THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS863-21

In the matter between:

LEWUSA OBO MAESELA AND
3 OTHERS **Applicants**

and

RGM CRANES (PTY) LTD **Respondent**

Heard: **23 & 24 May 2024**

Delivered: **29 April 2025**

JUDGMENT

MOLOTSI, AJ

<u>Introduction</u>

[1] This is a referral in terms of Rule 6[1] of the then-Rules of this Court. The applicants, LEWUSA obo Maesela and three others, referred an unfair dismissal dispute claiming that the individual employees' (applicants) dismissal for operational requirements was both substantively and procedurally unfair. One of the applicants, namely Dickson Chauke, is no longer part of the applicants. The respondent is RGM Cranes (Pty) Ltd.

[2] The applicants were dismissed by the respondent on 21 January 2021 and 23 January 2021, respectively. The applicants referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 26 January 2021. The matter was set down for conciliation on 20 October 2021. The dispute could not be resolved, and a certificate of non-resolution was issued.

[3] The applicant filed a statement of case on 20 January 2022.

<u>The relevant facts</u>

[4] On 2 November 2020, the respondent issued all affected employees, including the applicants, with an undated notice in terms of section 189(3) of the Labour Relations Act[2] (LRA), which set out *inter alia* that the respondent was contemplating retrenchments, and extending an invitation to the applicants to consult on, amongst other things, possible alternatives to dismissal.

[5] On 4 November 2020, the first section 189 meeting was held between the respondent and the applicants. The trade union representative, Joshua Mokoena, was also in attendance. The meeting was held at the respondent's premises.

[6] On 13 November 2020, and after the first meeting, the Respondent's compliance manager, Murray Vinnicombe, sent an email to the trade union attaching the minutes of the first meeting and requesting to have another meeting on 18

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[1] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

[2] Act 66 of 1995, as amended.

November 2020 at the respondent's premises. On 18 November 2020, the applicants and Mr Mokoena attended the second meeting.

[7] On 27 November 2020, Mr Vinnicombe sent an email to the trade union attaching the minutes of the second meeting. On 3 December 2020, Mr Vinnicombe sent an email to the trade union inviting the applicants to a meeting to be held on 9 December 2020. The meeting of 9 December 2020 was cancelled, and a further meeting was requested to be held on 23 December 2020 at 08h00. The meeting of 23 December 2020 did not take place.

[8] On 9 December 2020, the respondent's Managing Director signed a notice of retrenchment indicating that the applicants' services would be terminated as a result of their positions becoming redundant, as well as the fact that the respondent did not have any suitable alternative positions available.

[9] Tornado Maesela, Petrus Hlatshwayo, and George Mokgwashana were dismissed on 21 January 2021.

<u>Evidence</u>

On behalf of the Respondent

[10] Mr Vinnicombe testified under oath that he was employed by the respondent as a compliance manager around August 2020. He facilitated the return to work of employees during the COVID-19 pandemic.

[11] From March 2020, the respondent had implemented a no-work, no-pay policy. There were a lot of issues at the workplace relating to COVID-19, including social distancing and the employees' comorbidities. During October – November 2020, Mr Vinnicombe facilitated a section 189 process on behalf of the respondent. The section 189 process was a last resort to be considered by the respondent.

[12] During that time, the respondent had lost a number of projects as its clients had put their projects on hold. Capex, i.e. the design and manufacturing of

equipment, was put on hold as a result of the hard lockdown. Non-critical work at the workshop was also put on hold. As a result, the respondent's sales were jeopardised. Mr Vinnicombe was further informed that the respondent had implemented a policy of paying employees reduced salaries. The respondent consequently lost a significant amount of money as a result of the COVID-19 pandemic.

[13] As a result of social distancing challenges, most of the respondent's work was not performed in the workshop but rather at its clients' premises. The respondent's business involved the servicing of overhead cranes, and the nature of the work is that the equipment cannot be brought to the respondent's workshop, hence, the overhead cranes were serviced at the clients' premises. During September 2020, Capex was reinstated only at reduced levels. Capex was done by the projects department, and the manufacturing of big equipment was subcontracted.

