed the restructuring exercise by 31 July 2015 but on account of the postponement in consultation meetings, this date been extended to 30 September 2015. The minute of the meeting records that Kolobe advised the meeting of the proposed severance package, and of the respondent's intention to assist affected employees in relation to provident fund payments, unemployment insurance fund payments and to issue good references and certificates of service. Kolobe testified that he also advised the meeting that re-employment would be considered should business pick up again, and that preference would be given to retrenched employees. He stated that he would make available a consolidated vacancy report and set up voluntary severance packages. The minute records the Masuku stating that he wanted a list of all employees by service provided, grading et cetera, and that he also questioned the reasons for the retrenchment. Kolobe stated that he undertook to provide the quarterly financials to the unions.

- [15] It was agreed that the next meeting would be held on 18 September 2015 in Durban. Prior to the meeting, on 7 September 2015, Kolobe addressed an email to the union officials to which he attached minutes of the meeting held on 26 August 2015, a list of vacancies, a list of employees and a spreadsheet showing employees likely to be affected, based on LIFO. He recorded further that what were referred to as the 'wash bay financials' would be made available by the financial director. On 8 September 2015 the HR officer based in Durban addressed an email to line managers attaching documents that were attached to Kolobe's email sent the previous day, with the request that the documents be distributed to shop stewards and that they be reminded of the meeting scheduled for 18 September 2015.

- [16] The minutes of the fifth consultation meeting held on 18 September 2015 reflect that the SATAWU shop stewards from Germiston were not in attendance. The minutes record that Kolobe advised the meeting that the consultation process had already been delayed and that its completion was overdue. He recorded that he had a mandate to conclude the consultation process. By this stage, none of the union consulting parties could have been under any illusion about the respondent's concerns regarding the delays in the process. The SATAWU representative stated that they required to establish why their representatives from Germiston were not present and that in the circumstances, they would be leaving the meeting, which they then did. The meeting continued with representatives from the union, who at some point in the meeting advised that they needed to consult with and obtain legal advice from the union's legal officer on whether or not to proceed.
- [17] Kolobe's evidence was that he stated that he was willing to meet on 21 or 22 September 2015 to finalise the process. After a caucus, the union representatives stated that the legal officer would only be available on 28 September 2015 to meet with them and proposed that the next meeting be held on 30 September 2015. Kolobe stated that the respondent was unable to wait for that long since the consultation process had already extended for some 60 days beyond the intended completion date, and that notices would be issued on 25 September 2015 to all affected employees. The respondent would issue a draft memorandum to which the union would be invited to respond by no later than 21 September 2015. The minute of the meeting records that after union expressed the wish to consult with their legal official and before they caucused, Kolobe advised the meeting that the management would be willing to meet on 21 or 22 September 'to finalise the process'. This position was reiterated when the union returned from the caucus to advise that the legal representative was available only on 28 September 2015. The unions' case as pleaded is that the respondent had created an impression that there would be a meeting on 30 September; the union's only witness alleged that an agreement to that effect had been reached. I deal with this factual dispute below.

