

J1724/99

IN THE LABOUR COURT OF SOUTH AFRICA

In the matter between :

NUMSA and OTHERS

First and Further Applicants

and

DORBYL LIMITED

First Respondent

CLIDET 453 (PTY) LIMITED

Second Respondent

JUDGEMENT

FULTON AJ

1.INTRODUCTION

1.1 This matter concerns the retrenchment of employees who were on a protected strike at the time of their dismissal.

1.2 The first applicant is the National Union of Metalworkers of South Africa ("NUMSA"). The second and further applicants ("the individual applicants") are 176 employees who were employed at the first respondent's Busaf Letaba facility until its closure in October 1998. It is common cause that 54 of the 176 individual applicants were relocated to the premises of the first respondent's Rolling Stock Division in Boksburg, Gauteng ("the relocated employees"), whereas 122 of the individual applicants were retrenched. There is a dispute about whether or not the relocated employees were retrenched.

1.3The first respondent in this matter is described as Dorbyl Limited. The first respondent had several divisions, one of which was the Dorbyl Transport Products (“DTP”) division. The case before me concerns Busaf Letaba, also referred to as Busaf Northern Province (“Letaba”), which formed part of the Bus or Busaf division of DTP. The business of Letaba, which was situated near Nkowankowa (formerly Tzaneen) in the Limpopo Province (formerly the Northern Province), was the assembly of bus bodies.

1.4During the evidence of the first respondent’s second witness, Mr Duff, it came to light that shortly before this trial the business of Busaf Gauteng, the only remaining bus body assembly plant of the first respondent at that time, had been sold as a going concern to Clidet 453 (Pty) Ltd. On 11 November 1998 the applicants brought an application to join Clidet 453 (Pty) Ltd to the proceedings. I granted this application on 12 November 2003. Clidet 453 (Pty) Ltd is thus the second respondent.

1.5I was handed two bundles of documents. In relation to the first, bundle “A”, the parties agreed in the pre-trial minute that the documents were what they purported to be and could be placed in evidence without further proof. Save for a few exceptions, the content of these documents was not disputed by the parties. In particular, the parties were in agreement that, although not verbatim, the minutes of the consultation meetings contained an accurate summary of what occurred and what was said at the meetings. In relation to the second bundle, bundle “B”, which contained mostly financial documents, there was no such agreement.

1.6The first respondent commenced the leading of evidence and presented the testimony of four witnesses:

1.6.1Mr A Ngubeni, who in 1998 was the human resources director of the DTP division. Mr Ngubeni was called primarily to testify on the consultation process.

1.6.2Mr R Duff, who in 1998 was the managing director of the DTP division. Mr Duff’s evidence went chiefly to the operational need to retrench.

1.6.3Mr H Smith, who in 1998 was the general manager of Letaba. Mr Smith gave evidence about the events at Letaba prior to and at the time of the strike, and about the process whereby employees were selected for relocation to Gauteng.

1.6.4Mr I Armitage, the general manager of Busaf Gauteng. Mr Armitage gave evidence about the current situation at Busaf Gauteng.

1.7The applicants called one witness, Mr P Mabitsela, a NUMSA official who conducted the consultation process on the applicants’ behalf.

2.THE FACTS

2.1 Before I get to the facts of this matter some background on the bus body building industry is necessary. In the mid 1970's the bus body building industry was at its highest level. This was a function of apartheid because the government funded the bus operators who transported people from the homelands to the cities and *vice versa*, and thus the bus operators bought buses. This started to change in the early 90's as the regime of the time ran out of money and pegged funding. Furthermore, the taxi industry blossomed and took customers away from the bus industry. Government then decided to restructure the industry and this led to a paralysis in the industry. An additional problem was that some of the first respondent's competitors, such as Durabuild which was a subsidiary of the Bophuthatswana government, were funded by government. Durabuild, very much a thorn in the side of the first respondent, was in essence a vassal of state and derived all its income from the state. Then in 1994 when the democratic government was elected transport devolved to the provinces. This led to the hope that route allocations would be made but at the time of the hearing of this matter in November 2003 that had still not materialised.

2.2 This history is reflected in the business of the first respondent. In the 1980's the Busaf division of the first respondent consisted of four bus body manufacturing entities: one in Butterworth which closed in 1982, one in Pinetown which closed in 1983, one in Port Elizabeth which closed in 1997 and Letaba which as we know closed in 1998. In 2003 the only remaining entity was the entity in Gauteng which was sold to the second respondent in mid 2003.

2.3 I turn now to the events at Letaba in 1998. Letaba fell within the registered scope of the Motor Industry Bargaining Council, whereas for the most part the balance of the first respondent's divisions fell within the ambit of the National Industrial Council for the Iron Steel Engineering and Metallurgical Industries ("NICISEMI"). In May 1998 NUMSA and SAMIEA, the employers' organisation, reached a deadlock in their annual wage negotiations and on 21 August 1998 NUMSA notified the Motor Industry Bargaining Council that its members would embark on a strike on 1 September 1998. The employees in that industry, including the individual applicants, embarked on a national strike on 1 September 1998. It is common cause that the strike was a protected one and that NUMSA's demand or one of NUMSA's demands was that increases be paid on actuals and not minima.

2.4 Mr H Smith, Letaba's general manager in 1998, testified that when he took up his position in March 1998 Letaba was incurring losses. These losses were communicated to the entire workforce when the executive came to Letaba for monthly meetings, and also by Mr Smith personally when he interacted with the shop stewards. During the former, management would talk to the workers and explain the problems. As

regards the latter, Mr Smith informed the shop stewards of the difficult position in which the company found itself. He also gave the shop stewards basic business training, for example, how to understand an income statement and a balance sheet and what one could do when things went wrong. Mr Smith also testified that he met with NUMSA the day before the strike started. At the time he said he was naïve enough to believe that the individual applicants would not support the strike. He gave the shop stewards two messages: firstly, the individual applicants had no reason to support the industry wide strike because the first respondent was already paying increases on actuals and not minima and secondly, he said to the shop stewards that they knew that the business was in a precarious state and that they should not *“take the matter out of [his] hands”*. Mr Smith knew that it was on the cards that Letaba could close and he said he was saying that if the strike went ahead the plant had no future.

2.5 On the day the strike started Mr Smith attempted to arrange a meeting with the workers through Mr Malatjie but was informed by Mr Malatjie that he should communicate any message that he wanted to get to the workforce through the shop stewards. Mr Smith held a second meeting with Mr Malatjie and the shop stewards on 3 September 1998. Mr Smith informed the shop stewards that they had no reason to strike and that the strikers better return to work or they would be putting the business at risk. Mr Malatjie put the strikers demand to Mr Smith i.e. that Letaba move out of the Motor Industries Bargaining Council to the NICISEMI or that the first respondent give a 12 – 18 % increase. Mr Smith explained to Mr Malatjie that it was not possible for the first respondent to unilaterally decide to move to the NICISEMI.

2.6 Mr Smith's evidence on these communications with the workforce and the shop stewards was not seriously challenged and in any event Mr Malatjie, the chief shop steward, was not called to rebut it. I therefore accept that at the time of the commencement of the strike in early September 1998 the Letaba shop stewards knew of the losses Letaba had incurred and the difficult position in which the facility found itself.

2.7 On 4 September 1998 Mr Smith drafted a memorandum to all striking employees. The memorandum confirmed that management and NUMSA had met on 3 September 1998 and had discussed the union's demands i.e. that Busaf Letaba move out of the Motor Industry to the Metal Industry or grant an increase of 12 to 18%. The memorandum then set out why the first respondent could not do this. The last sentence of the memorandum was: *“We therefore appeal to all striking employees to return to work before too much damage is done in terms of our delivery commitments and production targets.”* Mr Smith testified that he handed this memorandum to a few key people in the hope that the message would reach the striking employees.

2.8 The August 1998 report of Mr Smith, which was seemingly completed in September 1998, contains the

following important comments:

2.8.1 Letaba was contemplating employing an additional 25 short-term employees from October 1998.

2.8.2 The September strike would have a severe impact on the month's forecast and management hoped to negotiate a favourable recovery plan.

2.8.3 The workforce believed that they were grossly underpaid relative to workers in similar industries located in Johannesburg and Mr Smith anticipated that this disparity was likely to lead to similar problems in the future. However, if Letaba were to pay the higher wages it would be at a competitive disadvantage. Mr Smith posed two possible solutions: close the wage gap and simultaneously address the *"aggressive element"* in the workforce or relocate to Gauteng.

2.8.4 Letaba was experiencing a low order intake which could only be expected to improve when government's new transport system was implemented.

2.9 On 18 September 1998 the first respondent put an offer to NUMSA. The key aspects of that offer for the purposes of this case were as follows:

2.9.1 The first respondent offered to close the gap between "current actual rates of pay" in the Motor Industry and equivalent Metal Industry grades on a quarterly basis over a period of 3 years.

2.9.2 The parties would negotiate at plant level in respect of a recovery plan which would include working on Public Holidays and Saturdays at normal rates.

2.9.3 Unless a written response to the offer was received before 12h00 on Monday, 21 September 1998, the offer would lapse.

2.10 On 22 September 1998 Mr Smith informed NUMSA in writing that as the strike action had crippled production *"to a point where it has now become critical to make alternative arrangements to prevent the Company from loosing [sic] firm orders"*, Letaba had no other option but to employ temporary labour as soon as practically possible. Mr Smith also informed NUMSA that Letaba had decided to implement a lockout in response to the strike action and that the lockout was effective as from 22 September 1998. Lastly, Mr Smith informed NUMSA that in the event that the striking employees decided to return to work they were required to give 2 days' notice before they would be allowed to return to work.

