

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Durban

Case No: D 510/99

In the matter between:

L. MZOLO & 12 OTHERS

Applicants

and

TOYOTA S.A MANUFACTURING

Respondent

JUDGMENT

PILLAY, J

1. The Applicants challenge their retrenchment by the Respondent in December 1998 and January 1999 on procedural and substantive grounds. The background to the dismissal spans over a year. Much of the evidence was documented. The documentation stood largely uncontested as to the truth of their contents. It is the primary source from which the Court can glean what the version of the Applicants' trade union, SAMRI was of the events as no one was called to testify on its behalf. I intend firstly, to traverse the evidence chronologically.
2. On 21 November 1997 the Respondent met with SAMRI to discuss the hostile global and national economic environment facing the motor industry and projected the consequences thereof for the Respondent at local and divisional levels. The analysis was that the Respondent needed to redesign its production processes to become more efficient in order to remain competitive. That involved a reduction in man-hours through voluntary early retirement

(VER), granting voluntary separations packages (VSP's), short time and extended cost cutting measures. The implications of these measures for each department were also presented. The clear message of the briefing was that the manning levels had to be reduced.

3. In February 1998 the Respondent initiated formal consultations in terms of section 189 of the Labour Relations Act No 66 of 1995 (LRA) with SAMRI.
4. On 3 March 1998 the Managing Director, Mr H. Coetzee addressed a notice to all employees about the manning levels reduction. The notice recorded that the consultations with the trade unions that began in 1997 arose as a result of the need to reduce the workforce because of declining production volumes, loss of business and process design.
5. The notice made it clear that although the decision to retrench had been taken, efforts were being made to avoid job losses through e.g. VER's, VSP's, short time, training and limited external recruitment. The employees were also informed that consultations were ongoing with amongst others, SAMRI in order to
 - *“ minimize the number of employees affected*
 - *seriously explore alternatives to retrenchments*
 - *agree process, timings, confirm NBF package, etc*
 - *agree post-retrenchment assistance ”*
6. Employees were invited to channel their concerns and proposals to their departmental human resources manager or shop steward for the attention of the appropriate forum.
7. It was not disputed that all the Applicants did receive this notice. There is no evidence as to what, if anything, each of the Applicants did on receipt of this notice.
8. Four days later on 7 March 1998 the Respondent made a presentation to senior managers about the manpower situation in the organisation. The briefing outlined the budgetary constraints, employment trends relative to production trends, the need to reduce the headcount and the means to achieve that, the employees who would be affected, the need for organisational restructuring and efficiency improvements. Specific procedural steps were

identified and the timing thereof presented. The Respondent confirmed that consultations would be ongoing. A benchmarking trip abroad was to be undertaken in April by senior executives. Training on key performance areas (KPA) would commence and continue from April. Ideas for the new structure were to be formulated by May. Staff reduction would commence from June 1998. Projections for the reduction of the head count due to the application of the KPA (as distinct from volume reductions arising from market forces) were also forecast.

9. The reductions due to market forces affected the hourly paid staff. In the case of the salaried staff, the reductions were driven mainly by the need to become more efficient in the prevailing global and economic climate.

10. On 20 April 1998 SAMRI representatives, including its chairman Mr T. Blaunfeldt, who was also an employee of the Respondent, met with representatives of the human resource (HR) department *“to continue consultations regarding retrenchments at Toyota which commenced towards the end of 1997.”* The agenda items were:

1. The reasons for the retrenchments
2. Areas affected
3. The process
4. Future plans

11. The Respondent's representatives traversed Mr Coetzee's presentation referred to above with SAMRI. It announced that a bench marking trip overseas would be undertaken by the executive management and that an exercise to identify KPA's was planned in order to achieve world class manufacturing standards. The need to retrench was restated.

12. Mr Thomson, the Human Resources General Manager, confirmed at this meeting that the consultations thus far had been in terms of section 189 of the LRA.

13. By letter dated 24 April 1998 SAMRI confirmed the discussions of the last meeting but supplemented the minutes in certain respects.

14. Firstly, SAMRI disputed that the consultations had begun in 1997. It alleged that there was

only one briefing in February 1998 when the possibility of a reduction in the manning levels was mooted. SAMRI was of the view that the first meeting held in terms of section 189 of the LRA was on 20 April 1998.

15. In its reply dated 5 May 1998 Mr Thomson contended that the first formal step in the consultative process was the meeting of 19 February 1998, which had been preceded by informal discussions in 1997.

16. The only evidence before the Court namely, the testimony of Mr Thomson and the documentation, support the Respondent's version that the consultations began formally in February and informally before then. A SAMRI representative should have testified if the Applicants wished to disprove this.

17. SAMRI also believed that the information supplied was selective. It was not convinced of the rationale. It requested that no further meetings be held at plant or departmental level but at the central level.

18. Mr Blaunfeldt, on behalf of SAMRI, nevertheless undertook to consider the Respondent's representations further and *"if necessary, make a formal request for further information as contemplated in terms of the Act."* He also indicated that SAMRI would submit questions about the commercial rationale for the retrenchments in due course.

19. To SAMRI's request that the Respondent terminate discussions at departmental or plant level, Mr Thomson reported thus:

"3. Discussions relating to the rationalisation and centralisation of the Tac "A" and "B" plants are already well advanced and your Mr Alan Dorning has been kept informed of progress at these plants. As explained to you, the rationale of manning reductions at the TAC plants is different to that at the TSM plant, and it is therefore our belief that these discussions should continue at plant level. We shall however continue to meet at a central level to discuss manning reductions at other plants, e.g. TSM."

20. Mr Thomson then invited SAMRI to seek any further clarity it required. He also pointed out

that the stage had been reached for considering the process of manning reductions.

