

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO J4064/98

In the matter between:

**NATIONAL EDUCATION, HEALTH AND
ALLIED WORKERS UNION**

First Applicant

AND OTHERS

Second and Further Applicants

and

THE UNIVERSITY OF PRETORIA

Respondent

JUDGMENT DELIVERED ON 25 FEBRUARY 2002

1. INTRODUCTION

- 1.1 The Respondent, the University of Pretoria ("The University") terminated the employment of approximately 600 of its support services employees on about 30 June 1998 and thereafter on about 31 July 1998, for alleged operational reasons. These employees were drawn almost entirely from Category C3, which is the lowest category in the University's employment hierarchy . They are the individual Applicants (or "the employees") in this

matter, represented by the First Applicant, NEHAWU (or “the union”). Almost all the employees in question were employed in the University’s Campus Control, Technical Services, Estate Services, Building and Cleaning Services and, Residence Cleaning Services. In short, these employees worked in the University’s support system.

- 1.2 The employees were advised of the termination of their services in letters addressed to them, signed by the principal of the University, dated 29 May 1998 and 26 June 1998.
- 1.3 The retrenchments resulted from the University’s decision to outsource its Support Services on an extensive scale.
- 1.4 The outsourcing and retrenchment exercise was conducted over a considerable period, from February 1997 to May 1998 in two phases. The first phase involved an investigation of the cost effectiveness of certain Support Services departments. The second phase was a stage during which consultations were held and which was initiated with a “Notice of Consultation in accordance with Section 189, Labour Relations Act, 1995 (“Operational Requirements”).
- 1.5 The investigation phase was conducted by an external management Consultancy known as Strategy Partners headed by Mr Herman Marais who was directly involved in setting up the management structures to control the process.
- 1.6 A decision to contract with strategy partners had been decided upon in principle on 18 February 1997 and had been minuted by the “Rektoraat”. The Consultancy was formally appointed during April 1997 to investigate and make recommendations regarding the improvement of cost

effectiveness. The formal parameters of the appointment were confirmed on 7 May 1997 in a letter from the University's Vice-Principal to the Consultant.

- 1.7 The investigation was known as the Support Services Development Project. During the investigation, workshops and steering committees were established in each of the Support Services under investigation. An investigation was conducted into the Support Service in question. Shortcomings in the provision of the services and the underlying problems were identified, certain restructuring alternatives were raised, discussed and evaluated and recommendations were then made to the University. The recommendations were contained in several reports produced by Strategy Partners between September and November 1997. By and large the recommendations proposed far reaching rationalisation and extensive outsourcing, the implementation of which inevitably led to large scale retrenchments, including the retrenchments of the employees in this matter.
- 1.8 On 25 May 1998 the University formally announced its final decision on the question of outsourcing in a document entitled "University of Pretoria Support Services Development Project Management Decisions".
- 1.9 The Applicants contend that the retrenchment of the individual Applicants was procedurally and substantively unfair in that it was not justified by operational requirements and did not conform to the requirements laid down by Section 189 of the Labour Relations Act 66 of 1995 ("The Act").
- 1.10 At this stage, it is the only the issue of fairness that is before me. By agreement, the question of relief has been held over for determination at a later date.

- 1.11 The attack on the dismissal of the individual Applicants, is a three-pronged attack.
- 1.12 At first there is a preliminary issue being an ***ultra vires*** argument relating to the competence or otherwise of the decision that led to the retrenchments at issue. During the cross-examination of Professor de Beer, the Vice-Principal of this University, the question of authority arose. The Applicants then filed a notice of amendment to their statement of case to the effect that the decisions to outsource and which resulted in the retrenchment of the individual Applicants, were taken by a committee known as Hoofbestuur alternatively by an officer of the Respondent, being its Vice-Chancellor or Principal. It was contended that neither the committee nor the officer were empowered or duly authorised in terms of the provisions of the University of Pretoria (Private) Act No. 106 of 1990 read with *inter alia* the provisions of Section 34 of the Higher Education Act No. 101 of 1997, to take the decisions which were in the premises, so it was argued, null and void.
- 1.13 The main thrust of the Applicants' case on the merits was presented at two levels, the first being that there was *a priori* commitment by the University to outsourcing and the requirements of Section 189 were not fulfilled; secondly that the conducting of the Support Services Development Project, pre-empted and rendered impossible the carrying out thereafter, of a proper process in terms of Section 189 of the Act.
- 1.14 On the evidence of Professor De Beer Hoofbestuur met on 24 May 1998 and took the decision to outsource Support Services. On 22 May 1998 according to Professor De Beer, Hoofbestuur had held a special meeting and took certain in-principle decisions about the Support Services Project

that included outsourcing. The documentation relating to this decision was prepared and approved on Sunday afternoon, 24 May 1998. According to Professor De Beer, even though the University spoke of Hoofbestuur, it was in fact Professor Van Zyl who took the decisions, in his capacity as the Principal.

- 1.15 The Applicants called only one witness. He was Dr G M Adler who holds a Ph.D in Political Science from the Columbia University which he obtained in 1994 and has been associated with the Department of Sociology at the University of the Witwatersrand since 1991 until the end of 2000.
- 1.16 The gist of his evidence was a critical analysis of the investigations and consultations conducted. The purpose of his testimony was to demonstrate that Strategy Partners and the University conducted the aforesaid process in a manner calculated to result in one outcome, which was the preferred outcome of the University, namely outsourcing. Professor Adler, who obviously has conducted extensive research in Industrial Relations and the phenomenon of outsourcing, commented on the worldwide trend in Universities to implement outsourcing to make them more cost-effective. He gave examples of Universities in the United States of America where outsourcing failed and was shown to be not necessarily the best method of solving financial problems at an institution of learning.
- 1.17 The Respondent led the evidence of Professor De Beer (its Vice-Principal), Mr Marais of Strategy Partners, Dr Visser who used to be the Executive Director of the National Productivity Institute. He gave expert evidence in respect of cost-effectiveness and the implementation of internal outsourcing and restructuring. Professor Van Zyl who was the Principal of the University at the relevant time was also called to give evidence.

