

SOUTH AFRICA / JUDGMENT

Makalima v Edu-Loan (Pty) Ltd (JS 176/09)

[2013] ZALCJHB 4 (21 January 2013)

[2013] ZALCJHB 4

COURT

Labour Court Johannesburg

BEFORE

AC Basson

CASE / FILE NUMBER

JS 176/09

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

case no: JS 176/09

In the matter between:

SAKHEKILE VEZI MAKALIMAApplicant

and

EDU-LOAN (PTY) LTDRespondent

Heard: 2 and 3 June 2011

Delivered: 21 January 2013

Summary: Dismissal on the basis of operational requirements.

AC BASSON J

- [1] The applicant (Mr Sakhekile Vezi Makalima) claims that his dismissal on the basis of operational requirements was substantively and procedurally unfair. The respondent (Edu-Loan (Pty) Ltd) submits that the dismissal was substantively and procedurally fair on the basis of operational requirements. The respondent Edu-Loan (Pty) Ltd operates nationally and is in the business of providing study loans to students. It is based in Cape Town, Port Elizabeth, Polokwane and Johannesburg.
- [2] The facts which gave rise to the dismissal of the applicant are somewhat unique in the sense that an extensive consultation process in respect of a new structure for the respondent preceded and was completed prior to the issuing of a further notice to the applicant informing him of the fact that the respondent contemplated a dismissal on the basis of operational requirements. At the time that the respondent commenced with extensive consultations on a new structure, it was not contemplated that the applicant faced a possible retrenchment although the respondent issued a section 189(2)(a)(i) notice to all employees before the consultations in respect of the new structure commenced. This notice indicated that retrenchment may follow from this process although it was not envisaged at that stage. However, once it became clear that the applicant's position (and in fact his whole department) became redundant as a result of the implementation of the new structure, the respondent had one consultation meeting in terms of section 189(3) of the Labour Relations Act¹ ('the LRA'). This consultation meeting was preceded by a (further) section 189(3) notice. Although it is in dispute exactly how exhaustive this meeting was, it was common cause that such a consultation meeting was held. The applicant was dismissed shortly thereafter.
- [3] The respondent submitted that the dismissal in the present case was fair and that the respondent was entitled to follow a consultation process in circumstances where it had not yet contemplated that there would be a dismissal for purposes of restructuring the business. It further contended that an employer was entitled to proceed with a retrenchment process once it appears that it is not able to absorb all of its employees in the new structure.
- [4] The applicant contended that, at the stage when the restructuring exercise led to the conclusion that a retrenchment exercise would be embarked upon, the respondent was required to conduct the consultations afresh. The respondent disagreed and contended that this would have meant that all employees

who have been placed in new positions alternatively have been used to populate the new agreed structure, would then have to be made subject to a separate retrenchment exercise.

- [5] Before I proceed to the merits of the matter, it is necessary to restate the fact that a dismissal on the basis of operational requirements is a no fault dismissal. Because it is a no fault dismissal and in order to ensure that an employee faced with such a possibility is treated fairly, the legislature has set out fairly detailed procedures that must be followed prior to arriving at a decision to dismiss on the basis of operational requirements.² In following these procedures it is not required that the employer follow a checklist approach. What is required is that the employer must genuinely attempt to engage its employees and attempt

to reach consensus on the items listed in section 189(3) of the LRA.³

- [6] In this particular case, the respondent commenced with consultations regarding a new organisational structure approximately two months before the applicant was informed that he was one of the five employees who were now facing possible retrenchment. The respondent urged this Court to

find that these preceding consultations in respect of the restructuring process should be taken into consideration in arriving

at a decision that the retrenchment was fair despite the fact that those consultations were aimed at introducing a new structure in the workplace and not strictly aimed at an actual retrenchment exercise. The applicant, however, insisted that there were no proper consultations regarding his retrenchment and persisted with the submission that his dismissal was substantively unfair. More in particular, he insisted that proper consultations had to be conducted once he was informed of his possible retrenchment. As already pointed out, it was common cause that although extensive consultations had taken place over a period of about two months regarding the proposed new structure, only one consultation meeting took place after the applicant was informed of the possibility of a retrenchment. I will now turn to the relevant facts in more detail.