[14] Prior to the commencement of the section 189 process, the respondent considered other options like short-time layoff of employees and one director and finance manager had to be let go. Around June 2020, the respondent also put forward a proposal of voluntary retrenchment, and four technicians accepted voluntary retrenchment. Furthermore, the employees took a 10% reduction in their salaries.

[15] The respondent further concluded a shutdown agreement with employees, which provided that:

> 'a. All staff to take annual leave for the period of the shutdown.
>
> b. Staff who currently don't have enough leave to cover the shutdown period will be allowed to go into the negative on their leave allocation.
>
> c. Monthly paid employees will be required to take unpaid leave during the rest of the year, until such time that they are in credit with their leave allocation.
>
> d. Weekly paid employees will be requested to work weekends, at normal rates (no overtime) to make up the negative leave balance.

e. Should the shutdown be extended beyond the 17th April 2020, the company will have no alternative but to implement the temporarily layoff all staff until such time that the company can resume its operations.'

[16] The above options were implemented prior to the respondent proceeding with the section 189 process. The respondent started implementing the section 189 process towards the end of October 2020. Retrenchment was the last resort considered by the respondent. The respondent's sales as compared to a previous period had decreased by about R20 million. Employees considered for retrenchment were employees who were not able to work due to COVID-19 restrictions. The original number of people identified was ten employees, and then this number was eventually reduced to four. The affected employees were from the following categories: four employees from the projects division, comprising one off-painter and from the workshop division, one off-painter and two off-general labourers.

[17] The original ten employees were identified based on the LIFO principle, retention of skills and people who were not able to come back to work due to COVID-19 restrictions. On 2 November 2020, the employees were issued with a section 189(3) notice. The key points in the section 189(3) notice were that: reasons for dismissals were based on operational requirements; Covid-19 lockdown; pricing affecting the sales, global economy, as the business was largely project-orientated, to reduce the total costs of the respondent.

[18] The method of selecting the employees for retrenchment consisted of LIFO and retaining specific expertise and skills, some individual responsibilities may increase or decrease on the redefined job function and demotions as a result of the redeployment of staff to other divisions or intergroup subsidiaries. The retention of skills and expertise necessitated that the technicians were based at the clients' premises, and work carried out at the respondent's workshop was minimal.

[19] As a result of the new organisational structure, previously they had eight heads of department (HODs), and in the new structure, they had three. The three HODs were the finance manager, technical director and technical manager.

[20] Two consultation meetings took place between the respondent and the applicants and the applicants were represented by a union official. Mr Vinnicombe attended the consultation meetings. The first consultation took place on 4 November 2020. The purpose of the consultation was to ascertain from the employees if they have other alternatives to the alternatives provided by the respondent. During the consultation, the union stated that the process was unfair. There was a short discussion on short time, and one person, namely Mr Chauke (one of the employees identified for retrenchment), knew that he (Mr Vinnicombe) recently joined the company and therefore wanted other senior managers to be part of the section 189 process. Mr Mokoena asked about the process of rotating staff, and he (Mr Vinnicombe) stated that the idea was to reduce the costs of the respondent.

[21] He explained that the respondent had already considered: the reduction of working hours in accordance with the requirements of the COVID regulations and the Disaster Management Act[3] (DMA); 10% reduction of wages across the company; systematic return of individuals that could work in accordance with the COVID regulations and DMA, taking into account the comorbidities as defined by return to work policy; restructuring of the company due to lost income and early retirement of certain individuals (two individuals took this option); mutual separations; and resignations (three individuals took this option).

[22] The applicants did not raise any issues in respect of the measures which were taken by the respondent prior to the commencement of the section 189 process. The applicants only took issue with how money was handled. This is related to the TERS and UIF payments. Mr Chauke further stated that the respondent wasted money as they bought vehicles. Another issue raised by the employees was that the respondent initially indicated that there would be no layoff when they accepted the 10% salary reduction, and why the respondent was not utilising a rotation system. A feasibility study was conducted, and it was agreed to sell the company vehicles and lease vehicles for three years.

[3] Act 57 of 2002.