2.11 At approximately 07h40 on 23 September 1998 Letaba attempted to engage casual labour but were unsuccessful because of the hostility of the striking employees. Most of the striking employees were armed with sticks with which they assaulted the casual labourers. The striking workers also refused permission for the casual labourers to gain entry to the premises.

2.12 Also on 23 September 1998, NUMSA wrote to Mr Smith requesting that the first respondent forward its 18 September 1998 offer to the NUMSA head office and requesting certain information, including a list of employees. The second last paragraph of this letter stated *“We will appreciate it if the above information can reach our offices within 7 days from date hereof so that we can be able to seriously [sic] consider your offer.”*

2.13 In addition, on 23 September 1998, Mr Smith notified NUMSA in writing of Letaba’s intention to start consultations in relation to a possible closure and that the first meeting in this regard would take place on 1 October 1998.

2.14 On 25 September 1998 Letaba instituted an urgent application to interdict the actions of the striking employees in relation to the casual labourers. On 28 September 1998 this court issued a rule nisi restraining the striking employees from the conduct complained of.

2.15 Also on 25 September 1998 management provided NUMSA with the list of employees which NUMSA had requested in order to consider management’s 18 September 1998 offer.

2.16 On 29 September 1998 the directors of Dorbyl Transport Products held a meeting. The minutes of this meeting contained, in my view, certain critical records:

2.16.1 Under the heading “Forecast” the minutes reflect the following:

“Bus Division did not table a revised forecast as a result of the decision to relocate the plant to the RSD premises.” It was common cause that at this time the Bus or Busaf division consisted of Letaba only.

2.16.2 At paragraph 3.2 under the heading “Busaf Letaba” the minutes reflect the following:

“The current position at Letaba was discussed in depth and preliminary indications were that a loss of R900k would be incurred at PBT level. It was noted that NUMSA had not responded to Dorbyl’s offer in respect of improving labour rates to the Metal Industries levels over a period of three years.”

Options for Dorbyl were:-

- i) Continuation with higher labour rates and an intransigent workforce.*
- ii) Complete closure.*
- iii) Closure and relocation to Gauteng.*

After discussion, the Executive unanimously agreed to proceed with Union Consultations regarding Option 3.

Messrs Duff, Smith and Ngubeni were especially mandated by the meeting to proceed as expeditiously as possible to minimise disruption to Busaf customers.

A more detailed financial study is to be conducted on an urgent basis concerning the proposed relocation of Busaf Letaba, to the RSD premises. A draft proposal will be tabled at the Dorbyl Exco meeting on 7 October. Lockout action is to be instituted in the interim while the strike is still in progress.”

PBT stands for profit before tax. As stated above the RSD premises were the premises of another division of the first respondent [where no buses were assembled] in Boksburg, Gauteng.

2.16.3 At paragraph 4.4 under the heading “Union Related Issues” the minutes reflect:

The Chairman expressed his belief that the union had targeted Dorbyl during the strike action and no latitude was to be extended to Numsa under any circumstances.”

2.16.4 At paragraph 4.5 under the heading “Durabuild” the minutes reflect:

“Media coverage is to be sought on the Durabuild issue relative to the closure of the Letaba and PE plants.”

2.17 On 30 September 1998 NUMSA wrote to Mr Ngubeni. NUMSA informed Mr Ngubeni that in principle its members accepted the respondent’s offer and were willing to go back to work as soon as possible, but that a written agreement should be concluded and that it did not accept a recovery plan on the basis proposed by the respondent. On the same day Mr Ngubeni wrote back to NUMSA and informed it that the first respondent would respond to NUMSA’s letter at the consultation meeting on 1 October 1998.

2.18 On 1 October 1998 at 11h00 the first consultation meeting took place. Management was represented by, *inter alia*, Mr Ngubeni (“AN”), Mr Smith (“HS”), Mr Duff (“RD”) and Mr Flint (“MF”), an executive director of DTP. NUMSA was represented by Mr Mabitsela (“PJ”), Mr Malatjie (“RM”) and the balance of the shop stewards. Also present were staff representatives, i.e representatives of non unionised staff, including Mr V Nomvela (“VN”) and a SANCO representative, Mr Mabuza (“EMA”).

2.19 As many of the issues in this case revolve around what occurred at the 1 October 1998 meeting I set out below some of the material portions of the minute:

“AN = Without wasting any time then, I would like to ask Mr Rob Duff to give us the background which led to the Company’s intention to start the Consultations on possible closure of the Busaf Northern Province (Letaba) facility.

RD = To start with, I can simply say the company has been losing a lot of money for the past five years. In order to give you some indication we have been incurring pre tax losses for this financial year as follows :

April	=	R360 000
May	=	R267 000
June	=	R589 000
July	=	R111 000
August	=	R104 000
September	=	R950 000 (Estimate)

All in all, we have lost about R2,4 million in six (6) months. Given that, it is clear that there is no business sense to continue operating in Letaba. No shareholder would like to invest in such a company. **The decision to close is purely an economic decision.**

PJ = Can you substantiate your claim/statement of losses incurred?

RD = Yes, you can have an abridged copy of the financial statements now.

NB At this stage Mr H O B Smith volunteered to make a copy, which was given to the Union. (See attached copy).

PJ = When do you intend to close down the facility?

AN = As soon as possible. Look, there is no production currently take place. We may start removing some equipment immediately.”

Management were asked whether the closure was as a result of the strike.

“EMA= Is the closure related to the current strike?

AN = Not necessarily so. The company has been incurring major losses as from April 1998. The September NUMSA strike only aggravated the situation. The company has reached a stage of no hope for better things to come in the near future.”

Mr Malatjie accepted that the first respondent had incurred losses and commented as follows:

“RM = *We do understand that you made losses for the past six (6) months. Let us not talk any further. There is no use.”*

The minute reflects that NUMSA wanted to know when Letaba was closing:

“PJ = *Is the September strike the main reason for closure?*

AN = *No. As stated earlier it only made things worse. Can we adjourn the meeting now, and agree on the date of our next meeting?*

PJ = *What are we going to tell our members out there. Should we tell them that the company is closing?*

AN = *We made it clear that our intention is to start the Consultation process for a possible closure. No final decision has been taken yet. It sounds as if you want to push us to make a final decision today.*

VN = *I don't want to see the company closing down. The company's offer of the 17/9/98 was reasonable.*

AN = *That was rejected by NUMSA. They only conditionally accepted it yesterday and that was too late as the offer is not on the table any more.*

PJ = *NUMSA has got structures. I did write to you, Mr Ngubeni and Henry Smith, regarding our position concerning the offer. It was difficult for me to respond in time. This is not an individuals issue [sic]. Right now, our position is we want to go back to work. **You better tell us now when are you closing.***

EM = *I would like to plead with NUMSA to give Busaf enough time to decide on the exact date of closure. Giving such a decision today will be too soon.*

PJ = *What should I tell our members after this meeting then? Regarding the issue of working on Saturdays, Sundays and holidays at normal rates of pay, we say that is totally unacceptable. Our members are not slaves, we have an agreement here that our members will work only ten (10) hours overtime per week.*

NB *At this point in time, it was clear that the company was under pressure to come up with the exact date of closure and the way forward. Realising this the Chairperson asked for a caucus. Both parties then caucused for about 30 minutes.*

PROCEEDINGS RESUME:

AN = *We were asked to come up with a decision as to when to close down the company. In making that decision, we have considered everything which was said previously and we are of the opinion that nothing will change the current market forces of this industry. Even the Premier of Northern Province will not change that overnight. Our final decision thus is to close down the factory as soon as practically possible. In order to minimise the impact of the closure, certain skills will be identified and specific individuals offered jobs somewhere else in a smaller operation (possibly in Gauteng Province)."*

2.20 Near the end of the meeting Mr Smith states that he will discuss the identification of the skills needed at the new site with the foremen the next day.

2.21 On 2 October 1998 Mr Mabitsela wrote to Mr Ngubeni. In the letter Mr Mabitsela records that the company had given NUMSA notice of its intention to close down BUSAF Letaba and of its intention of relocating to Gauteng to a smaller operation. He goes on to request from management the resolution of the board of directors on closure and all relevant information pertaining to closure and the reasons for closure. In the last paragraph Mr Mabitsela states:

"You have undertaken to provide us with the above requested information, the date of the intended closure and your proposal on the severance package before the end of Friday 2 October 1998."

2.22 On 2 October 1998 NUMSA were telefaxed a copy of the minutes of the meeting of 1 October 1998, the abridged financial statement given to them during the meeting of 1 October 1998 and a letter from Mr Ngubeni. The material aspects of this letter were:

2.22.1 NUMSA was informed that Letaba would be closed on 5 October 1998.

2.22.2 The reasons for closure were economic "such as lack of orders which has resulted in continuous losses which can no longer be sustained."

2.22.3 The proposed method for selecting retrenchees was retention of skills.

2.23 The next consultation meeting took place on 5 October 1998. On the same day NUMSA and SAMIEA settled the national wage dispute in terms of a collective agreement which was signed and which provided for the cessation of the strike. Also on that day Mr Duff prepared a memorandum on Busaf Letaba for the Dorbyl executive committee meeting on 7 October 1998. This telling memorandum reads as follows [the emphasis is mine]:

“TO: DORBYL EXCO DATE : 5 OCTOBER 1998

FOR YOUR CONSIDERATION AND DISCUSSION ON WEDNESDAY, 7 OCTOBER 1998

BUSAF LETABA

Purpose

*The purpose of this memorandum is to inform Exco of the latest position at Busaf Letaba and **the consequences of the decision taken at the DTP Board Meeting last week to close the operation and relocate on a scaled down basis to RSD's premises in Boksburg East.** A fully motivated submission, including future prospects, will be prepared to the usual standard for the November Meeting.*

Background

Established in 1972 the company depended for $\pm$ 15 years on various forms of Government Decentralisation assistance etc. This included an incentive paid for employing the maximum number of people. Since the late 1980's these forms of assistance have progressively disappeared and the business must today necessarily compete with a number of localisation disadvantages which do not affect its competitors.