21. In its response dated 7 May 1998, SAMRI requested written reasons or motivation for the contemplated retrenchments in terms of section 189(3) of the LRA. It persisted that all consultations including those relating to TAC, a division of the Respondent, should be conducted at a central level. It also disputed that Mr Dorning was consulted.
22. Mr Thomson, responding on 11 May 1998, pointed out that the records reflected that Mr Dorning had been involved in the consultations at TAC since 1997, where the *“consultation is already well advanced, and has fully covered the rationale for proposed manning reductions at our TAC plants, as well as ongoing exploration of alternatives, selection criteria, etc.”*
23. Mr Thomson also pointed out a contradiction in SAMRI’s faxes of 24 April and 7 May. SAMRI was requesting the Respondent’s reasons in terms of section 189(3) without engaging with or reacting to the representations made by the Respondent, despite having undertaken to consider such representations.
24. In a fax dated 12 May 1998 Mr Blaunfeldt persisted that there had not been proper consultations and threatened legal action if it did not receive written reasons for the retrenchments in terms of section 189(3). Until written reasons were supplied, SAMRI refused to consider meeting with the Respondent.
25. In his fax of 15 May 1998 Mr Thomson reiterated that there had been consultations with SAMRI at TAC. He also undertook to provide a written summary of the Respondent’s rationale for the proposed manning level reductions at TSM where the Applicants were employed.
26. On 22 May 1998 Mr Thomson once again sketched the global and economic trends impacting on the motor industry which informed the decision to become a world class manufacturer. In order to achieve this objective, the Respondent had identified three imperatives for itself namely:
 1. to clarify and redefine the roles and functions of employees per level and job, in order to increase efficiency and focus.
 2. to structure effectively in order to enhance efficiency and contain costs.
 3. to assess employee effectiveness and develop the requisite skills,

knowledge and ability in the people.

27. Once again SAMRI was invited to propose alternatives to the Respondent becoming a world class manufacturer, as consultations were to begin on the effect that the measures to achieve world class manufacturing would have on manning levels and the process to be followed.

28. SAMRI remained dissatisfied with the written reasons provided for the proposed manning level reductions as, in its view, there was still no compliance with section 189 of the LRA. Mr Soon Cronje, the general secretary of SAMRI, nevertheless agreed to meet with the Respondent to enable the latter to expand on the rationale for world class manufacturing so that SAMRI could assess *“to what extent it would impact on possible reductions in manning levels.”*

29. The following day, the meeting was held. According to minutes taken of the meeting Alan Dorning confirmed that the consultation process at TAC was no longer a problem. At the end of this meeting SAMRI accepted the need for the Respondent to review its manning levels and structures. Mr Thompson conceded that the acceptance did not extend the Respondent's need to retrench specifically.

30. Mr Thomson informed the SAMRI representatives that:

“The next meeting when we get together we will be in a better position to give a lot more detail on what depths will be affected by a reduction in headcount. There are areas that are fat and need to be addressed. The levels that will be looked at will be from levels 5 upwards. All levels will be affected. TSM will be looking at all depths and divisions and disciplines.”

31. This meeting put to rest SAMRI's concerns about the consultations at TAC and the fact that they were not being conducted centrally, as there is no evidence that SAMRI persisted with this complaint. Furthermore, SAMRI asked no questions nor made any comment about the substance of the information that the Respondent had shared with it up to that stage, the imperatives that the Respondent had identified or the next step that was to be taken in the reduction process i.e. the application of imperatives across the board in the organisation. Despite having protested that the information supplied had been *“selective”*, SAMRI did not clarify this concern or specify what further information it required, other than to insist on

compliance with section 189(3) of the LRA. In what respects section 189(3) had not been complied with was also not specified.

32. This led Mr Thomson to record in a fax to Mr Cronje that there was

“general agreement about the rationale for Toyota to review its manning levels and structures in order to remain competitive, and to progress towards world class manufacturing standards. Having reached consensus on the rationale for us to review manning levels and structures, we shall now need to consult on the effect of the company proposal on these issues.”

There was no reaction from SAMRI to this letter. As far as the Respondent was concerned, discussion about the rationale for the review of the manning levels was now closed.

33. Thereafter, there was a lull in activity at the central level while the results of the bench marking trip were considered and implemented by the managers. During this period Mr. Thomson testified that the results of the bench marking trip had become available. Several reports including the one from Mr. Jansens, a director, were available. He had not seen the report himself until about November 1998. Some managers received KPA training. In addition, 8 members of SAMRI, including Mr. Blaunfeldt, Mr Soon Cronje, and Mr. Alan Dorning also received KPA training. The Respondent did not consult with SAMRI or all the managers about the bench marking trip reports *per se*. However, managers were given the learnings from the trip which had been contextualised for local conditions. The process was outlined for them and they were instructed to go through it departmentally.

34. Managers at departmental level had to look closely at their structures and, in consultation with the workforce at that level, to explore whether there were better ways of functioning in order to achieve world class manufacturing standards. They had to develop new organograms for their departments. As many SAMRI members were senior employees, they were deeply involved in the process of implementing the restructuring to achieve world class manufacturing standards. While the details were dealt with at plant level, the broader issues were discussed at central level. Included in such issues were the rationale for the manning level reductions, how it was to be undertaken and what the effect would be on the employees.

35. This testimony of Mr Thomson was largely corroborated by Mr Leonard von Graevenitz and the line managers of the applicants who each outlined the steps that they took in relation to the applicants concerned in the restructuring process at departmental level. In the absence of any evidence from the Applicants and SAMRI, it stands uncontroverted. I will return to the detail of their evidence in due course. This approach had never been questioned by SAMRI while the process was underway.

31. On 12 October 1998 the Respondent briefed its senior managers who included some SAMRI members, about the economic forecast for 1999, the deteriorating market conditions, the implications for production, the reduction of working time and outlined an action plan. The plan itemised resizing, cost containment measures including a cut in human resource costs and voluntary separation and specified the time frames therefor.

36. On 3 November 1998 the Respondent informed SAMRI that the time had come to consider reducing the manning levels for the reasons given during the consultations. Mr. Thomson discussed several alternatives such as short time, reduction of overtime, curtailment of external recruitment, VER and VSP's, release of casuals and training. Some of the alternatives had already been implemented. Cumulatively, they did not go far enough to reduce the manning levels to the extent that was needed. Further reductions were necessary and SAMRI was invited to participate fully in discussions about the reduction in manning levels. There was no input or questions from SAMRI at this meeting.