1.18 Several bundles formed part of the record in this matter. These bundles contained the presentation submitted Strategy Planning, minutes of consultation meetings held between the Union and the various steering committees and other parties, resolutions, the sources relied upon by both expert witnesses, general documents relating to the investigation conducted by Strategy Planning, and several other relevant documents.

2. ULTRA VIRES AND THE PRINCIPAL'S AUTHORITY TO TAKE DECISIONS

2.1 Hoofbestuur, a committee comprising the Principal (Professor Van Zyl), who was the chairperson and senior officers of the University such as Professors De Beer, Erasmus, Marx and Sinclair, met on several occasions throughout the Support Services Project set in motion to conduct the investigations and second phase of the restructuring exercise. This committee was not governed by a constitution. According to Professor De Beer Hoofbestuur was a decision-making mechanism which advised the Principal in his decision-making. He opined that Hoofbestuur was the "Rektor in Rade". As already noted, Hoofbestuur took certain in-principle decisions about the Support Services Project (which included outsourcing) on 22 May 1998. Professor Van Zyl testified that Hoofbestuur was a collective decision-making mechanism but that he took responsibility for its decisions and had authority to take such decisions because such authority was inherent in his position and by virtue of the delegations given to him.

2.2 Professor De Beer argued that the Principal was authorised by the Council, the standing committee of the Council and by the various

delegations of that body to take the decisions with respect to the Support Services Project. He referred to a meeting held on 9 February 1998, where the standing committee of the Council expressed its wholehearted support for Hoofbestuur with respect to the Support Services Project.

- 2.3 The Applicants argued that there is an obvious difference between an expression of support for something and the delegation to a functionary of the power to do that act in the first place.
- 2.4 Professor De Beer argued that it was unnecessary for a specific mandate for the Support Services Project to have been given because the Principal had that power in any event. Section 9 of the University of Pretoria (Private) Act No. 106 of 1990 vests the government of the University in the Council.
- 2.5 The Applicants also argued that the concentration of the University on its core business, the application of business principles to the governance of the University, including its Support Services, the outsourcing of those Support Services and the retrenchment amounted to far-reaching changes in the way which the University was organised in the manner of its operation and in matters of governance which do not form part of the routine and ordinary, day-to-day management of the University. They argued that decisions of such magnitude had to be taken by a body clearly and properly authorised to do so, and could not have been effected lawfully by the Principal.
- 2.6 Section 9(7) vests in the Council the power to administer the property of the University and to control the University and all its affairs and functions. Section (9) empowers the Council to “appoint all such persons as it considers necessary for efficient conduct of the University and determine

the official title, status, powers, privileges, functions and duties of any person so appointed ...” Section 9(11) of the Act empowers the Council to “establish committees of the Council consisting as well as members of the Council and other persons, and may delegate any of its powers and duties to a committee appointed by it from its member or to any of the officers of the University”. Hoofbestuur was not a committee of the Council as envisaged in Section 9(11) of the Act.

- 2.7 A resolution of the Council dated 1984 resolved in paragraph 7.5.1 thereof to delegate to the Principal “Die Uittvoerende Bestuur van die Universiteit ten volle ... waarby ingesluit is die Raad se bevoegdhede om aan enige besluit van die Raad uitvoering te gee”. It also resolved to authorise the Principal to execute any executive act necessary for the executive management function. It would appear that the delegations were made in terms of Section 8(A)(1) of the University of Pretoria Act No. 13 of 1930.
- 2.8 The Applicants contended that Section 8(A)(1) does not confer upon the Council the power to delegate its functions to the Principal, but by resolution to delegate any of its powers or functions to a committee, and not to the Principal or any other officers of the University. It was also argued that an Act contrary to a statutory provision was incapable of ratification and that since there was no valid delegation of the power, the Council was bound to take decisions as to retrenchments, itself and it could not ratify the *ultra vires* Act of Hoofbestuur or the Principal. It was also argued that the Principal did not have an implied power to take the decision such as he did.
- 2.9 The Respondent argued that the decision made by the Principal on 22 and 24 May 1998 was not contrary to statutory provisions. In terms of Section 8(A)(1) of Act 13 of 1930 the Council is entitled to delegate authority to a

committee if the members of that committee are members of a Council. Section 7(1)(A) of that Act provides that the Principal of the University is a member of Council and that the Principal is appointed as a one-man committee in terms of the regulations. The Respondent also annexed a delegation document R600/81 to its head of argument, in this regard. It was argued that paragraph 7.5.1 of the Council's minutes of 19 November 1984 specifically refers to Section 8(A)(1) of the 1930 Act, clearly implies that the Council accepted that the delegation was to the rector or Principal, as a one-man committee. It was pointed out that Act 106 of 1990 repealed the whole of the 1930.

2.10 Act and that Section 11 of the 1990 Act, entitled the Council to delegate its powers and duties to a committee, or to any of the officers of the University. Reference was made to the Principal's letter of appointment in which the Principal was appointed by the Council as the Chief Executive Officer of the University and the Chief Disciplinary of the University. It was argued that it was expected of him in deliberation with the Council to fulfil leadership functions *inter alia* with regard to strategic planning, strategic management, organisation to ensure the highest degree of efficiency and effectiveness.

