IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J4193/99

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **1st Applicant**

G M MTHEMBU & 15 OTHERS **2nd and further Applicants**

and

CENTRAL INFORMATION SERVICES (PTY) LTD **Respondent**

JUDGMENT

NDLOVU AJ

<u>Introduction:</u>

[1] In this trial the Second and Third Applicants (the "individual Applicants") claimed that their dismissal on 18 August 1999 by their former employer company, Central Information Services (Pty) Ltd., (the Respondent herein) was unfair.

[2] Hence, together with their representative trade union, the First

Applicant herein (the "Union") they instituted the present action, seeking relief, including the declaration that the dismissal was both substantively and procedurally unfair, directing their reinstatement to the Respondent's employ and ordering Respondent to pay them compensation.

[3] The action was preceded by a certificate issued by the relevant Bargaining Council to the effect that the conciliation process failed to resolve the dispute between the parties.

The Parties' Contentions:

[4] The evidence for the Applicant was adduced by Mohapi Lazarus More, (Lazarus More) the Union's local organiser and Gabriel Motlalentwa Mthembu, the Second Applicant herein. The evidence for the Respondent was adduced from Barend Hermanus Pieterse, the Respondent's co-director and Aubrey Charles, the Respondent's Quality Control Inspector.

The Applicants' Case:

[5] Lazarus More testified that he had no knowledge about the retrenchment of the individual Applicants which took place on 18 August 1999. He told the Court that he was himself dismissed by the Union with effect from 10 August 1999. In other words,when the individual Applicants were dismissed, he was no longer employed by the Union. He said he knew nothing about meetings that were alleged to have taken place during July and August 1999. He was last at the Respondent's work premises in or about May 1999 when he had gone there to request for a personal loan.

[6] Lazarus More was, however, reinstated in the Union's employ in or about late October 1999 after a successful internal appeal against his dismissal. This was then long after the individual Applicants were dismissed.

[7] According to Lazarus More he only had knowledge about retrenchments that took place in April 1999 at the Respondent's work place. In respect thereof he had been invited to a meeting of the Respondent's management, shop stewards and workers. The worker members had informed him that there were problems at the work place, which had resulted to them working short time. Short pay, as a result, had compelled them to take cash loans from the Respondent to buy sundries, such as groceries. At the end of the week these loans would be deducted from their wages, resulting to them taking almost nothing home. Hence, about 30 of them were opting for voluntary retrenchment.

[8] Under cross-examination, Lazarus More denied a suggestion that during April 1999 the Respondent's management had in fact sought to retrench 60 employees, but that as a result of negotiations and pleas by the Union only 31 had been retrenched. He further denied that the meeting he attended (prior to the April retrenchments) was a consultative meeting envisaged in Section 189 of the Act. He contended that it was only a general meeting at which he had been invited by the Union members. However, he admitted that also present at the meeting were Pieterse, the Respondent's co-director and other white employees (who were seemingly non-Union members).

[9] Mr Jonker (for the Respondent) put it to Lzarus More that a consultative meeting was held at the Respondent's work place

during July 1999 and that it was part of a consultative process that culminated in the retrenchments on 18 August 1999. It was put to Lazarus More that he was part of that process, which he denied.

[10] Lazarus More was referred to a clause in paragraph 6.2 of the Applicant's Statement of Claim, which was to the effect that the Applicants appeared to acknowledge that certain consultation meetings were held, and that their only problem was that they were not accorded sufficient opportunity to make considered and effective alternative proposals at those meetings. He had no comment to this issue.

[11] The next witness for the Applicants was Mthembu. He was in the Respondent's employ from August 1998 until 18 August 1999, when he and other individual Applicants were dismissed by the Respondent. He was a guillotine operator and also a shop steward, affiliated to the Union.

[12] He told the Court that prior to the short time being introduced, they were working 44 hours a week plus overtime. They started working short time when the working time was reduced to 35 hours a week. In January 1999 the weekly hours were further reduced to 28.