Section 189(3) Notice dated 2 September 2008

- [7] On 2 September 2008 the respondent issued a section 189(2) notice entitled: 'Notice of contemplated Consultations' to all employees of the respondent. The employees were informed of the fact that a strategy was developed with the assistance of Strats Inc (an independent consultancy firm) to develop a revised strategy for the respondent with the aim of taking the company to the next level. The notice specifically states that '[w]e subsequently needs to adapt the structure to implement this strategy'. Employees were informed as follows:

'Edu-loan intends to engage you in consultations as stipulated above. This is then the first Notice, being termed the section 189(2) Notice.

Edu-loan intends to consult with you on measures team easily avoid any possible dismissal due to operational requirements "retrenchment". It is believed that a constructive consultation station will certainly avoid dismissals.

Should such measures not be able to be utilized and or exploited then the remainder of section 189(2)(a)(ii) onwards may be used in this process. A further notice will be issued therein.'

- [8] The applicant was informed that a consultation process will be held on a date to be advised and that the applicant was entitled to be assisted by an employee, a trade union official or other recognised legal persons. The applicant was further informed as follows:

‘In the event of staff that has been / positions that have been identified not being able to be absorbed in the new structure, then further consultations and notices will follow. It is however particularly envisaged at this time that it appears more probable that no dismissals will follow, but that only structural changes will be affected.’

[9] The notice further informs the applicant that a retrenchment process will be followed once it appears that an individual cannot be absorbed into the new structure:

‘In the event of staff that have been / positions that have been identified not being able to be absorbed in the new structure, then further consultations and notices will follow. It is, however, particularly envisaged at this time that it appears more probable that no dismissals will follow, but that only structural changes will be effected.’

Edu-Loan may also contemplate offering voluntary retrenchment but same may only be considered at a later stage.’

[10] During August 2008, the respondent embarked on a consultation process for the sole purpose of informing all employees of the intended changes. The consultation process was therefore not strictly conducted in the context of a retrenchment exercise although the applicant (and all the other employees) was informed in the first section 189 Notice that retrenchment may be an option should any employee not be absorbed in the new structure. As already pointed out, the retrenchment followed much later. Moreover, the retrenchment that followed much later was not as a result of the respondent being in financial dire straits but because of the structural changes to the company which resulted in the applicant’s redundancy. The consultation process that started in August/early September was in the form of a road show all over the country and took approximately two months. All employees were consulted in respect of the new proposed structure.

[11] The respondent called one witness - the Human Resources Manager, Ms Gengadoo who gave detailed evidence about the reason for the restructuring and the process that was followed during the road show and the process which resulted in the retrenchment of the applicant. She testified that she oversaw the Human Resources Department and that she managed the HR functions of the respondent. She explained the business of the respondent as being in essence a lending company (akin to a finance company) that lends money to students who wish to further their studies. The respondent will lend the money to a student (usually to the parent who applied for the loan) and would pay, for example, a university for whatever degree the person wants to study for. The loan would then be deducted from the salary of the person who had applied for the loan. At the time of the retrenchment, the respondent employed approximately 110 to 120 employees nationally in the major regional centres of South Africa.