The major disadvantages at present relate to the following :-

- i) *Extra cost for movement of materials from Gauteng.*
- ii) *Cost of transporting chassis and complete buses from and back to Gauteng.*
- iii) *Difficulty in adequately resourcing the business with capable management.*

Until the strike the only competitive advantage was payment of average labour rates $\pm$ 10% cheaper than in Gauteng.

Profit History (R000)

The performance of Letaba in the last three financial years can be summarised as follows :

	<u>SALES</u>	<u>PBIT</u>	<u>PBT</u>
1998	24 757	1 009	817
1997	24 245	1 770	1 606
1996	21 097	1230	1 133

In the current financial year following additional product development costs as a consequence of the P.E. closure, the PBIT performance can be summarised as follows :

<u>Apr</u>	<u>Ma</u>	<u>June</u>	<u>Jul</u>	<u>August</u>	<u>September</u>
<u>il</u>	<u>y</u>		<u>y</u>		<u>(Estimate)</u>
(23	(11	(357)	99	143	(644)
9)	3)				

Significantly September's result was directly a consequence of the National Strike by Numsa and has effectively prevented the company from recording an estimated PBIT of R250k in the month.

Labour

In the 1970's and up to ±1986 Busaf Letaba's rates of pay could be described as being very low. Over a period of time these rates have improved to an average of 25% better than NICMI minimums. The company has continued to award increases on actuals on an annual basis with the application of the set-off principle. (7% in 7/98). Significantly, even with the Industry strike now having been settled at between 8 and 10 percent, Letaba's rates of pay would still exceed the new Industrial Council's minimums (before application of the offset.)

Numsa are very active in the North Eastern areas of Northern Province and have effectively campaigned that the company is paying "slave wages" and exploiting its members. On 1/9/98 a militant Shop Steward and an ambitious Union organiser effectively took the workforce out on strike under the guise of solidarity with the rest of the motor industry but in reality based on their demands that Dorbyl cease paying wages below those paid under SEIFSA.

Importantly Numsa did not strike at either Durabuild or TFM, Busaf's main competitors. There is reason to believe that Busaf was singled out for being a Dorbyl company and therefore possibly a "soft target" which could be used as a lever to achieve broader industry wide goals including the elimination for the differential in wage rates between urban and rural areas.

Equally significant is that Numsa did not take up an offer by Dorbyl Chapter II Companies dated 18/9/98 to equalise wages rates with the Metal Industry on a progressive basis 3 years linked to a strike recovery plan.

DTP Meeting – 29 July 1998

Following detailed analysis of the situation and in view of labour's intransigent position, DTP Directors reviewed available options :-

- i) Continue operating at Letaba with higher labour costs.
- ii) Complete closure and withdrawal from the industry.
- iii) Closure and relocation/establishment of Busaf Gauteng at RSD.

Broadly speaking Option 1 would render the business more uncompetitive at a time when market forces dictate further cost reductions. The participation of labour in a suggested recovery plan included in a proposal to Numsa was rejected outright and in hostile fashion. We cannot contemplate labour playing a role to improve productivity etc given the current Union inspired attitude. Option 1 is thus completely unviable.

Option 2 would entertain the business closing permanently at a minimum cost of :-

- | | | |
|-----|------------------------|-------|
| i) | Fixed asset write-off | R7,5m |
| ii) | Retrenchment costs etc | R1.5m |

Note :

The property is rented and we are confident of extricating Dorbyl from the lease for less than two months rental (±R60k).

If Option 2 was to be pursued, additional avoidable interest costs would have to be carried at ERFSA given their commitment to the Hawk program and the likelihood that alternative body builders could not produce the 80 buses scheduled in the program in the time presently envisaged.

Option 3 is by far the best solution to the impasse. Advantages for pursuing this route are as follows:

- i) Better location to market.
- ii) Reduced closure cost in respect of plant write-off and retrenchment expenses.
- iii) Occupation of vacant production bays at RSD which will produce R300k p.a. rental income for Dorbyl.
- iv) Utilisation of much of RSD's infrastructure to substantially reduce the cost base of a separate entity as presently established in Northern Province. This includes H.R., financial, industrial engineering, plant maintenance services including the provisions of power and water utilities etc.
- v) Elimination of material and chassis and bus/transport cost, R1,5m p.a.)
- vi) Continued ability to produce ERFSA and TATA buses in accordance with forward strategic plans.

Financial Synopsis

It is currently estimated that it will cost R3,6m to close and relocate Busaf Letaba to RSD. This includes recommissioning, staff relocation and recruitment costs and allows for costs pertaining to lost production of R350k while the relocation takes place.

For a business generating R40m annual sales total savings of R2,8m p.a. are envisaged. The pay-back is therefore conservatively estimated to be between 15 and 20 months.

Summary

After considering the above, DTP Directors unanimously agreed to proceed with Option 3 as expeditiously as possible. As at Monday, 5 October transfer of chassis and partially complete buses to RSD was under way and transfer of equipment and stores should be complete by end October. It is intended to quickly produce certain buses from RSD's premises with selected personnel who, if possible, will relocate to Gauteng during October. Significantly, expressions of support have been received from major customers including Interstate Bus Lines, Matstrans and Mercedes Benz.

It is proposed to update Exco more fully at the November meeting once more clarity is to hand regarding an accurate estimate of relocation costs and final agreed retrenchment costs etc. Simultaneously, a brief review of the future business plan for Busaf Gauteng will be presented together with appropriate financial justification. At this stage the production of some 200 buses with a rationalised product range is anticipated yielding R2,5m PBIT with effect from financial 1999/2000."

2.24 The key aspects of the consultation meeting of 5 October 1998 are:

2.24.1 Selection criteria

- NUMSA proposed LIFO as the criterion to select the employees to be relocated to Gauteng. Management on the other hand wanted to select employees on the basis of core skills.
- After a caucus management reported to NUMSA that the criteria would be a combination of LIFO and retention of skills.
- Management informed NUMSA that Mr Ngubeni and Mr Flint would "do the selection process" and would inform NUMSA of the outcome the next day. Management also informed NUMSA that Mr Malatjie and the shop stewards could do their own

identification of the necessary core skills and the parties could then compare their lists the following day to ascertain if there was any common ground.

- NUMSA requested that it be provided with a list of employees and that such list should contain the employee's years of service, grade, severance package and the relocation allowance.

2.24.2 Employees to be relocated

- NUMSA proposed that a R1000 relocation allowance be paid to employees relocating to Gauteng, that 5 days' paid leave be given to these employees to look for alternative accommodation in Gauteng and that the relocating employees be paid a severance package.
- Management agreed to pay a relocation allowance of R1000 and to give these employees 3 days' paid leave to look for alternative accommodation, but declined to pay the relocated employees a severance package.

2.24.3 The provision of financial information

- NUMSA complained that it had not been provided with all relevant information requested. In particular, NUMSA requested a copy of *"the cancelled order"*.
- Management responded that it had provided all relevant financial information to NUMSA and disputed that NUMSA had requested detailed financial information. It, however, informed NUMSA that if NUMSA wanted to look at detailed financial information it could do so the following morning. As regards the cancelled order management informed NUMSA that the order had been cancelled telephonically.

2.24.4 The end of the strike

- In view of the end of the strike NUMSA wanted to know why employees were not back at work.
- Management responded by relying on its letter of 22 September 1998 where it informed NUMSA of its decision to lock employees out and its 2 day notice requirement in the event that employees wished to return to work.
- NUMSA informed the meeting that it had handed a letter to management indicating that its members would be returning to work on 7 October 1998.

2.24.5The removal of chassis to Gauteng

- NUMSA wanted to know why chassis were being moved to Gauteng.
- Management explained that *"Intimidation is one of the reasons for us to move the chassis to Gauteng so that production can continue as we did not know when the strike would end."*

2.25On 5 October 1998 Mr Mabitsela wrote a letter to Mr Ngubeni requiring an undertaking in writing before close of business on that day that the company would not close down Letaba until such time that there is proper consultation. The letter did not solicit a response other than that Letaba closed on 5 October 1998.

2.26The next consultation meeting was held on 6 October 1998. In addition to Mr Mabitsela attending this meeting as NUMSA's representative, Mr M Motsepe, NUMSA's regional general secretary, attended the meeting. Mr Motsepe had not attended the prior consultation meetings. The material aspects of this meeting are:

2.26.1Selection criteria

- NUMSA was provided with the list of employees it had requested at the meeting of 5 October 1998. NUMSA asked management to identify the employees who would be relocated and Mr Flint read the list and informed NUMSA that about 58 employees would be relocated.

- NUMSA informed management that the list of employees identified for relocation was unacceptable as there were signs of favouritism in it. Management responded that it was prepared to listen to NUMSA's representations on the list, that the list was just a proposal and suggested that Mr Malatjie and Mr Smith get together to try and compile an agreed list.

2.26.2The provision of financial information

- Mr Motsepe informed management that the financial information provided to Mr Mabitsela was of no relevance, that Mr Mabitsela was not financially astute and was thus not mandated to make a decision *"in that regard"* and that he wanted detailed financial information to be sent to NUMSA's financial consultants. Mr Motsepe then listed the information he required which was substantial.
- Management's response was to explain to Mr Motsepe that there had already been 2 consultation meetings, that Mr Mabitsela was given the information he needed, that NUMSA had pressurised the company to make a decision to close the facility and that the company could not now be drawn back to where it was on the first day. It was pointed out to Mr Motsepe that some of the information he had requested had already been provided to NUMSA.
- After a caucus management stated that it was more than happy to provide the necessary and relevant financial information again, but that their position was that they had in this regard already met their obligations.