[13] He told the Court that on 16 August 1999 he was instructed by Pieterse to inform the workers to attend a meeting on 18 August 1999 on the company premises. At that meeting Pieterse referred to the work crisis which had resulted to the short time. He pointed out that as a result of less hours worked, the Respondent was under-producing. He then said that he would

not further reduce the working hours below 28 hours per week. Instead, he suggested to the workers to discuss the issue amongst themselves and return to him with suggestions.

[14] The workers informed Pieterse that they had no suggestions with regard to the question whether to increase or decrease the 28 hours-weekly working time. In other words, the workers left the matter in Pieterse's discretion.

[15] Pieterse had then left the meeting. Shortly thereafter he returned with a list of 16 names which he called out and said that those were the workers to be retrenched. He said he had no alternative but to retrench them. Those 16 employees were the individual Applicants.

[16] No Union official was present at the meeting of 18 August 1999. Later in his evidence, Mthembu disclosed that although he had been a Union member since 1998, he was however not paying his Union subscriptions. In other words no deductions from his wages were being made for this purpose. He also told the Court that they had not advised the Union about the meeting of 18 August 1999.

[17] He testified that once their names were called out they were then asked to leave the company premises immediately and return on 20 August 1999 for their severance pay.

[18] On 20 August 1999 not all of them came for the severance pay. Those who came, including himself, (Mthembu), were given letters and asked to sign these as acknowledgement that they had received their payments. They were asked to sign even

before they were actually paid. For his part, he was paid for the notice and severance package.

[19] He further told the Court that the first retrenchment had taken place in or about May 1999. Consultative meetings had taken place prior to that retrenchment. During that consultative process the Respondent's representatives had explained to them about the financial problems the Respondent was encountering in its business operations.

[20] Mthembu further said there were certain meetings which were held starting from January 1999, but which had nothing to do with the Respondent's financial problems. According to him, the meetings were only in respect of the work problems, which he said related to the issue about an impending Telkom deal. He said the Respondent's management was informing them that Telkom had promised to offer the Respondent a huge work contract and that the Respondent was just waiting for that moment to come. These meetings were held with management almost every month.

[21] On the same day of their retrenchment (that is, 18 August 1999) they went to report the matter to the Union, where they were told that the Union's local organiser was not in the office and that he had been absent for some days. He emphasised that there was no consultation that preceded their retrenchment. He was, therefore, asking the Court to order that he be reinstated and be paid compensation by the Respondent. At the time of his dismissal he was earning R10,21 per hour.

[22] Under cross-examination, Mthembu admitted that during 1998

the Respondent was congested with workload. Hence, they were working full normal hours (that is, 44 hours) plus overtime. However, the workload dropped by January 1999, when the short time was introduced.

[23] At the Bargaining Council, to which they had referred their dispute for conciliation, they were not represented by the Union. However, he denied that the Union did not declare the dispute to the Bargaining Council on their behalf. He said it was only his mistake not to have reflected the Union's name on the conciliation referral forms, but his own name. He said he and the co-individual Applicants had referred the dispute for conciliation in their capacity as members of the Union and that, for that reason, the Union was represented.

[24] It was put to him that the Section 189 consultative meetings were held during July 1999 and August 1999, to which he responded that he had no knowledge thereof. He further claimed that they were not given notices of the retrenchment. He also denied that there were two consultative meetings held prior to 18 August 1999.

[25] Mthembu admitted, however, that they were working short time due to the Respondent's under-production. He contended, however, that the Respondent could have decreased the working hours even below 28 hours per week, instead of retrenching them. When asked why he and other co-individual Applicants did not propose that idea as an alternative measure, he said they were not given the chance to make alternative proposals.

[26] He acknowledged that, since he was given the notice pay and the

severance pay, the Respondent was not owing him anything.