- [18] On 21 September 2015, Kolobe addressed a letter to all union officials. In the letter, he summarised the process that had been undertaken, as well as the issues discussed at the meeting of 18 September 2015. He recorded that s 189 (3) letters had been sent to all parties on 1 July 2015, the first meeting held in Germiston on 13 July 2015, the next meeting in Durban on 22 July 2015, as well as a summary of all issues agreed on at this meeting recorded in his letter dated 5 August 2015. He also recorded the proposal for a follow-up consultation meeting on 11 August 2015 and the union's failure to respond to this invitation, as well as the further proposal for a consultation date of 14 August 2015 and the failure by the union to respond. He recorded the respondent's proposal for a meeting on 24 August 2015 and that this meeting was held in Durban when it was agreed to meet again on 26 August 2015 in Germiston. The letter recorded further that the respondent had earlier indicated that the consultation process should have been completed on 31 July 2015 and that the target had been moved to 31 August 2015 after consultation. The letter notes that in the last consultation meeting, the respondent explained that the process could not be extended beyond 25 September 2015 and that affected employees will would be given termination letters on 28 September 2015. Attached to the letter was a list of employees per region who would be given notices on 28 September 2015. There was no response to this letter, and in particular, no response to the effect that notices should not go out pending the conclusion of any further agreed meeting.
- [19] On 28 September 2015, the affected employees were given notice of termination of employment, without any further consultations.
- [20] Only Kolobe gave evidence for the respondent, and only Masuku, the union's regional organiser, testified for the applicants. The core factual dispute between the parties was whether at the meeting on 18 September 2015, the respondent had agreed to hold a further consultation meeting with union after the union officials had met with the union's legal officer on 28 September 2015 and whether it was agreed that there would be a further meeting after that date.

Masuku testified that after being given an opportunity to telephone their head office to secure a meeting with the union's legal officer, an agreement was reached with the respondent that a further meeting would be convened after the legal officer had been consulted on 28 September 2015. The respondent's version, as reflected by Kolobe's evidence, is that there was no such agreement and that the union was advised that the respondent was available to meet on 21 or 22 September 2015 but not beyond that.

- [21] I have no hesitation in accepting the evidence of Kolobe over that of Masuku. Masuku was a poor witness. His evidence-in-chief comprised, to a significant extent, monosyllabic denials or affirmations of leading propositions put to him. His evidence was often contradictory. For example, it was put to Kolobe that Masuku would testify that he had never received the s 189(3) notice. Masuku also sought to convey that he had sight of the notice only at the first consultation meeting, this despite the fact that the notice was admitted in the pre-trial minute. Under cross-examination, Masuku conceded to having seen the notice before the meeting. Much of Masuku's evidence related to a denial of ever having received some of the email communications and attached documents addressed to him by the respondent. He explained that he was a relatively new appointment in the region, and lacked the facilities and resources to do his job. Masuku's responses in relation to communications between him and the respondent comprised no more than a series of unacceptable and evasive answers in which he suggested that the inability to access certain communications was not his fault, but the fault of his malfunctioning computer, and that correspondence was not seen or respondent to by him. Masuku went so far as to say that he received some emails, didn't receive others and didn't know whether he received others. He also gave evidence that he did not know whether he received attachments to the emails that he may or may not have received. His evidence in this regard was entirely unsatisfactory. None of the minutes of any of the meetings between the parties record Masuku ever having mentioned that he was not receiving emails, not even in response to Kolobe pertinently raising the issue of the union's failure to respond to emails. Masuku then attempted to shift the blame do the

respondent's human resources officer, alleging that there was an agreement between them that he would be advised of what was being sent. It is not only extremely improbable that a union official would rely on a member of management to ensure that he received communications sent to him, but it would have been apparent to Masuku, at least by the meeting of 24 August 2015, that the human resources manager was not complying with the alleged agreement. When it was put to Masuku that if his evidence were true, he would have taken offence and dealt with the matter, he could not give a proper answer. In any event, Kolobe's undisputed evidence was that he gave standing instructions to the management to distribute all communications to the shop stewards. Even if Masuku had not received some documents, these would have been made available to the union's shop stewards. In short, Masuku's evidence was vague, contradictory, inconsistent with the minutes of the meetings (which were never disputed at the time, despite their having been made available to union officials, nor afterward, during these proceedings. Kolobe, on the other hand, gave evidence that was clear and confident and without contradiction, and consistent with the minutes of the consultation meetings. Under cross-examination, he made concessions when they were sought and in my view, was an entirely credible witness.