2.11 Consequently, the Council expressly and impliedly authorised the Principal to act on its behalf, with the task of appointing and dismissing staff, amongst other functions and duties. It was argued that the Council's authority to dismiss should be extended to the Principal as it is "reasonably necessary" or "incidental" to the Council's authority.

2.12 It is of note that the Council only meets approximately three times per year, and I agree with the proposition that the Council would not be in a position to appoint and dismiss staff on a daily basis. Both the 1990 and

1997 Acts state categorically that the Principal is the Chief Executive Officer of the University (Section 7(2) of the 1990 Act), that the Principal is responsible for the management and administration of the public institution (Section 3 of the 1997 Act), and that the Council may delegate its powers to any officer of the University, including the Principal (Section 11 of the 1990 Act and Section 68(2) of the 1997 Act).

2.13 “Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly confirmed, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred”. (Baxter: Administrative Law page 404).

2.14 It has also been held in a number of cases that the scope of authority may be regarded to be impliedly extended if such authority is “reasonably necessary” or “incidental” to the authorised power (See: **City of Cape Town v Claremont Union College, 1934 AD 414 ad 420; Randfontein Estates G M Company Limited v Randfontein Town Council, 1943 (AD) 475 at 494 and 495; Moleah v University of Transkei and Another 1998(2) SA 522 at 535E to 538I).**

2.15 In the **City of Cape Town - Case (*supra*) at 420, Wessels C J said:**

“Now I take it as settled law, ...that what is reasonably incidental to the proper carrying out of an authorised Act must be considered as impliedly authorised. Courts of Law must consider the matter from the point of view of reasonableness; they must not hold that an Act of a Corporation is *ultra vires* upon a narrow interpretation of the

powers conferred on the Corporation by the statute. They must look to all the circumstances, and especially to the consequences of holding the Act to the *ultra vires*.”

In my view, the Sections referred to in 1990 and 1979 Acts conferred upon the Principal the powers to dismiss. Both Acts make provision for a delegation of powers to the Principal. At best the decision of the Principal was voidable in **NEHAWU v The University of Cape Town and Another (2000) 7 BLLR 819 at 25D/E** the University Council was found to be competent to ratify a decision to terminate services of employees, that was taken before the Council was properly constituted.

2.16 According to the minutes of the Council and standing committee for meetings held in October 1997, February 1998, March 1998 and May 1998, the standing committee and the Council was at all relevant times aware of and confirmed the actions and decisions taken regarding the restructuring process and the eventual outsourcing and retrenchment.

2.17 Insofar as the question of ratification is concerned, it was argued on behalf of the Respondent that the support given by the Council to the decisions of 22 and 24 May 1998, constituted ratification. The applicants as noted herein before, argued to the contrary, that support and ratification were two separate concepts. In **Neugarten and Another v Standard Bank of South Africa Limited 1989(1)SA 797(A) at 804H** Nicholas J A held that **“ratification may be express or it may be tacit, that is, implied by conduct from which it is inferred that the person alleged has ratified intended to adopt or confirm the Act”**. It would appear that ratification is nothing more than the confirmation of the transaction with retrospective effect. This, in my view, would also include the concept of

ratification.

3. THE FIRST LEVEL OF ARGUMENT

- 3.1 The voluminous body of documentation filed by the University in the course of the restructuring exercise, references are made about open-endedness, transparency and the participative nature of the two-phase process. Assurances are also given at several stages of the restructuring process, that a final decision had not yet been taken.
- 3.2 The Applicants argued that there was marked difference between the University's public discourse which it presented to those outside its internal management structures, and its internal discourse through which its true approach to the process becomes apparent. Far from transparent, open-ended process presented to the employees and the union, a different picture emerges when the University talks to itself and its consultant (Mr Marais of Strategy Partners). The Applicants' case was that from very early on in the process there was a fixed predisposition to outsourcing as the appropriate response to an already identified and settled need to improve efficiency and cost-effectiveness, namely outsourcing. In support of this contention the Applicants made reference to and relied strongly on the strategic vision speech presented to the University by its then incoming Vice-Chancellor and Rector, Professor Van Zyl on 28 January 1997 at the opening of the academic year.
- 3.3 In this address Professor Van Zyl set out the future course of the University and his ideas for the repositioning of the University. Emphasis was to be placed on improved efficiency and cost-effectiveness. The

University was to concentrate on its core business, namely teaching and research. Its management philosophy would be to place greater emphasis on business principles. Matters which had to receive specific intention was the University's Support Services and its employees. He specifically said that partnerships with the private sector should be investigated and in particular the outsourcing of Support Services.

3.4 The Applicants made the point that the sentiments reflected in the Principal's address were also present in the presentation by strategy partners to the University management on 17 February 1997 in which the consultant described the Support Services investigation which it proposed to conduct. Further, it was argued that it also was a striking feature in the closed meetings of the "Projekbestuurskomitee", a body that was set up to manage the restructuring process and to bring it timeously to **"its logical conclusion"**.

3.5 According to the Applicants the entire process was not a true and open-ended joint problem solving exercise but rather one that could be described as a process of pseudo-participation. The Applicants contended that **"the trappings of a consultative process were put in place to secure the acquiescence of those who were ultimately retrenched to an outcome that was pre-determined"**. They said that by the time that consultations were purportedly held in terms of Section 189 of the Act, the result was *a fait accomplie* as outsourcing and retrenchments were the logical result of the entire process.

3.6 The Applicants also noted that strategic partners were contractually required to bring the Union into the process and conduct the investigations and consultation processes. They contend that the

presentation of the restructuring process to management differed markedly and materially from the manner in which it was presented to NEHAWU, and that this presentation was positively misleading. In this regard reference was made to the meeting of 6 May 1997 when Strategy Partners held its first meeting with NEHAWU.