[23] During the first consultation, Mr Chauke demanded a qualification audit of the technicians as he believed that he was more qualified than other technicians. However, Mr Chauke only had two years of service with the respondent at that time. The minutes of the first consultation were circulated to the union, and the respondent did not receive any disagreements in respect of the minutes. During the first consultation, the applicants did not discuss alternatives to retrenchment.

[24] The second consultation meeting took place on 18 November 2020. In the second meeting, the minutes of the first meeting were discussed, and Mr Mokoena raised an issue about the minutes. The feedback given arising out of the first consultation was that: regarding TERS payment, the respondent paid employees advances for the month of April on a weekly basis; the respondent received TERS payments and the employees were paid and that the respondent never said that there would not be layoff when the employees accepted the 10% salary reductions.

[25] The respondent did not utilise the rotation system because there was little to no work required for the sandblaster. Sandblasting was previously done by Petros Hlatshwayo, an assistant at the workshop. Each technician was now responsible for their own sandblasting and consequently, there was no need for Mr Petros Hlatshwayo. In respect of George Mokgwashana, a general worker, what little painting that was required in the workshop was carried out by each technician or assistant technician.

[26] In respect of Tornado Maesela, the projects painter, the respondent lost a number of tenders that it had hoped to secure. There were no large amounts of work in the projects division, and in June 2020, Tornado messed up when he was painting monorail beams; he also booked the wrong hours. The applicants failed to provide details on how the process was flawed.

[27] During the second consultation meeting, the respondent was working at less than 50% of its capacity. In the consultation, Mr Mokoena raised issues relating to the previous layoff, and this had nothing to do with the retrenchment process. The applicants provided no alternatives to avoid retrenchments. At the end of the second

consultation, Mr Vinnicombe requested the third consultation meeting to take place on 9 December 2020.

[28] The minutes of the second consultation meeting were circulated to the trade union, and no comments were received as to whether the minutes correctly reflected what was discussed during the second consultation meeting.

[29] On 9 December 2020, the applicants arrived for the third consultation meeting. The applicants did not enter the meeting venue as they were waiting for the union representative to arrive. The meeting was supposed to start at 08h30 on 9 December 2020. The union representative failed to attend the meeting, and the applicants did not attend the meeting. The applicants stated that they would go to the union offices. At 09h15, Joshua Mokoena arrived, and he informed him that the applicants had gone to the union offices. Mr Vinnicombe denied that the applicants were refused entry to attend the meeting on 9 December 2020.

[30] Mr Vinnicombe then sent another email requesting the next consultation meeting to be held on 23 December 2020. The applicants and the union representative did not attend the meeting on 23 December 2020, and the decision to retrench the applicants was taken on the same day. Mr Vinnicombe proceeded to prepare the retrenchment letters. Despite the fact that the notice of retrenchment is dated 9 December 2020 and signed by Mr Alex Dowling, the managing director, on 9 December 2020, the employees did not attend the consultation meeting on 9 December 2020.

[31] The date of retrenchment is not 9 December 2020. The intention of the consultation meeting of 9 December 2020 was to inform the applicants that unless they provide alternatives, no other discussions would follow other than the retrenchment.

[32] The applicants had the following service period with the respondent: George Mokgwashana had 16 years of service; Tornado Maesela had three years of service;

Petros Hlatshwayo had three years of service, and Dickson Chauke had two years of service.

[33] Under cross-examination, Mr Vinnicombe confirmed that he worked for the respondent as a consultant and he became part of management. That he had 25 years' experience at that time, and he followed the main agreement of the MEIBC when he conducted the retrenchment process. He confirmed that he has never seen the applicants' work.

[34] He confirmed that the applicants were not part of the new structure, which was drafted on 26 August 2020. He did not know prior to the first consultation that the applicants were members of the union. The applicants were chosen for retrenchment as their relocation was not possible.

[35] He agreed that the applicants signed for 10% salary reductions in order to avoid retrenchment. He confirmed that four other employees returned to work, and they worked as and when required. He confirmed that the respondent's HODs indicated that the applicants could not do any other work. The applicants did not have their curriculum vitae in their files. He looked at the performance appraisals and competency assessment of the applicants.