- [12] During 2007, the respondent saw a tremendous growth of approximately 21% in the value of loans. The respondent then called in the help of a company called Strats Inc to assist the respondent to investigate the company, the markets and the respondent's competitors to determine what kind of business was available. The Board of Directors of the respondent, at that stage, envisaged a growth in the amount of R1 billion in the revenue of the respondent.
- [13] The internal process followed in this consultation process entailed interviews with all members of staff right from the Chief Executive Officer down to the tea lady. Gengadoo testified that the road show was an information session and it was also regarded as a consultation process because it was interactive. Employees were able to ask questions about the benefits that the respondent offered.
- [14] Gengadoo referred the Court to a document entitled "Strategic Assessment Rejuvenating the Business" and explained that this document (in the format of a slideshow) was compiled with the input of Strats Inc. She and other General Managers had also perused the document before it went out and gave their input where they felt it was necessary. This document was used during the road show during the consultation process with the staff members. The document covers various issues: It gives an overview of the growth in the respondent's business. It also records that interviews were held with all staff members and the fact that it was established that there was low staff morale and that as a result the respondent had low productivity levels. The investigation further revealed that the majority of interviewees reiterated the need for a revised organisational structure that takes into consideration employees 'abilities and competencies by placing them in positions where they will be most effective'. She testified that some employees were of the view that the respondent needed to look at the organisational structure to ensure that each person is placed in the right position so that the respondent would be able to meet its goals and enhance (possible word missing). Although some staff members expressed dissatisfaction with some areas of the business of the respondent, the common feature for the future included the requirement of a new direction; the requirement of a new organisational structure and the creation of a company that everyone could believe in. The document further sets out the strategy and business considerations necessary in order to take the respondent to the next level. According to this document, there were certain internal business systems and platforms that needed to be addressed to coincide with the implementation of this strategy so that a specific goal could be reached. These business considerations included marketing and the upgrading of the contact centre.
- [15] The Department Human Resources also conducted a survey throughout the company. This survey revealed that there was a need for on-the-job training.
- [16] The presentation importantly sets out the 'current structure' reflecting the structural position of the applicant as it was in August 2008 as well as the revised (or proposed new) structure that amended the old structure. The new structure was put into place at the end of September 2008. Gengadoo, however, explained in her evidence that further amendments to the structure were effected later on and was as a result of further consultations. The new

structure shows, inter alia, that the Finance Department remained unaffected but that the Marketing Department now had two tiers: the one is the Research and Development component and the other is the Product Development component. The most radical change was in respect of Operations and

Sales in the old structure. This department was done away in the new structure. The new structure now had a National Sales Department and Operations.

- [17] At the time of his dismissal, the applicant was employed as the Business Development Officer for the section called 'Corporate Sales' or 'Corporate Structure' (in the current structure before the restructuring). His duties entailed looking at corporates or employers and helping with the processing of application forms for clients that would sign up with him. Corporate sales consisted of a General Manager for Corporate Sales and applicant. Gengadoo testified that the respondent's division disappeared completely after the structural changes were effected and that his manager had been appointed to another position in another division. As a result of these changes, the applicant's position no longer existed and no longer had that function in the new structure as sales were not done by the Sales Division in the new structure. It is further common cause that the immediate superior of the applicant was later deployed as the General Manager: Business Networking in the new department and the respondent elected to have the fixed term contract of the assistant in the old structure (Corporate Sales) run its ordinary course and elected not to renew such fixed term contract.

Section 189(3) Notice: Notice of retrenchment Consultations

- [18] Because the applicant could not be absorbed into the new structure, he was informed in a letter dated 7 November 2008 that retrenchment consultations would now commence. The applicant is informed that he could not be absorbed into the new structure and that retrenchment consultations would now commence. The letter lists the various consultation topics and informed the applicant that the relevant information on which the respondent had based its decision to retrench will be disclosed. He was further informed that consultations will take place on 11 November at 9h00 in the board room.
- [19] Consultations did take place at the offices of Gengadoo. She testified that she discussed the fact that the structure Corporate Sales no longer existed. The minutes of the meeting confirms that this issue was discussed with the applicant. The minutes further points out that the applicant had received all notifications regarding vacancies via e-mail and that he chose not to apply for the positions. The minutes further confirm that five people in the respondent were affected by the retrenchment process. The applicant denied that proper consultations were held with him but admitted that he did not apply for positions in the new structure.
- [20] Gengadoo testified that various new positions became available during September. These positions were financial positions in the Finance Department and required specific qualifications in order to qualify. An employee was, inter alia, required to be able to do

bookkeeping. A loan administrative position (which is an administrative position) was also available in the Operations Division. A person in this division had to assist with customers. There were also two supervisory positions available. Gengadoo testified that these positions were made known to the staff and that the applicant knew about these positions. She testified that some people did in fact successfully apply for positions and that they have therefore not been retrenched. Gengadoo testified that the applicant chose not to apply for any positions. She, however, testified that the applicant participated in the consultation process. The issue of severance pay and payment for outstanding leave was also discussed with the applicant. The applicant testified that the meeting lasted approximately 10 minutes. Gengadoo denied that this was the case.