2.26.3The decision to close

- Mr Motsepe asked if the company's decision to close the facility and relocate to Gauteng was irreversible.
- Mr Ngubeni responded that he would phrase it differently and say *"having considered all proposals from the various parties to*

the negotiations, a final decision to close the Company was taken.”

2.26.4 Alternatives to closure

- Near the end of the meeting Mr Motsepe informed management that NUMSA would consider a wage freeze if management reconsidered the decision to close the facility.
- Management did not respond to this suggestion.

2.27 On 7 October 1998 Mr Smith wrote a letter to Mr Mabitsela and Mr Malatjie. Referring to NUMSA’s letter giving 2 days’ notice of the return to work Mr Smith recorded that at the meeting on 5 October 1998 management had *“declared short time”* and that as the situation remained unchanged, short time would remain in place until further notice.

2.28 On 7 October 1998 the applicants’ attorneys of record sent a letter to Mr Smith. This letter records some of the complaints made in this case and, in particular, records that the applicants had referred a dispute to the CCMA in relation to the company’s failure to provide all relevant information in regard to the closure of the facility and the retrenchment of NUMSA members.

2.29 On 9 October 1998 Mr Ngubeni wrote to Mr Mabitsela. The material parts of this letter are:

2.29.1 Mr Ngubeni informs NUMSA that the company had notified NUMSA that the retrenchment date would be 9 October 1998. He goes on to say that *“Severance packages for all hourly paid members were calculated and handed over to yourselves on 6 October 1998 as requested.”*

2.29.2 Mr Ngubeni records that the contracts of employment of NUMSA members *“have now been terminated”*.

2.29.3 Management was available to meet with NUMSA on 12 October 1998 to once again make available to NUMSA all relevant information requested and to endeavour to reach consensus on the list of employees to be offered alternative employment in Gauteng.

2.30 The bundle of documents contained a document dated 9 October 1998 and which was an example of a standard retrenchment letter. The letter advised the employee that he/she is retrenched and confirms that his/her services were terminated on 9 October 1998.

2.31 Mr Motsepe responded to Mr Ngubeni's letter on the same day. In the letter Mr Motsepe challenges the company's request to consult after it had already closed and once again requests the *"required information"*.

2.32 Also written on 9 October 1998 is a letter to NUMSA from the company's then attorneys of record who "without prejudice" and without admitting liability, once again offer to make available all and any relevant documentation requested.

2.33 On 12 October 1998 Mr Motsepe wrote to Mr Ngubeni to inform him that clarification would be sought at the meeting of 12 October 1998 on the reasons why the company was not offering everyone contracts of employment at the new premises; whether such contracts were new or whether they were a continuation of existing contracts; demanding that the selection criterion be LIFO only and asking the company to detail what relevant information it had disclosed to NUMSA. Mr Motsepe also requested the company to reconsider its decision to close the facility.

2.34 The last consultation meeting was held on 12 October 1998. The material aspects of this meeting are:

2.34.1 Selection criteria

- At the previous meeting Mr Smith and Mr Malatjie were requested to go and compile a new list of employees to be relocated. Mr Smith reported that that was done and 80% of NUMSA's proposals were entertained. Mr Malatjie confirmed that a new list was compiled but that *"when the letter came from our Attorneys"* he had said that NUMSA was no longer going to consider the list.
- The minute records that Mr Smith and Mr Malatjie were then given time to again go through the list and reach consensus on the employees to be relocated. Mr Smith testified that this was an error in the minute as he did not recall any further discussion with Mr Malatjie other than to explain why Mr Malatjie himself had not been offered a job in Gauteng.
- Mr Flint said that sufficient consensus has been reached on selection criteria. Mr Smith said that *"consultations were done"*

and compromises made. There is a lot of common ground. We differ on 3 names out of a list of 58 names.”

- After a caucus, Mr Ngubeni informs the meeting that “*we are all happy about the list compiled by Henry [Mr Smith] and Rufus [Mr Malatjie]. That is a list reached through consensus and we should all accept it. With that now accepted, the Company will do everything possible to pay severance packages by Friday 16 October 1998. All packages for the hourly paid employees will be calculated up to last week Friday 9 October 1998.*”

2.34.2 Provision of information

Mr Ngubeni stated that NUMSA had been provided with “*all the information needed*” namely, financial statements, the reasons for closure and the date of closure, the cancelled order, the Dorbyl Limited annual reports, the name list of employees, the letter from Dorbyl Limited to Mr Alec Erwin, Busaf Letaba’s workload from 1982 and a preliminary list of employees to be relocated to Gauteng.

2.34.3 The decision to relocate

Mr Smith gave the reasons on how the company will reduce costs by being based in Gauteng.

2.34.4 NUMSA’s letter of 12 October 1998

Management responded to NUMSA’s letter of 12 October 1998. Management explained that the Gauteng operation would be smaller and consequently, jobs could not be offered to all employees, that relocated employees would continue with their contracts of service and would not be paid severance pay and that the decision to close was final and irreversible.

2.35 Mr Smith testified that he, together with Mr Malatjie, met with each of the employees identified to enquire whether he/she wanted to be relocated. They worked off a list which had columns stating “Will relocate”, “Will not relocate” and “Reasons”. If the employee wanted to relocate then the employee signed the “Will relocate” column. If they did not want to relocate they signed the “Will not relocate” column and management put the reason why they did not want to relocate in the “Reasons” column.

2.36 Upon closure of Busaf Letaba the first respondent relocated its operations and 54 of the individual

applicants to the RSD plant in Boksburg, Gauteng. It was the applicants' case that the standard retrenchment letter went to all employees, even the relocated employees. In advancing this contention the applicants relied on two common cause facts in the pre-trial minute to the effect that *"the individual applicants were employed by the [first] respondentuntil their dismissal in October 1998"*. Mr Franklin, for the respondent, pointed out to me at the commencement of the hearing that the content of these paragraphs were misleading and it was the first respondent's case that the 54 relocated employees continued in the employ of the first respondent and were not retrenched. Mr Smith testified that the retrenchment letter was not given to all of the individual applicants. It was only given to those employees who did not relocate to Gauteng. Mr Smith further testified that the letter was not handed out on 9 October 1998 but was given to employees the following week after the individual interviews with employees who had been identified to be relocated. It is, in my view, highly improbable that the 54 relocated employees were retrenched. It seems unlikely to me that the first respondent would have paid severance packages to employees who would continue to work for it in Gauteng. Furthermore, at the 5 October 1998 consultation meeting NUMSA requested that relocated employees be paid severance pay and management declined to do so. There is nothing in the minutes of the consultation meetings of 6 and 12 October 1998 to suggest that management changed its mind on this issue. In fact the contrary is true. At the 12 October 1998 meeting Mr Ngubeni states: *"Relocated employees will continue with their contract of services. No severance packages will be given to them and hence nothing will discontinue or stop. Even their union membership will continue."* I consequently find that the 54 relocated employees were not retrenched.

2.37 On 2 November 1998, NUMSA referred a dispute to the CCMA in relation to an alleged unfair retrenchment. This dispute was certified unresolved on 29 March 1999.

3. THE ISSUES

3.1 Paragraph 7 of the pre-trial minute recorded the issues that I am required to determine. At the commencement of the hearing Mr Van Der Riet informed the court that the applicants had withdrawn their allegations in relation to severance pay and therefore I am not required to determine the issue referred to in paragraph 7.8 of the pre-trial minute.

3.2 The legal issues to be decided are:

"7.1 Whether or not the retrenchments were fair and in compliance with the requirements of the law and of fairness and in particular –

7.2 Whether or not the dismissals were automatically unfair on the ground alleged that the respondent dismissed the individual applicants for their participation in a protected strike, alternatively for their conduct in furtherance of a protected strike.

7.3 Whether or not the dismissals were automatically unfair on the ground alleged that the respondent dismissed the individual applicants for their exercise of their rights in terms of the Act.

7.4 Whether or not the dismissals were for a fair reason based on the respondent's operational requirements.

7.5 Whether or not the respondent failed to comply with section 189(1) of the Act, on the ground alleged that the respondent made a final decision to retrench prior to embarking on, alternatively prior to completing a process of meaningful consultation with the Union.

7.6 Whether or not the respondent failed to comply with section 189(2)(a) of the Act, on the ground alleged that the respondent did not attempt, alternatively did not genuinely attempt, to reach consensus with the Union on appropriate measures to:

7.6.1 avoid the dismissal;

7.6.2 change the timing of the dismissals; or

7.6.3 to mitigate the adverse effects of the dismissals.

7.7 Whether or not the respondent failed to comply with section 189(2)(b) of the Act, on the ground alleged that the respondent did not attempt, alternatively did not genuinely attempt, to reach consensus with the Union on the method for selecting the employees to be dismissed.

7.8 Whether or not the respondent failed to comply with section 189(2)(c) of the Act, on the ground alleged that the respondent did not attempt, alternatively did not genuinely attempt, to reach consensus with the Union on the severance pay for the individual applicants.

7.9 Whether or not the respondent failed to comply with section 189(3) read with section 189(4) and section 16 of the Act, on the ground alleged that the respondent failed to disclose relevant information that would have allowed the Union to engage effectively in consultation and in particular whether or not the

respondent failed to disclose relevant information relating to:

7.9.1 its financial position;

the alleged loss of major contracts;

the reasons for the proposed dismissals;

the alternatives that the respondent considered before proposing the dismissals and the respondent's reasons for rejecting each of those alternatives; and

the possibility of the future re-employment of the individual applicants.