[36] He could not deny that applicants were on an extended layoff when the consultation process started. He further could not deny that Tornado Maesela was last at work on 30 June 2020, George Mokgwashana was last at work on 26 May 2020, and Petros Hlatshwayo was last at work on 26 May 2020. Despite the applicants being on an extended layoff, functions performed by the applicants were not going to be performed in the company in future, hence the retrenchment was a cost-saving exercise.

[37] He further confirmed that some individuals were given an opportunity to clean the workshop. He confirmed that in 2021, the respondent employed other people in certain jobs, like the lady who was employed in stores from a subsidiary company. He confirmed that the respondent had subsidiary companies. There was an RGM in

Rustenburg, but there was no possibility to utilise the applicants in RGM Rustenburg. RGM Rustenburg had crane assistance and not workshop assistance. He did not inform the applicants about RGM Rustenburg. The applicants never suggested to the respondent that they should be demoted.

[38] A person by the name of Elias was not retrenched but kept in the panel building. A person by the name of Enos earned R60 per hour with eleven years of service and was not retrenched, and George Mokgwashana earned R81 per hour and was retrenched. A person called Sam returned to work and was earning R34 per hour, and was able to perform other duties like collecting refuse at the workshop.

[39] Mr Vinnicombe confirmed under cross-examination that the meeting of 23 December 2020 was not confirmed by the union and the applicants.

On behalf of the applicants

[40] Mr Joshua Mokoena testified under oath that the trade union started recruiting members at the respondent's workplace in July 2020. In August 2020, they wrote a letter to the respondent as per section 21 of the LRA. The union then referred a dispute to the CCMA

[41] He was involved in the retrenchment process. He confirmed that he takes no issue with the minutes of the consultation meetings except paragraph 3.5 of page 9 of the bundle of documents (trial bundle). During the consultation meetings, the union presented options to the respondent and asked the respondent why it was retrenching the applicants.

[42] There was an option available other than retrenchment, and the employees had already signed for that option. The union expected the respondent to propose a further reduction in the salaries of the applicants, like a 15% or 20% salary reduction instead of retrenchment. The issue of the 10% salary reduction was done by the respondent and the applicants without the trade union.

[43] He attended the consultation meeting on 18 November 2020. This was after he confirmed the meeting after receiving the request from the respondent. The respondent did not consider the issue of a salary cut during the consultation process. The selection of the applicants for retrenchment was unfair. The 10% salary reduction affected all employees at the workplace, and now it was unclear how the applicants were identified for retrenchment.

[44] He arrived late for the meeting of 9 December 2020. When he arrived for the consultation meeting, he was informed that the applicants had left. He called the applicants, and the applicants informed him that the respondent had cancelled the meeting.

[45] The trade union normally closes its offices for the December holidays, during the second week of December. He did not attend the meeting of 23 December 2020, as it would have been difficult to attend such a meeting, as the Union office closed during the second week of December 2020. It is clear that the respondent had already made up its mind to retrench the applicants. The applicants could have been taken to other departments. It was the respondent who should have considered alternatives to dismissal.

[46] Under cross-examination, he confirmed that the applicants were not at work on a full-time basis. When he drafted an email dated 5 October 2020, he was informed by the workers that the respondent had asked them to collect mutual separation monies, and hence he drafted the email dated 5 October 2020. The workers were previously offered a 10% salary reduction and later told to collect mutual separation monies. He confirmed that all of these happened prior to the retrenchment process.

[47] During the consultation meeting of 4 November 2020, they disagreed about other matters before they could discuss the procedure followed by the respondent. There were other non-union members who attended the consultation meetings, and he therefore did not want to dominate the consultation process. The respondent had to show them why they were not taking up the option of a further salary reduction.

This was an important issue for the trade union. The respondent did not indicate to the trade union why the existing 10% salary reduction was not working at that stage.

[48] The alternatives put forward during the consultation meeting were a further decrease in the applicants' salaries.

[49] Mr Tornado Maesela testified under oath that he was employed by the respondent as a painter. He was painting cranes, beams, etc. He spayed cranes at the workshop and thereafter installed them at the client's sites. During COVID, he installed cranes at Komatsu. He was not only responsible for painting but also did other duties as well.

