
REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT **CAPE TOWN**

CASE NO: **C 930/2000**

In the matter between:

MICHAEL JOHN KUKARD & 5 OTHERS

Applicants

and

MOLAPO TECHNOLOGY (PTY) LTD

Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

- 1] This case has had a long and chequered history, and were I to go into its ups and downs, this judgment would be far longer than it really should be – and would be delayed in coming out further than it has in fact been delayed, in some ways due to the fact that I have unfortunately been hamstrung by circumstances it is not necessary to traverse herein, but which were beyond my ordinary control.

2] I eventually heard argument in this matter on the 25th February 2005. It was in circumstances wherein the Applicants had filed their Heads of Argument that very morning. These Heads of Argument had been due in June 2004! Even as the Heads were handed in that morning, - and I had not read them - there was a suggestion that the Applicants could be best served if the matter were argued at a later date, a suggestion that was happily abandoned.

3] Whilst the major focus of this judgment does not aim to be around why the Heads of Argument by the Applicant were almost nine (9) months late in delivery - and in violation of a mutually arranged schedule that dictated such Heads to have been submitted in June 2004, failure for which was never explained despite a plethora of letters from the Respondents seeking an explanation, - the Applicants' only explanation, from Mr Taylor, their Counsel can be summarised as follows:-

- He could not afford the time to attend to drafting and filing his Heads of Argument;
- The reason for that was a purely financial one as he could not bear the case financially when once it became an extended trial; and
- He had been carrying the case out of his pocket.

4] Since the Applicants' conduct in the trial is something that may or may not impact on, at the very least, the costs order that I will make, I propose to leave the question of the effect of the ups and downs in the conduct of the trial, and the implications thereof, on costs, for later determination in this judgment. I consequently proceed to deal with the merits.

THE MERITS

5] The Applicants were all employees of the Respondent company. They were retrenched on or about the 28th April 2000. That there was a need to retrench - technically often referred to as dismissal for operational reasons - is not in dispute between the parties. What is in dispute, - and it appears it is in fact the only issue for my determination -, is whether or not the Respondent, in retrenching the Applicants, complied with the procedural requirements prescribed by s 189 of the Labour Relations Act No. 6 of 1995 (the LRA). In making their submissions in this regard, the Applicants query, in particular, whether the Respondent consulted properly and/or adequately with them and/or their appointed representatives on the issues referred to in s 189. Put differently, the question for my consideration is whether the Respondent has succeeded in convincing me that the Applicants' dismissal was for a fair reason, and that the procedure followed in effecting the dismissals was a fair one. The Respondent has argued that the answer to both questions must be answered in its favour. The Applicants resist such a finding being made. In order for me to decide which of the

contending parties reasonably reflects the correctness of its/their allegations, I have to turn to the evidence.

6] The Applicants referred the matter of their dismissal to this Court. Respondent had purchased on the 1st of April 2000(!), the repair arm of one of Telkom's divisions, Invatek, as a going concern. Since all the Applicants were employees at Invatek, Cape Town, at the time Respondent purchased Invatek, their contracts of employment transferred automatically to the Respondent on purchase. By the 28th of that very month, Respondent had dismissed a number of employees throughout the country, including the Applicants, based on its operational requirements. The Applicants referred the dispute that arose as a consequence of these dismissals to this Court, the basis being that their dismissals were substantively and procedurally unfair. It was common cause – and this is trite – that in the circumstances, the Respondent bears the **onus** to prove that the Applicants were dismissed for a fair reason and in accordance with a fair procedure. Has the Respondent discharged that **onus**?

7] Over a number of days, the matter was on trial, and I heard oral evidence. I also perused the pleadings and a lot of documents that were submitted by the parties in support of their respective cases. I am indebted to the parties for the comprehensive way in which they presented their cases. To be sure, there were complications. There were interruptions. There were unscheduled applications for postponements by the Applicants as evidence unfolded. Eventually,

however, the case was argued and I now have to evaluate the arguments presented.

LEGAL POSITION

A. Substantive fairness

- 8] Generally, where an employer claims entitlement to terminate the services of his/her employees on grounds of financial or business operational reasons - requirements based on the economic, technological, structural or similar needs, the so-called no fault termination, - such employer must comply with the requirements prescribed by the LRA, particularly sections 189, 189A, 197 and 197A. An employee, under the LRA jurisprudential regime, now has a fundamental right **not** to be unfairly dismissed by his employer, even if he thinks he is entitled to do so for operational reasons, if the dismissal is not substantively and procedurally fair.