- [22] The relevant legal principles are well-established. In relation to substantive fairness, it is incumbent on the employer party to establish a commercial rationale for the retrenchment. In so far as procedure is concerned, the LRA contemplates that the consultation process is one in which the parties jointly seek to avoid retrenchment and ameliorate its consequences. It is not a process in which the employer party simply announces the decisions that it intends to implement – the employer must remain open to persuasion. Equally, union parties to the consultation are obliged to co-operate in achieving the objectives of the process. The process is not one of collective bargaining, and the power play that often characterises collective bargaining engagements is not, generally speaking, appropriate in a s 189 consultation. Of course a union can and no doubt will bring whatever collective muscle it may have in order to influence the

outcome of any consultation process, but the nature of the process is one in which active co-operation rather than obstruction is required. This court has emphasised many times that adversarialism is inconsistent with joint consensus-seeking and that mutual co-operation is necessarily required from both parties.

- [23] In *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC), this court said the following:

[19] Fair procedure primarily requires that the parties engage in a meaningful joint consensus seeking process. This obligation, which has its origins in *Johnson & Johnson v Chemical Industrial Workers Union* (1999) 20 ILJ 89 (LAC), requires at least that the parties attempt to reach consensus on the issues listed in s 189 (2) and (3). More precisely, the employer must invite representations on these issues from the appropriate consulting party, seriously consider and respond to any representations that are made. Both parties are required, in good faith, to seek consensus. This is not a mechanical process – meaningful joint decision-making requires that the party sacked with the honest intention of exploring the prospects of agreement. If no joint consensus seeking process has occurred, this court is obliged to determine which party was responsible for the state of affairs. If it was the employer party, the dismissal was procedurally unfair

- [24] In *Visser v Sanlam* (2001) 22 ILJ 666 (LAC) at paragraph 24, the court said the following:

The process of consultation envisaged in s 189 (2) involves a bilateral process in which obligations are imposed upon both parties to consult in good faith in an attempt to achieve the objectives specified in the section. In my view, the respondent fulfilled its obligations in terms of s 189 (2). If any conclusion is justified, it is that the appellant failed to engage adequately in the consultation process envisaged by the section. Accordingly, it cannot be said that the retrenchment of appellant was procedurally unfair.

- [25] In *Smith & others v Courier Freight* (2008) 29 ILJ 420 (LC) the court said the following

[68] I find on the balance of probabilities that the union was responsible for frustrating the restructuring process to the detriment of its members, the employees. In *NUMSA v Kaefer Thermal Contracting Services (Pty) Ltd* [2002] 6

BLLR 570 (LC) the court held that where the consultation process has been frustrated it is not for the party who caused the frustration to complain that there was non-compliance with the consultation process.

[69] I am satisfied that the employer made genuine attempts to engage with the union on the retrenchment process. However, it could not allow the union to delay the process of restructuring indefinitely. The union overplayed its hand and must now accept the consequences of its ill-advised decision unnecessarily to delay the consultation process. In the light of the aforesaid, I believe there was substantial compliance with the provisions of s 189 of the Act by the employer...

(See also *United People's Union of South Africa and others v Grinaker Duraset* (1997) ZALC 11 (LC) where the court referred to the 'correlative duty' on the other consulting party to cooperate in an attempt to reach consensus before the employer ultimately exercise its right to take the final decision; and *Smith and others v Courier Freight* (2008) 29 ILJ 420 (LC) where this court held that the employer party had made genuine attempts to engage the union on the retrenchment process and could not allow the union to delay the process indefinitely in circumstances where the union and overplayed its hand by adopting a recalcitrant attitude.)