[50] The other duties that he performed were to assist technicians when their assistance were not at work. He would also accompany the technicians to the client's sites and dig holes and perform boilermaking duties. He was working every day prior to COVID-19. George Mokgwashana was doing similar work to him.

[51] Petros Hlatshwayo was doing sandblasting. Petros Hlatshwayo would also go to the client's sites. Petros Hlatshwayo did sandblasting at SAPPI. Petros Hlatshwayo would also assist technicians. They would also do general work that the respondent would ask them to do, like cleaning the workshop.

[52] On 26 March 2020, the respondent called all the staff members into a meeting. They were told about the leave days. The respondent called them one by one to sign the leave forms. He did not sign the leave form as he asked the respondent when COVID-19 would end. His last day at work was on 29 June 2020, and he was not working every day and only worked when required.

[53] During the consultation meeting of 4 November 2020, they agreed with the trade union that Mr Chauke would speak on their behalf. It was not necessary for all of them to speak. At the time of the consultation process, work was continuing. Moeketsi, a cleaner, was doing painting work. Sam, another cleaner, was doing

painting work. Sam was performing George Mokgwashana's duties. It was clear that when the first consultation meeting took place, the respondent had already taken a decision to retrench them. Both Moeketsi and Sam were still doing the work that he and George Mokgwashana were doing.

[54] Mr Vinnicombe, on 9 December 2020, whilst they were standing outside at the gate, informed them that the consultation meeting was cancelled. After this meeting, he travelled home to Limpopo. He does not know about the meeting of 23 December 2020.

[55] Under cross-examination, he confirmed that he accepted the 10% salary cut as he wanted to save his job.

<u>Evaluation</u>

[56] The advent of the COVID-19 pandemic and the subsequent lockdown did not give employers a license to dismiss employees based on operational requirements without fair reasons. No matter the reasons, dismissal based on operational requirements is not just a mere tick-box exercise. This Court is duty-bound to determine whether there were fair reasons for dismissal and whether the dismissal was effected in accordance with a fair procedure.

[57] Section 188(1) of the LRA provides that:

> '(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –
> (a) that the reason for dismissal is a fair reason –
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> (b) that the dismissal was effected in accordance with a fair procedure.'

[58] The respondent, like many other employers across the country and the globe, faced difficult decisions when the hard lockdown commenced towards the end of March 2020. The respondent concluded a shutdown agreement with its employees.

What the respondent further agreed with its employees was that all the employees would get a 10% salary reduction. The evidence shows that the purpose of this 10% salary reduction was to ensure that the employees kept their jobs.

[59] The respondent, upon the relaxation of the hard lockdown rules, was faced with a loss of revenue. The respondent's Capex was severely affected as clients put orders on hold. The respondent's sales were severely dented to the value of R20 million as compared to the previous year prior to COVID-19. As a result of this, the respondent had to cut costs to ensure the survival of the business. During that time, the employees were on a layoff, i.e. working as and when required to work. Employees were not working regularly.

[60] When the respondent employed Mr Vinnicombe around August 2020, it was clear something had to be done. The respondent had previously embarked on voluntary retrenchments and mutual separations. Some employees accepted these options. Other employees resigned. The evidence of the respondent suggests that this was not enough, as the respondent continued to suffer losses.

[61] Mr Vinnicombe's evidence was that the retrenchment of employees was considered as a last resort. Even if retrenchment was considered as a last resort, the retrenchment process must comply with section 189 of the LRA. Section 189(3) of the LRA required the respondent to issue a written notice to the applicants inviting them to consult and to disclose all the relevant information including but not limited to: the reasons for the proposed dismissals, the alternatives that the employer considered before proposing dismissal, and the reasons for rejecting each of those alternatives, the number of employees likely to be affected and the job categories in which they are employed, the proposed method of selecting which employees to dismiss, the time when or the period which, the dismissals are likely to take effect, the severance pay proposed, any assistance that the employer proposes to offer to the employees likely to be dismissed.