[See: **Johnson & Johnson (Pty) Ltd v CWIU** 1999 ILJ 89 (LAC); **Baloyi v M & P Manufacturing** 2001 ILJ 391 (LAC); **Kotze v Rebel Discount Liquor Group (Pty) Ltd** [2002] 2 BLLR 138 (LAC).]

- 9] According to Grogan,¹ the Courts have held that the requirement that dismissals must be for a fair reason means that an employer has to show that the retrenchment of employees was aimed at effecting savings. In other words, the employer must demonstrate that there was a **bona fide** rationale for the retrenchment of the employees. The process of establishing whether or not to retrench employees must be fair to the affected parties, the employees to be

1 *Workplace Law*, 7th Edition, Juta, 2003, p 197 ff

retrenched.²

10]Thus, in determining, in this case, whether the dismissals were justified, I will have to be satisfied as to whether or not there was, firstly, a commercial rationale for the decision to dismiss the Applicants. If I find that there was, in other words, if I find there was a reasonable basis upon which the decision to entrench was based, I will have to conclude that the dismissal was substantively fair. More, however, I have to do. I should also be satisfied that the manner in which the proposed dismissals were to be effected was a fair one, not merely a “correct” one. In other words, my task will be to ensure, in evaluating the evidence, that the Respondents and the Applicants did not merely go through the motions of consulting over the various issues listed in s 189(2), but whether the attempts made were real. That is the crux of the matter.

[See generally, ***BMD Knitting Mills (Pty) Ltd v SACTWU*** (2001) 221 ILJ 2264 (LAC).

APPLICANTS’ CASE

11]The case by the Applicants is that the Respondent, fully aware that the electronics division of Invatek was a loss making business, and that the telephone line portion of the business was going to be advertised, nonetheless proceeded to purchase the electronics division even though they had failed to conduct an in depth due

² One is not unmindful of ***De Beers Consolidated Mines Ltd v CCMA*** 2000 ILJ 1051 (LAC) where dismissal of supermarket shelf packers for theft of small items was held to be dismissal “rooted in operational requirements”.

diligence investigation of the business before acquiring it. I do not know what to make of this submission by the Applicants. I can only guess that the insinuation is that the basis for the Respondent's decision to retrench is not a **bona fide** one. I say so because what I have stated above is the sum total of Mr Taylor's submission on the subject of whether the dismissals were substantively fair.

12]Not only does he **not** say that the Respondent's decision to buy a loss-making operation without a thorough-going due diligence exercise was reckless and therefore does not qualify for retrenching for a fair reason – whether or not that would be a viable proposition is a separate issue; it is just that he does **not** make that argument – but he also, in both his written heads and in argument, did not address the Respondent's Heads of Argument that dealt clearly and separately with whether Applicants can claim to have been dismissed unfairly substantively. Neither in his Heads nor in Court has Mr Taylor addressed this aspect. I will return to this aspect later in this judgment.

13]It may well be that this failure to address whether the Applicants' dismissal was substantively unfair or not was informed by what Mr Taylor in argument said to me, namely, that what this case really turned on are "selection criteria". Indeed, in his Heads of Argument, Mr Taylor dealt extensively – and almost exclusively – with what in fact are grounds for the Applicants' assertions that their dismissals were procedurally unfair.

14]In essence, the submission by the Applicants was that the dismissals were procedurally unfair because, *inter alia*,

- The employer did not consult when it contemplated dismissing for operational reasons;
- The employer failed to engage in a meaningful consultation process on any of the issues contemplated in s 189;
- The employer maintained an inflexible stance on “timing”, taking an attitude that the tight time frames it set were “non-negotiable”;
- Not only were selection criteria unilaterally determined, and not in any way communicated to, or debated with the respective unions, it was unrealistic and fanciful for the Respondent to contend that the Union (Applicants’ representative) had in fact been given an opportunity over the weekend to analyse the criteria, and to make meaningful proposals in relation thereto;
- The employer failed to disclose, and to provide the Unions with information sought by it.

