



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 874/16

In the matter between:

SOLIDARITY OBO DE KLERK

Applicant

and

THE SOUTH AFRICAN STATE THEATRE

Respondent

Heard: 31 May and 1 June 2018 (heads of argument submitted on 15 June 2018)

Delivered: 20 September 2018

Summary: Unfair dismissal following dismissal for operational reasons. Dismissal procedurally and substantively unfair. Applicant awarded maximum compensation.

JUDGMENT

PRINSLOO, J

Introduction

- [1] Solidarity acting on behalf of Ms de Klerk (the Applicant) referred an unfair dismissal dispute to this Court in relation to her dismissal based on the Respondent's operational requirements.
- [2] Before turning to the merits of the case, it is necessary to give a brief overview of the pleadings, the pre-trial minute and the issues for the Court to decide.

The pleadings and pre-trial minute

- [3] It is common cause that the Applicant was employed by the Respondent on 15 March 2002 as groups and conferences co-ordinator and that from 1 February 2012 she held the position of payroll administrator.
- [4] The Applicant's employment was terminated on 30 September 2016.
- [5] The Applicant's pleaded case is that she received a notice in terms of section 189(3) of the Labour Relations Act¹ (LRA) on 11 July 2016 and that she was subsequently informed that she would be retrenched and her services would be terminated with effect from 30 September 2016. The Applicant's case is that the Respondent did not consider any alternatives to retrenching her, notwithstanding the fact that 15 positions were advertised at the time of her retrenchment. The Respondent's pleaded response to this is that it did not have alternatives available due to the lack of skills and qualifications of the affected employees and the said employees did not apply for the advertised positions because they did not meet the minimum qualification requirements.
- [6] The Applicant's case is that no consultations took place in terms of the provisions of section 189 of the LRA, that there was no attempt to reach consensus on appropriate measures to avoid the dismissal, to minimize the number of dismissals, to mitigate the adverse effects of the dismissal, no attempt was made to establish whether alternatives existed and the selection criteria was not agreed or consulted on.
- [7] The Applicant took issue with the selection criteria as it was not consulted on or agreed to between the consulting parties, nor was it fair and objective, but instead the Respondent had already identified the positions and employees that became redundant without any consultation on the selection criteria. The Applicant was afforded no opportunity to make submissions in terms of section 189(5) of the LRA.
- [8] The gist of the Applicant's case is that she was denied the opportunity to make representations to avoid her dismissal as no consultation process was followed. To this the Respondent's pleaded case is that there was no possibility that the Applicant could have avoided her dismissal as she did not

¹ Act 66 of 1995 as amended.

fit into the new organisational structure because the skills audit automatically disqualified her.

- [9] The Respondent's case is that as a direct response to the audit it received in 2015, the CEO indicated in November 2015 that the Respondent would be implementing a productivity improvement plan over the next year and that if the initiatives to increase profitability and to reduce fixed costs did not yield results, the Respondent would have to retrench ten employees per year as from 2016.
- [10] On 6 July 2016 the Respondent held a meeting with employees to discuss the re-alignment of the State Theatre to ensure that it meets its objectives. A new organisational structure had been approved by the Council and this was the direct result of the audit qualification and the skills audit. As a result of the new organisational structure, a retrenchment process would ensue for three years, with ten employees being retrenched each year. The plan is known as the Turnaround Strategy and Operational Planning.
- [11] The Respondent's pleaded case is that from 11 July 2016 ten employees were handed notices of retrenchment in terms of section 189(3) of the LRA. On 12 July 2016, a letter was received from Duvenage & Duvenage Attorneys, acting on behalf of the ten affected employees and in the letter, proposals for consideration were put forward. Consultations with the affected employees were held on 18 and 19 July 2016 and the proposals put forward, were considered by the Respondent's management.
- [12] On 1 August 2016, the Respondent's management accepted all the proposals put forward, except the proposal for higher severance pay. After consultations, it came to the Respondent's attention that different representatives claimed to represent the affected employees and consequently the Respondent extended the consultation process. Termination letters were handed out on 29 September 2016.
- [13] The Respondent pleaded that the affected employees were dismissed based on selection criteria that had been identified by the skills audit, which involved the re-alignment of the State Theatre by restructuring to improve its workforce, skills and productivity.