37. The consultations resumed on 5 November 1998. Mr Thomson recapitulated on the rationale for the manning reduction and the alternatives considered. He requested SAMRI to also consider alternatives and submit its proposals within the week. One of the concerns raised by SAMRI was the issue of centralised and decentralised consultations. Mr Thomson assured SAMRI that the overall programme would be governed from the central manning meetings while *"process related issues would be consulted on at plant level."* SAMRI seemed to have accepted the explanation as no further objection or counter-suggestion was made.

38. The only other concerns raised by SAMRI at this meeting related to alleged coercion by line managers of employees for them to take the VSP's. Outsourcing and the employee assistance programme (EAP) were also discussed. It neither commented on nor questioned the rationale for the reduction and the process to be followed.

39. The next consultation was held on 12 November 1998. Despite being asked at the previous meeting about a week ago to propose alternatives by 11 November 1998 in writing, SAMRI claimed that it was not aware that it had to do so at this meeting. It had therefore not made any written proposals as requested.

40. Nevertheless, during the discussions it proposed several alternatives including:

- reconsideration of the VSP applications that had been refused;
- extension of the period for making VSP applications;
- 'sweetening' the package for employees reaching early retirement; and
- inter-divisional transfers.

41. The Respondent reiterated the alternatives that it had already considered or implemented. On reporting that contracts with contractors could not be cancelled, Mr Frans Davidtz who had recently joined the SAMRI team, requested a list of the contractors who might have affected the position.

42. Despite having accepted the rationale for reviewing the manning levels at the meeting of 23 June 1998, SAMRI reserved its rights to request a written explanation for the economic rationale for the retrenchments. Mr Thomson pointed out that this information had been dealt with extensively in previous meetings and in writing. SAMRI did not specify what was deficient in the explanation that had already been provided up to and including 23 June 1998.

43. No comments, questions or concerns were raised about the restructuring that was already underway in TSM. This meeting had been attended by senior SAMRI representatives including Mr. Blaunfeldt and Mr. Cronje who had also undergone KPA training. In the absence of any objection about the process thus far, it was reasonable for the respondent to assume that SAMRI, knowing what the process was and how the restructuring was being implemented, had no complaints about it. The reservation of their rights could have meant no more than a sign of the general unhappiness that any trade union would experience if their members are retrenched.

44. Furthermore, as the senior and other SAMRI members were being engaged at departmental level and as the economic rationale for the reduction of the manning levels, be that through temporary measures such as short time or retrenchments, had been presented and agreed, the request for the economic rationale for the retrenchment at this stage was *prima facie* unreasonable. Not surprisingly, Mr. Thomson concluded that SAMRI was being obstructive. It must also be pointed out that the content of SAMRI's input focused on ways to avoid the retrenchment. It did not contest or otherwise engage the Respondent about the economic and efficiency rationale for the restructuring.
45. On 13 November 1998 Mr Cronje e-mailed Mr Thomson about his concerns that certain managers were drawing up lists of employees apparently without criteria as they did not know what criteria had been agreed. Mr Thomson clarified that the manning reductions were due to restructuring and that it was inappropriate to identify individuals for retrenchment at that stage. Acknowledging that there could have been a communication problem, he undertook to forward Mr Cronje's concerns to the managers involved.
46. About 17 November 1998 Mr Blaunfeldt informed Mr Thomson that SAMRI had reserved its rights to "*question further information to convince us as to the reason for the proposed redundancies*". The meeting of 12 November was purportedly the first opportunity SAMRI had to hear alternatives to the proposed retrenchments.
47. The meeting of 12 November was clearly not the first time that the Respondent had tabled alternatives to the manning level reductions for discussion.
48. Mr Baunfeldt then requested various financial information, information about the alternatives SAMRI had suggested, about outsourcing and training. The information was required purportedly to enable SAMRI "*to expand on the alternatives.*" No information about the selection criteria was sought.
49. Financial information is usually sought at the beginning of the consultation process. More than 10 months had passed since the consultations began. Why such information was being sought at such a late stage in the process, remains unexplained. Nevertheless the information was supplied.

50. Mr Thomson reverted to SAMRI about its alternatives on 17 November 1998. The VSP's having been extended once could not be extended again as there had not been many applications therefor. *"Sweetening"* the package for early retirement would have been counter-productive to the Respondent's objective of attaining world class manufacturing standards. The purpose of the restructuring was to reduce the manning levels without shedding skills and efficiencies. The Respondent's refusal to accede to these proposals was therefore not unfair as suggested by Mr Wade.

51. Despite having considered or applied the alternatives, it was still necessary to reduce the salaried staff through retrenchment. Mr Thomson notified SAMRI that at the *"next meeting a list of redundant positions and employees as well as proposed selection criteria for employees not in redundant positions but who may have to be retrenched"* would be provided.

52. When the consultations resumed two days later, a number of issues arising from the previous meeting was raised. That the stage had been reached to consider a list of redundant positions and employees and proposed selection criteria, was not contested.

53. Despite having refused previously to extend the date for the VSP's the Respondent agreed to consider a number of VSP applications that were made after the closing date. It rejected the request to extend the VSP to the new year as it wanted to finalise the reduction programme by the shut down to avoid the uncertainty amongst staff, and for economic reasons.

54. SAMRI proposed short time and other temporary measures to avoid retrenchment. These were rejected given the nature of the re-organisation and the prolonged poor economic forecasts.

55. The respondent explained the severance pay package which exceeded the LRA limit.

56. The selection criteria were explained as follows:

"a) Entire function/department/section redundant:

This will result in the positions affected and present incumbents becoming redundant.

b) Decreased workload as a result of restructuring/volume reduction:

Selection criteria will be a combination of last in first out and the skills of existing incumbents.”

The Respondent undertook to provide SAMRI with a list of the affected positions by 23 November 1998. SAMRI reserved its comments on this issue.