15]Mr Taylor also told me that on a close evaluation of the evidence, I would be persuaded that some employees were unfairly dismissed. He particularly told me that in the case of one of the employees,

Lyndon Bredenkamp, for example, the Respondent unlawfully and unfairly put him in a pool of employees who would be affected by the decision to retrench some workers.

16]This was so, argued Mr Taylor, despite the fact that claims by the Respondent that it was restructuring the business because of its financial predicament, notwithstanding, Bredenkamp's position remained unaffected even after the restructuring exercise. There had therefore been no need for interfering with Bredenkamp's position in the Company, to his detriment. He could not, in the circumstances, be said to have been fairly retrenched, argued Mr Taylor. In the case of one Nero, who had a bursary, there was no "saving" that could justify his dismissal. Being a more experienced worker than the one selected, one Odendaal, Nero should have been kept since doing so was costing the Company nothing, given his bursary. In the event, his retrenchment was irrational and could not be justified. It was unfair, argued Taylor.

THE CASE FOR THE RESPONDENT

17]The Respondent's point of departure was that in the pre-trial minute, the general need to retrench had not been placed in issue. Besides, evidence adduced at the trial dealt in detail with the circumstances that necessitated the retrenchment process. The Respondent relied, principally, on the evidence given by Mr Hart which, it was submitted, was not seriously challenged in cross-examination nor had it been contradicted by any other evidence. In

view of the fact that Mr Taylor did not come across as seriously contending that their dismissals were not substantively unfair – to be sure that was one of the pillars of his case, but it was not seriously argued – I will not spend much time in analysing the evidence in support of the contention by the Respondent that there had been an operational justification, as contemplated in both the LRA and in decided cases, that necessitated the retrenchment.

18]In short, the Respondent had taken a business decision to buy, as a going concern, Invatek from Telkom notwithstanding that historically the division had no history of profit-making, and despite it being clear that between the date of offer and date of purchase, Respondent would not have an opportunity to conduct a full analysis of the business it was buying. Respondent had been fairly confident that it would be able to turn the business around without having to resort to laying off employees, who, as I stated earlier, were transferred with the business since the business was being bought as a going concern.

19]As often happens in these deals, on actually taking over the business, Respondent got a rude awakening. Telkom had not disclosed what the Respondent considered a material condition at the time of the sale transaction, namely, that Telkom had ceased to repair SLTS (as Respondent understood that to be the position). This function, without disclosing this to the Respondent, had been passed to individual customers. According to Mr Hart, who testified on behalf of the Respondent, the effect of all of this, was that the

Respondent had to budget for this function. Where the Respondent had estimated that its losses would be R40m (forty million rand) per year, with an additional cost of R50m (fifty million rand) to be provided for in respect of repairs, the loss to Respondent would actually be R90m (ninety million rand) per year. This, the Respondent, had not bargained for.

20]The situation demanded drastic action – and drastic measures were taken. Its financiers being prepared to finance this amount for only two months, Respondent had to turn around the business in that period to keep it from bleeding to death. A restructuring and retrenchment process had to be taken, not only at the Cape Town branch of the Respondent, but countrywide. There was clearly a genuine reason – a ***bona fide*** economic rationale that compelled the Respondent to take the preliminary decision to consider the possible retrenchment, as it was entitled to do. The question I have to answer by examining the evidence closely is whether the ultimate decision to retrench, when it came, was genuine and not merely a sham.

[See: **SA Clothing & Textiles Workers Union & Others v. Dicroto - A Division of Trum and Springbok Holdings** (1998) 19 ILJ 1451 (LAC).]

21]Before I even consider whether the employer was entitled, in law, to take the final decision to retrench, I must search for evidence that shows whether the Respondent, as Mr Taylor submitted, applied

selection criteria that had not been canvassed with the employees in consultation and whether, in any event, the selection criteria were correctly applied in relation to the various applicants. Mr Taylor told me that I would find in the evidence of Peddie and Hart that different criteria were applied to different levels within the organisation. However, the big thing with Mr Taylor was that this was never communicated to, nor debated with, the workers at any stage. He also told me that the composition of the criteria was unilaterally determined and not in any way communicated to or debated with the respective unions.