The evidence adduced

- [14] The Respondent called its human resources manager, Ms Mopayi as its only witness. She testified that she facilitated the retrenchment process on behalf of the Respondent.
- [15] On 6 July 2016 there was a meeting with NEHAWU and on the same day a staff meeting was held at 14:00 and in both meetings the union and the employees were informed that the Respondent would implement a new organisational structure. The CEO informed all staff members of the reasons for this namely the poor financial performance of the organisation, the qualified opinion of the Auditor General, the outcome of the skills audit conducted by an independent contractor and the need to ensure the future sustainability of the organisation. The CEO indicated that the human resources department (HR) would contact all the affected employees.
- [16] On 11 July 2016, Ms Mopayi handed the section 189 notices to all the affected employees, wherein it was indicated that the Respondent wanted to meet with the affected employees to proceed with the consultation process. The consultations were held on 18 and 19 July 2016. Ms Mopayi explained that the proposals put forward were to be considered and that the Respondent indeed responded to the proposals and she described the process that followed as a 'to and fro' consensus seeking process. The Respondent even extended the consultation process due to outstanding proposals that needed to be considered and the affected employees were invited for further consultation on 5 September 2016. The proposal that the Respondent paid two weeks' severance pay for each year of completed services could not be accepted and the Respondent disclosed the reason why the proposal was rejected as the financial position of the Respondent. Termination letters were issued on 30 September 2016.
- [17] In respect of consultations held with the employees, Ms Mopayi testified that the first meeting was held on 18 July 2016 and that during this meeting the content of the section 189(3) notice was explained to the affected employees as well as the reason for the retrenchment process. She requested the affected employees to put forward any proposals they might have.

- [18] It is evident from the minutes of the consultation meeting held on 18 July 2016 that the Applicant requested to see the business plan, the new organogram and wanted to know why her position was redundant.
- [19] On 27 July 2016, the Applicant addressed a letter to Ms Mopayi wherein she made reference to documents Ms Mopayi undertook on 18 July 2016 to provide to her by 20 July 2016. On 20 July 2016, Ms Mopayi sent an e-mail to the Applicant informing her that management was still deliberating on her proposal and feedback would be forwarded to the Applicant by no later than 26 July 2016. On 26 July 2016, Ms Mopayi sent another e-mail to the Applicant stating that the feedback regarding her proposal was being deliberated on and that they would revert to her soonest. The Applicant asked why there was a failure to provide her with the information she required for the consultation process.
- [20] Ms Mopayi explained that the documents the Applicant was looking for were the document that detailed the reasons for retrenchment, the Strategy document and the new approved organogram. She testified that the organogram and operational plane were e-mailed to the Applicant on 18 July 2016 and subsequent to that, the Applicant requested no further information. The Respondent complied with the Applicant's request for the information. This is disputed by the Applicant.
- [21] On 31 August 2016, the consultation period was extended to 8 September 2016 in order to resolve the only outstanding issue of severance pay and the Applicant was invited to a consultation meeting scheduled for 5 September 2016. There was no consensus reached on the issue of severance pay as the Applicant asked for two weeks' pay per completed year of service and the Respondent was not in a position to pay more than one weeks' salary.
- [22] Ms Mopayi explained that the Respondent's financial position was the reason for retrenchment and the new structure implemented by the Respondent, was informed by its financial position and the outcome of the skills audit. The Respondent's employees had no input into the new structure.
- [23] In respect of the skills audit, Ms Mopayi explained that 21st Century, an HR company, was contracted to conduct a skills audit for the Respondent and in

doing that, they considered the required qualifications for a position and they looked at the incumbent of the position. The outcome of the skills audit was a finding that the organisation was not adequately equipped and the employees were not fit for their jobs as they did not have proper qualifications. This made it difficult for the Respondent to carry out its mandate.

- [24] A “Turnaround Strategy and Operational Planning 2016/17 – 2018/19” (the Strategy) was drafted in response to the outcome of the skills audit and the qualified audit by the Auditor General and its purpose was to improve efficiency and ensure sustainability. Ms Mopayi explained that each department was looked at but specific attention was given to the finance department, as the focus there was to appoint staff with knowledge of accounting principles. The finance department is regarded as a strategic department and crucial to the attainment of a positive financial outcome.
- [25] The Strategy was to be implemented during the 2016/17 financial year and the process was to take place over three financial years. The new organisational structure was approved on 26 May 2016. Ms Mopayi explained that prior to the implementation of the Strategy, the option to shut down the organisation existed.
- [26] Ms Mopayi testified that the Applicant was employed in the finance department as a payroll administrator. The skills audit indicated that the finance department needed urgent attention to ensure that staff with knowledge of accounting principles be appointed in the said department. The qualification required for payroll administrator was a national diploma in accounting principles and the Applicant did not have such a qualification. Ms Mopayi testified that the finance department played a strategic and crucial role to ensure that the Respondent attains a positive audit outcome, which is key in ensuring that the Respondent receives funding from the Department of Arts and Culture and there was a risk to have an unqualified person in this department.
- [27] The purpose of the new structure was to improve the Respondent’s financial position, to improve efficiency and to ensure continuity going forward as well as to improve the qualifications across the entire organisation to ensure that it meets its mandate.