[62] The respondent on 2 November 2020 issued a written notice in terms of section 189(3) of the LRA. The written notice is undated and was signed by the

respondent's Managing Director, Alex Dowling. The written notice was issued to the trade union of the applicants. In terms of the written notice, in compliance with section 189(3) of the LRA, the respondent amongst others stated the reasons for dismissal, based on operational requirements as being (i) the current downturn experienced by the respondent due to continued COVID-19 lockdown extensions and sales compared to the previous year decreased by R20 million; (ii) pressure regarding pricing which has negatively affected sales; (iii) corporates disinvestment in the form of work either been stopped or delayed affecting sales: and (iv) a rise in manufacturing costs and clients' unaffordability.

[63] Was there a justifiable and genuine reason to dismiss the applicants based on operational requirements? The requirements listed in section 189(3) of the LRA in respect of the alternatives to retrenchment to be considered by the respondent and reasons for rejecting the alternatives, the proposed method of selecting employees to be retrenched, the number of employees likely to be affected and the job categories in which they are employed, had to be complied with. In essence, a proper consultation process must follow.

[64] A consultation process between the respondent and the applicants and their trade union representative took place on 4 November 2020 and 18 November 2020, respectively. Only two consultation meetings were held. The minutes of the two consultation meetings were not in dispute except for a minor issue raised by Mr Joshua Mokoena.

[65] The summary of the consultation meeting reveals the following: On 4 November 2020, this meeting was characterised by discussing issues related to the layoff of employees (a process which took place before the retrenchment exercise) and why the practice of rotating staff was not being done. The other issue which was discussed related to TERS payment to the employees, and that other employees are doing the work of the applicants, as well as a request to conduct a qualification audit for all technicians, as per the minutes. Mr Vinnicombe viewed the purpose of the meeting as to discuss any issues and possibilities of negotiating points that would require top management input.

[66] Mr Vinnicombe then went on to discuss what the respondent has previously done, i.e. reduction of working hours in accordance with requirements of the COVID-19 regulations, a 10% salary reduction across the board, return of employees to work in accordance with COVID-19 regulations, restructuring of the company due to loss of income.

[67] As to the consultation meeting on 4 November 2020, nothing was discussed relating to the selection method used for identifying the applicants to be retrenched. Nothing was discussed regarding the alternatives considered by the respondent and why such alternatives were rejected by the respondent. Nothing was disclosed to the union and the applicants as to why the previous measures implemented by the respondent were not working. This latter part relates to what is called the disclosure of all relevant information.

[68] The consultation meeting held on 18 November 2020 can be summarised as follows: The meeting started by giving feedback on the issues raised in the first consultation, which, amongst others, included TERS payment to employees and reasons why rotation of employees was done. Then Mr Vinnicombe, in what appears to be an attempt to indicate why the applicants were selected for retrenchment, stated that there is little or no work for sandblasting, which was performed by Petros Hlatshwayo.

[69] As for George Mokgwashana, the workshop painter, little painting work is required at the workshop. As for Tornado Maesela, the respondent lost a number of tenders it had hoped to secure and that during June 2020, Tornado messed up a painting of monorail beams. As for Dickson Chauke, due to his declaration of HIV status and due to COVID-19 regulations that anyone with existing co-morbidity would make them susceptible to COVID-19 and must have reduced interaction and that Dickson has a reputation of being difficult to work with.

[70] The meeting of 18 November 2020 then discussed the issue regarding the non-training of black employees and whereas white employees were trained. The union members were discriminated against and victimised. Again, the issue of layoff was discussed as the union representative stated that the layoff was unfair and wanted the employees to be reinstated. Mr Vinnicombe stated that the issue regarding the reinstatement of employees was presently under review at the bargaining council after the union had referred an unfair labour practice dispute. Eventually, the feedback which was given by Mr Vinnicombe was rejected by Mr Mokoena.

[71] Mr Mokoena stated that the layoff was impacting the employees and that the process was unfair and procedurally incorrect. The union then demanded the immediate reinstatement of employees, the resolution of section 189, whilst the employees were back at work, and that the employees were not getting paid.

[72] During the consultation meeting of 18 November 2020, nothing was discussed regarding the alternatives considered by the respondent and the reasons for rejecting the alternatives. The only thing which was discussed appears to have been the selection method. Furthermore, on the face of it, no sufficient information was disclosed to the applicants and the union during the consultation process to enable the consultation process to take place fairly.