- 3.7 Strategy Partners explained the purpose of the consultancy as being to assist with improved cost-effectiveness and efficiency of Support Services and that the consultancy had been asked to facilitate a process of evaluation of the efficiency and cost-effectiveness of all Support Services. There would be discussions with various stakeholders steering committees representing all stakeholders including workers and unions, independent review of cost-effectiveness and efficiency, workshop-developed conclusions and a list of improvement alternatives which would be considered at a second workshop, and ultimately implementation of the proper consultations with all role-players.
- 3.8 The Applicants criticised Strategy Partners for omitting to state that it was in fact contractually obliged by the University to bind the Union into this process and to secure its acceptance for the mandate of the Support Services Project. It argued that Strategy Partners was not acting as an expert consultant available equally to all parties involved, but was instead acting on behalf of the University to conduct the project that it wanted carried out.
- 3.9 Mr Jaftha, of the Union who represented the Union throughout the process, asked at this meeting, whether retrenchments were envisaged. The Applicants argued that the response to this question was misleading since it was to the effect that no final decision had been taken yet and that there might even be the possibility of increasing posts to ensure cost-

effectiveness.

- 3.10 The process was also criticised for not disclosing to the Union that outsourcing was a very likely outcome. This is stated against the background that a strong message was conveyed by Strategy Partners to the University that it should concentrate on its core business and that Support Services do not form part of that core.
- 3.11 Other criticisms levelled at Strategy partners was that it characterised support services as an onerous labour relations environment by making reference to the benefits of outsourcing as opposed to having one's own workforce and the concomitant problems of industrial actions and the like. One of the University's witnesses conceded that this remark was insensitive.
- 3.12 The Applicants also made the point that the practical requirements for successful outsourcing received detailed attention by Strategic Planning in its reporting to the University, whereas this attention was not matched by a comparable consideration of the practical requirements for successful internal restructuring. As against frequent references to outsourcing in the written proposal of Mr Marais, there is no suggestion that the Report Services employees are part of the University community, that they are part of its asset base, or that they are bearers of tacit skills and an organisational memory.
- 3.13 Further criticism levelled against the University by the Applicants, was that outsourcing contracts were drafted prematurely, containing a clause to the effect that industrial conflict would be the responsibility of the contractor and that the University could secure the removal of contractor's employees from its premises, should it not address the problem successfully. Mr De

Beer explained in this regard, that the University was entitled to address such problems in a contract, given the possibility of future conflict.

3.14 Professor Adler's evidence and the tenure of the cross-examination of the Respondent's witnesses, constituted an in-depth critical analysis of the language used during the process and its eventual resemblance to the outcome of the entire process. In essence, the Applicants case was that at the time the consultation phase was initiated, the Union and employees were faced with a foregone conclusion as to outsourcing, which the Union had an onus to displace. The analysis was thorough, careful and deliberate and cannot be repeated herein in all its detail. The main points which are relevant to my enquiry have been referred to.

3.15 The method and work product of Strategy Partners was also severely criticised. It was asserted that the work product of Strategy Partners is incapable of independent verification, since many of the findings and conclusions set out in the reports of the support service investigation cannot be tested, properly scrutinised or verified. The working papers, underlying documentation, such as surveys, questionnaires and notes of interviews were not available because Mr Marais had destroyed them two years after they had come into existence because according to him, he had limited floor space. These papers were destroyed after litigation in this matter had already commenced.

3.16 In its report to the University, Strategic Partners enumerated certain risk factors. The University's expert witness, Dr Visser conceded that whether or not there was sound foundation for such risk factors and whether they had been properly discussed at a particular workshop, could not be assessed because the information was not available.

- 3.17 The Applicants also pointed out that the surveys conducted in hostel cleaning, for example. Strategic Partners was criticised for only surveying the views of 132 students with a population of approximately 4 900 occupants, less than 3% of the hostel occupants and the survey is the only one of a few references to information on how the surveys were conducted. Professor Adler pointed out that there is no indication how the sample was drawn, what the response rate was or from which hostel it was drawn. A previous survey conducted by Profession Pieter Vermeulen of the University identified how his survey was conducted and in it, he explained the significance of its returns. This survey was referred to in illustrating the shortcomings of Strategic Partners in this regard.
- 3.18 Professor Adler said that there was no accurate information as to the actual wages of employees and the liability into service levels, without which it could not be concluded, as it indeed was, that fundamental change was needed to improve costs and service levels. He said it was further not possible to ascertain from the documentation that was available, what part of the payroll cost cuts (the University's biggest expense) was associated with efficiency levels and what parts with cuts in salary. Mr Marais explained, with regard to Campus Security employees that he did not think employees were likely to accept cuts in salaries as these appeared not to have been discussed.
- 3.19 The Applicants contended further, that it does not appear from the documents which were produced, that Strategic Partners performed a thorough-going financial analysis based on a proper factoring in of all the elements that could play a role in a proper restructuring process. They said that this goes to the very heart of the question whether the option of internal restructuring was taken seriously and improperly investigated.

3.20 Reference was also made to the absence of :

- (a) consideration of changing a grading system from a task-based to a competence-based one and a proper costing of such an exercise;
- (b) a detailed recasting of the entire remuneration structure linking performance directly to pay;
- (c) a detailed consideration of an improvement in management information systems;
- (d) a consideration of the introduction of user-friendly management information systems;
- (e) an investigation of different ranges of teamwork options and the corresponding wage implications thereof;
- (f) the conducting of an informed tender gathering process in respect of training programmes or an investigation of appropriate training programmes for all levels of employment from managerial to lower grade;
- (g) any exploration of a change towards differential shift and work times, particularly in the context of the fluctuating level of demand for Support Services in the University environment or of the possibility of averaging hours.