Respondent's Case:

[27] Pieterse held the BSc (Engineering) and MBA degrees. His co-directors were Zweli Hlongwane and Christo Marais.

[28] He referred the Court to the Respondent's financial report dated 10 August 2000 for the Respondent's financial year ended 29 February 2000, which was prepared by independent chartered accountants and auditors, Basson & Partners. The report showed that the Respondent's business sustained a net loss of R44 483,00 during the 2000 financial year, compared to a net profit of R95 824,00 for the previous financial year (1999). The report was included in the Court file.

[29] Pieterse told the Court that the Respondent was involved in the business of manufacturing steel towers or masts and commenced its operations in 1998. From that year until early 1999 their only client was Telkom. The towers were supplied to Telkom when it was engaged with the installation of telephone lines in rural areas. Telkom flooded the Respondent with heavy workload, even beyond the Respondent's expectations. Hence, the business was booming during the first year of the Respondent's operation. As a result, the Respondent's first financial report showed a turnover of over R7 million.

[30] When the business started in April 1998 it employed only 18 workers, but by December 1998 there were some 120 workers employed. There was a two shift system, which made the business activity continuously running for 24 hours a day and 7

days a week during that period (April 1998 to December 1998).

[31] However, things changed for the bad by December 1998 when the Respondent was informed that Telkom would no longer be rolling out their telephone network any further. This created a huge concern for the Respondent. Indeed, in January and February 1999 the Respondent received no work from Telkom, which advised the Respondent that there was to be a halt in its rural project, until further notice. The halt was apparently occasioned (as the Respondent was made to understand) by the fact that certain Americans and Malaysians had bought 30% of Telkom shares. The outstanding work the Respondent had obtained from Telkom was completed by the end of February 1999.

[32] On 9 April 1999 the Respondent issued a letter to all employees and shop stewards, whereby they were informed of the operational crisis and of the Respondent's intention to rationalise its operation, which could probably involve retrenchments. In the letter a meeting with the employees was proposed for 18 April 1999. At the meeting these matters were fully discussed with the workers.

[33] Pieterse further testified that when the situation did not improve, the short time scheme was introduced. He said the normal working hours were initially reduced to 36 hours per week. Subsequently this was further reduced to 18-20 hours per week.

[34] He also told the Court that at all the consultative meetings the Respondent was represented by its labour consultant, Donald Lotter.

[35] The first retrenchment was effected on 23 April 1999. Between April 1999 and August 1999 there was still a low rate of incoming workload. The employees were still working short time, which did not ameliorate the situation. As a result, the Respondent was forced to engage in another retrenchment exercise in August 1999.

[36] In terms of a collective agreement with the Council, the Respondent had advised the Council of its operational crisis. The notification was acknowledged by the Council on 12 July 1999.

[37] Pieterse further told the Court that at the end of July 1999 the management held a meeting with Lazarus More and other shop stewards on the issue of the Respondent's low business activity and the necessity for a further staff reduction. He told the Court that it was this consultative process which culminated in the next retrenchment on 18 August 1999, which was the subject of the present litigation. He told the Court that there were, however, no minutes taken at the meeting of July 1999 because nobody was there to take the minutes, since the Respondent's administrative staff had also been reduced.

[38] The witness refuted the allegation in the Applicant's statement of claim that the individual Applicants were dismissed because of their involvement with, or membership of, the Union. He pointed out that the Union was not a party to the dispute at the conciliation level, but only the individual Applicants in their personal capacities. For this reason, he challenged the Union's *locus standi* before this Court, since its dispute with the Respondent was not concilaited before the Council.

[39] Pieterse further submitted that if there had been no consultation, as the Applicants now claimed, the Union would have taken the matter up with the Council. Since this did not happen, was proof that the consultation did in fact take place. He further contended that the Union never complained to the Respondent's management about lack of consultation prior to the retrenchments.