7.10 Whether or not the respondent failed to comply with section 189(6) of the Act, on the ground alleged that the respondent failed to consider and respond to, alternatively failed adequately to consider and respond to, the representations made by the Union, and on the further ground alleged that the respondent failed adequately to state its reasons for disagreeing with the Union's representations.

7.11 Whether or not the respondent failed to comply with section 189(6) of the Act, on the ground alleged that the respondent did not select the individual applicants as the employees to be dismissed according to criteria that had been agreed to by the Union, nor according to criteria that were fair and objective."

4.THE LAW

4.1Retrenchment of protected strikers

4.1.1Section 67(4) of the Labour Relations Act 66 of 1995 ("the LRA") provides that an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike. Section 67(5), however, provides that section 67(4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike or for a reason based on the employer's operational requirements.

4.1.2Consequently, the critical question in this case is whether the individual applicants were dismissed for

participating in a protected strike or whether they were dismissed for the operational requirements of the first respondent. If the reason for the dismissals is the participation in a protected strike, and not the respondent's operational requirements, then the dismissals will be automatically unfair [section 187(1)(a) of the LRA].

4.1.3 This was the question that came before the Labour Appeal Court in **SA Chemical Workers Union & Others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)**, a decision by which I am bound. There the court, at 1726 [32], held as follows:

“The enquiry into the reason for the dismissal is an objective one, where the employer’s motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be applied here. The first step is to determine factual causation: was participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair: the next issue is one of legal causation, namely whether such participation or conduct was the “main” or “dominant” or “proximate”, or “most likely” cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue is to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or most plausible inference is drawn from circumstantial evidence in civil cases.”

4.1.4 As a strike by its very nature results in economic hardship for the employer a further vexing question in matters such as the one before me is how much economic hardship is an employer required to tolerate before it is entitled to retrench employees. This question has on several occasions been considered by the Labour Appeal Court and the Supreme Court of Appeal (then the Appellate Division). The LAC in **BAWU v Prestige Hotel CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC) 937 A-C** and **Cobra Watertech v NUMSA (1995) 16 ILJ 582 (LAC) 616 F** held that dismissal must be the last resort of the employer. However, in **NUMSA v Vettsak Co-operative & Others 1996 (4) SA 577 (A)** and in **National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd 1997 (4) SA 51 (A)** the court accepted a threshold of “the likelihood of substantial economic loss.” In the **Afrox** matter (*supra*) Froneman DJP said that he thought it better not to adopt either approach but rather to seek a solution from the provisions of the LRA and its impact on the collective bargaining process itself. At 41 the court stated:

“The general approach of the LRA is to immunize employees participating in a protected strike from normal delictual and contractual consequences (s 67(2)). In return an employer is not obliged to remunerate employees during a protected strike (s 67(3)) and it may employ replacement labour during a protected strike, except for designated maintenance services and during offensive lockouts (s 76). The outcome, or resolution, of a strike is thus normally left to the respective positions of power of the opposing parties. Dismissal only becomes a weapon in exceptional circumstances, when operational requirements dictate its use (s67(5)). Even in non-strike dismissals based on operational requirements an employer must seek appropriate measures to avoid dismissals, minimize their number, change their timing and mitigate their adverse effects (s 189(2)(a)). These are all indications that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational reasons.”

4.1.5 Mr Van Der Riet referred me to the recent LAC decision of **Chemical Workers’ Industrial Union v Algorax (Pty) Ltd 2003 11 BLLR 1081 (LAC)**. There the Labour Appeal Court referred to an employer’s obligation to avoid dismissals for operational requirements and to minimise the number of dismissals and stated *“....the reason for the lawmaker to require all of these things from an employer was to place an obligation on the employer to only resort to dismissing employees for operational requirements as a measure of last resort.”* The decision therefore appears to conflict with the decision in the **Afrox** matter. With respect, I think that the **Algorax** decision (*supra*) is somewhat anomalous if one considers that the Labour Appeal Court in 2003 accepted that there is nothing in the LRA which precludes an employer from retrenching employees in order to increase its profits [**Fry’s Metals (Pty) Ltd v NUMSA & Others [2003] 2 BLLR 140 (LAC)**]. Mr Van Der Riet did not contend that an employer must be on the brink of insolvency before it is entitled to retrench employees. He said that he understood the “last resort” requirement in the **Algorax** decision to mean that an employer must show that retrenchments were necessary. Be that as it may, the court in **Algorax** did not mention, even obliquely, the **Afrox** decision and therefore in my view cannot be taken to have overturned that decision.

4.1.6 Mr Franklin, relying on the remarks of Froneman DJP in the **Afrox** LAC decision (*supra*), emphasised that I am not to determine the correctness or otherwise of the decision to close Letaba, but rather to determine whether the operational reason relied upon by the first respondent was genuine, and not merely a sham. Mr Van Der Riet, in turn, once again referred me to the **Algorax** decision (*supra*). In that case Zondo JP stated the position as follows:

“Sometimes it is said that the Court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business

knowledge or expertise which the employer as a businessperson may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this Court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether dismissal was fair or not must be answered by the Court. The Court must not defer to the employer for the purpose of answering that question. In other words, it cannot say that the employer thinks it is fair, and therefore, it is or should be fair.”

4.1.7 Both Mr Franklin and Mr Van Der Riet were *ad idem* that this aspect of the **Algorax** decision affirms the court’s views in the **Afrox** decision on proving an operational requirement.

4.2 The procedural fairness of a retrenchment

4.2.1 In the event that an employer is able to show that the dominant or main reason(s) for the dismissal is a proper operational requirement that is not the end of the matter. The employer is also required to show that the retrenchments were procedurally fair. This court and the Labour Appeal Court have on many occasions emphasised that consultation in the context of a retrenchment exercise means a “joint problem solving” or a “joint consensus seeking” exercise. If an employer makes a decision to retrench employees before consultation has been completed it essentially presents employees with a *fait accompli* and that is fatal to the procedural fairness of the retrenchments.

4.2.2 Counsel for both parties referred me to the decision of **Johnson & Johnson v CWIU & Others 1999 20 ILJ 89 (LAC)**. In that case the LAC characterised the employer’s obligations under section 189 as follows:

“The employer must initiate the consultation process when it contemplates dismissals for operational reasons. It must disclose relevant information to the other consulting party; it must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting; it must consider these representations and, if it does not agree with them, it must give its reasons.” The court went on to say that these obligations “are geared to a specific purpose, namely to attempt to reach consensus on the subjects listed in Section 189(2). The ultimate purpose of Section 189 is thus to achieve a joint consensus seeking process. In this manner this section implicitly recognises the employer’s right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed.”

4.2.3 Mr Franklin referred me to two cases that are relevant to procedural fairness. The first was **National**

Education Health & Allied Workers Union & Others v University of Pretoria (2002) 23 ILJ 740 (LC)

and pertained to the requirement that an employer may not make a final decision to retrench before consulting the representative union. In this matter the court stated that an employer is unlikely to announce the possibility of retrenchments before it is itself convinced of the need to take that step, for fear of precipitating unnecessary labour unrest. An employer should not therefore be criticised for its firmly held views at the time it embarks upon a retrenchment consultation process. Its conduct can only be adjudged to be unfair if at the commencement of the consultation process it has taken an irreversible decision and was not open to persuasion otherwise. The second decision was **Wanda & Others v Toyota SA Marketing (a Division of Toyota SA Motors Limited) 2003 (2) BLLR 224 (LAC)**. In this matter the court held that it is not good faith consultation to initially adopt a firm standpoint on a consultation topic and then attempt to alter that stance later in the consultation process, without reason.

4.3Relief

4.3.1As will become apparent I find that the dismissals in this matter were for proper operational requirements and thus substantively fair. In the circumstances I do not intend to deal with the law surrounding reinstatement.

4.3.2The amended section 194 of the LRA which applies from 1 August 2002 reads as follows:

“(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee’s conduct or capacity or the employer’s operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal”.

4.3.3In **Foulden & Others v House of Trucks (Pty) Ltd (2002) 23 ILJ 259 (LC)**, Landman J held that the amended section applies to unfair dismissals that occurred even before 1 August 2002. No argument was addressed to me that I should depart from that decision and I intend to follow it.

4.3.4I turn now to the law on compensation in instances of procedural unfairness. In **Johnson v Johnson** (*supra*) the court held as follows:

“Even if it is accepted that that compensation means ‘a sum of money for something lost’ the ‘something lost’ under section 194(1) is the employee’s right to a fair hearing or procedure prior to dismissalThe compensation for the wrong in failing to give effect to an employee’s right to fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is

punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance. The nature of an employee's right to compensation under s194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress [always taking into account the provisions of s 194(1)], or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."

4.3.5 The Labour Appeal Court in **Johnson & Johnson** (supra) also held at 28:

"The achievement of a joint consensus seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under s 189(1), (3), (5), (6) and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process."

4.3.6 In **Johnson & Johnson** one of the union's complaints was that the employer had failed to consult on severance pay. In this regard the court said:

"The appellant's [employer's] proposals on the severance package were put to the union at the meeting of 30 September 1996. The union at no stage queried the reasonableness of the package itself (which had been negotiated with it in 1994). When the union referred the dispute to the commission for conciliation mediation and arbitration no mention was made of the alleged failure to consult on severance pay. The overwhelming inference is that the union's silence indicated its agreement on the reasonableness of the appellant's proposals. Even if this is not the case it is nevertheless clear that the appellant, by putting its proposals on the table without restricting the union in any way from responding, sought to achieve, from its side, the purpose of jointly seeking agreement on the issue. It cannot be blamed for the union failing to comply with its corresponding obligations under s 189(2) and (6) and thereby frustrating that purpose."