- [21] Five employees in the respondent were served with notices. Gengadoo insists that she had a proper discussion with the applicant on all the issues listed in the notice. From 11 November until 17 November, the respondent attempted to find some position for the applicant. At that stage, it was a possibility of a position at Tshwane University of Technology.
- [22] Gengadoo was adamant that there was proper consultation with the applicant and that sufficient information (the road show documents) were given to the applicant. The applicant was also informed of alternative positions.
- [23] It is common cause that no further meetings were held. On 11 November 2008, the applicant was informed that he was retrenched because his position had become redundant. A hand over was done on 18 November 2008. A certain Mr Percival Lekgetho was allocated to help with the hand over.
- [24] It is also common cause that LIFO was not used as a selection criterion. In fact, Gengadoo conceded that if LIFO was used there was a good possibility that someone else would have been dismissed and not the applicant. She was, however, adamant that the applicant could not be retrained. Her evidence was that the respondent essentially looked at skills when it populated the new structure. As already pointed out, the applicant did not apply for any positions in the new structure. Gengadoo was cross-examined about the respondent's decision to keep Percival and not the applicant. She explained to the Court that Percival had the skills that were required in the new structure whereas the applicant did not.
- [25] Gengadoo testified that the applicant had been aware of the fact that his department no longer existed and that he was aware of this fact since August/ September 2008 when the road show was done. He therefore could not have been under any misimpression. The applicant was therefore aware of the fact that his Department would be done away with in September 2008 which was two months before his retrenchment date and that it was already apparent at that stage that his Department was going to fall away. She further testified that the road show afforded people with an opportunity to ask questions and query the structures.

[26] The applicant did not dispute that there had been a need to restructure the respondent. In fact, in his evidence in chief, he stated that the restructuring of the organisation meant that the organisation grew bigger. It appears that he was of the view that his position was secure notwithstanding the fact that the organisational structure had changed. The applicant also admitted that the positions were advertised shortly after the road show in August. However, he testified that he did not apply for any position because his position was not affected and would not be affected by the restructuring. The applicant conceded that the population of the new positions had taken place during September and October 2008. The new positions were then advertised thereafter. The applicant conceded that he was aware of the positions and that some employees had applied for these positions. He did not deny that his department/ division fell away but he insisted that his position did not fall away and that he had assumed that he would be moved into another position. The applicant, to a direct question from this Court as to why he did not apply for any positions even after he saw the advertisements, saw other employees apply for positions and saw even his manager being appointed in another position, gave an elaborate and non-sensical answer. In short it was his evidence that he did not make an enquiry about his position and where he was going to be moved simply because he assumed that his position was safe. The applicant also could not answer why he did not dispute in his evidence in chief the fact that the termination letter informed him that a retrenchment process had been followed and that it was agreed that the result of the restructuring was that the applicant's position was redundant. He also could not answer to the Court why it was not denied that his termination letter recorded an agreement in respect of severance pay.