- [28] In the section 189(3) notice, the method of selecting employees to be retrenched was recorded as that the listed positions would be redundant with the implementation of the new structure, as approved by Council on 26 May 2016 and any vacancies or combined roles that arose, would be advertised and filled on the basis of the best qualified person for the job. Ms Mopayi testified that there was no consensus seeking process with regard to the selection criteria as the criteria was the direct response to the outcome of the skills audit.
- [29] Ms Mopayi testified that the Respondent took measures to avoid or minimize dismissal by embarking on a business improvement plan in 2015, which was specifically implemented as an alternative to retrenchment. The Respondent tried to save costs by implementing no salary increases, reducing overtime, supply chain processes were reviewed to ensure cost savings and leave days were capped for cash payouts. She explained that these initiatives are still in place since 2015 and that it resulted in a slight improvement on the Respondent's financial side.
- [30] In respect of the timing of the dismissals, Ms Mopayi explained that the CEO announced the critical state of the Respondent in November 2015 and the implementation of the Strategy changed the timing of the retrenchments from 2015 to 2016 and that the retrenchments were introduced over a period of three years.
- [31] Ms Mopayi's evidence on selection criteria was that the position of the Applicant was redundant as a direct result of the skills audit and the position she held, did not form part of the new structure. She explained that the new position was more from a financial perspective and the qualifications required for the post are different. Previously the required qualification was a diploma which took less than one year to complete and the new requirement was a national diploma that required three years of study. The Applicant did not possess the required qualification. Ms Mopayi explained that the selection criteria were the redundancy of positions and once the affected employees were told that their positions were redundant, they were not afforded an opportunity to consult on that. The Applicant never agreed to the selection criteria.

- [32] In cross-examination Ms Mopayi testified that the position of payroll administrator that was previously occupied by the Applicant no longer existed on the new organogram and the new position in the new structure is 'payroll clerk', for which position the Applicant did not have the required qualification.
- [33] Ms Mopayi conceded that the Applicant was a payroll administrator since 2012 and that she never poorly performed her duties in that position. Ms Mopayi was unable to show the job description and minimum requirements for 'payroll clerk' as such was not placed before Court, for reasons Ms Mopayi was unable to explain. She explained that the Applicant was retrenched because she did not have a national diploma in finance and the post of payroll administrator was not part of the new structure. Ms Mopayi explained that the duties of the payroll clerk include the administration of the payroll and input into the payroll.
- [34] Ms Mopayi conceded that the minimum requirements and job responsibilities for 'payroll clerk' were never discussed with the Applicant during the consultation process and that she was never given an opportunity to discuss the said position with the Respondent during the consultation process. She further conceded that the Applicant was not told about the required qualification and that that was the reason for her retrenchment. Ms Mopayi's response to a question from the Respondent's counsel as to whether the Applicant could have obtained the required qualification, was strangely enough that the Applicant never proposed that. It is unthinkable that Ms Mopayi could concede that the Applicant was never told about the required qualification and in the same breath expect her to make a proposal in respect of the required qualification.
- [35] The new structure was approved on 26 May 2016. Ms Mopayi explained that the Respondent's Council took a decision to make positions redundant based on the skills audit. In terms of the section 189(3) notice, ten positions were redundant and the incumbents of all ten positions were retrenched. The Applicant's experience in other departments or her ability to perform the functions of 'payroll clerk' was never discussed with her as the skills audit automatically excluded the Applicant.