4.3.7 In **Scribante v Avgold Ltd (2000) 21 ILJ 1864 (LC)** Damant AJ, after having reviewed the case law on compensation, considered the relevant factors to be taken into account in determining whether to award compensation in the context of a procedurally unfair retrenchment. At 3.15 and 3.16 the court held the following:

"Having weighed up the authorities, in my view the relevant factors to be taken into account in determining whether to award compensation or not are the following:

- 1. whether the employer has already provided the employee with substantially the same kind of redress;*
- 2. whether the employer's ability and willingness to make that redress is frustrated by the conduct of the*

employee;

3. the degree that the employer deviated from the requirements of a fair procedure;

4. whether the employer secured alternative employment for that employee.

I am satisfied that it is not appropriate to take into account the actual loss sustained by the employee, whether the employee successfully obtained alternative employment immediately after the dismissal, whether the employee did or did not mitigate his loss, and the period it would have taken to effect a fair dismissal. I am also satisfied that the other factors considered in the Brandadd case such as length of service, prospects of finding alternative employment and the financial position of the employer, are not relevant factors."

4.3.8 In a later decision **Alpha Plant & Services (Pty) Ltd v Simmonds & Others (2001) 22 ILJ 359 (LAC)** Goldstein AJA found it unnecessary to deal with the relevance or otherwise of patrimonial loss but considered it relevant to consider the extent of the employer's deviation from the requirements of consultation and assistance laid down by the LRA when deciding whether or not to award compensation.

4.3.9 Damant AJ's reasoning was cited with approval in the minority judgement of Page AJA in **HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes (2002) 23 ILJ 278 (LAC)**, although the court did add that the list of relevant factors is not an exhaustive one. Of course the cases referred to were all decided on the provisions of section 194(1) of the LRA prior to its amendment in 2002. I should also point out that in the **HM Liebowitz** case the dismissal was not just procedurally unfair but also substantively unfair and it was for this reason that Zondo JP disagreed with Page AJA's reference to the case law set out above. I mention in passing that in the majority judgement in the **HM Liebowitz** case Zondo JP at [15] stated that he was of the view that length of service may be relevant to a case where the only reason why the dismissal is unfair is that the employer failed to follow a fair procedure. After reviewing all the case law I, with respect, do not agree. Be that as it may, Zondo JP's remarks were *obiter* as that matter dealt with the compensation to be awarded in circumstances where the dismissal was both substantively and procedurally unfair.

4.3.10 I too do not believe that the list of factors listed as relevant in the **Scribante** case should be viewed as being exhaustive. After considering the principle behind the award of compensation in a procedurally unfair dismissal and the comments of the LAC in **Johnson & Johnson** as set out above I am satisfied that a further relevant factor is the extent to which the union failed to comply with its corresponding obligations under sections 189(2) and (6) of the LRA.

4.3.11 The only remaining question then is whether there is cause to depart from the existing case law now

that section 194(1) has been amended and the distinction between compensation for procedurally and substantively unfair dismissals has been eliminated. Neither counsel in this matter addressed me on this issue. I do not believe that there is cause to depart from the body of case law on this issue. In matters where a dismissal is found to be substantively fair the employee was rightly dismissed and therefore any loss sustained by the employee cannot be said to have been caused by the dismissal. It is essentially a question of causation. I therefore believe that the principles enunciated in the long line of cases set out in the **Scribante** decision remain good law despite the fact that section 194(1) has been amended.

5.APPLICATION OF THE LAW TO THE FACTS

5.1The reason for the dismissals

5.1.1Would the dismissals have occurred if there was no participation in the strike? On the first respondent's own version the strike exacerbated an already precarious financial predicament and was one of the factors that contributed towards its decision to close Letaba. This is borne out by, *inter alia*, Mr Ngubeni's response at the 1 October 1998 meeting to Mr Mabuza's question of whether the closure of Letaba was related to the current strike. Mr Ngubeni responded: *"Not necessarily so. The company has been incurring losses as from April 1998. The September NUMSA strike only aggravated the situation."* That being the case there is factual causation between the strike and the dismissals. The question then is what was the "main", or "dominant", or "proximate" or "most likely cause" of the dismissals.

5.1.2Mr Van Der Riet submitted that the most probable inference to be drawn from the established facts is that the reason for the closure and the dismissal of the individual applicants is the fact that NUMSA members resorted to strike action to achieve their aim of eliminating the wage gap. Mr Franklin, on the other hand, contended that the employees were dismissed following their participation in a strike, which had a severe impact on Letaba's business. That does not mean, submitted Mr Franklin, that the employees were dismissed because they went on strike. Rather the position is that a pre-existing financial predicament which had threatened the viability of the business prior to the strike, was greatly exacerbated because of the strike.

5.1.3Mr Van Der Riet contended that the first respondent did not have a proper operational requirement when it terminated the services of the employees. In making this contention Mr Van Der Riet relied on the following:

- At the time the first respondent

decided to close Letaba there were orders of more than R14.6 million on hand that could have been executed in Letaba. This was contrary to what management had informed NUMSA i.e. that the closure was for *“economic reasons such as lack of orders”*. The new facility at Boksburg could not and did not execute these orders before the next year. Mr Smith testified that this work would definitely have been completed before then had the orders been executed at Letaba.

- The cost disadvantages of the Letaba plant had been there for many years. If one compares the period of July 1997 to August 1998 with the period October 1998 onwards, nothing, apart from the strike, had changed in the economic conditions that affected Busaf Letaba.
- The first respondent's witnesses did not offer any explanation why a reduction in the Letaba workforce would not have offered savings at least similar to those later obtained in Boksburg.
- To further advance this argument Mr Van Der Riet relied on Mr Smith's reference in his August 1998 report to *“the aggressive element in the workforce”* and to Mr Duff's comment in his 5 October 1998 memorandum that the true reason for the strike was that NUMSA was *“very active in the North Eastern areas of the Northern Province and [had] effectively campaigned that the company is paying ‘slave wages’ and exploiting its members”* and that *“on 1/9/98 a militant Shop Steward and an ambitious union organiser effectively took the workforce out on strike under the guise of solidarity with the rest of the motor industry but in reality based on their demands that Dorbyl cease paying wages below those paid under SEIFSA.”*

5.1.4I have several difficulties with Mr Van Der Riet's submission. The first is that it ignores a great deal of compelling and objective financial data on the decline of the DTP business, but more particularly the business of Letaba. Secondly, the fact that the first respondent relocated 54 hourly paid employees from Letaba to Boksburg, including three of the seven shop stewards, runs counter to this argument. Thirdly, for all intents and purposes Mr Malatjie and Mr Smith agreed on which employees should be relocated to Gauteng. Mr Smith agreed to all but one employee put forward by NUMSA in reaching that decision. And lastly, it seems unlikely to me that in late 1997 the first respondent would invest some R6 million in the Letaba facility only to some 9 or so months later close the facility in order to partly rid itself of a troublesome workforce.

5.1.5It is clear from the evidence that Letaba and the DTP division were suffering financially on various fronts and had been for some time prior to the strike. Mr Duff testified that Letaba closed because of an economic decline, a diminishing market, declining and negative economic returns. Mr Duff stated that Letaba was not a viable business at the time that a decision was made to close the facility. Duff highlighted the following:

5.1.5.1 Losses

For the FYE March 1999 the Busaf division incurred a PBIT of R2.7 million. In the previous financial year the division had suffered a loss of R594 000.00. In relation to Letaba a loss of R2.6 million was incurred for the period April 1998 to November 1998. The PBT loss of the division for the 1999 FYE was R4.8 million, whereas in the previous financial year the division had suffered a loss of R1.4 million. During the period April 1998 to November 1998 Letaba incurred a PBT loss of just more than R4 million. In Mr Duff's view these were significant losses. For the 1999 financial year the whole of the DTP division incurred a loss of R22.2 million, whereas in the previous financial year the loss was some R13.4 million.

5.1.5.2 Shareholders' return

The losses resulted in a PBIT to capital employed of -57% i.e. the negative return to shareholders was -57%. In Mr Duff's view this was an appalling return. As regards the EVA ("Economic Value Added") of the bus division for the 1999 financial year i.e. the type of return a shareholder could expect if it invested in a similar operation, the figure was R3.1 million for the Busaf division. The EVA for the DTP division for the 1999 financial year was R 30.5 million.

5.1.5.3 Cash flow

As regards cash flow, the Busaf division had an adverse cash flow of R7.3 million for the FYE March 1999.

A part of this was attributable to the closure of Letaba. In the previous year the division had had an adverse cash flow of R2.3 million. This indicates that there was an increased negative cash flow of some R5 million and that the division was continuing to absorb shareholders' funds. As regards Letaba there was an adverse cash flow for the period April 1998 to November 1998 of R11.3 million.

5.1.5.4Orders

As regards orders received by the Busaf division there was a decline in the level of orders received by some R18 million i.e. there were R22.7 million orders on hand as at 1 April 1998 for completion during the 1998 financial year, whereas as at 31 March 1999 there were R4.8 million orders on hand for completion during the next financial year.