Brief exposition of the law

- [27] In essence, it was the applicant's contention that no valid economic rationale for his dismissal existed. As will be pointed out herein below, I am persuaded on the evidence that such an economic rationale existed. I am further satisfied that the applicant was aware of the restructuring process and that he in fact embraced the new structure. It is clear from the evidence that his whole department disappeared and that even his manager (the only other person in the department) was appointed in another department.
- [28] What appears to be in issue is the applicant's insistence that a proper consultation process had not been followed. The suggestion was that the consultation process in respect of the restructuring cannot be taken into account in deciding the fairness of the consultation process. As will be pointed out herein below, I do not agree. The consultation process that preceded the restructuring is relevant. More in particular, that consultation process did take place against the background of a possible retrenchment process.
- [29] This present matter bears striking similarities with the matter in *Mazista Tiles (Pty) Ltd v National Union of Mineworkers and Others*.⁴ In the *Mazista* matter, the Labour Appeal Court upheld the fairness of a dismissal on the basis of operational requirements where the employer invoked the provisions of section 189 of the LRA with the aim of changing the terms and conditions of employment which intended to lead to the termination of

employment. In that matter the consultations initially dealt with changes to terms and conditions of employment but took place in contemplation of retrenchment because the company contemplated retrenchment as a possible solution if the workers rejected its proposals. The LAC pointed out that an employer is entitled to make profits and is not precluded from retrenching employees if they reject changes to terms and conditions of employment that will make the business more profitable or competitive. The union contended (similar to what the applicant is contending in this matter) that the consultation process was not a consultation on redundant procedures but rather negotiations on the change of the conditions of employment. In *Mazista*, the employees were retrenched because they did not agree to the changes to their conditions of employment. The workers and the union were given notice of the proposed restructuring and invited alternative proposals and scheduled a consultation meeting with the union.

[30] Although there undoubtedly are differences between the *Mazista* case and the present matter, in both cases consultations took place in respect of changes in the workplace. In both cases the consultations

took place against the backdrop of a possible retrenchment. If regard is had to the first notice in the present case, it is clear that the applicant was informed that, although retrenchment was not envisaged at that stage, retrenchment was an option in the event the applicant could not be absorbed in the new structure. In other words, even at that early stage the applicant was made aware of the fact that, in the event he is not absorbed in the new structure, a further notice in terms of section 189(3) would be issued to him and a consultation process (a retrenchment process) would be followed. It follows, in my view therefore that the consultation process that was conducted in respect of the new structure forms part of the consultation process that commenced after the section 189(3) notice was issued. Put differently, the applicant was informed before the consultation process commenced that should he not be accommodated in the new structure he may face dismissal. Consultations therefore did take place against the backdrop of possible retrenchments and can, therefore, in my view not be detached from the consultation process that took place after the section 189(3) notice was issued. Although the circumstances giving rise to his dismissal in the present case are different from those in the *Mazista* matter,⁵ the conclusion reached by the LAC in *Mazista* is relevant to the present matter. The LAC in *Mazista* concluded that the consultation process, although not specifically about the retrenchment of the employees, was considered to be sufficient in that it considered some of the issues relevant to the consultation process in terms of section 189.⁶

[31] In the present matter the respondent (as was the case in *Mazista*) also gave a notice to the applicant once it became clear that his position was now at risk. The LAC in *Mazista* concluded that the consultation which took place complied with the requirements of section 189 and that the dismissal was procedurally fair and that the employees had been afforded an adequate opportunity to furnish the employer with counter proposals.⁷

[32] I am satisfied that the applicant had been afforded an adequate opportunity to furnish the respondent with counter proposals. The presentation that was given to the employees clearly sets out the new structure and clearly sets out the fact that the applicant's

department no longer existed in the new structure. He could, therefore, not have been under any misimpression that he would necessarily have been retained in the new structure. A simple comparison of the two structures makes it clear that his department no longer existed. The applicant therefore had sufficient information regarding the structure. The evidence shows that the process that was embarked on was comprehensive. I am further of the view that the information that was used during the initial

consultation process may be used in terms of a subsequent retrenchment exercises. The uncontested evidence of Gengadoo was to the effect that the contents of the Strats Inc document⁸ encompassed financial projections, turnover figures, assessments, training and a host of other disciplines within the workplace which could leave little doubt that the particular process that was followed preceding the compilation of the aforesaid road show document was comprehensive, meticulous and could leave employees with little doubt as to what the true business position is. The evidence further indicates that both the applicant and the respondent debated alternatives and it certainly appears prima facie that the applicant was given a fair opportunity to provide his input in the circumstances and similarly the consultation was genuinely aimed at reaching consensus.