[40] He further told the Court that Lotter was always taking minutes at the consultation meetings. He said Lotter was expected to have kept those minutes. Lotter was employed by the Respondent and therefore keeping the minutes would have been part of his duties, Pieterse testified. However, the Respondent no longer had any association with Lotter since 2001.

[41] The witness further stated that the selection criteria employed in the retrenchment exercise of 18 August 1999 was Last In First Out (LIFO) plus job skills. He further pointed out that the Union never asked for the postponement of the retrenchments, nor did it make any request for any written information, in terms of the Act. He said it was not true that the Applicants were not accorded sufficient opportunity to submit their alternative proposals.

[42] Pieterse further submitted that if there had been any victimisation to any of the Union members, as alleged by the individual Applicants, it would have been expected of the Union to have confronted the Respondent. This, the Union never did, which served as proof that there was no such victimisation. He suggested that Mthembu had taken the matter up only because he had become upset when he was selected as one of the 16

employees to be retrenched.

[43] It was put to him that the LIFO principle was never applied. Pieterse refuted this suggestion. Mr Cartwright (for the Applicants) further put it to the witness that if the LIFO principle had been properly applied, Mthembu would not have been retrenched ahead of one Andries Motsepe, who was also a guillotine operator as Mthembu, but who had joined the Respondent after Mthembu. Pieterse's response was that whilst Mthembu was only a guillotine operator, Motsepe was multi-skilled, in that, in addition to being a guillotine operator, he was also a cropper operator and a press operator. Hence, there was an operational need on the part of the Respondent to retain Motsepe's services for his multi-work skills.

[44] Pieterse insisted that the consultation process had begun in July 1999, which culminated in the retrenchments of 18 August 1999. However, he could not produce documentary proof to this effect. He said he would have to contact Lotter for this documentation, including the minutes of the meetings he referred to. Further, he said it would be easy to contact Lotter who was then working in the Vaal Triangle.

[45] He said, in all, there were three meetings which were held before the retrenchments on 18 August 1999 namely on 16 April 1999; July 1999 and 18 August 1999, the latter date being the date of the dismissal of the individual Applicants. Of course, it seems to me that the meeting of 16 April 1999 would not have been directly linked to the dismissal of the individual Applicants, but rather the April retrenchments. Pieterse himself told the Court that the consultative meetings that resulted to the August

retrenchments had started in July 1999.

[46] The next Respondent's witness, Charles, told the Court that he started working for the Respondent from the time of its inception in April 1998. He was also himself a shop steward.

[47] Charles confirmed that when the Respondent's business started in April 1998 it operated 24 hours a day and 7 days a week. However, the workload had gradually decreased. This situation had resulted in the first retrenchments in April 1999.

[48] He told the Court that after the April retrenchments the next consultation meeting was held in July 1999. He said both the meetings of 16 April 1999 and July 1999 were attended by Mthembu and Lazarus More. Pieterse was also always present at the meetings. Suggestions were made that the LIFO principle must be used in the event of further retrenchments, which idea was agreed upon. During the July 1999 meeting, the management gave the employees two options to choose from, namely:

[48.1] That the short time scheme be intensified, in that the working time be further reduced to below 28 hours per week; or

[48.2] That further retrenchments be effected.

He said the employees went for option 2.

[49] According to Charles, the next meeting (after July 1999) was held on 16 August 1999, at which all employees, including Mthembu, other shop stewards and Lazarus More were present.

[50] He could not recall whether the affected employees had known about the meeting of 16 August 1999. He was also not sure of what was discussed at that meeting, save that, in general terms, it was still about further possible staff reductions. He could also not remember how long after that meeting the next retrenchments were effected.

[51] In response to questions by Cartwright, Charles stated, among other things, that at the meeting of July 1999 Lazarus More was present. In fact, he said, it was Lazarus More who was taking minutes for the Union at that meeting, whilst Lotter was taking minutes for the Respondent.