3.21 The Applicants contend that the above failures on the part of Strategy Partners indicate that there was no serious examination of internal restructuring, since if such an option was considered, these issues and

their cost implications and likely benefits would have been discussed. The strategic planning report as a whole, is criticised for its lack of detail of alternatives considered by the University or by itself.

3.22 Strategy Partners was also criticised for calculating the payroll costs of “Terrein Dienste” on the basis of internal restructuring, by simply exercising from the wage bill the 9% of employees that, it was projected, would be retrenched through internal restructuring. The point was made that no proper factoring of other benefits that may arise from a proper restructuring exercise was conducted in this regard.

3.23 Strategy Partners asserted that, in relation to Campus Security, working hours were lower than industry norms and that the cost per guard per hour was higher than industry norms. Mr Marais agreed with the proposition that the major component of the differential between the University’s Campus Security and industry norms is the hours worked and not the wages paid.

3.24 Strategy Partners recommended to the University that internal restructuring would not succeed. According to Professor Adler, it had done so without conducting a proper skills audit across the entire sector in question to establish skills, desires and capacities which would have been a first step of any series investigation of internal restructuring. He also explained the meaning of pseudo-participation, as referring to practices that have the form of participation but none of its guarantees. He described it as a strategy for employers to obtain their wishes and retain control over decisions while appearing to do otherwise.

3.25 Mr Marais explained that a long investigation focused exclusively on the skills of employees was not done, since it was not the task of the project

team. The Applicants contend that this is no justification for a failure to conduct such a proper skills audit and examination of retraining costs which, for any *bona fide* restructuring examination would be the exercise equivalent to tendering investigation and the obtaining of provisional contract prices that was indeed conducted for the outsourcing option. It was further argued that this failure was due to the fact that outsourcing was a foregone conclusion in the minds of Strategy Partners and the University.

3.26 The Applicants also argued that survey findings were manipulated by exaggeration of the negative. Surveys of client perceptions were done. In its survey of non-academic clients' perceptions of the services provided by technical services, all perceptions were above 3,5 on a scale of 0-5. These perceptions it was noted by the Applicants, were initially described as "reasonable to positive perceptions amongst non-academic clients" but in its overall conclusions relating to technical service Strategy Partners described the responses as merely "acceptable". Mr Marais held the view that there was not much difference in these various formulations. He said that the nuance difference between the phrases was "very small". In the University's management conclusions in February 1998 it remarked that "based on the perceptions of clients, the service levels ranged from unsatisfactory to marginally low". The Applicants contended that this language illustrates that the University also subscribed to an approach that was geared to the accentuation of negative features of the services in question.

3.27 The Applicants also argued that an approach which inflated the negative was also found in the opinion scale itself, which was loaded, according to the Applicants, in a fashion so as to encourage negative responses

amongst those who were surveyed. The opinion scale that was used to gauge the attitudes of workers to a variety of aspects such as leadership, work structure, personnel, organisational climate and client satisfaction rendered a score of 3,5 on a scale between 0/5, merely acceptable, a score of between 2,5 and 3,5 as critical, and a score of below 2,5 as reflecting major problems. It was argued that this scale was loaded so that an average score of 2,5 was indicative of major problems in the area under consideration and in the result the opinion scale was clearly loaded to accentuate negative results and to yield the conclusion far reaching change was required. In the hostel cleaning services, the Nerina Hostel stood out, scoring high with respect to quality response, helpfulness, communication and value for money. The Applicants argued that in the ultimate report of Strategy Partners in report of hostel cleaning it dissolved Nerina's significance by producing a summary that service levels 'varied' in the different hostels. It was criticised that it did not adopt the approach of viewing Nerina as providing a model that required a close examination to assess why it had excellent client satisfaction and how its operational processors could be reproduced in the hostel cleaning services as a whole. Mr Marais explained that one swallow does not make a summer, and this answer, the Applicants contend, is to refuse to address the issue.

3.28 The Applicants made the point that the outsourcing on hostel cleaning services as compared with its internal restructuring, was projected to achieve savings of no more than R300 000 per year, yet it would mean the retrenchment of workers who had unusually long service profiles, a sum over 12 years.

3.29 An example was also given of a steering committee in technical services, which recommended that the appropriate restructuring option for the

support service was internal restructuring and not outsourcing. The Applicants contend that Strategy Partners simply overrode this conclusion and made its own recommendation to management in the favour of outsourcing. It argued that Strategy Partners ought, if it was seriously investigating internal restructuring in a democratic and participative manner, would have actively lent its assistance and professional expertise to technical services in refining its proposals to present to the University, not in casting an onus on them to justify their own decision while the experts independently prepared a recommendation overriding the process. Strategy Partners asserted that the Steering Committee's recommendation was "diametrically opposed to the analysis" and was "onvanpas".

- 3.30 On the 21st May 1998, Mr Jaftha of NEHAWU had made a proposal that management of Support Services should be outsourced. The University was criticised that for the fact that even though Hoofbestuur was going to be meeting at 14h00 the following day to make its decisions, this proposal was not even tabled and examined at the meeting. The following day Professor De Beer responded by saying that the proposal was not an option.
- 3.31 On 13 November 1997, NEHAWU submitted redeployment proposal to the University which received no formal written response until 22 May 1998. The redeployment proposal included a proposal to form worker co-operatives to take over the services in question. The redeployment proposal was not accepted.
- 3.32 The essence of the Applicants criticism of the consultation process was that cost-effectiveness was preferred to restructuring at the expense of the employees and the consultation as a whole.

- 3.33 It was submitted that the consultation process was not a joint problem solving exercise or joint consensus seeking approach as envisaged by Section 189 of the Act.