[26] Turning to the issues in dispute in the present instance, I deal first with the requirement of substantive fairness. The case made by the respondent in its answer to the applicant's statement of case is that it suffered a significant reduction in volume during the 2014/2015 financial year, that it had lost 40% of one of its main contracts (the H&K contract), and that unfavourable market conditions in South Africa had made it difficult for the company to achieve its financial targets. Kolobe referred to the management accounts for the Germiston wash bay that had been disclosed during the consultation process. These disclosed a loss of some R1.4 million for the 12 months ending June 2015. The respondents did not challenge this figure. None of the evidence proffered by Kolobe in support of these averments was seriously challenged in cross-examination, nor was the claim of substantive and fairness pursued with any particular vigour by the applicants' witness Masuku. The challenges to

substantive fairness raised by the union during the trial demonstrate both its failure to grasp the scale of the challenges that confronted the respondent's business, and the paucity of the unions' response. For example, the applicants' counsel put it to Kolobe that the union had suggested that the cleaning products used by the respondent were substandard and that this had had the effect of increasing costs to the detriment of saving jobs. This aspect had been dealt with comprehensively by Kolobe, who gave undisputed evidence regarding the importance of the cleaning product to the respondent's business of transporting chemicals and other substances, health and safety considerations, and the quality controls that the respondent had in place to ensure proper cleansing between loads. To the extent that the applicants made an attempt to impugn the apprenticeship programme conducted by the retrenchment, suggesting that apprentices ought also to have been affected by the retrenchment exercise, Kolobe gave undisputed evidence regarding the terms of the relevant legislation, the terms on which apprentices were engaged, the fixed term nature of the contracts and the purpose of the program as a means to ensure succession planning for diesel mechanics not only within the respondent but for the country as a whole. These are but two examples of the level of engagement by the union on the issue of the need to retrench. They are recorded in the minute of the meeting held on 26 August 2015, where for good measure, one of the union's shop stewards helpfully added that the respondent should be investigated for corruption.

- [27] In short, none of the challenges to the substantive rationale for the retrenchment have any merit and I have no hesitation in concluding that the dismissal of the affected employees was substantively fair.
- [28] In relation to procedural fairness, as I have indicated above, the applicants have launched a broad attack, alleging a failure to comply with the requirements of s 189. To the extent that the applicant's allege that the respondent failed to consult with it on all the issues regarding terms of the LRA, the consultation process must necessarily be viewed in its own context. That context was a stated

intention by the respondent, given that the proposed retrenchment was in the scheme of things of a small scale, to conclude the consultation within 30 days of the date on which the s 189 letter was issued, i.e. by 31 July 2015. The union was aware of this time frame from the outset, and it was repeatedly emphasized in the meetings. Further, any substantive progress in the first two meetings was not possible on account of first, a proposal by the union that a single consultation be held in respect of both the Germiston and Durban operations and secondly, the proposal that the CCMA be asked to facilitate the consultation process. In regard to the latter, Masuku held himself out as having a great deal of experience in s189 consultations and stated that in his experience, intervention by the CCMA had been fruitful. Kolobe's evidence, as recorded above, was that the CCMA had no jurisdiction and would say as much. On closer questioning, Masuku conceded that his experience in retrenchment processes had been limited, to say the least. The impression gained from Masuku's testimony was that he was out of his depth, and lacked the capacity to engage in what is ultimately a process of interest-based problem solving, and that this was, to some extent at least, responsible for the slow start to the process.

- [29] Substantive issues were clearly discussed once the consultation got underway. At the meeting held on 26 August 2015, a perusal of the minutes reflects that that the union made no positive contribution to the process but was content rather to make accusations against the respondent including the allegation of corruption, made without any basis whatsoever. Masuku made no comment in relation to these allegations and clearly felt that he was at liberty to allow such conduct to continue and could only explain, in cross-examination, that the respondent did not view the allegations as serious. This was clearly not the case. Kolobe had testified that the respondent took the allegations very seriously and indeed took umbrage at them.
- [30] As I have recorded above, the meeting of 18 September 2015 was intended to be a meeting of all of the unions and the respondent. The meeting ended unsatisfactorily for all concerned, and the blame for this is largely to be ascribed