[52] When it was put to him that according to Pieterse's evidence, the only meeting in August 1999 was on 18 August and not 16 August, the witness insisted that the meeting was held on 16 August. He said he got this information from Mr Tee's diary. Tee was the third witness for the Respondent.

[53] Arthur Maxwell Tee, employed by the Respondent as quality controller since 1998, told the Court that he had taken notes at the meeting of 16 August 1999, which, however, were only his personal notes. Nobody had asked him to do so, but it was only his habit to take notes. He said he did not see anyone else taking notes at the meeting of 16 August. In response to cross-examination, he said there were two other meetings which were held prior to 16 August 1999. He said there was, by the way, another meeting which was held on 18 August 1999. He could not remember the date when the two meetings prior to 16 August were held. He could not even remember the months when that took place.

[54] He also told the Court that Lazarus More and Mthembu were present at both meetings of July 1999 and 16 August 1999.

[55] However, when he was later asked about whether Lazarus More was present at the two meetings prior to 16 August, he said he had, only seen Lazarus More once and that, therefore, he could not even be able to identify him (Lazarus More) again.

[56] Later in his evidence the witness told the Court that he took notes only at the meetings of 16 August and not of July 1999 and 18 August 1999. He was also not sure of how many meetings were held, which led to the 18 August retrenchments.

Analysis and Evaluation of the Evidence:

[57] The following facts are common cause or not in dispute:

[57.1] The individual Applicants were employed by the Respondent before their dismissals.

[57.2] In or about August 1998 the individual Applicants started working short time, as per arrangement with the Respondent's management, and by August 1999 they were working only 28 hours per week, from the normal time of about 44 hours per week.

[57.3] There was a number of employees who were retrenched by the Respondent in or about April 1999 as a consequence of the Respondent's business operational problems.

[57.4] The Respondent dismissed the individual Applicants on 18 August 1999.

[58] In issue and which the Court is required to determine is whether the dismissal of the individual Applicants was substantively and/or procedurally unfair and, if so, whether or not they are entitled to reinstatement and/or compensation.

[59] The Respondent filed a financial report, prepared by independent chartered accountants and auditors in respect of it's business operation for its financial year period 1/3/1999 - 29/2/2000, and which showed a net deficit of R44 483, in comparison to the net profit of R95 824 for the previous financial year ended 28/2/1999. This was despite the fact that the latter-mentioned period was constituted of 11 months, as the business commenced only in April 1998.

[60] The financial report aforesaid was not challenged by the Applicants. There is, therefore, no reason for the Court not to accept it. On the basis of the report it is hard to dismiss a submission that something went terribly wrong and bad for the Respondent's business from early 1999. It is clear that if nothing was done about the situation, the continued viability and survival of the Respondent's business would, in all probability, have been jeopardized.

[61] I am, accordingly, satisfied that the Respondent discharged its onus in proving beyond a balance of probabilities, that the dismissal of the individual Applicants was substantively fair. (section 192(2)).

[62] On the aspect of procedural fairness, the Applicants contended that the Respondent did not allow them any meaningful consultations, as envisaged in Section 189, to take place before

finally deciding on the retrenchments.

[63] It seems to me that although the Respondent appears to have done something towards ensuring consultation with the individual Applicants, the efforts were far from enough, to have ensured full compliance with the provisions of Section 189.

[64] According to the Respondent's case, the consultative process was started at the meeting of July 1999, which culminated in the retrenchments of 18 August 1999. According to the Applicants' case, no such meeting ever took place.

[65] The Respondent's witness, Pieterse and, indeed, the Respondent's Counsel, put emphasis in the Applicants' submission contained in paragraph 6.2 of the Applicants' Statement of Claim, which the Respondent apparently construed as favourable to its case. In this paragraph the Applicants allege as follows:

"6.2 Respondent failed to allow the Applicants or their trade union representatives sufficient opportunity to make considered and effective alternative proposals at the consultation meetings".