57. Mr. Thomson confirmed the date for completing the reduction programme as 11 December 1998. He estimated that about 70 salaried employees would be affected by the compulsory manning reduction process. SAMRI requested time to revert about the matters arising from that meeting. The SAMRI representatives at this meeting included Mr Blaunfeldt, Mr Cronje and four other members.

58. On 23 November 1998 the Respondent provided SAMRI with the outstanding information requested on 17 and 19 November 1998, including lists of the affected salaried staff by reference to work area, position and levels. This was followed on 25 November 1998 with lists of the names and functions of salaried and electrical staff who would be affected by the reduction. A series of e-mails were then exchanged querying the selection of particular individuals for retrenchment.

59. When the consultations resumed on 26 November 1998 it was to confirm the names and number of employees affected, the timing and the package and to discuss the post dismissal assistance to be afforded to the retrenchees.

60. SAMRI objected to employees being informed by the managers that they were retrenched as this undermined the consultations at the central forum. The Respondent clarified that affected employees were merely being consulted by the managers to be informed that their positions had become redundant and to receive their comments. Such consultations were not considered by the Respondent to be final notices of retrenchment. This was not contested by SAMRI.

61. Mr Thomson reminded SAMRI to make their submissions about the proposed retrenchments as requested on 19 November 1998. SAMRI agreed to do so by 2 December 1998. SAMRI once again challenged the rationale for the redundancy. This time it was on the basis that it was *“unaware that world class manufacturing, benchmarking and restructuring were part of the rationale for manning reductions”*. In refusing to revisit the issue Mr Thomson recounted

the previous communications which dealt with the rationale.

62. The Respondent restated its position regarding the severance package. It rejected SAMRI's proposals to improve the severance package as it was more than twice the prescribed amount.
63. As regards the affected employees, SAMRI refused to discuss the issue as it alleged that it had not been consulted fully on the restructuring rationale. Mr Thomson pointed out that the matter had been covered at the meeting of 19 November 1998. SAMRI agreed to submit written queries regarding specific employees by 2 December 1998 after being assured that the final retrenchment notices would not be issued before then.
64. At this meeting, SAMRI had still not commented on, criticised, questioned or made any counter-proposal about the selection criteria.
65. On the same day Mr Coetzee issued a notice to all employees reporting on the manning reduction programme. He confirmed that the employee representatives had been consulted on alternatives to retrenchment, selection criteria and post dismissal assistance. He referred employees to management structures in case of difficulty.
66. By e-mail dated 2 December 1998 Mr Cronje provided the Respondent with a list of concerns regarding nineteen individuals. The primary complaints were that there were no consultations with or about the employees listed and that there were no selection criteria.
67. Having now obtained clarity as to what further explanation SAMRI required, the Respondent arranged consultations for 7 and 8 December 1998 with SAMRI to discuss each listed employee's case with the line manager concerned. SAMRI's list formed the basis of those discussions.
68. At the consultations of 7 and 8, SAMRI declared at the outset that the entire process should commence afresh as the Respondent had given no rationale for the restructuring and had not complied with section 189 of the LRA. Mr Blaunfeldt eventually agreed that SAMRI would participate whilst reserving its rights.
69. Thereafter, the managers were called to discuss each employee and department concerned.

Many presented organograms of the department before and after the proposed restructuring. The motivation that was presented to SAMRI at this meeting for the identification of particular individuals for retrenchment was substantially the same information that was provided to the court when the managers testified, and to the Applicants when they were consulted during the process of redesigning the departments. The Applicants did not dispute that the information had been provided to SAMRI as summarised in Exhibit A326A-L. If the justification for the retrenchment of certain individuals as presented at the meeting of 7 and 8 December 1998 was not in dispute, the Applicants should have made this concession in the pre-trial proceedings to curtail the proceedings.

70. Not all the managers were aware of written reports of the bench marking exercise. They were given directions from senior management either in the form of a percentage by which the manning levels should be reduced or the functions that should cease or be restructured. The first phase was to redesign the departments in accordance with the directives in order to identify the posts that would be redundant and those that needed to be restructured by e.g. minimising the functions.
71. The second phase was to apply the selection criteria to those whose positions had become redundant or were restructured. All the managers testified that they applied the selection criteria as recorded at Exhibit A293. Their interpretation of the criteria was that if the position became redundant, the employee concerned would have to be retrenched, unless a vacancy could be found. Despite this, some of them went beyond the scope of the selection criteria and considered skills and LIFO even if the individual's position had been declared redundant.
72. Some managers compared the education and qualification of employees when making the selection in order to identify employees who would be most skilled. In this way they ensured that the person selected for retrenchment was in fact the least suitable for the position, having regard to the Respondent's objectives for restructuring.
73. As a result of the consultation on 7 and 8 December 1998 the retrenchment of 10 employees was suspended until the end of January 1999, pending further consideration.
74. The kernel of the concerns that SAMRI had about the explanations provided by the managers was captured thus in a letter sent to the Respondent about 10 December 1998:

“Certain of the managers indicated that they did not consider alternatives outside their own department, the one manager had stated that he had given a list of employees to the Human Resources Department and he considered it their duty to investigate alternative positions outside his department. We require that the above information be confirmed to us in writing as required by the Act and in terms of paragraph 1(c)(iv) of the draft Court Order in order that we may consider same and revert to you with our comments and proposals;”.

SAMRI raised no concerns about the selection criteria at all.

75. Mr Thomson confirmed on 10 December 1998 that as regards the other employees who had been selected, the consultations in regard to them were concluded.

76. In a fax dated 11 December 1998 SAMRI contended for the first time that consultations over the selection criteria had not taken place and the Respondent had failed to provide the economic rationale for the reduction. The Respondent suggested that the parties meet in the new year to discuss these aspects in relation to all its members.