22]I have enormous problems with Mr Taylor's approach to the evidence - and his argument thereanent. In the same breath as he argued as indicated above, he submitted that it was unrealistic for the Respondent to contend that the Union had been given an opportunity over the weekend to analyse the criteria about which Hart and Peddie had testified. Further, he acknowledged that Kemp had conceded in cross-examination that the criteria in themselves were not unfair, but countered that criteria, in any event, being standard criteria, were objectively fair when viewed objectively. Without referring me to any part in the record for his submission, and without elaborating where in the evidence I could find this, and in relation to which employee was affected thereby, Mr Taylor submitted that if one examined Peddie's evidence regarding the selection criteria, and the application thereof, it was clear that the criteria "included subjective elements".

I disagree.

23]A proper analysis of the evidence of Hart and Peddie, the Respondent's principal witnesses, whose evidence was unshaken by Mr Taylor's sometimes fairly aggressive cross-examination, was that in view of the predicament the employer found itself in, it consciously decided to adopt technical qualifications, experience and skill as selection criteria at operational level. Those workers who would quickly understand **and** apply electronics systems and repair would be preferred at the operational level. At management level, employees would be selected in accordance with their experience, seniority, as well as their standard of education and qualification. Whilst LIFO was a consideration, it was not absolute, something that case law has in any event now settled.

[See: **Naicker v Q Data Consulting** (2002) 23 ILJ 730 (LC).]

24]Kemp's concession that these selection criteria were fair is borne out by the fact that no Applicant testified that they were otherwise – which is why I have problems with Mr Taylor's argument. All that Kemp queried was that they were unfairly applied, not that they had never been communicated to them. ***En passant***, I found it remarkable that Mr Taylor, in his Heads of Argument, as well as in his address to me, despite his Heads presumably having been a response to Respondent's Heads which had been filed a considerable time before he drafted his, dealt only with two of the Applicants whom he represented, namely, Nero and Bredenkamp.

He made no submissions with regard to Kemp, Bruiners, Crowe and Kukard. Whether this omission means he had no submission to make thereanent I will never know. The upshot is that the argument by Mr Wesley relevant to these employees is unchallenged. I accept it as such and I will therefore spend very little time analysing evidence with respect to them.

25]Mr Wesley dealt in detail with the evidence in support of his submission that the Applicants had been dismissed for a fair reason. With regard to Kemp and Bruiners, who had been managers in quality control, and where restructuring dictated the employment of one manager, the selection of one Rive who had been a supervisor of both of them, and had superior skills in quality control, could only **not** be challenged, because the evidence of Hart thereanent was convincing, but also could not be rejected on account only of the evidence given by Kemp and Bruiners, who clearly testified in a manner that demonstrated that each of them acted in the self interest.

26]Bredenkamp, the evidence was clear, was selected because he wanted to leave but did not seek to appear to have resigned. His evidence at seeking to evade this conclusion was preposterous, with him seeking to invoke fanciful conspiracy theories that had no basis in fact. I reject his version of events totally. I need say nothing about why Crowe was selected since evidence by Peddie as to why he was selected was unchallenged.

27]Relevant to Nero, an IT specialist, he was selected for retrenchment because there was one post and the incumbent, Odendaal, who had written the software for the regional offices, was chosen. This competence by Odendaal was never challenged by Nero in cross-examination. Nero had sought to contest his dismissal on the basis that the Employer had made some undertaking to pay for his studies up to 2001 – making his dismissal in 2000 unfair. Even if it was so – and I express no opinion on whether his version of this undertaking was persuasive to me that it indeed had been made – as Mr Wesley correctly submitted, his remedy lies elsewhere. The existence or otherwise of a contractual right to be paid his salary cannot in and of itself invalidate the correctness of the Employer's decision to select him for retrenchment. Another forum could see to it that his salary remains paid notwithstanding his dismissal.

[See: ***Fedlife Assurance Ltd v Wolfaardt*** 2002 (1) SA 49 (SCA).]

28]Kukard was a relatively harder case. He had long service. However, notwithstanding his claims to the contrary, for example, that he could repair more equipment than other employees, his flexibility ratings were low according to Peddie and Hart principally because the most important aspect of repairs was technical competence, and an ability to learn to repair new equipment quickly. These attributes Kukard unfortunately did not have, and he could thus not be considered for a business that needed to be saved from the brink of economic abyss quickly to avoid a financial disaster. I am therefore satisfied, for all these arguments, that the decision to lay

off the selected employees was substantially fair. The remaining question is whether the process was also procedurally fair.