[66] No satisfactory explanation was given by the individual Applicants of why this apparent self-contradictory averment was made in their Statement of Claim if, in fact, there was no consultation at all conducted with them by the Respondent, in terms of section 189. When Mr Lazarus More was asked to comment about this averment, he said he had no comment. When the same question was put to Mthembu, he said that the "consultation meetings" mentioned in paragraph 6.2 of the Statement of Case, referred to consultation meetings which did

not take place. I have no understanding of what this means. Such response was simply evasive, if not unintelligible.

[67] Accordingly, the Court would have been satisfied that the Respondent did in fact conduct certain consultation meetings with the Applicants which were relevant to the retrenchments of 18 August 2002 if the Respondent reliably indicated which those meetings were. As I have indicated, it does not seem that the provisions of section 189 were fully complied with by the Respondent in any attempted consultative process.

[68] Although there is no hard and fast rule about the form which the section 189 consultation meetings should take, it is common practice to have all meetings minuted, for the record sake. It is a notorious fact to this Court that in a large number of cases where the procedural fairness of a dismissal is in issue, the disputes centre around the question of whether or not the section 189 consultation meetings were held between the employer management on the one hand, and the unions and/or affected employees, on the other. It is, therefore, quite unusual and, indeed, strange that, in this day and age, there can still be a company which does not seem to realise the importance of taking minutes of such meetings and keeping a record thereof, such as the Respondent failed to do in this case. The fact that the Respondent had no adequate administrative staff to attend to this aspect, is no excuse. In any event, Pieterse told the Court that Lotter was supposed to have taken the minutes at all meetings. He aslo said Lotter was easily contactable by him. Yet no minutes were produced nor Lotter called to testify.

[69] Under the circumstances I am inclined to accept that if any

consultation meetings were held, those were meetings only as admitted to by the Applicants. For instance, it was admitted by the Union that consultation meetings were held in respect of the April 1999 retrenchment exercise, which, although not directly relevant to the present case, it served to establish the point of the downturn in the Respondent's productive and income-earning capacity. With respect to the retrenchment of August 1999, the Respondent alleged that the consultative process started with the meeting of July 1999 and followed by the final one in August 1999. There were contradictions between the evidence of Pieterse, on the one hand, and Charles and Tee, on the other, with regard to the exact date of the meeting or meetings of August 1999. Pieterse appeared adamant that only one meeting was held on 18 August 1999, which was also the date of the individual Applicants' dismissal. On the contrary, Charles and Tee said it was held on 16 August 1999.

[70] As for Pieterse's version, I am unable to conceive how, in all probability, a consultation meeting could have been held on the same day on which the employees were dismissed. I will return to this point shortly.

[71] As a process, a section 189 consultation is expected to consist of proposals and counter-proposals, caucus meetings, consultations with respective principals, etc. The process also involves a lot of lobbying amongst the union officials and members as to what stand to take on specific issues. Whatever the size a business entity can be, I hardly imagine a scenario where a section 189 consultative process, if properly conducted, could be started and finalised in one, or even two days. It was even more so where the retrenchment exercise had affected 16 employees.

[72] In my view, accordingly, the meeting of 18 August was no consultation meeting, but only a meeting whose main agenda was to announce the fate of the 16 employees to be retrenched. They were only to be advised about their last date of work and when they should return to collect their notice and serverance pay. It was not part of any consultative process, as envisaged by section 189.

[73] As for the version of Charles and Tee who contended that the meeting was held on 16 August, I find their evidence unreliable in this regard. Charles told the Court he got this information from Tee's diary on the same morning that he came to Court to testify (that was, 23 September 2002). He was testifying about an incident that allegedly took place more than 3 years previously. Admittedly, therefore, he had no personal independent recollection of what he was testifying about, particularly with regard to the dates of the events. Under the circumstances, a reasonable possibility could also not be excluded that he might have been referring to the consultative process that preceded the April 1999 retrenchments, but not directly linked to the retrenchment of the individual Applicants on 18 August 1999.