77. The employees were retrenched on 11 December 1998. Discussions about the 10 suspended retrenchments resumed on 18 January 1999. Three of them were placed in vacancies in the MLD division. With regard to Twelfth Applicant and one Mr Steenkamp SAMRI suggested that medical boarding be considered. It proposed that one Mr Visagie be employed at a lower band and the existing incumbents be “bumped” on a LIFO basis. With regard to Messrs Mjweni and Rungasany, SAMRI requested that the Respondent should explain the difference between the early retirement and retrenchment packages to them.

78. The Respondent was prepared to accommodate all but three of the remaining seven employees. These three namely, the Eleventh Applicant, Mr Mjweni and Mr Rungasamy were retrenched on 31 January 1999.

79. It can be inferred from the content of the proposals that were made that SAMRI accepted the rationale for the retrenchments.

80. With regard to the Seventh Applicant, Mr McConnel had received a directive that the

refurbishment function had to be eliminated. The Seventh Applicant's position therefore became redundant. As such, if no vacancy could be found for him he had to be retrenched in terms of the selection criteria. Despite this, Mr McConnel compared the seventh Applicant's years of service and skills with others in his grade in the department. In terms of the selection criteria this step should only have been invoked if his position had been restructured.

81. It transpired that the Seventh Applicant had four years service against the 2 years of Messrs Atherton and Sumpton. However, he fell short on skills. Messrs Atherton and Sumpton had N3 and N4 certificates respectively, hydraulic training and had been trained in-house in fault finding on all the new machines in the plant. Being in refurbishment, the Seventh Applicant's experience was in machinery that was over 15 years. He could build machinery. However, he had not worked in maintenance where there had to be a quick response to breakdowns during production.
82. In May 1998 the Seventh Applicant had been transferred from his job as a fitter to the laboratory in the paint shop because of a back injury. The initial period of three months was extended. His retrenchment on 11 December 1998 was effected from the laboratory.
83. Mr McConnel testified that when a general skills audit was done the Seventh Applicant was asked to produce proof of his qualifications which he alleged he had acquired in England. He was unable to do so as his certificates were stolen from his car and he could not have them replaced. As a result when he was identified for retrenchment this qualification could not be considered.
84. The Seventh Applicant was also not multi-skilled. Having searched for vacancies in other machine tool maintenance areas, no vacancies were found. Accordingly, having applied both criteria, the Seventh Applicant could not be rescued from the retrenchment list.
85. At the consultation on 7 and 8 December 1998 SAMRI suggested that alternatives be considered for the Seventh Applicant because of his disability. Mr McConnel subsequently offered the Seventh Applicant a grade 4 position. He rudely rejected the offer. He confirmed during his testimony that he was still not able to do the work of a fitter and asked to be reinstated into the position he had held in the laboratory. That position had been made available to him temporarily to accommodate his disability.

86. That is the evidence summarised chronologically. Before turning to analyse the evidence, the Twelfth Applicant's case can be dispensed with first.
87. The Respondent's case as regards the Twelfth Applicant was that Mr Peter Shadwell, the General Manager: Quality Assurance and Mr Thomson met with him and explained that if he wanted to pursue the option of being medically boarded he would have to make the application himself and the Respondent would support it. Pending the outcome of the application, he was to be temporarily transferred to CVA for January.
88. If he did not wish to apply to be boarded he was invited to suggest other alternatives that might be jointly investigated. If necessary, the retrenchment date would have been further postponed. This communication was confirmed in writing [Exhibit A106-7].
89. The Twelfth Applicant e-mailed his response on the 29 January 1999 that he did not want to pursue the medical boarding option and requested that his retrenchment be processed.
90. He negotiated and accepted that he would remain on the medical aid scheme and any additional payments would be deducted from his retrenchment package. He also accepted that he could continue to use a leased vehicle for February, the payment for which would also be deducted from his package. He thanked the Respondent for its assistance.
91. The Twelfth Applicant was one of the two witnesses who testified. He was unimpressive as a witness. He was evasive and clearly had a long-standing axe to grind with the Respondent. Any merit that might have existed in his case quickly dissipated when he testified that his retrenchment amounted to victimisation because he had lodged a grievance against his superior, Mr Simon Blevins. This had never been pleaded.
92. The Court finds that the Twelfth Applicant negotiated and accepted his retrenchment and the terms thereof. He can have no claim for unfair dismissal in the circumstances.
93. Turning to the analysis of the evidence, although non-compliance with fair procedure can lead to substantive unfairness, the Court will for convenience deal with each ground separately.

94. In their statement of case the Applicants made the bald allegation that there was no substantive basis for their dismissal. In the second Pre-trial Minute, they attempted to clarify the issue further as follows:

“6. In regard to the issue of substantive unfairness, the Applicants advised the Respondent that they required it to establish the rationale for their retrenchments as a result of them being unable to understand such rationale.”

95. For the first time the Applicants disclosed that the complaint of substantive unfairness was founded on their inability to understand the rationale for the retrenchments. The complaint was not that the rationale did not exist or had not been supplied.

96. This lack of understanding was expatiated in the Addendum to the Pre-trial Conference Minute as follows:

“1.2 The Applicants are, however, unaware as to how the objective of becoming a world class manufacturer impacted on manning levels, or the extent to which the attaining of that objective necessitated a review of the Respondent’s structures or manning levels...”

97. The Addendum which was prepared at the request of the Court so that the parties complied with its guidelines for pre-trials in retrenchment disputes, was only filed after the trial started. It was submitted for the Applicants that they were hampered in pleading and preparing their case as they did not understand the rationale for the retrenchment. Why it was that the Applicants had never before articulated the alleged substantive unfairness as they did in the Addendum was not explained. The expatiation is a far cry from the bald statement originally pleaded.

98. Mr Wade submitted that it was implicit from SAMRI’s request during the consultations for a written explanation for the economic rationale for the retrenchments that it had not understood what the implications of implementing world class manufacturing would be on the manning levels. To draw such an inference from the request is somewhat far-fetched. SAMRI represented senior employees who should have had no difficulty in either understanding the rationale or articulating their lack of understanding precisely as Mr Wade put it. Furthermore, the emphasis in the request appears to be that the rationale should have been provided in writing, as specified in section 189(3). Whatever the intention was in making the request, it should not have been left to the Court to draw inferences about a matter of such importance to

the Applicants' case. A SAMRI representative should have been called as a witness by the Applicants to explain the request.