- [36] In re-examination, Ms Mopayi was asked about the Applicant's case that her selection for retrenchment was predetermined upon which Ms Mopayi responded that when the organogram was approved, the Respondent knew that the position of payroll administrator would be affected in a retrenchment process. The Applicant was not appointed in any other position as she never applied for another position.
- [37] The Applicant testified that she was employed by the Respondent in March 2002 and she was dismissed in September 2016. The Applicant testified that she first became aware of the fact that she was affected by a retrenchment process on 11 July 2016 when she received the section 189(3) notice. The said notice informed her that the Council approved a new organogram and that her position became redundant. A meeting was held with her on 18 July 2016 and during this meeting she was informed that the reason for her retrenchment was the new organogram and the business plan which had been approved on 26 May 2016 and the fact that her position was redundant.
- [38] The Applicant testified that there was no discussion about qualifications and at the time of the meeting, she had not received a copy of the organogram. No advertisement or job descriptions were discussed and she was not informed about the possibility to apply for any advertised position. She explained that nothing, apart from the fact that her position was redundant, was discussed. The Applicant was unaware of the outcome of the skills audit or the requirement of a national diploma and none of that was discussed with her.
- [39] The Applicant testified that she had done the Respondent's payroll for a period of four years without a qualification and the lack of her qualification was not discussed at any point. She was only told that her post was redundant and there was no discussion about alternatives and she only learnt in Court about the required qualification.
- [40] The Applicant testified that there was no discussion about her previous experience or selection criteria as she was only told that her position was redundant due to the new structure.
- [41] The Applicant testified that she has been looking for employment since her retrenchment but she is still struggling to find employment.

[42] In cross-examination, the Applicant was asked why she did not apply for a position or asked to see the available vacancies. The Applicant explained that she asked for the organogram and she had no idea what positions were available.

Analysis

[43] I will now deal with the issues this Court has to decide.

Substantive fairness

[44] The first issue I have to decide is whether the Applicants' dismissal was substantively fair.

[45] The Applicant's challenge in respect of substantive fairness is two-fold. Firstly, it is disputed that there was a general need to retrench and the Applicant's case is that the functions she performed at the time of her dismissal, still exist and are still performed. Secondly, the selection criteria applied, was not reasonable.

The need to retrench

[46] The evidence placed before this Court is that the Respondent received a qualified audit from the Auditor General, it conducted a skills audit and came up with a new structure and Turnaround Strategy. Part of the plan was to retrench ten employees *per annum* over a period of three years from 2016.

[47] The results of the skills audit indicated that the Respondent was not adequately equipped and employees were not fit for their positions. The organisation was re-aligned and in terms of the new structure, the payroll administrator position previously occupied by the Applicant became redundant and the new position responsible for the payroll was that of the payroll clerk. The skills audit indicated that the payroll clerk has to have a national diploma as a minimum qualification.

[48] Ms Mopayi testified that the position of payroll administrator no longer existed on the new organogram and the new position in the new structure is 'payroll clerk', for which position the Applicant did not have the required qualification. As the Applicant does not have a national diploma, she was automatically

excluded from the new structure and she was disqualified from further employment with the Respondent. She explained that the core function of the payroll clerk was to do input into the payroll and the core function of the payroll administrator was the same. The title changed but the function remained essentially the same.

[49] Ms Mopayi testified that the functions of the payroll clerk are essentially the same as those of the payroll administrator and it was more a change in title rather than a change in functions with the additional requirement of a national diploma. Ms Mopayi further explained that the payroll system used by the Respondent is the VIP Payroll system, which is an easy system and does not require any formal qualification or degree. It is undisputed that the Applicant was the payroll administrator for a period of four years prior to her retrenchment and that there were no complaints in respect of her performance and the fulfilling of her functions in respect of the payroll. Although the Applicant was able to perform the duties, she did not have the required qualification.

[50] In *South African Airways v Bogopa and Others*² the Labour Appeal Court has held that:

'The question, which arises, is what the obligation of an employer is in relation to the dismissal of employees for operational requirements when it does away with an old structure and adopt a new structure (for operational requirements). An employer has an obligation to try and avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position, the duties of which the employee concerned can perform with or without at least minimal training. Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactorily, the employer can deal with the case as a case of poor performance.' (footnotes omitted)

[51] It is evident to me that the only reason why the Applicant was retrenched is because she did not have a qualification in circumstances where she was able

² (2007) 11 BLLR 1065 (LAC) at para 60.

to perform the duties and functions of the position for more than four years without such qualification, where the payroll system used by the Respondent is an easy one that does not require a tertiary qualification and where the only basis for this requirement is the outcome of a skills audit.