5.1.6By reference to the executive committee meeting minutes for the DTP division and the business reviews that he prepared for those meetings, Mr Duff took the court through the status of the business from June 1997 to March 1998. Aspects highlighted by Mr Duff were:

- The first respondent constantly monitored and attempted to reduce operational costs. The measures adopted included retrenchments.
- Sales fell short of expectation and forecasts.
- Durabuild remained a thorn in the respondent's side and the first respondent continually attempted to engage government on the issue.
- The profitability of the business was dependent on a steady flow of orders and this was not present.
- The respondent, after the closure of Port Elizabeth, concentrated its efforts on Letaba: capital was injected, skills were transferred from Port Elizabeth, technology was improved to satisfy a broader market and the input of a business consultant was obtained.
- A substantial order was anticipated, but not forthcoming, from

Great North Transport.

- The first respondent considered itself to be operating in a depressed market. This was caused by a number of factors, including the rise of the taxi industry and the failure by government to allocate new bus routes in accordance with its revised transport policy.

5.1.7 The poor state of the market led to the closure of Busaf Port Elizabeth in mid-1997. Busaf Port Elizabeth closed for the same reasons as Letaba. At the time, mid-1997, the first respondent considered whether to continue in the bus body building business at all, and if so, at what location. Management decided to consolidate at Letaba and to concentrate on making Letaba a successful enterprise.

5.1.8 Mr Smith testified that when he became the general manager of Letaba in March 1998 he inherited a budget that was grossly unrealistic at current orders and manning levels. Mr Smith expressed the view that if the order intake didn't improve Letaba would make a PBIT loss of R1.8 million. Mr Smith then implemented cost cutting measures at Letaba including the closure of the drawing office (which had been retained after closure) in Port Elizabeth, moving employees from indirect positions (positions which did not involve the building of buses) to direct positions and terminating employees on contract. For the months of July and August 1998 there was an improvement in the PBIT figures because of the cost cutting measures that he had implemented, but the plant was still making losses.

5.1.9 I turn now to the executive meeting of 29 September 1998. As I am of the view that the first respondent made the decision to close at this meeting (see below) I believe it is critical to consider what factors at the time led to that decision. These are the established facts:

- Letaba had been incurring losses since April 1998 and a substantial loss of R950 000.00 was anticipated for the month of September 1998.
- The business had been absorbing unacceptable levels of cash.
- Shareholders were unhappy about the returns they were receiving on their investment.
- Management had communicated and explained the precarious state of the business to the shop stewards but the employees had nevertheless decided to proceed with the strike.
- Management had attempted to employ casual labour to alleviate

the losses but was unable to do so because the strikers had prevented this. The actions of the strikers led to the court order of 28 September 1998.

- The first respondent continued to lose orders to Durabuild who operated in a way that indicated that it was immune to competitive forces. Raising this with government had had no positive outcome.
- The first respondent was operating in a declining market. It had waited several years for government to finalise its transport policy but this had not occurred. A large order was expected from the Northern Province but this had not materialised.
- A sister division (also part of the DTP division), ERF SA, which assembled chassis had developed a new Hawk chassis. Mr Duff was enthusiastic about the chassis and 80 chassis were scheduled for assembly. It did not make sense to outsource the bus body building to another company. It also did not make sense to build the bodies in Letaba as the chassis would have to be driven to Letaba and then, once the bodies had been assembled, back to Gauteng.
- The first respondent's offer of 18 September 1998 had lapsed. NUMSA had not accepted the offer but had indicated that it was giving the offer its serious consideration. It thus appeared that management's compromise of improving wages over three years was not acceptable to NUMSA or the individual applicants.
- Letaba had several competitive disadvantages: it was not close to its market; the movement of materials from Gauteng resulted in additional costs; transporting chassis to and from Johannesburg carried additional costs and there was difficulty in adequately resourcing the business with capable management. Letaba's competitive advantage lay in the low wages of the employees.
- The first respondent had the opportunity to use vacant bays at RSD and share costs and infrastructure with RSD.

5.1.10 The facts as set out above show that there were indeed several operational requirements that led to

the dismissals. However, the troubling aspect of the dismissals is the timing thereof. Mr Van Der Riet in oral argument emphasized that it was from the timing of the dismissals that I was to infer that the dominant reason for the dismissals was the strike. This submission rested on the following facts:

- The first respondent had been suffering losses for some months prior to the strike. The distinguishing factor in late September/early October 1998 was the strike.
- The consultations took place in record time and the dismissals occurred with undue speed.
- Management did not give any consideration to continuing at Letaba on a reduced scale.
- Management was adamant that the strikers were not going to come back to work. When NUMSA gave the required two days' notice that the strike was over, management informed NUMSA that short-time was implemented.
- If the first respondent had permitted the strikers to return to work the plant could have immediately started working on the orders at hand and the orders would have been processed sooner at Letaba than in Boksburg. This was not an option considered by management.
- The relocation cost the first respondent some R3.6 million.

5.1.11 There are, however, three considerations that, after careful analysis, I believe indicate that the timing of the dismissals should not be decisive. The first is that on Mr Smith's evidence, which I accept, NUMSA and the individual applicants were at the time of the commencement of the strike well aware of the precarious financial state of Letaba's business. Well knowing this the applicants decided to embark on a strike and pursued their demand for some 5 weeks thereafter. Secondly, on the facts the first respondent would have had proper operational requirements to close Letaba prior to the commencement of the strike. As submitted by Mr Franklin, in the event that I was to find that the timing of the dismissals was decisive I would be faulting the first respondent for not closing Letaba earlier. Thirdly, it seems to me that the strike demand was in itself an operational requirement that contributed towards the first respondent's decision to close Letaba when it did. When I put to Mr Ngubeni that Letaba had endured its location cost disadvantages for quite some time and asked him what it was in September 1998 that led the first respondent to its decision to relocate to Gauteng, he responded that if the first respondent had had to pay the Metal Industry wages immediately that "*would have killed Letaba*". I understood this to mean that if the first respondent acceded to the strikers' demand, Letaba would lose its competitive advantage and this

would have sooner or later have led to the closure of the facility. There was other evidence of this. Mr Smith in his August 1998 report stated: *“Strike action – Apart from the current strike it now seems likely that we could experience similar problems in future. The perception of the workforce is that they are grossly underpaid relative to workers in similar industries located in Johannesburg. If Busaf must pay wage rates similar to that of our competitors in Johannesburg we will have a competitive disadvantage based on the cost premium associated with procuring materials from Letaba. Solutions – 1. Resolve the labour issues based on an agreement on closing the current wage gap, while at the same time addressing the aggressive element within our workforce. 2. Re-locate facilities to the Reef.”* The minutes of the 31 August 1998 executive meeting of the DTP division reflect that in relation to Letaba: *“Discussions are to take place between management and employee representatives and shop stewards. The issue relating to the differential between wages in Letaba and on the Reef, if pursued, could result in the eventual closing of the plant.”* And lastly, Mr Duff in his 5 October 1998 memorandum commented that to continue operating with higher labour costs at Letaba would render the business uncompetitive at a time when market forces dictated further cost reductions. I do not believe that one can in the circumstances of this matter equate the strike demand with the strike. Equally I believe it to be a leap of logic to in this matter find that because the strike demand was a consideration in the decision to dismiss, that the strikers were dismissed for participating in a protected strike.

5.1.12 Consequently, after careful consideration of the totality of factors contributing to the decision to close Letaba, I am satisfied for the reasons set out above that it is more probable than not that the dominant or main reasons for the dismissals were a variety of proper operational requirements and not the strike itself. I consequently find that the dismissals were substantively fair.

5.2 The procedural fairness of the retrenchments

There were three main attacks on the procedural fairness of the dismissals: firstly, the decision to close was made prior to the commencement of consultations; secondly, the first respondent gave the applicants inadequate financial information and thirdly, the selection of the relocated employees was unfair. The last two attacks were, correctly in my view, not pursued by Mr Van Der Riet in argument save to reiterate that because the decision to close Letaba was made prior to the commencement of consultations that decision marred all aspects of the dismissal procedure. However, as the latter two attacks are relevant to compensation I intend to deal with them.

5.2.1 The decision to close was made prior to the commencement of consultations

5.2.1.1 The first respondent's case was that the final decision to close Letaba was made at the 1 October 1998 consultation meeting after NUMSA had pressed it to make that decision and after Mr Duff had sought the final approval of Mr Cooper during the first adjournment of that meeting. The applicants' case was that the decision to close Letaba was made at the 29 September 1998 DTP executive meeting.

5.2.1.2 In my view it is overwhelmingly probable that the decision to close Letaba was made at the 29 September 1998 executive meeting. These are the reasons why I am the view that it is highly probable that the decision to close was made at the 29 September 1998 executive meeting:

- The first respondent's own documents directly contradict its version. The minute of the 29 September 1998 executive meeting refers several times to the "*decision to close*" Letaba and even requests members of management to take certain steps pursuant to that decision. Mr Duff when he is explaining the commercial rationale for closure at the 1 October 1998 meeting states: "*The decision to close is purely an economic decision*". Then there is the memorandum of Mr Duff of 5 October 1998. This memorandum written shortly after the executive meeting and the first consultation meeting refers directly in its first paragraph to the "*consequences of the decision taken at the DTP Board Meeting last week to close the operation*." The first respondent contended that as this memorandum was written after the 1 October 1998 I should not give it much weight. In the words of Mr Duff there was too much emphasis placed on the "*semantics of the wording*". I disagree

as in my view it is likely that the wording in these contemporaneous documents reflects what occurred at the time.