[73] The consultation meetings between the applicants and the respondent fell short of being a meaningful joint consensus-seeking process. In *SA Clothing & Textile Workers Union and Others v Discreto – A Division of Trump & Springbok Holdings*[4], the Labour Appeal Court (LAC) held that:

> '[7] The need to consult before a final decision on retrenchment is taken, is said to found its rationale in both pragmatism (the need to avoid retrenchment altogether or at least to minimize dismissals and mitigate their consequences) and principle (to give employees a chance to be heard and to avoid or minimize industrial conflict) … .

[4] (1998) 19 ILJ 1451 (LAC) at paras 7 – 8.

[8] …For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process have been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process.'

[74] In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Union*[5], the LAC held that:

'… The word 'fair' introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would

[5] (2001) 22 ILJ 2264 (LAC) at para 19.

have been chosen by the court. Fairness, not correctness is the mandated test.'

[75] The selection criteria followed by the respondent was not fair and objective. At worst, the selection criteria used by the respondent to select the applicants for retrenchment was influenced by the applicants conduct at the workplace in respect of Dickson Chauke and his medical condition, the applicants' high salary especially George Mokgwashana who was earning R81 per hour, as per the evidence of Mr Vinnicombe that he was earning more than other employees and lastly that their relocation was not possible. The respondent was not confined to applying only the LIFO principle.

[76] It is a trite principle that, absent an agreement, the selection criteria for operational requirements dismissal must be fair and objective. In *Jones v KPMG Aiken & Peat Management Services (Pty) Ltd*[6], the Industrial Court held that:

> 'It is a truism that an employer should apply fair and objective criteria when implementing retrenchments. The intrinsic value of such criteria was explained as follows in *Williams v Compair Maxam* 1982 IRLR 83:
> 'The purpose of having, so far as possible, objective criteria, is to ensure that redundancy is not used as a pretext for getting rid of employees whom some managers wished to get rid of for other reasons. Excepting cases where the criteria can be applied automatically (eg last in, first out) in any selection for redundancy, elements of personal judgment are bound to be required, thereby involving the risk of judgment being clouded by personal animosity. Unless some objective criteria are included, it is extremely difficult to demonstrate that the choice was not determined by personal likes and dislikes alone.'

[77] The evidence shows that Mr Vinnicombe has not observed any of the applicants doing their work. The applicants' HODs or line managers did not testify during the hearing. Mr Vinnicombe testified that the HOD were of the view that the applicants could not perform any other duties. However far from it, the evidence of Mr Maesela, which was largely uncontested, was that the applicants were able to

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[6] 1995 16 ILJ 1241 (IC) at 1247B-D.

perform other duties which amongst others included, being assistant technicians, boilermakers, able to perform work at the client's sites, and any other general work which the respondent had assigned to them.

[78] Simply put, there was no fair and objective criteria used by the respondent to select the applicants for retrenchment. The respondent, by taking into consideration that some of the applicants were earning higher salaries, their medical conditions, that one of the applicants was difficult to work with, and that their relocation was not possible, was far from being a fair and objective selection criterion.

[79] The evidence of Mr Vinnicombe that he looked at skills retention is rejected, especially taking into consideration that Sam, Enos and others were doing the same work that the applicants were doing prior to their retrenchments. What is also telling is that Sam and Enos were doing the work of the applicants whilst the consultation process was underway. There was no evidence tendered by the respondent to show that Sam and Enos were more skilled than the applicants.

[80] This raised the inevitability that the consultation process was just a mere box-ticking exercise by the respondent and that the applicants were going to be retrenched come what may.

[81] The consultation meeting held on 18 November 2020 did not finalise the retrenchment process. Nothing was concluded on 18 November 2020, which was the last consultation meeting. More was still required, hence the parties agreed to meet on 9 December 2020. The evidence of Mr Vinnicombe was that the purpose of the 9 December 2020 consultation was to ask the union and the applicants to provide alternatives. It is the respondent who must indicate to the applicants that it has considered alternatives and to provide reasons why such alternatives were not considered. The respondent failed to do so.