99. Having regard to the cross examination of Mr. Thomson it would appear that Mr. Wade drew a distinction between the rationale for reviewing the manning levels on the one hand and for the retrenchments on the other hand. There is no evidence that SAMRI also made such a distinction. If it did, it was not communicated to the Respondent during the consultations. The rationale for reducing manning levels was also the rationale for the retrenchment, the latter being one of several ways of reducing manning levels.

100. In the circumstances, the probabilities are that the complaint of substantive unfairness had not been seriously made initially and was embellished only after the trial began.

101. The Applicants' concession in the Addendum

"1.1... that there was a need for the Respondent to review its manning levels and structures in order to remain competitive and to progress towards World Class Manufactures Standards. The Applicants accordingly do not dispute the prevailing economic circumstances, both local and international."

is therefore not surprising.

102. What is surprising however, having regard to the chronology of events, is the submission for the Applicants that they did not understand that implementing measures to achieve world class manufacturing standards would lead to retrenchments. Whether SAMRI knew and understood what the rationale was for the retrenchment is linked to the second leg of its challenge namely, the Respondent's failure to consult.

103. In their statement of case the Applicants pleaded that the dismissals for operational reasons did not comply with section 189 of the LRA and the guidelines because the Respondent failed to consult SAMRI on

"17.8.1 The reason for dismissals;

17.8.2 Appropriate measures:

- *to avoid the dismissals;*
- *to minimize the number of dismissals;*

- *to change the timing of the dismissals; and*
- *to mitigate the adverse effects of the dismissals.*

17.8.3 *The method for selecting the employees to be dismissed.*

17.8.4 *The severance pay for dismissed employees.”*

104. It was further alleged that the respondent had failed to disclose, in writing, to SAMRI the information referred to in section 189(3) of the LRA.

105. Despite attempts to clarify the procedural challenge in pre-trial proceedings, the net effect was that everything about the procedure remained in issue, with particular emphasis on the selection criteria and the duty to consult. The second Pre-trial Conference Minute summarised the position thus:

“7. In regard to the issue of procedural unfairness, the Applicants advised the Respondent that they intended to allege that it had failed to consult with them as contemplated in Section 189(1), 189(2)(a), 2(b), 2(c) and 189(3)(a) to (h) of the Labour relations Act, Act No 66 of 1995 (as amended).”

106. Whereas the Statement of Case and the First Pre-trial Minute restricted the procedural unfairness to sections 189(2) and (3) of the LRA, the second Pre-trial Minute expanded it to include subsection (1). Section 189(1) prescribes with whom an employer should consult if it contemplates dismissing for operational reasons. The Applicants failed to plead or prove in what respects section 189(1) had not been complied with. The Respondent consulted with SAMRI. There is no evidence that it ever refused to do so.

107. Section 189 (2)(b) provides:

“(2) The consulting parties must attempt to reach consensus on [-]
b) the method for selecting the employees to be dismissed;”

108. Section 189(3)(d) provides:

“(3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to-...
(d) the proposed method for selecting which employees to dismiss; “

109. Disclosure must therefore take place before consultation, which in turn must precede selection. The purpose of the disclosure is to enable the consulting parties to try to reach agreement on the selection criteria. In this way they can satisfy themselves first that the criteria are relevant, fair and objective before creating anxiety and instability unnecessarily as would happen if criteria were applied without consultation and were found to be inappropriate.

110. The Respondent's evidence is that after agreement to review the manning levels had been reached with SAMRI in June 1998, the line managers began to plan for the reductions. It was inadvisable, according to Mr Von Graevenitz, to discuss with SAMRI the plan or propose names of potential retrenchees at such a formative stage of the process as, in an organisation such as the Respondent, it would have led to unnecessary and prolonged anxiety and instability in the workforce. The selection criteria were then disclosed, discussed and applied within departments to generate a list of possible retrenchees. The Applicants have led no evidence to gainsay any of this.

111. Four phases to the selection process can be identified. The first was selecting and applying the criteria for restructuring each department. The criteria applied in this phase were the three imperatives referred to above that were prescribed to the managers.

112. It was recorded on behalf of the Applicants in the Addendum that:

"2.1...the Respondent failed to consult them at all regarding the application of selection criteria.

2.2.They are simply not in a position to comment on the fairness or otherwise of the selection criteria employed by the Respondent as they were at all times prior to their selection unaware as to:

2.2.1which functions/departments/ sections would become redundant; and

2.2.2which of them had a decreased workload as a result of restructuring."

It would appear that the Applicants now have no quarrel with this phase. If they do then they have not led any evidence about why the departments should not have been restructured in the way that the Respondent did.

113. The second phase of the selection process should have been to consult and perhaps agree with SAMRI the criteria that would have applied in selecting for retrenchment those employees whose functions became redundant or reduced. The third phase should have been to apply the

criteria to generate a list of possible retrenchees and the last phase would have been to consult with SAMRI to ensure that the criteria were applied fairly.

114. On the Respondent's version the selection criteria had been applied before 19 November 1998 i.e. before they had been tabled for consultation at the central forum. Mr Winchester submitted that the application of the selection criteria was merely to assess who might be affected by the restructuring. It was, he said, in the language of Kotze v Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ 129 (LAC) an exercise undertaken "*in principle*".

115. Phase three preceded phase two of the selection process. In the context of this retrenchment where all material issues had been tabled in the central forum, the selection criteria should have been discussed with SAMRI before the Respondent applied it to extract an "*in principle*" list.

116. The omission to disclose the selection criteria in the central forum before they were applied departmentally must however, be evaluated after a conspectus of all the evidence. In deciding whether the omission was fatal the court needs to also look at the substance of what was actually done.