[74] Tee told the Court, at the outset, that he did not remember the dates when the meetings were held. He only saw in his personal diary that he recorded about a meeting having been held on 16 August 1999. The diary was not admitted as evidence, nor was a proposal made in this regard by Jonker. The issue of the admissibility of the diary entry was therefore, never entered into. However, even on the assumption that the diary entry was admissible it would, in my view, not take the Respondent's case

any further on this aspect.

[75] According to his diary, Tee told the Court, Pieterse gave the workers two options to choose from, namely:

[75.1] That a further short time be introduced;
[75.2] That, otherwise, 16 workers would be retrenched.

[76] Even if this happened, such approach on the part of Pieterse (as alleged by Tee) could never be said to have constituted a consultation process as envisaged in section 189. The workers were simply confronted with two pre-determined options to choose from.

[77] It was also remarkable that, although he had earlier told the Court that it was his habit to take notes of meetings that he attended, he did not do so in respect of the two meetings which he alleged were held with the Union and/or the individual Applicants, one in July 1999 and another on 18 August 1999. He further alleged that there were two other meetings which were held sometime prior to 16 August 1999 and that he was not sure whether he took notes in respect thereof. It was not clear in his evidence whether the alleged July meeting was one of those "two prior meetings".

[78] The Court further took into account the fact that Tee gave evidence after he had been sitting in Court throughout the proceedings before he was called to testify. Jonker might not have anticipated that the situation would arise when he would need to call Tee. However, that does not alter the position that Tee was in Court and listening to all the evidence before he took

the witness stand. Hence, the credibility weight of Tee's evidence was to a certain degree adversely affected.

[79] In his evidence-in-Chief, Charles referred only to two meetings, one in July and the other on 16 August 1999. When it was put to him by Ms Kapa (for the Applicants) that according to the individual Applicants they only knew of a meeting on 18 August at which they were told to leave the Respondent's premises, Charles said he could not remember. When it was further put to him that Pieterse had told the Court about the meeting of 18 August and not 16 August, again he said he could not remember whether any meeting was held on 18 August.

[80] Tee, in his evidence-in-Chief, only referred to the meeting of 16 August and said nothing about July. When he was asked whether he knew anything about a July meeting, he then said in fact he knew of about five meetings that were held. However, on further cross-examination, he said the five meetings were related to the April retrenchments. When it was put to him that in terms of paragraph 5.4 of the Applicants' Statement of Case there was a meeting held on 18 August, then he said he remembered that there was indeed, a meeting held on 18 August. In my view, this was clearly an afterthought. In almost every respect Tee was hesitant about what he was saying. He kept on saying "I do not remember", "I am not sure", "I think", etc. He was, therefore, not a reliable witness.

[81] The Applicants denied that any meeting with the Respondent's management was held during July 1999. Absent any admissible proof to the contrary on the part of the Respondent, in this regard, I accept that, indeed, no such meeting took place.

[82] As indicated earlier in this Judgment, it was common cause that the individual Applicants were dismissed on 18 August 1999. Yet the letters of their retrenchments were dated 19 August 1999, literally meaning that the letters were issued one day after their retrenchments. The wording used in the letters did not purport to refer to an *ex-post facto* event, but rather to advise the recipient of his retrenchment as of the date of the letter, which was 19 August 1999, which was factually incorrect.

[83] I therefore tend to agree with the individual Applicants' version that on 18 August they were called to a meeting where their names were called out as selected retrenchees and then were ordered to leave the Respondent's premises forthwith.