PROCEDURAL FAIRNESS

29]The Applicants' complaint about the process followed appears from their analysis of the meetings held by the Employer with the employees. Applicants argue that the Employer failed to engage in a meaningful consultation process. For example, it was argued, even though it discovered on 1 April 2000 that it had lost the single telephone business, it **only** "dropped the bombshell" on the employees' union, CWU, on 6 April 2000. The Union indicated it could not respond to the presentation. On 7 April 2000, the Applicants claim, none of the s 189 issues were raised, nor, according to them, were same discussed at meetings on 12 to 14 April 2000. At this latter meeting, the Union had complained that the time lines imposed by the Respondent were unacceptable, and the Union insisted on the Respondent supplying them with information requested by fax on 14 April 2000, necessitating an adjournment of the meeting to 17 April 2000.

30]Since the Union needed more time, their attitude was that on 18 April 2000, none of the unions representing the employees could formulate any strategy without the information requested, hence the meeting was further adjourned for another week. No consultation, let alone a meaningful one, had taken place, it was argued. Consequently, the Employer could not be heard to be

arguing that the employees had failed to come up with alternative suggestions without mentioning any suggestions of its own. There was mechanic formalism that attended the Employer's dealing with the issue and, so it was argued, there was no evidence placed before me that demonstrated that the campaign that Hart had testified about, namely, endeavours by the Employer to reduce rental costs of premises not required, to cut on employment costs, and so on, were actually meaningfully engaged in to produce a result that would have avoided the employees losing their jobs in the manner in which they did.

31]Mr Taylor argued that the Employer mechanically adhered to time frames that were predetermined from which it was not prepared to budge; that it had purchased an organisation it had not conducted due diligence in relation to, and when that backfired, the disastrous consequence of its misfortune was visited upon the workers by the Employer, holding them to inflexible time frames, without the Employer taking the Union into its confidence about its disastrous misadventure in purchasing the business.

32]With regard to selection criteria, it was argued, not only did the evidence of Hart and Peddie indicate that different criteria were applied to different levels within the organisation, there was no communication of these criteria to the unions. Insofar as the Employer's testimony had been that the employees had been given a weekend to analyse the criteria, and revert with meaningful suggestions by way of reaction, Mr Taylor dismissed such evidence

as being fanciful and unrealistic and as evidence of the Employer's lamentable ignorance of how unions worked.

33]During argument, I do not recall that Mr Taylor was able to point me to the section in the evidence for his strong submission that further evidence of the unfairness of the process was the fact that the determination of how selection criteria were to be composed had been unilateral, let alone that even that had not been communicated to the Employees by the Employer. Nor have I been able to find whose evidence it is that Mr Taylor was relying on for that submission. Insofar as it is, if proved to be supported by evidence, a basis for holding that the process was unfair, Mr Taylor submitted that on the authority of **Fourie and Another v Iskor** 2000 11 BLLR 1269 (LC), I should equally find, in this case, that the employees had been subjected to a procedurally unfair process. Even with regard to information sought by the Union, the Employer had failed to both disclose and provide same, so the argument went.

34]In the view that I have taken of the case and the evidence, I do not intend to deal with all the submissions by Mr Wesley in any amount of detail as far as this aspect goes. Nor do I propose to deal point by point with his oral argument in reply, particularly, relevant to the submissions and oral argument by Mr Taylor. It would suffice to state, from the outset, that there was a candid admission by Mr Wesley that the time frames were tight. The only consideration is whether the Employer, on the evidence, has been shown to have

been ***mala fide*** in the conduct of the consultation process in one or all of, or even more than, the ways in which Mr Taylor argued the Employer's conduct rendered the consultation process procedurally unfair.

35]I have to say that for the Courts to determine the length of time – or minimum periods – which are objectively fair for the consultation process to properly be conducted in is always forever going to be a huge dilemma, one in relation to which the only binding principle is the evaluation of whether the process was fair or not. Whether the process was fair is a question of fact, and not a matter of how many hours or weeks or months or even years the consultation process took place. The question is not just whether consultation took place, whether relevant information was made available by the Employer to the employees, whether selection criteria were discussed between Employer and employee, whether employees had ample time to discuss and react to such criteria as had been disclosed – if that is so – to them, whether the employees meaningfully engaged in the process to obtain meaningful result or whether, as the Employer testified, the employees engaged in all manner of tactic to frustrate the process of determining whether and if a proper and fair case existed for the retrenchment process.