[33] I am further persuaded that the respondent, once it reasonably foresaw that it was not able to accommodate the applicant and other employees, was entitled to give effect to paragraph 4 of the section 189(2) notice and proceed to issue the section 189(3) notice. The notice which was issued to the respondent, in my view, complied substantially with the provisions of the LRA at Section 189(3).⁹

[34] I also do not accept the evidence that the consultation process only took 10 minutes. If regard is had to the handwritten notes of Gengadoo on the consultation meeting the probabilities favours the version of Gnegadoo that the consultation on 11 November 2008 could not have merely lasted 10 minutes as supported by the version of the respondent.

[35] I can also find no reason to reject Gengadoo's evidence that the revised structure was generally met with approval. The respondent therefore had, in my view, a fair economic rationale to implement the new structure. I am further of the view that a proper consultation process had been followed prior to implementing the new structure that made the applicant's position redundant. I am satisfied that the respondent genuinely and in good faith proceeded to consult with employees in an attempt to populate a new structure that would have given effect to the planned one billion rand turn over by populating such employees into a new structure. It is therefore clear that the respondent was not hasty in its restructuring process and that a period of two months were used by the respondent to engage all employees on all levels and all management spectrums to eventually obtain the buy in of all employees to achieve the new structure. It is also common cause that the

proposed structure was not the ultimate structure that was concluded at the finalisation of the road show sessions but that the structure was further adjusted based on the various meetings that were held with employees and as certain employees were further slotted into additional positions.

Was it fair to dismiss the applicant?

[36] It is common cause that the respondent position (and his department) disappeared. Once the structure was populated, it transpired that the applicant could not be accommodated. His position effectively became redundant. The applicant in particular was retrenched after he had decided not to apply for any alternative positions. His retrenchment therefore was not unfair.¹⁰ Although, it is accepted that an employee may not be obliged and/or is not obliged to accept any alternative position, it will be fair to dismiss an employee for operational requirements if the refusal to accept an alternative position is unreasonable. It is clear from the evidence that the respondent herein did not attempt to coerce the applicant to accept an alternative position. However, the applicant willingly did not make use of the opportunity to be considered for an alternative position.¹¹

[37] In the event, the applicant's dismissal on the basis of operational requirements was substantively and procedurally fair. In respect of costs, I have decided in the interests of fairness not to award costs against the applicant.

Special cost order

[38] The applicant did not file a practice note. The respondent has, however, filed the practice note. It was submitted on behalf of the respondent that the Practice Directive calls upon a party, in this case the applicant, to file a practice note before 09h30 at least three Court days prior to a matter being heard on the trial roll as in this case.¹² The applicant who at all material times, had been represented by attorneys had failed to file such a practice note and that the

practice note on the Court file was indeed prepared by Counsel for the respondent in terms of paragraph 9.2 of the aforesaid directive.

The respondent therefore submitted that the Court must grant a special cost order to the respondent for the preparation of the

Practice Directive and for complying with the aforesaid requirements of this Honourable Court.

[39] I am in agreement that the attorney on behalf of the applicant should pay the respondent's costs in preparing the Practice Directive *de bonis propriis*.

[40] In the event, the following order is made:

The dismissal of the applicant was substantively and procedurally fair.

No order as to costs in respect of the trial proceedings.

The applicant's attorneys to pay the respondent's costs in preparing the Practice Directive de bonis propriis.

AC BASSON, J

Judge of the Labour Court

APPEARANCES

For the applicant: Mr T. Faku

Instructed by: Qhojeng Attorneys

For the Respondent: Advocate F Venter

Instructed by: Grimbeek – Van Gaalen Attorneys

1Act 66 of 1995.

2See section 189 of the Labour Relations Act, 66 of 1995.

3Johnson and Johnson (Pty) Ltd v CWIU (1998) 12 BLLR 1209 (LAC) at paras 26-31, Alpha Plant and Services (Pty) Ltd v Simmonds and Others

(2001) 3 BLLR 261 (LAC) at paras 9-11, Wheeler v Pretoria Propshaft Centre CC (1999) 20 ILJ 2982 (LC) at paras 17-21.