to the union. I have no hesitation in accepting the evidence of Kolobe that the respondent had hired a vehicle for all of the shop stewards based in Germiston to drive to Durban and that the SATAWU shop stewards had not been transported because the AMCU shop stewards refused to do allow them in the car. Masuku's version that AMCU was not responsible to transport SATAWU shop stewards and that AMCU's shop stewards had not been informed that they were required to transport the SATAWU shop stewards is most improbable. The version that the AMCU shop stewards were never informed that they were required to transport all of the Germiston based shop stewards to Durban was never put to Kolobe in cross-examination. The more probable version is that the AMCU delegation at the meeting of 18 September 2015 clearly did their best to derail the meeting by leaving the SATAWU shop stewards in Germiston, and then by stating, amongst other things, that they did not know if they could continue the meeting in the absence of SATAWU. In any event, and contrary to what the applicants submit, there were issues of substance discussed at the meeting after the walk-out by SATAWU. The minutes reflect that the meeting continued for a period of a little under four hours, and that there was engagement on issues of substance. Masuku gave the highly improbable version that the minutes were not chronologically recorded and that the fact of the SATAWU walkout was recorded in the wrong place in the minutes, and that the substantive discussions were also not chronologically located in the minutes. No such version was put to Kolobe – it emerged only after Masuku was put under pressure during cross-examination.

- [31] Masuku testified that he was ready to make submissions on the issues that had been discussed in the 26 August 2015 meeting, but that on account of events that took place on 18 September 2015, he could not make them. This makes little sense. First, as I have indicated, the minute of the 18 September 2015 meeting discloses that despite the SATAWU walkout, matters of substance were discussed. The meeting lasted almost four hours. There was nothing to prevent Masuku from tabling his submissions and proposals, but for reasons best known to himself, he chose not to. To the extent that Masuku testified that the respondent would not allow him to make submissions, this is not supported by

any evidence, the minutes, the evidence of Kolobe or any version put to Kolobe. Further, when Kolobe sent the letter after the meeting emphasising the deadline and making clear that one last meeting was possible either on 21 or 22 September 2015, Masuku simply failed to respond. He was at liberty from the day on which he said he had submissions to table (18 September) to do so, but chose not to do so. Finally, Masuku's evidence that he was ready to table submissions on 18 September 2015 is difficult to square with his evidence that the respondent had failed to provide the union with sufficient relevant information to formulate its responses to the proposals tabled by the respondent.

- [32] In regard to Masuku's version that there was an agreement between the parties that another meeting would take place after the meeting with the union's legal officer on 28 September 2015, for the reasons I have recorded above, Masuku's evidence is wholly unreliable. His evidence regarding the purpose of the meeting with the union legal officer was inconsistent – it ranged from the implications of SATAWU uttering before withdrawing from the meeting that there would be 'another Marikana', to the implications for AMCU of SATAWU having withdrawn from the consultation meeting, and to the need to formulate an appropriate union response to the respondent's proposals. (The evidence suggests that all that the union came up with after the meeting was a proposal that the workers should assume control over the wash bays.) Further, there is no reference in the minutes (which it should be recalled were not placed in dispute by the applicants – on the contrary, the applicants accepted the minutes as an accurate reflection of the meetings concerned), to any agreement on the terms alleged by Masuku. On the contrary, the minutes are entirely consistent with Kolobe's testimony. They reflect no more than that the respondent was agreeable in principle to the union delegation consulting the union's legal official, but strictly within the time frame that had been tabled and emphasized more than once, a timetable that required a final meeting by no later than 21 or 22 September 2015. It is most therefore most improbable that there was an agreement to hold a further meeting after 29 September 2015; on the contrary, the probabilities are that the respondent announced that it would be distributing letters of termination to

affected employees by 25 September 2015 and that any final meeting would have to be held by 22 September. To the extent that the applicants' case is that Masuku formed the 'understanding' or 'impression' that there would be another meeting on 30 September 2015 (this is the pleaded case and one contrary to Masuku's assertion in his evidence that there had been an agreement to hold a later meeting), he should have been disabused of that notion by the clear communication to him at the meeting on 18 September 2015 that the last opportunity to meet was on 20 or 21 September, and that the process would end on 25 September 2015. Any impression to the contrary was not consistent with what had been clearly recorded by the respondent and communicated to the union.