117. Over a period of about four months the Respondent had explained the need to reduce its manning levels for economic and efficiency reasons. Intrinsic to all the interaction between the consulting parties was the acknowledgement that there would be retrenchments. The subject matter of the correspondence and the meetings referred explicitly to manning level reductions and often retrenchment was specifically mentioned.

118. Many SAMRI members were employed in senior positions by the Respondent and some, including its senior officials, were especially trained in KPA's which was the means by which world class manufacturing standards were to be achieved.

119. SAMRI had in fact agreed in June 1998 to the review of the manning levels. Apart from its incantation for the economic rationale for the retrenchment, SAMRI did not debate whether the decision to reduce manning levels was substantively justified. It preoccupied itself with finding ways of avoiding and postponing the retrenchments. This also fortifies the conclusion that the challenge to the substantive fairness was not seriously made.

120. For the Applicants to contend that they did not know how the implications of measures to achieve world class manufacturing standards impacted on manning levels or the extent to which it impacted on manning levels is wholly disingenuous. SAMRI was consulted about these issues. They had ample opportunity to ask questions which would have provided the Applicants with answers to clarify their understanding.

121. The managers had worked with the Applicants and SAMRI members at departmental level to redesign the structures. That was the second source through which the Applicants would have been informed. The specifics of the redesign and proposed restructuring which would have resulted in retrenchment was, on the uncontroverted evidence of the all the Respondent's witnesses, consulted on at departmental level. It was also their evidence that SAMRI and the applicants were aware of this and had raised no objections to consultations being conducted at dual levels.

122. Evidence of the practice of consulting about the selection criteria at departmental level exists in relation to the TAC division.

123. In his letter of 17 November 1998, Mr Thompson informed Mr Blaunfeldt that the Respondent would provide at the "*next meetings a list of redundant positions and employees as well as proposed selection criteria for employees not in redundant position but who may have to be retrenched*" (my underlining). On receipt of this letter SAMRI did not protest about a list of possible retrenchees being prepared before the criteria was agreed. What was presented then at the consultation of 19 November 1998 were proposed criteria, despite the fact that they had been applied to extract a *proforma* list.

124. SAMRI could have influenced the selection criteria. However, there is no evidence that it attempted to do so at all. On the contrary, all the available evidence suggests that it accepted the criteria at all times.

125. The Respondent's witnesses all understood at the time that the lists were not cast in stone. They were willing to amend the lists, which they subsequently demonstrated by actually suspending and reconsidering the retrenchment of 10 employees.

126. When on 13 November 1998 Mr Cronje raised a complaint about certain managers drawing up lists of employees without knowing what criteria had been agreed, the selection criteria had not yet been discussed between SAMRI and the Respondent at a central manning level. SAMRI could have but did not request that the selection criteria be discussed immediately. From SAMRI's silence and in the context of the Mr Cronje's e-mail, it would seem that the selection criteria *per se* was not a contentious issue then.

127. If it was an issue, the relationship between SAMRI and the Respondent was such that it could have raised it either in an e-mail as it did in relation to the MLC department, or at a central manning meeting. Mr Thomson's unchallenged testimony was that the relationship with SAMRI was an open and accessible one.

128. The moment for challenging the selection criteria was the meeting of 26 November 1998, if not before. Having questioned many other issues, SAMRI's silence on this aspect can only be interpreted to mean acquiescence, that is acquiescence about the criteria *per se* and their application in principle.

129. A two-day consultation was held specifically to explain the retrenchment of every individual whose proposed retrenchment was questioned by SAMRI.

130. However, havoc was being created as a result of communication problems. Letters of retrenchment were despatched prematurely. With the restructuring consultations and implementation taking place departmentally, the human resource department omitted to ensure that the line managers understood the limits of their mandate. Nevertheless, Mr. Thomson rectified these improprieties immediately.

131. The Respondent did not unreasonably withhold any information from SAMRI. There was no reason for it not to disclose the selection criteria at the central forum. It did not involve discussing names or positions of individuals. It may well be that the departments worked ahead of the central forum discussions. The human resources department might have temporarily lost control of the co-ordination of the departments. However, the selection criteria were not a secret. Nor was it deliberately withheld from the employees.

132. Accordingly, I must find that the Applicants knew what the criteria were and how they were being applied. They could have informed SAMRI, especially if they wanted to change the criteria.

133. Mr Wade submitted that SAMRI was not consulted about the severance package and the selection criteria. They were simply informed about them. That submission was made on the basis of the wording of the minutes of the meeting of 19 November 1998. Firstly, the minutes were a summary of the discussions, not a verbatim transcript. Mr Von Graevenitz confirmed that there was no discussion on these issues. However, SAMRI had the opportunity to respond to these issues if it wished. There is no evidence nor do the Applicants suggest that SAMRI attempted to discuss these issues but was prevented from doing so. If SAMRI chose to remain silent, it cannot now complain that there was no discussion.

134. Mr Wade suggested, without any evidence being led, that SAMRI had been prejudiced by not being given the agenda for meetings in advance so that they could prepare. If that was a concern for SAMRI at the time I have no doubt they would have raised it. When they did not receive the minutes expeditiously, they did not hesitate to complain.

135. Although the Applicants pleaded that the Respondent failed to apply fair and objective criteria, they led no evidence that such criteria as were applied were unfair or arbitrary. Nor have the Applicants led any evidence to say what criteria would have been fair and objective.

136. During the cross examination of the Respondent's witnesses it became apparent for the first time that the applicants contention was that "*bumping*" should have been considered and applied to ensure that long serving employees were retained. If SAMRI believed that there was any merit in "*bumping*" as a selection criteria it would have raised it. The meetings were also attended by senior officials of SAMRI, including on occasion its legal adviser Mr. Davidtz. The issue was also never pleaded or raised in the pre-trial minutes.

137. All the Respondent's witnesses were unanimous in their view that "*bumping*" would have been impractical and unworkable. In an organisation of about 6000 employees and several divisions they would not know where to start. Mr Shadwell attempted to sketch a scenario if "*bumping*" was applied. It would mean that each manager would have reorganised his department so that it is lean. A pool of potential retrenches would emerge. Their names would then have to be cascade down from one department to the next. The result would be that new and especially

trained personnel would be retrenched and replaced by longer serving employees who did not have the appropriate skills. The time that such a process might take may be a year. To traumatise the workforce with such uncertainty would lead to instability. At the end of it all it may well be that the Respondent had not achieved the objectives for which it began the process in the first place.