[82] The applicants, together with their trade union, were not provided with an opportunity after 18 November 2020 to indicate which alternatives the respondent could consider. The evidence of Mr Mokoena was that they did provide the

respondent with alternatives, which, amongst others, included the option of a further reduction in the salaries of employees by about 15%-20%. Although this option is not indicated anywhere in the minutes of the consultations of 4 and 18 November 2020, respectively, this Court accept that this would have been an option from the applicants had the consultation meeting of 9 December 2020 taken place. At any rate, the respondent had an obligation to disclose to the applicants why the measures implemented previously were not working.

[83] The consultation meeting of 9 December 2020 did not take place. The respondent's version was that the applicants were waiting for the union representative, hence, they did not enter the meeting venue, and they left to go to the union offices. The applicants' version was that the respondent cancelled the meeting. What is common cause between the parties is that on 9 December 2020, the union representative was running late for the meeting.

[84] On the balance of probabilities, it is unlikely that the applicants would decide to abandon the consultation meeting of 9 December 2020 simply because the union representative was running late. The probabilities are that the respondent, having observed that the applicants are not inside the meeting venue and the union representative was running late, decided to cancel the consultation meeting.

[85] What substantiates the above finding is that the respondent's Managing Director, on 9 December 2020, signed the applicants' dismissal letters. It is therefore easier for the respondent to cancel the consultation meeting as it had already taken a decision to dismiss the applicants on 9 December 2020.

[86] What to make of the alleged consultation meeting scheduled for 23 December 2020? The evidence shows that the parties agreed on the dates for each consultation. The consultation dates were not imposed on one party by another party. The evidence of Mr Mokoena, which was largely uncontested, was that the trade union closed its offices during the second week of December 2020, and therefore, it was going to be difficult to attend the consultation meeting on 23

December 2020. The union did not confirm 23 December 2020 as the date for the consultation meeting.

[87] The evidence of Mr Vinnicombe that the decision to dismiss the applicants was taken on 23 December 2020 is rejected. The documentary evidence clearly shows that the applicants' dismissal letters were signed by the respondent on 9 December 2020.

[88] It is clear that the 23 December 2020 consultation meeting was a sham as the respondent's Managing Director had already signed the applicants' dismissal letters on 9 December 2020. This conduct of the respondent was callous and resulted in unfairness towards the applicants. There was simply not going to be any purpose served by the consultation of 23 December 2020, as the applicants were already dismissed at that time, despite the fact that the applicants were not aware of their dismissals. The applicants received their dismissal letters in January 2021.

[89] Given all of the above, especially taking into consideration that other employees were performing the duties of the applicants, that no fair and objective selection criteria was followed by the respondent, the failure by the respondent to consider alternatives to retrenchment and the respondent simply not informing the applicants about alternatives at RGM Rustenburg. Adding to this, the fact that when the new structure was drafted in August 2020, the applicants were already not part of the new structure despite the fact that the retrenchment process was considered at the end of October 2020, the fact that the applicants were already last at work 30 June 2020 and 26 May 2020 respectively, failure by the respondent to disclose to the trade union and the applicants why the measures previously implemented were not working (it was not enough for the respondent to mentioned the previous measures taken). All this illustrates that there was no genuine and justifiable reason to dismiss the applicants based on operational requirements. The respondent had no intention to participate in a meaningful joint consensus-seeking process in an attempt to avoid or minimise the retrenchment.

[90] It is the finding of this Court that the dismissal of the applicants was both substantively and procedurally unfair.

[91] The applicants sought reinstatement. Reinstatement is a primary remedy in terms of the LRA. There was no evidence tendered by the respondent to show that the continued employment of the applicants would be intolerable and that it is not reasonably practicable for the respondent to reinstate or re-employ the applicants.

[92] Consequently, the applicants are entitled to reinstatement as a relief.

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

<u>Order</u>

1. The dismissal of the applicants was substantively and procedurally unfair.
2. The respondent is ordered to retrospectively reinstate the applicants to their previous positions, which they occupied prior to their dismissal.
3. The respondent is further ordered to pay each applicant backpay calculated at their rate of pay at the time of dismissal.
4. There is no order to costs.

H Molotsi

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: A Goldberg

Instructed by: Goldberg Attorneys

For the Respondent: J Scallan

Instructed by: D.R. Du Toit