36]In the end, deciding the issue of procedural fairness, bearing in mind all the time, that the requirement of the Act is that a meaningful consultation process needs to be followed prior to a dismissal, really depends on whether the evidence points to a ***bona***

fide endeavour by all the parties to resolve the question of whether employees can or should be laid off, or whether one of the parties has frustrated the process by refusing to participate. There can be no general rule for whether this has happened, each case obviously depending not only on its own facts, but also on the way in which the evidence of those facts impressed the trier of fact. In a given case, the tight time frames, in the context of that particular case, may be way too unreasonably tight as to have amounted to a formalistic adherence to process, but so devoid of all substance as to render the process hollow for that very reason. In another case, the same tight frames, in the context of the facts of the case, may be found to be reasonable.

37] Even though I have agonised over the process in this case, and even as I am very sympathetic to Mr Taylor's passionate submissions on how the process was heavily loaded against the employees, I am not persuaded that the Employer, on the evidence tendered by it, can be held, justifiably, to have followed a process that can be labelled as having been wholly unfair.

38] I am satisfied that Hart and Peddie's evidence is unblemished in its clarity that the Employer, as soon as it contemplated that retrenchment might be necessary, attempted to engage the representative unions with the first consultation on 6 April 2000, six days after the end of March which had signified the discovery of a financial crisis for the Employer as a result of which urgent steps became necessary for efforts to be taken to save the company. For

six days, the evidence shows, the Employer engaged consultants to advise it on what the viable options were to resolve the financial crisis. When, by 6 April 2000, the reality of the grimness of the financial position of the company became known, namely, that even though the company would be saved, jobs might have to be cut either through voluntary retrenchments or forced removals, the Employer decided to hold, and indeed held, intensive consultative meetings on the four days in April over a period of three weeks, with one scheduled meeting of 7 April 2000, not happening because, on the evidence, the Union had not held a meeting with its members to consult with them on the issues of the meeting of 6 April 2000.

39]Evidently, this period was very tight but it is interesting that even Kemp, one of the affected employees, acknowledged that the situation demanded urgency of attention. His issue was that the Employer's time frames were too tight. He did not, however venture to suggest what time frame would have been fairer in the circumstances. That attitude does not, unfortunately, help me. Further, Kemp conceded, (contrary to what had been the complaint), that the Employer in fact did provide the union with a great deal of information during the consultation process. I therefore have tried with difficulty to find any evidence to justify Mr Taylor's suggestion that the employees were not provided with the necessary information.

40]The evidence also does not support Mr Taylor's contention that selection criteria were never discussed with the employees. The

detailed memorandum provided, (on 20 April 2000), to the Union was a consequence of the deliberations on 18 April 2000, culminating in a final list of those to be laid off being drawn on 25 April 2000.

41]However, there is something in this process that I need to express my views on. I accept that there may be different perspectives held by the Employer, on the one hand, and the employees, on the other, about the value attached by each of these constituencies to the significance of the Freedom Day celebrations of 27 April in South Africa's post-apartheid era. It is an emotive issue that shows the yawning gap that exists still between the beneficiaries of the Apartheid order, mainly whites in general, and their commercial enterprises, on the other hand, and victims of Apartheid, black workers in the main, on the other. For the former, 27 April 2000 was probably just another working day wasted as a public holiday. In this case, for example, it is clear that the Employer thought only about the mess his company was in, and processes it felt had to be engaged in that were geared at saving the company from ruin. Not even Freedom Day celebrations were to stop the Employer from seeking to force the workers to engage in a process that they felt could wait. For the workers, the celebrations of Freedom Day were evidently clearly so close to their hearts that the mere suggestion that they should have prioritised consultations over celebrations is anathema to them, almost an insensitive suggestion.