- [33] The overall impression that emerges from the evidence is that the respondent extended the deadline for the conclusion of the consultation process from 31 July to 31 August and then to 25 September 2015. During the entire period, the union was not only uncooperative in the consultation process, it did anything other than involve itself in a joint consensus-seeking process. Masuku's allegations concerning his supposed incapacity properly to conduct of the consultation process by virtue of the difficulties he says he was experiencing occasion by his lack of resources are nothing but a convenient excuse for what amounted at best to his failure of leadership, at worst to a mendacious campaign to frustrate the consultation process.
- [34] In short, the evidence discloses that the respondent did everything that was reasonably required to consult with the union and to enter into a joint consensus-seeking exercise. It was thwarted at every turn, and not unreasonably, some 60 days beyond the initial end-point, it chose to draw the process to a close.
- [35] The submissions made on behalf of the applicants incorrectly assume a union is entitled to adopt an entirely passive approach in the consultation process, and then seek to hold the employer party to account for a failure to comply with what amounts to a checklist. The inevitable but unfortunate result is that the issues that ought properly to have been canvassed in the workplace for discussion and

solution-seeking are debated in the courtroom. This is not what is intended by s 189. A union that fails to engage with the employer party and thereby seeks to protract the consultation process) most often in the naïve belief that it is buying time for its members), is not entitled to adopt the position of an armchair critic, seeking to hold the employer party to account for a consultation process that it claims was inadequate. The union would have been better served by approaching the consultation process as a process of joint decision-making, as it was required to do, and in which it played an active and constructive role. The union showed no interest in consensus. It failed to make a single constructive proposal in any of the meetings that were held, or by way of written response to any of the respondent's proposals. Instead, as I have noted, the union elected to be a passive but obstructive participant in the consultation process. In the words of the *Courier Freight* judgment (*supra*), the union overplayed its hand and must now accept the consequences of its ill-advised decision to delay the consultation process as far as possible.

- [36] For the above reasons, in my view, the respondent has discharged the onus to establish that the dismissal of the employees was procedurally fair. The referral thus stands to be dismissed.
- [37] Section 162 confers a broad discretion on the court to make orders for costs according to the law and fairness. The court does not ordinarily make orders for costs in circumstances where parties to a dispute are engaged in a collective bargaining relationship, and where the effect of the order would be to prejudice that relationship. Kolobe testified that since the retrenchment, the unions' representativity in the workplace had decreased, and it did not seem to me that any order for costs would have the effect of prejudicing any relationship that remains in existence between the respondent and the union.
- [38] The factor that inclines me to order that costs follow the result is the manner in which this litigation has been conducted. The applicants contested substantive and procedural fairness to the end, without compromise. The case against substantive fairness was never made explicit; it amounted to little more than a

denial of the respondent's case. None of the substantive factors cited by the respondent as having given rise to the financial difficulties that it was suffering were ever addressed on their merits, neither during the consultation process nor during these proceedings. During the consultation, the union's representatives appeared content to make proposals that can only be described as flippant, and to make derogatory and insulting remarks about the respondent. These are singularly unhelpful in a process designed to promote and generate joint solutions to the prospect of pending unemployment. The union chose instead to treat the consultation process as a site of power play, not only against the respondent, but also its rival union SATAWU.

[39] For these reasons, in my view, the interests of justice and fairness dictate that the union should be ordered to pay the costs of these proceedings.

I make the following order:

1. The applicants' referral is dismissed, with costs.

André van Niekerk

Judge

REPRESENTATION

For the applicants: Adv. C Malan, instructed by Larry Dave Attorneys

For the respondent: Adv. A Snider, instructed by CDH Attorneys.