- Shortly after the commencement of the 1 October 1998 meeting Mr Ngubeni is asked when management intended closing down the facility and he responds *“as soon as possible.....We may start removing some equipment **immediately**”* (my emphasis). And equipment was indeed moved extremely quickly – on 5 October 1998 Mr Ngubeni informs NUMSA that chassis had already been moved to Gauteng. 1 October 1998 was a Thursday. That means that there was one working day between the first consultation meeting and the removal of the chassis.
- Management’s approach at the 1 October 1998 meeting was not one of *“joint problem solving”*. Management did not say *“these are the problems – how are we going to deal with them.”* Also, when NUMSA asked if the facility was closing and, if so, when, management did not say to NUMSA that it was jumping the gun and that before that decision could be made a proper consideration of ways to avoid dismissal should take place.
- There were indications from NUMSA after the first adjournment at the 1 October 1998 meeting that it wanted management to reconsider the

decision to close. Management's response was to inform NUMSA that it had pushed the first respondent into making a decision and that that decision was final.

- At the later consultation meetings NUMSA requested management to reconsider its decision to close Letaba. Management refused to do so.
- Considerable losses had been incurred by the time the end of September 1998 approached. The first respondent had been unable to mitigate those losses by employing temporary labour. In fact, the notice to commence retrenchment consultations was given on the very day that the employment of casual labourers were prohibited by the strikers. In the words of Mr Duff there had to be an attempt to "*stem the flow of blood from the company.*"

5.2.1.3I consequently do not believe that when management entered the first consultation meeting it had a firmly held view and was open to persuasion as was found in the **University of Pretoria** case (*supra*). The facts simply do not warrant such a conclusion.

5.2.1.4Having said that, I am however of the view that NUMSA's acceptance of the operational need to close and, in particular, the losses suffered by Letaba, coupled with its pressing for a date of closure are relevant to the amount of compensation that should be awarded to the retrenched employees and therefore should be carefully scrutinized.

5.2.1.5Mr Van Der Riet argued that NUMSA's questions about when the facility would be closed must be seen in the context of the fact that the strikers wanted to return to work. On 30 September 1998 NUMSA informed the first respondent that its members in principle accepted the three year wage increase proposal and wanted to return to work as soon as possible, but that it required a written agreement to be concluded and that it did not accept management's recovery plan proposal. Mr Ngubeni's response to this letter was

to inform NUMSA that management would respond to NUMSA's proposal at the 1 October 1998 meeting. I therefore accept that NUMSA was expecting a response to its proposal at the 1 October 1998 meeting and that its members, having evinced a desire to return to work, were waiting for a response to NUMSA's proposal.

5.2.1.6 Be that as it may, it must have been patently apparent to NUMSA at the 1 October 1998 meeting that the first respondent was serious about the closure of Letaba. The discussion did not centre around breaking the deadlock on the parties' positions *vis-à-vis* the strike but rather the serious situation in which Letaba found itself. Also, save for asking management to substantiate the losses alleged to have been incurred, NUMSA did not seriously challenge the reasons put forward by management for the decision to close Letaba. This makes sense to me in the light of Mr Smith's evidence that he had communicated the precarious state of the business to NUMSA prior to and at the commencement of the strike. The minute confirms this in two important aspects. Mr Ngubeni at the meeting stated that the performance of Letaba had been shared with the employees on a consistent and regular basis and this comment was not challenged by NUMSA. And Mr Malatjie stated: *"We do understand that you made losses for the past six (6) months. Let us not talk any further. There is no use."* Under cross-examination Mr Mabitsela tried to explain that this comment meant that NUMSA wanted to talk further but I reject that evidence. In addition, after the commercial rationale has been explained NUMSA was offered the opportunity to adjourn to another date. Mr Mabitsela under cross-examination accepted that the purpose of the adjournment offered was to give NUMSA the opportunity to consider the first respondent's motivation for the closure of Letaba and to respond to it. NUMSA did not take up this opportunity. It is also clear from the minute of the 1 October 1998 meeting that NUMSA was pressing management to tell it if Letaba was closing and, if so, when. If NUMSA had been misunderstood in asking these questions as it alleged, then it is strange that it did not protest Mr Ngubeni's announcement of a final decision to close after the first adjournment of the 1 October 1998 meeting. Mr Mabitsela's comment of *"I forced you to make a decision because I wanted to know"* at the 5 October 1998 meeting also shows that it is unlikely that NUMSA was misunderstood.

5.2.1.7 It seems to me then that whilst the first respondent should be held accountable for its failure to comply with its obligations in terms of section 189(1) and section 189(2)(a)(i) of the LRA, NUMSA too should be held accountable for its failure to comply with section 189(2)(a)(i) of the LRA. I consequently find that the retrenchments were procedurally unfair on the basis that the first respondent made a decision to close Letaba prior to the first consultation meeting and failed to consult properly on appropriate measures to avoid dismissals. As stated above, I am of the view that NUMSA's actions are pertinent to the question of compensation and I deal with this later.

5.2.2 Selection criteria and the provision of information

5.2.2.1 Mr Van Der Riet did not, correctly in my view, pursue these attacks in argument. I say correctly because the evidence did not warrant pursuing an attack on these grounds.

5.2.2.2 Mr Smith's testimony showed that the first respondent consulted both on selection criteria and on the people to be selected, that by a process of consultation substantial consensus was reached, and that the persons identified for relocation were the people who in fact went to Boksburg. Mr Malatjie was not called to rebut Mr Smith's evidence and I therefore accept it in its entirety.

5.2.2.3 I consequently find that in relation to selection criteria and the actual selection of employees to be relocated/retrrenched, which is of course an issue of substantive fairness, the retrrenchments were fair.

5.2.2.4 As regards the provision of information I am of the view that the evidence revealed that although the first respondent could have done better (compare for example Mr Duff's 5 October 1998 memorandum with the minute of the 1 October 1998 meeting), it did provide NUMSA with sufficient information to evaluate its motivation for the closure of Letaba. In reaching this conclusion I have taken into account the following:

1.1.1 The first respondent did communicate the predicament of the business to its employees and the shop stewards prior to the commencement of the strike and shortly thereafter.

- On the facts the first respondent gave NUMSA most of the information requested and in response to repeated complaints to provide further information continually offered to make available all and any relevant documentation.
- Mr Motsepe's request for additional information came at a time after NUMSA had accepted the first respondent's motivation for closure.

5.2.2.5 I consequently find that in this respect the retrrenchment was procedurally fair.

6.COMPENSATION

6.1 Having found the dismissals to be substantively fair but procedurally unfair I now deal with whether compensation should be awarded to the retrenched employees and, if so, how much.

6.2 I deal first with the 54 employees relocated to Boksburg. As I have found that these employees were not retrenched it follows that they are not entitled to any relief.

6.3 I deal next with the 122 employees who were retrenched in October 1998. The relevant factors to be considered as per the **Scribante** and **Alpha Plant** cases are the degree that the employer deviated from the requirements of fair procedure and whether the employer secured alternative employment for the employee. As there was no offer of settlement in this case the first two factors mentioned by Damant AJ in the **Scribante** decision are irrelevant.

6.4 Mr Franklin contended that in the event that I made a finding of procedural unfairness on the basis that the first respondent made a decision to close Letaba prior to consultations then I am obliged to take into account the actions of NUMSA at the 1 October 1998 meeting. Mr Franklin further contended that these actions of NUMSA had the effect that the first respondent's failure "*made no difference to the outcome*" of the consultations. I do not believe that this is correct. As set out above the first respondent made the decision to close prior to it commencing retrenchment consultations and it did not adopt a joint problem solving approach or a joint consensus seeking approach when it did commence consultations. In particular the first respondent did not attempt to seek consensus on appropriate measures to avoid dismissals. During the hearing of this matter the first respondent was heavily criticised by the applicants for not having considered remaining in Letaba but on a reduced scale. It may be that if the first respondent had approached the consultations with the correct approach this alternative would have been considered.

6.5 I do, however, for the reasons that I have explained above, believe that it is relevant for the purposes of compensation to consider the extent to which the union failed to comply with its obligations under sections 189(2) and (6) of the LRA. In my view the breach of fair procedure in this matter was serious and I would have been inclined to award the retrenched employees a significant amount of compensation for the procedural unfairness of their dismissals had it not been for NUMSA's own failure to comply with their corresponding obligations under sections 189(2) and (6) of the LRA.

6.6 Mr Van Der Riet contended that the first respondent's premature decision to close Letaba vitiated the entire consultation process. I do not agree. The evidence revealed that there was substantial consensus on the selection criteria and that the parties agreed upon all the employees who should be relocated, save

one. In addition, the parties did consult on ways to minimise the number of dismissals. I do not believe that I can take into account the fact that the parties did not in a formal sense consult on measures to change the timing of the dismissals because of NUMSA's insistence that management inform it of when the facility would be closing.

6.7 In all the circumstances I consider that it would be just and equitable to award the 122 retrenched employees compensation equal to two months' remuneration to be calculated at the remuneration level that applied to them at the time of their retrenchments.

6.8 Neither party addressed me on the question of costs. I therefore do not intend to deviate from the normal principle that costs should follow the event.

6.9 As the business of the first respondent was sold to the second respondent in or about mid 2003 as a going concern the provisions of section 197 apply and as such I am of the view that my order in this matter should be made *vis-à-vis* the second respondent.

7. ORDER

7.1 I accordingly make the following order:

7.1.1 The 54 employees who were relocated to Gauteng were not retrenched.

7.1.2 The retrenchments of the balance of the individual applicants were substantively fair but procedurally unfair.

7.1.3 The second respondent is ordered to pay the balance of the individual applicants two months' remuneration calculated at the remuneration level that applied to them at the time of their retrenchments in October 1998.

7.1.4 The second respondent is ordered to pay the applicants' costs.

KA FULTON

Acting Judge of the Labour Court

Appearances:

For the applicants: Adv H Van Der Riet SC instructed by Cheadle Thompson & Haysom Inc

For the respondents: Adv A Franklin SC instructed by Pienaar Swart Nkaiseng Inc

Date of hearing: 3 November 2003

Date of Judgement: 08June 2004