4. THE SECOND LEVEL OF ARGUMENT

- 4.1 It was contended that the real work which should have been done between the employer and the Union in a joint consensus seeking approach was in fact done in advance of the Section 189 process. It was argued that it was done in the *ad hoc* and unrepresentative structures created and controlled by the management consultant. By the time the Section 189 process commenced, the Applicants contended, the *die* was already cast. A settled view in favour of outsourcing had at that stage already been formed and endorsed. The possibility of conducting a joint problem solving exercise had by then become foreclosed because all that remained open for discussion, was the detail relating to the implementation.
- 4.2 Meetings were held with the Unions and workshops had been set up. Alternatives were discussed and evaluated according to certain criteria. The Applicants argued that the alternatives that were presented are “well-known to management consultants and are the standard option that will usually arise for consideration”.
- 4.3 Mr Marais saw the steering committees that were established as vehicles for the participation of interested groups in the investigation and evaluation of different options. The Applicants argued that the process driven by Strategy Partners operated through *ad hoc* structures with *ad hoc* membership which weren’t recognised either in the recognition agreement or in Section 189 of the Act. NEHAWU was not present at the first meeting

of the hostel cleaning services steering held on 19 August 1997. The second meeting also occurred in the absence of NEHAWU. The Applicants argued that these workshops and steering committees clearly did not take the form of collective interaction between management and its unionised workforce. The presence and involvement of management in the steering committees was dealt with by Strategy Partners and the Projekbestuurskomitee as a strategic matter, according to the Applicants. The reason proffered by the University for this situation was that it was undesirable to inhibit other stakeholders in the discussion of those committees. NEHAWU objected on several occasions to the absence of direct interaction with management in the process. Senior management was not directly involved in the process in its first phase but subsequently became involved directly in the second phase.

4.4 It is the Applicants' view that the decisions of the consultant and the views of management are not separable. The Applicants further argued that the work of seeking solutions should have been done in direct consultation and interaction between the University and NEHAWU and that the University had as early as February 1997, a legal responsibility to engage the Unions in a Section 189 process, and not to pass the substance of that process off onto the management consultant and its workshop. Strategy Partners was also criticised for reporting back regularly to the Projekbestuurskomitee on the exercise, questionnaires, surveys and developing a profile of problem areas in each of the sectors. The second phase of the project was a process of evaluating the results of first phase and considering alternative solutions. Phase three was the process of deliberation and decision-making, and Phase four was the implementation.

4.5 It was finally contended that the implication of the project in question, was

irreversible. Reliance was placed on a minute of 14 August 1997, when the Projekbestuurskomitee recorded that it was dawning onto the participants of the process that change was necessary and that change would have to be effected eventually. According to the Applicants the Section 189 process was to be initiated by management through a comprehensive process and was not to be left in the hands of Mr Marais.

- 4.6 Even with the greatest good faith, the Applicants argued, that a proper Section 189 process could not have been revived or introduced as though from scratch at the time of its purported initiation.

5.

- 5.1 I now propose to deal with the various arguments presented and the facts.

- 5.2 The costing difficulties which the University was faced with at the relevant time was not placed in dispute. This was put to Dr Visser when he was cross-examined on behalf of the Applicants. Professor De Beer gave evidence that there were several bulletins of possible cuts in University subsidies. Certain steps were taken the past, to deal with these problems but it came necessary to consider reducing the University's running costs and to examine the wage bill. Increased competition required and enhanced strategic positioning of the University's core functions.

- 5.3 During June 1998 wage negotiations were conducted between the University and the Union. The minutes of a meeting held on 19 June 1998, reflects that the Union understood and accepted that the retrenchment itself, but wanted an agreement that the increases which

were being negotiated should be implemented for its members for the period 1 April to June 1998.

- 5.4 Professor Van Zyl, the Vice-Chancellor, gave evidence about the necessity and subsequent success of the restructuring process embarked upon. His evidence which was not challenged in this regard, indicated that in following the recommendations of Strategy Partners, there would be massive savings. The Applicants believe that the savings were not so great as to sacrifice the positions of the individual employees in question. I accept that the savings were not massive, but they were substantial. Professor Van Zyl also testified that there was an increase in service levels, a decline in theft on the campus, improved quality of cleaning and the optimal use of buildings.
- 5.5 On the evidence of both parties, there was a sound commercial rationale behind the restructuring process.
- 5.6 The Applicants' objection to the process is that from the beginning of the project, there was a fixed and settled preference on the part of Strategy Partners and management for outsourcing in respect of its labour intensive support services. The decision to outsource and hence the retrenchments were not preceded by a joint problem solving exercise, as required by Section 189 of the Act.
- 5.7 The appointment of Strategy Partners, according to the testimony of Mr Marais and Professor De Beer, was to investigate the efficiency and effectiveness of the Respondent's support services. The Respondent wished to be more competitive in an international sense but its income was reduced. Professor De Beer also referred to the white paper on higher education transformation which prescribed efficient utilisation of funds

within the tertiary educational sector. The decision to restructure was therefore not only based on cost savings, but enhanced efficiency. Both considerations fall within the managerial prerogative. Reference thereto was also made in one of the collective agreements concluded between the parties.

5.8 The Vice-Chancellor's speech to which much reference was made by the Applicants, clearly envisaged sweeping changes in respect of the University, non-core functions, specifically in its support services. He pertinently mentioned outsourcing in his speech. The applicants demonstrated that the non-core functions were regarded as problematic by the University. Strategy Partners indeed held the view that the utilisation of non-unionised labour in respect of the non-core functions of the University was more advantageous, than contending with a unionised workforce. So much is reflected in its recommendations. It would be reasonable to accept that the University perceived outsourcing as an attractive option and that it was the preferred option of Strategy Partners after its investigations.