42]Mr Wesley argued that the Employer was quite alive and sensitive

to the importance of these celebrations, but, in his view, the prioritisation of those celebrations over consultations was “inappropriate” and the Employer ought not to be blamed for the consequences of the Union’s choice. For the most part, particularly, with respect to the absence of explanation from Kemp as to why no work could be done by the Union in the period from 20 April to 25 April 2000 (the Easter Weekend), and on 26 and 27 April 2000, the latter day being Freedom Day, Mr Wesley submitted that the reason given was insignificant. I cannot agree with him that the reason given is an insignificant one in a transformative post-Apartheid South Africa.

43]There is, in my view, something precipitous about the way in which, over that critical period, this Employer conducted itself. The formalistically correct approach – business like if you want – with which the Employer dealt with this time in its negotiations process with the workers was insensitive. It failed to appreciate the passion with which workers, black workers in particular, hold the advent of freedom close to their hearts. Insofar as I am called to make a value judgment by Mr Wesley to the effect that the Union failed the Applicants – and not the Respondent – in the process that was not as complete as it could have been, that value judgment must be premised not only on the evidence, but also on what I perceive to be the values of present day South African society. I hold that the values of dignity, freedom and **ubuntu**, values enshrined in our Constitution, place an imperative on Employers to be much more sensitive to what is dear and sacrosanct to their employees. In this case, a long Easter Weekend culminating in the Freedom Day

celebrations of 27 April 2000, was conducive to the employees' desire to celebrate a historic event in the history of the land. I do not consider that it is fair, therefore, to suggest that the choice the workers made is something that they ought to be blamed for.

44]I do not consider that the Employer should have been as inflexible on this as it in fact was. An otherwise fair process up to the point when the long weekend came about was somewhat marred by this unfortunate attitude by the Employer. It is an attitude, hardnosed it must be said, that unfortunately, in my view, rendered this process not as exhaustive as it could have been, had there been some sensitivity on the part of the Employer. It is an insensitivity that does not amount to ***mala fides***. It is one, however, that is not a technical deficiency either. It goes to the heart of what should weigh with me heavily as to whether a matter of weeks could have made any difference to the ultimate fate of the Employer.

45]Was it not in the interests of the Employer to have opted for a flawless consultation process, one that probably would have taken a few more weeks to complete rather than go ahead on the basis that if the workers chose to celebrate an Easter Weekend culminating in Freedom Day celebrations, they had only themselves to blame if they lost their jobs? I think our Courts, in a constitutional democracy like ours, would lose their credibility if they were to hold that a choice like that which was made by the employees in this context, cannot exonerate them from blame if they get dismissed for non-participation in the process to that extent.

46]I think that if the Employer had allowed a period of four to six more weeks of intensive engagements with the workers, holding them to strict timetables, the process would have been flawlessly completed. Because that time was not allowed, the process can be held, and I so hold, to have been unfair to that limited extent. It is a period in relation to which the Employer must be prepared to pay compensation to the workers who were dismissed. Because of the decision I have come to, I am unable to accede to the submission by Mr Wesley that I should order the Applicants to pay the Respondent's costs because the Respondent was brought to Court without good reason, expending considerable resources in defending a case it ought never to have had to meet. I disagree. My reasons have been stated.

47]Before I conclude, I need to remark about the period it has taken for this judgment to come out. In my view, it is not an uncomplicated matter. The situation was compounded by my own ill-health which culminated in a lifestyle-altering surgical operation which I suddenly had to undergo in the July recess period during which I had meant to complete re-reading the record and re-visiting the arguments and my own notes. Insofar, therefore, as justice delayed has been justice denied, I apologise. These factors are over and above the fiasco I alluded to at the beginning of this judgment.

CONCLUSION

48]The Applicants have been partially successful, although, substantially, the Respondent has successfully resisted their case. In my view, therefore, an appropriate order would be as follows:

- 48.1 The Applicants' dismissal was for a fair reason;
- 48.2 The dismissal of the Applicants was not in accordance with a fair procedure;
- 48.3 The Respondent is ordered to pay the dismissed employees compensation that is the equivalent of three (3) months remuneration, an amount just and equitable in the circumstances of this case; and
- 48.4 There will be no order as to costs.

D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: 25 FEBRUARY 2005

Date of Judgment:

For the Applicants:

MR TAYLOR

Instructed by: **MURPHY WALLACE SLABBERT**

INC

CAPE TOWN

For the First Respondents:

MR WESLEY

Instructed by: **BOWMAN GILFILLAN INC**

SANDTON