- [52] There was no evidence placed before this Court to show how the retrenchment of the Applicant assisted the Respondent in becoming more efficient or how it assisted to save costs or contributed to the long term sustainability of the State Theatre. In fact, those reasons were pale in comparison with the Respondent's fixation on the required qualification.
- [53] There was also no evidence to show that the Applicant did not possess the necessary skills to perform the functions attached to the position of payroll clerk. This Court cannot accept the Respondent's *ipse dixit* that the Applicant was not qualified for the position of payroll clerk, without evidence to substantiate and support such a version.
- [54] Ms Mopayi's evidence was superficial in that she was only able to say that a qualification was required, but she did not tell this Court why it was required and why, apart from not having the qualification, the Applicant was not able to perform the Respondent's payroll duties.
- [55] The Respondent did nothing more but to follow a 'cast in stone' process based on a skills audit and a plan to retrench ten employees *per annum* for three years, no matter what. The Respondent never interrogated the outcome of the skills audit, and if they did, it was not evident from Ms Mopayi's evidence. The Respondent never questioned the results of the skills audit in respect of the payroll clerk position, why a tertiary qualification was necessary when the system was easy and required knowledge of the operation of the VIP Payroll system, rather than a formal qualification and why the Applicant should be dismissed, purely because of the fact that she did not have such a qualification, in circumstances where she performed the function for four years without complaints about her performance and evidently was able to do that without the 'required' qualification.
- [56] The Respondent dismally failed to show that a tertiary qualification was a requirement for the position of payroll administrator or payroll clerk and that

the fact that the Applicant did not possess such a qualification, was a fair reason to retrench her.

- [57] The requirement of a tertiary qualification was introduced as an *ex post facto* requirement which did not justify the Applicant's dismissal.

Selection criteria

- [58] The challenge in respect of selection criteria is two-fold. On the one hand the Applicant challenges the application of the criteria and on the other hand, the Applicant's case is that there was no consultation on the criteria. I will deal with the entire challenge in respect of the selection criteria at once, although part of it is a challenge in respect of the procedural fairness.

- [59] The evidence of Ms Mopayi showed that the new structure was approved on 26 May 2016 and the Respondent's Council took a decision to make positions redundant based on the skills audit. In terms of the section 189(3) notice, ten positions were redundant and the incumbents of all ten positions were retrenched.

- [60] Ms Mopayi's evidence on selection criteria was that the position the Applicant occupied was redundant as a direct result of the skills audit. The Applicant did not possess the required qualification for the position of payroll clerk and she was therefore automatically excluded. This is once again indicative of the Respondent's approach and attitude in respect of the skills audit and the retrenchment of its employees. An employee who was able to perform the functions in respect of the Respondent's payroll, was automatically excluded because a skills audit indicated that a qualification was required for a position the Respondent knew very well did not require a tertiary qualification.

- [61] The Applicant's case is that the selection criteria was never discussed with her. In the pre-trial minute the Respondent recorded that the Applicant was provided with the selection criteria and all documentation that influenced the Respondent's selection process. The Respondent further stated that the Applicant was consulted extensively and provided with the necessary documentation to understand the selection criteria.

- [62] In her evidence Ms Mopayi however made a turnabout from the position set out in the pre-trial minute when she testified that there was no consensus seeking process with regard to the selection criteria as the criteria was the direct response to the outcome of the skills audit. Ms Mopayi explained that the selection criteria were the redundancy of positions and once the affected employees were told that their positions were redundant, they were not afforded an opportunity to consult on that. The Applicant never agreed to the selection criteria.
- [63] The Respondent's claim that the Applicant was extensively consulted on the selection criteria is not supported by its own witness and I cannot but accept that the Applicant was not consulted on the selection criteria.
- [64] The Applicant was dismissed in a process where the selection criteria was never discussed or disclosed. The Respondent's reason for the Applicant's dismissal, namely her lack of qualifications, was never communicated to her.
- [65] In argument, Ms Wilson for the Respondent, referred to the judgment handed down in *Nylin Colin van Staden and 13 Others v Telkom SA (SOC) Limited*³ where the Court was faced with a challenge in respect of selection criteria after the employer embarked on a restructuring exercise. A perusal of the said judgment shows that it does not support the Respondent's case and it is not clear why Ms Wilson brought this judgment to my attention, seeing that she was representing the employer and the judgment did not assist her case.
- [66] Be that as it may, in *Nylin Colin van Staden* the Court emphasized that section 189(2) and 189(7) of the LRA show that the method of selecting employees to be dismissed is placed high on the issues to be consulted upon and the legislature obliges consulting parties to engage in a meaningful joint consensus-seeking process to attempt to reach consensus on the method of selection. The method of selection is as important as measures to avoid or minimize the number of dismissals. It was held that the Court must be more vigilant on the issues of selection criteria, given the potential of abuse and unfairness.