138. The selection criteria applied by the Respondent were fair, objective commercially and organisationally justified. Mr Wade submitted that the managers went beyond their briefs to consider criteria such as education and qualifications in selecting the retrenches as such criteria went beyond the criteria of skills.

139. Skills means :

“Knowledge (of). . . . 2 Ability to do something (esp. manual or physical) well; proficiency, expertness, dexterity; an ability to do something, acquired through practice or learning” (The New Shorter Oxford English Dictionary.)

140. In enquiring about the Applicants’ education and qualifications, the managers did no more than assess the Applicants’ respective abilities or potential to do the job. Hence, an applicant within a computer qualification would have enjoyed preference in a technologically transforming environment. It must be remembered that the purpose of restructuring was not simply to reduce costs for the sake of it. The Respondent needed to restructure in order to build in efficiencies to be competitive in a global market. Hence it would not have served the Respondents purpose to apply LIFO strictly without regard to the Applicants’ respective abilities to do the job.

141. Mr Winchester submitted that as Mr Blaunfeldt had intimated after the meeting of 7 and 8 December 1998 that the retrenchments were conducted fairly, it was not open to the Applicants to challenge their dismissals. Mr Thomson had testified that about 10 December 1998 Mr Blaunfeldt had said to him telephonically words to the effect that they had *“fought a good fight”*, that the Respondent and SAMRI had done everything they could to avoid the retrenchments. When he was saying this Mr Thompson believed that Mr Blaunfeldt was in the company of Mr Davidtz, SAMRI’s legal adviser.

142. The Court cannot elevate this exchange to be acceptance and endorsement by SAMRI that the retrenchments were fair. Besides being merely an expression of Mr Blaunfeldt’s opinion, it was

not pleaded as a defence by the Respondent. As a material aspect of the Respondent's case it should but was not recorded in writing to SAMRI. It was led after an adjournment and after the evidence-in-chief had been led, almost as an after thought. Correspondence from some of the other SAMRI officials after 7 and 8 December 1998 records continuing dissatisfaction with the retrenchments. However, the evidence stands as proof as to what SAMRI, or at least its Chairman and possibly its legal adviser thought about the process at the time.

143. However, there is also other evidence which supports the suggestion that Mr Blaunfeldt was satisfied with the process. Mr Greg Stanley, a SAMRI official, e-mailed Mr Blaunfeldt on 20 January 1999 about a problem with 10 retrenchments; he needed to decide how to handle them. Mr Blaunfeldt responded as follows:

"Unfortunately you were not present at our meeting with Toyota on the 18th. All these issues are well in hand & we FD included are awaiting Toyota's response to questions raised. Please hang on, do nothing & we will advise of the developments once known. Thanks."

144. Mr Stanley was not satisfied with this response. It would appear that there was some dissension within SAMRI's ranks about how to deal with the retrenchment. A possible inference to be drawn from the absence of SAMRI as a witness in these proceedings is that Mr Blaunfeldt's testimony might have been damaging to the Applicants' case. He would have had to explain for instance why, as late as 20 January 1999, he was not willing to challenge the retrenchments if the facts for a case of alleged unfair dismissal had already been established. This evidence cries out for an explanation from Mr Blaunfeldt or any other SAMRI official.

145. Finally, the Respondent made out a *prima facie* case that each Applicant had been consulted in the redesigning process and in the process of applying the selection criteria and determining the severance pay. The Respondent's witnesses were not challenged about this. They also failed to lead any evidence in rebuttal.

146. The Respondent's omission to disclose the criteria for retrenchment before it was applied departmentally was a procedural defect. However, it was not a material defect that vitiated the entire retrenchment procedure. If I am wrong about this, I will need to consider the matter of compensation.

147. None of the Applicants refuted the evidence that they knew before the trial began precisely

why they were selected for retrenchment. The trial became unduly protracted when the line managers had to testify about each Applicant. That information had already been presented to the Applicants or their representatives prior to and on 7 and 8 December.

148. But for two of the Applicants, the rest immunised themselves against the risks of cross-examination by not testifying. In the case of the Seventh Applicant who did testify, the evidence did not support the remedy he sought. He rudely rejected an offer of alternative employment although in a lower grade, and persisted in a claim for reinstatement when he knew full well that he had a medical condition which prevented him from returning to his position as a fitter.

149. The role of SAMRI during the consultations and the trial was unhelpful. During the consultations it elected to “reserve its rights” instead of to actively engage the Respondent. Consultation involves more than taking counsel or seeking information or advice from someone. (*MAWU v Hart (1985) 6 ILJ 478 (IC)*) In retrenchments, it is a “*joint problem-solving exercise*”. (*Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA (1994) 15 ILJ 1247 (A)*). If one party chooses not to debate the issues but to remain silent, then it also chooses not to exploit its opportunity to consult.

150. In the circumstances, there is no reason to penalise the Respondent with an order for compensation or award the Applicants more than the severance packages they had received. However, despite finding that the failure to consult about the selection criteria before it was applied was not a material procedural defect, it was nevertheless a formal flaw in the process. The Respondent is therefore not entitled to any costs.

151. In the circumstances the Court grants an order in the following terms :

- a. Colin Arnold Victor Coombe in his capacity as executor of the Estate Late William Edmund Yates, is substituted for the Sixth Applicant.
- b. The dismissal of the Applicants for operational reasons was substantively and procedurally fair.
- c. Each party must pay its own costs.

Judge Labour Court of SA.

Date of Trial : 6 – 16 November 2000
Date of Judgement : 7 December 2000
For the Applicants : Adv. R. Wade
Instructed By : Deneys Reitz
For the Respondent : Adv. A. Winchester
Instructed By : Shepstone & Wylie