[84] There does not, however, appear to be any substance in the argument that the "LIFO plus Skills" principle was applied in this retrenchment exercise. Mthembu's contention that he was retrenched ahead of his junior (by length of service) Motsepe, this was appropriately respondeded to by Pieterse who said that although Mthembu and Motsepe were both guillotine operators, Motsepe had further skills as cropper operator and press operator, which Mthembu did not have. That was the reason Motsepe's retention was preferred by the Respondent. Thereafter, the issue of LIFO plus Skills was not further pursued by the Applicants. For this reason, I must accept that this principle was properly and fairly applied, which was a reasonable and fair selection criterion in the circumstances (section 189(7)).

[85] Further, according to Mthembu, when they attended the meeting of 18 August, Pieterse informed the workers that the 28 hours-

per-week short time had resulted in underproduction and that he (Pieterse), did not, however intend to intensify the short time scheme any further. Mthembu said Pieterse had then asked the workers to come up with suggestions of what they thought should be done. The workers had then told Pieterse that they had no suggestions on whether to increase or further reduce the 28 hours-per-week working time. This would have been a form of consultation on the part of the Respondent, but for the fact that the Respondent did not, in my view, appear to be prepared to discuss anything except the 2 options he put on the table for the workers to choose from. Such attitude showed lack of *bona fides* on the part of the Respondent in its professed willingness to consult with the Applicants.

[86] However, this aspect, although procedural in nature and form, it impacts rather more on the question of whether or not there was a need to retrench, in the first place, which involves the substantive fairness aspect of the dismissals. I have already found that the retrenchment of the individual Applicants was substantively fair.

[87] There are, however, other important procedural aspects which do not appear to have been properly addressed by the Respondent. For instance, there was evidence that the individual Applicants were paid for the notice and severance pckages, but it remained unknown what formula was used to calculate those payments. Clearly, the Respondent undertook the calculation exercise unilaterally. This was in violation of section 189(2)(c) and (3)(f) of the Act.

[88] The Respondent, having failed to comply with the provisions of

the abovementioned subsections of section 189, the individual Applicants were thereby denied their right in terms of section 189(5), that is, to make representations, if any, in response to the matters dealt with in the provisions aforesaid.

[89] Be that as it may, the Court takes into account that none of the individual Applicants have complained that their notice and severance payments were not properly calculated or that such payments were inadequate. There was, therefore, no prejudice, in this regard, suffered by the individual Applicants.

[90] It is my finding, therefore, that the dismissal of the individual Applicants was procedurally unfair. Having found so, in the light of the facts of this case, I do not believe that the individual Applicants are entitled to any compensation.

[91] Mthembu testified that at the time of his dismissal he was a member of the Union, but not paying any subscriptions. There was no evidence that any of the other individual Applicants were paid-up members of the Union, as at the time of their dismissal. As a result, no subscription deductions were being made by the Respondent from the wages of Mthembu and probably the other individual Applicants. This was apparently the reason why the Union was not contacted by the Respondent for the “meeting” of 18 August. The Union was only alerted by the individual Applicants after they had been retrenched.

[92] Indeed, at the conciliation meeting the Union was not represented. The certificate of outcome reflects only the individual Applicants as Applicants. In other words, there was no dispute which was conciliated between the Union and the Respondent. The Union is not cited in the present case as

appearing on behalf of the individual Applicants, but in its own right. In my view, therefore, its dispute with the Respondent ought to have first been conciliated. Its case is, accordingly, not properly before the Court. It has been brought prematurely.

Order:

[93] In consequence whereof, I make the following order:

[93.1] The First Applicant's claim is dismissed with costs.

[93.2] The dismissal of the individual Applicants was substantively fair but procedurally unfair.

[93.3] There is no order for compensation.

[93.4] There is no order as to costs.

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NDLOVU AJ

Date of Judgment : 15 May 2003

Appearances:

For the Applicants : 1) Mr D Cartwright (Union Official)
2) Ms N N Kapa (Union Official)

For the Respondent : Mr W Q Jonker
c/o Jonker Smith and Bergh Inc.