4(2004) 25 ILJ 2156 (LAC).

5In the Mazista matter the respondent initiate the consultation process in order to bring about changes in conditions of service and in the present matter the respondent initiated the consultation process in order to introduce a new structure) the fact that there were consultations about the rationale for implementing a new structure.

6In this regard the Court held as follows: '[64] However, the court a quo decided the matter on the basis that the appellant had failed to indicate to the respondent that it wanted to discuss retrenchment as required by s 189. While it may be true that the appellant did not expressly state that the consultations were held in terms of s 189, it was, nonetheless, clear from the agenda of the issues to be considered at some of the consultation meetings that the parties were required to consider issues relevant to a consultation process in terms of the section. Even if the respondents had initially laboured under the impression that the purpose of the consultation was to seek the employees' consent to the proposed changes to terms and conditions of service, such a misunderstanding must have been cleared by the terms and the language employed in some of the notices they received from the appellant.' (Court's emphasis.)

7Id '[70] For the above reasons I am unable to agree that the consultation which took place between the parties did not comply

with the requirements of s 189 and that the dismissal was procedurally unfair. In my view, the respondents were given an adequate opportunity to furnish the appellant with whatever counter-proposals they had in order to avoid being retrenched and they had failed to do so. Instead, they claim that they perceived the entire process to have amounted to negotiations for the proposed changes to terms and conditions of employment. According to them the appellant should have commenced a fresh process of consultation when the employees rejected its proposal even though they had no counter-proposals to make. In view of the notice issued by the appellant on 13 July setting out the agenda of the meeting of 19 July, it is inconceivable that the respondents could still argue that the consultation was about changing the terms and conditions of service. [71] In the light of all the above conclude that the dismissal was fair both substantively and procedurally fair.'

7Id '[70] For the above reasons I am unable to agree that the consultation which took place between the parties did not comply

with the requirements of s 189 and that the dismissal was procedurally unfair. In my view, the respondents were given an adequate opportunity to furnish the appellant with whatever counter-proposals they had in order to avoid being retrenched and they had failed to do so. Instead, they claim that they perceived the entire process to have amounted to negotiations for the proposed changes to terms and conditions of employment. According to them the appellant should have commenced a fresh process of consultation when the employees rejected its proposal even though they had no counter-proposals to make. In view of the notice issued by the appellant on 13 July setting out the agenda of the meeting of 19 July, it is inconceivable that the respondents could still argue that the consultation was about changing the terms and conditions of service.

[71] In the light of all the above conclude that the dismissal was fair both substantively and procedurally fair.'

8Bundle B: p 18 – 59.

9'(3) the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all

relevant information, including but not limited to – the reasons for the proposed dismissals; the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;

the number of employees likely to be effected in the job categories in which they are employed;

the proposed method for selecting which employees to dismiss;

the time when, or the period during which dismissals are likely to take effect;

the servants pay proposed;

any assistance that the employer proposes to offer the employees likely to be dismissed;

the possibility of future re-employment of the employees who are dismissed;

the number of employees employed by the employer; and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceded 12 months.’

9(3) the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all

relevant information, including but not limited to –

the reasons for the proposed dismissals; the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;

the number of employees likely to be effected in the job categories in which they are employed;

the proposed method for selecting which employees to dismiss;

the time when, or the period during which dismissals are likely to take effect;

the servants pay proposed;

any assistance that the employer proposes to offer the employees likely to be dismissed;

the possibility of future re-employment of the employees who are dismissed;

the number of employees employed by the employer; and

the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceded 12 months.’

10NETU and Another v Henred Fruehauf Trailers (Pty) Ltd (2001) 7 BLLR 804 (LC).

11See in general: Sayles v Tartan Steel CC (1999) 20 ILJ 647 (LC).

12Consolidated Practice Directive 2010, para 9.1.

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