³ Unreported case number JS 95/15, handed down on 11 May 2018.

- [67] The LRA places primacy on an agreed method of selection and in *Nylin Colin van Staden* the Court emphasized that an employer must double its efforts during a consultation process to reach an agreement on the selection criteria and failure to do so, simply means that an employer invites the court's scrutiny on the method it employs.
- [68] The use of qualifications as selection criteria, opens the door for this Court to assess whether such criteria is fair and objective. Lack of qualifications on its own as criteria is unfair, particularly where the employees had job security and where the LRA protects them from being unfairly dismissed.
- [69] It is trite that fairness requires that employees who are selected for retrenchment on the basis of lack of skills or qualifications, should be afforded an opportunity to make representations on that. *In casu* the Respondent's retrenched the Applicant, using the skills audit, conducted by outside consultants, as the basis for retrenchment. The skills audit indicated a tertiary qualification as a requirement, without considering the workplace specific requirements. It cannot be a fair basis to deny an existing employee her job security, more so where she had been performing payroll functions for more than four years.
- [70] On the Respondent's own version, there was no consultation on the issue of selection criteria.

Procedural fairness:

- [71] The second issue to be decided is the procedural fairness of the Applicant's dismissal. The Applicant's case is that the Respondent failed to engage her in a joint consensus seeking consultation process, as required by the LRA.
- [72] The Respondent's position, as recorded in the pre-trial minute, is that it strictly complied with the provisions of section 189 of the LRA. A consultation meeting was held on 18 and 19 July 2016 and this meeting constituted consultation with the Applicant as envisaged in section 189(2) and (3) of the LRA.
- [73] The following is undisputed based on the evidence presented by the parties:

73.1. The Respondent's Council approved a new structure on 26 May 2016;

- 73.2. On 6 July 2016, during a meeting, the Respondent's employees were informed that the Respondent would implement a new organisational structure and that ten employees *per annum* would be retrenched over the next three years;
- 73.3. On 11 July 2016, Ms Mopayi handed the section 189 notices to all the affected employees;
- 73.4. The Respondent met with the Applicant on 18 July 2016 as part of the section 189 consultation process. The Respondent informed the Applicant that her post was redundant;
- 73.5. During the said consultation, the Applicant and the Respondent did not discuss and consult on the selection criteria, alternatives to retrenchment, the Applicant's previous experience, vacancies available in the new structure, the job description and qualifications required for the post of payroll clerk;
- 73.6. The Applicant did not discuss selection criteria or alternatives to dismissal with the Applicant because she was automatically excluded from the new structure because she did not have the required qualifications.

[74] Section 189(2) of the LRA requires a joint consensus-seeking process and an attempt to reach consensus on appropriate measures to avoid the dismissal, to minimize the number of dismissals, to change the timing of the dismissals, to mitigate the adverse effect of the dismissal, the method of selecting the employees to be dismissed and severance pay.

[75] It is evident that the issues required by the LRA were not discussed as the Respondent was set on retrenching ten employees *per annum* and was set on retrenching the Applicant for reasons related to her lack of qualification.

[76] Ms Mopayi conceded that the Applicant was not told about the required qualification and that it was the reason for her retrenchment. The Applicant's experience in other departments or her ability to perform the functions of 'payroll clerk' was never discussed with her as the skills audit automatically excluded the Applicant. No amount of consultation would have changed the

Applicant's fate as she was automatically excluded and she had to face the axe.

[77] The Respondent did not engage in a joint consensus-seeking process and made no attempt to reach consensus on the issues required by the LRA. The Respondent followed a mechanical process without any real effort to engage the Applicant on the prescribed issues.

[78] In view of my aforesaid findings, it follows that the Applicants' dismissal was unfair.

Costs

[79] Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness.

[80] Had it not been for the fact that the Applicant was represented by a trade union, I would not have hesitated to grant a cost order in her favour.

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

Order

1. The Applicant's dismissal is procedurally and substantively unfair;
2. The Applicant is awarded compensation equivalent to 12 (twelve) months' salary, calculated at the rate of remuneration on date of dismissal;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr van der Hoven and Ms Nel of Solidarity

For the Respondent: Advocate K Wilson

Instructed by: Motalane Kgariya Inc Attorneys