5.9 Even though none of the Applicants or Union Representatives gave evidence, I will accept for purposes of this case, that workers are opposed to outsourcing as they view it as a device to undermine the organisation of workers and that it impacted negatively on employment security. It poses a serious threat to employment security. It is however, a viable legitimate, commercial mechanism.

5.10 The question arises whether a leaning towards outsourcing as one of several options, or even an expectation on the part of an employer that outsourcing would be ultimately achieved, derails an entire process, so much so, that it falls foul of the provisions of Section 189 of the Act. I do

not believe it does. The Section does not envisage that parties to a joint consensus seeking process may not have certain strong views as to what the outcome of the process should be. Opposing views would only be natural, in a process such as the one envisaged by Section 189.

5.11 To establish that the outcome was predetermined before the consultation process began, I would have to find that Strategy Partners was appointed and instructed to ensure that outsourcing takes place, irrespective of other views. The facts will have to show some collusion between Strategy Partners on the one hand and the University on the other hand. There would also have to be some indication that the members of the steering committees were also involved in such a collusion.

5.12 Strategy Partners was not appointed as an agent of the University. It is an independent organisation. Professor De Beer and Professor Van Zyl only met Mr Marais on the day he was appointed. The fact that Strategy Partners as contractually bound to obtain a mandate from the Union in the Project is not a flaw in the consultative process. The University's council met three times a year. It would have been impractical to expect the council's members and members of the University's Human Resources Department, to conduct the investigations and subsequent consultations. Professor De Beer gave evidence that the University simply did not have the internal capacity to perform this type of exercise.

5.13 On the evidence before me, 18 November 1997, was the date on which the University contemplated retrenchments. Notice was given to the Applicants in terms of Section 189 of the Act on this day.

5.14 According to Professor De Beer the investigation was not part of Section 189 procedure. The Applicants argue to the contrary. They contend that

the investigations were flawed in that the steering committees had dealt with measures to avoid dismissals, which they say, was a topic which had to be discussed with the Union during the consultation stage. Although measures to avoid dismissals were dealt with in the steering committees, this was only one of many issues dealt with in both the workshops and the steering committees.

5.15 Mr Marais testified that all stakeholders including the Applicant were invited to and participated in steering committees during the investigation by Strategy Partners. The results and options arising from the investigation were summarised, together with supporting documentation and discussed and considered. According to him all stakeholders had the opportunity to question the factual correctness of the results of findings and had the opportunity to discuss any uncertainty resulting from the investigation by Strategy Partners. Alternatives that were discussed during the steering committees, ranged from retaining the *status quo*; internal improvements and internal restructuring; outsourcing or contracting out; the privatisation of the service. The Union confirmed its participation in the support services development project in writing. This was the evidence of Mr Marais. There was no evidence presented by the Applicants to contradict him.

5.16 Mr Marais further testified that in compiling his reports, the support services of the Respondents were measured and compared with other Universities, private sector suppliers and other corporate environments to compare all perspectives in a process called "*benchmarking*". The seasonal nature of support services at the University of Pretoria, indicating high periods and low periods of demand for certain support services, was also demonstrated.

- 5.17 In Technical Services, the predominant group of affected employees were represented by SAWU. These employees compiled their own report and agreed with the Respondent on the outcome of the support services review.
- 5.18 Dr Adler, the only witness called by the Applicants, admitted that he did not consult with any persons in the steering committees, neither did he speak to any of main role players of the Union, i.e. Mr Jafta or Ms Molefe. Neither was any other official of the Union consulted on this aspect. Dr Adler could not dispute the fact that retaining employees, as a subject, also discussed during the steering committees.
- 5.19 It may have been useful, particularly for the Applicants and Dr Adler, if Mr Marais did not destroy his source documents and notes and could provide this documentation. In my view, the omission to furnish these documents was not fatal to the process. There is no indication that there was *mala fides* intention behind Mr Marais' decision to destroy the documentation in question. The vast number of documents, which were in fact produced, seem to suggest that there was nothing sinister about the loss of the other source documents.
- 5.20 There is no obligation, in terms of Section 189 of the Act, to involve employees in an investigation into restructuring, before it actually contemplates retrenchments. In some instances, it may be premature. Notwithstanding, the Union was invited to this process. In this regard it is of note that the Union did not compile its own report, or attach the methodology of Strategy Partners much sooner than it did. I gained the impression that the Union could have played a far more interactive, role in protecting its members.

- 5.21 At the meetings held with Trade Unions before 18 November 1997 it was evident that the discussion did not relate only to the support services but to the position of the University as a whole, including the academic departments. Employees were told that there had to be a form of streamlining as the University became more efficient and effective. The University's financial position was also discussed.
- 5.22 In my view, the meetings were not held to convey that the University would henceforth conduct only its core businesses. In the **UP Bulletin**, dated 29 October 1997, voluntary severance packages were mentioned. The Applicants argued that this was a further indication that retrenchments were *a fait accomplis* before 18 November 1997.
- 5.23 The Respondent pointed out in its heads of argument that the discussions relating to voluntary severance packages only pertained to academic staff who were fifty-five years and older. The minutes of a meeting of 20 October 1997, reflected that an official of SAWU, had asked Mr Marais about voluntary retirement packages and whether it could present a solution to the problem being faced by the University. At this stage it is of note to remember that the Respondent not only had to consider the Union in question, but also was accountable to other unions. Professor De Beer replied that he had discussed voluntary retrenchment packages because it was an obvious plan.
- 5.24 With regard to the minutes of the second meeting of the Projeijkbestuurskomitee, dated 15 May 1997, the Applicants contended that the language adopted in the minutes clearly indicate that the University adopted an approach incompatible with an approach that has its departure point a commitment to joint problem-solving. In this document it

is stated that a mandate of the Trade Unions would eventually not be necessary and it goes on to say that Union participation in the project is desirable and should be promoted. Section 189, does not require an agreement or a mandate on the part of employees, before the employer may embark on restructuring. It is also not the case that the union wanted to give a mandate.

5.25 Mr Marais was appointed in terms of a letter, in which it was clearly put that the project should be a participative process giving stakeholders an opportunity to jointly evaluate the current cost efficiency and effectiveness of the services concerned, the opportunities of performance improvement, as well as the options and guiding criteria towards change and that the evaluation of future options regarding the functioning of each support service would be carried out with proper consideration of *inter alia* the interest and rights of employees, students and other service users. This letter is an objective fact and an indication of the university's will to engage in a proper process.

5.26 The corner stone of the Applicants case with reference to this document and others already discussed, was that the language used when "the University spoke to itself" and when it spoke to the Union was dissimilar. The Applicants imply that the University was hypocritical in the method in which it dealt with the Union. The same type of criticism is levelled at Strategy Partners. The premature drafting of contracts with sub-contractors, on the face of it warrants serious criticism. It was also explained that there were practical reasons for this step. These contracts were also disclosed in the Project. The University's council consisted of several persons and so did the steering committees. It is inherent in the structure of the University, faced with the problems it had, that there would

be debates and discussions. It is extremely difficult, to make a finding as to some form of collective hypocrisy pseudo-participation or *mala fides* in a project of such an extensive nature, as the one undertaken, in this case. I have already expressed my views on the question of a consulting party, having a certain view. The uncontested evidence of Mr Marais was that, only at the second meeting of one of the steering committees, outsourcing was mentioned for the first time.

5.27 When Mr Sehone, expressed his concern during a meeting with Mr Marais, on the possibility of restructuring and the risk of accompanying staff reductions Mr Marais stated that he answered Mr Sehone in the context of the project and what he believed was the right thing to do and that he said that there was an open agenda and that all options would be on the table, including staff increases. He stated categorically that the Union was presented with a full picture of the objectives, approach and methodology of the project. He further stated that on a meeting of the 29th May 1997 where outsourcing was discussed, it would have been incorrect to view outsourcing as a reasonable outcome at that stage. He stated that it was not the object of the project. The Applicants called no witness to refute this allegation. Insofar as Mr Marais was criticised for certain non-disclosures, Professor De Beer, gave who gave evidence on behalf of the Respondent, stated that if it was done, it was not done on the instructions of the Respondent. There is also no suggestion that senior management participated in the actual recommendations made by the steering committees.

5.28 In **Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA (1004 15ILJ 1247 (A) at 1252F, Smalberger J A** held that:

“It seems to me that the duty to consult arises, as a general rule, both in logic and in law, when an employer having foreseen the need for it contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; and appreciation of the need to take remedial steps, and the identification of retrenchment as a possible remedial measure. Once that stage has been reached, consultation with employees or the Union Representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable.”

5.29 In the matter under consideration the Union was part of the process, before the employer foresaw the need for retrenchment.

5.30 In finding that employees were faced with *a fait accomplis* Ngcobo J A stated the following in **Decision Surveys International (Pty) Ltd v Ndlamini and Other [1999] 5LLR413 LAC at 417, paragraph 25:**

“Similarly, the invitation to the Union to consult can hardly be said to have been a genuine one on the facts of this case. The final decision to retrench had already been taken; the timetable for retrenchment had already been fixed’ the selection criteria had been decided upon; the number of employees to be retrenched had been determined. The effective date of retrenchment could not be altered, hence the company’s refusal to meet and consult with the Union either on 28 or 29 October, as these day fell after the decision to retrench had been implemented. In consultation with the Union, therefore, would have amounted to no more than going through motions”.

5.31 In the aforesaid judgment the decision taken by the employer was clearly irreversible. In the matter under consideration, such comments are not applicable. The Applicants did not call a single witness who participated in the process. They have to prove that the Respondent made a final irreversible decision to retrench the individual Applicants, before the consultation process ensued. They further have to show that the university was effectively not open to persuasion on the need to retrench employees, even if an in-principle decision to retrench had been taken. That in itself did not mean that the process as such was unfair or that the employees had been confronted with *a fait accompli*. **See: Fletcher v Elna Sewing Machine Centres Pty Ltd [2000] (3BLLR) 280LC and NEHAWU v University of FortHare [1998] 19ILJ 122LC.)**

5.32 In the light of the facts of this matter and the nature of the attack on the consultation process the following comments made in **the Atlantis Diesel** decision (*supra*) are of significance are:

“Consultation provides an opportunity, *inter alia*, to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment (or softening its effect) and to discuss and consider alternative measures. It does not require an employer to bargain with its workers or Unions with regard to retrenchment. Furthermore, the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management”.

5.33 The aforesaid decision, in my view confirms the managerial prerogative to take commercial decisions. The University complied with the Act. It followed its prescribed procedures and followed expert advice to avoid

breaching the procedures. The process was complex. Several factors were taken into account. In these circumstances, without the evidence of someone who was actually present at the meetings, I am not able to infer from the analysis of all that had taken place, that the outcome was predetermined, irrespective of the Project. Whereas aspects of the Applicants' criticism of the methodology used was accurate particularly with regard to surveys, the standard set was too high in the context of Section 189 of the Act.

5.34

I am not satisfied that in this matter, that *a fait accomplis* was demonstrated on the facts or that the Respondent did not comply with the spirit and letter of Section 189 of the Act. Consequently the application should be dismissed. Costs should follow the result.

E REVELAS

On behalf of the Applicants

On behalf of the Respondents

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