

SOUTH AFRICA / JUDGMENT

Nagapan v Yum Restaurants International (Pty) Ltd ta KFC (JS227/21) [2025] ZALCJHB 292 (25 March 2025)

[2025] ZALCJHB 292

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS227/21

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FLYNOTES:

LABOUR

– Dismissal – Operational requirements –
Inadequate consultation process – Failed to provide sufficient time for employees to prepare for consultations –
Rejected counterproposals without justification – Inadequately explained selection criteria – Rendered process procedurally unfair – Genuine rationale for restructuring accepted – Substantive unfairness arose from flawed application of selection criteria – Failure to justify decisions – Dismissal substantively and procedurally unfair
– Labour Relations Act 66 of 1995, s 189.

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS227/21

In

the matter between: SHARLENE
 NAGAPAN
 Applicant/Plaintiff
 and
 YUM
 RESTAURANTS INTERNATIONAL (PTY) LTD
 t/a
 KFC
 Respondent/Defendant

Heard: 9 to 12 September 2024
 Closing
 arguments filed: 27 September 2024

Delivered: 24 March 2025

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicant brings this referral to seek an order declaring her dismissal from the respondent for operational requirements as both substantively and procedurally unfair and seeks compensation equivalent to nine months' salary. The respondent opposes this referral and contends that the applicant's dismissal was fair and in the premises. The respondent seeks an order that the referral be dismissed with costs.

Background

- [2] The respondent, KFC, is part of a global company known as Yum! Restaurants based in the United States of America, which has various brands across the world, including KFC. Approximately 50 KFC restaurants are owned by Yum! and are referred to as equity stores. The majority of restaurants are franchises.
- [3] It is common cause that the Human Resources (HR) division of the respondent, prior to the restructuring, comprised HR partners that supported various franchise partners in South Africa and in the rest of the sub-Saharan Africa region called ROSSA. At that point in time, the HR support team in the respondent comprised three employees, being the applicant and Ms Unathi Ncunyana, who occupied the two HR Field Manager roles, and Ms Lizelle Revell, who occupied the HR business partner role. In April 2020, the effect of the COVID-19 pandemic brought about a need for the respondent to review its HR division. To this end, the respondent announced that Ms Ncunyana's role would be to provide HR support to ROSSA Franchisees and HR Leads; the applicant's role would be to provide HR support to SA Franchisees and HR Leads, and Ms Revell's role would be to provide HR support to SA Franchisees

and HR Leads. The changes that were to be implemented were to be of a temporary duration, from 29 April 2020, for the duration of the pandemic.[1]

[4] A week prior to 31 August 2020, Global Business communicated a need for structural change in the entire organization aligned to its business strategy.[2] The result of this structural change is that the two HR Field Manager roles were collapsed into one role, resulting in two roles in the HR function. Following consultation meetings on 5, 8 and 13 October 2020, the applicant and Mesdames Ncunyana and Revell competed for these two available roles. The applicant was not successful and was ultimately dismissed on 30 November 2020.

Evidence

- [5] Ms Akhona Qengqe, General Manager for the respondent, gave evidence on behalf of the respondent. The applicant gave evidence on her own behalf.
- [6] Ms Qengqe confirmed that the applicant's role prior to the structural change was an HR Field Manager role. In this role, the applicant supported both the South African and ROSSA Franchisees. When the changes were implemented, the new HR Field Manager role was to only support South African Franchisees. The role of the HR Field Manager was to ensure that Franchisees follow HR policies and procedures and that the people strategy in the Franchisees aligns with the global YUM! and KFC strategy.
- [7] Ms Qengqe referred to the notification by the respondent's then General Manager, Rudi van Schoor on 31 August 2020, when he informed staff of the Restaurant Support Centre (RSC) of the upcoming organizational restructure driven by the global business and that there was no clarity at that point what this would entail for Africa.[3]
- [8] Staff who were within the scope of the restructure received letters in terms of section 189(3) of the Labour Relations Act[4] (LRA) on 5 October 2020.[5]
- [9] On 5 October 2020, Mr. van Schoor took the staff through a presentation[6] incorporating the rationale for the restructure, which was to ensure that the structure of the organization would deliver on the

organization's strategy based on five strategic elements that were common across the global business.[7] The global business needed the right capabilities with digital skills to deliver its strategy. This presentation was followed by functional meetings with staff to discuss what the new structure would look like. Ms Qengqe explained that when KFC became aware of the restructure that was on the horizon, cost-saving interventions were implemented – vacancies were frozen, and early retirement was considered along with critical skills retention.

[10] Ms Qengqe stated that the first consultation meeting took place on 5 October 2020. She referred the Court to page 7 of the trial bundle, which shows the following agenda items for the meeting of 5 October 2020:

'1. Alternatives explored and potential impact on our people

2. Time frames
3. Proposed severance benefits
4. Proposed criteria to be applied; and
5. Proposed team structure.’

- [11] The second consultation took place on 8 October 2020 for the staff to present proposals. However, the evidence was that this online meeting was only for the duration of 39 minutes and 42 seconds.[8]
- [12] The third and final team consultation took place on 13 October 2020 where the respondent considered the counterproposals made and gave feedback to the employees. The timeline was extended to 21 October 2020 for the closure of applications, and the impacted employees were advised of the one-on-one consultations that were to follow. In an email dated 13 October 2020 at 19:41 pm, Ms Qengqe confirmed to the impacted employees that the application process would open on 15 October 2020.[9] The counterproposals received were consolidated by the respondent.[10]
- [13] After each consultation, on 6, 9 and 14 October 2020, frequently asked questions (FAQs) were published. The FAQ incorporated the consolidated questions asked by staff and answers provided by the respondent. Ms Qengqe’s evidence was that the FAQs formed part of the consultation process.
- [14] Ms Qengqe further stated that on 15 October 2020, one-on-one consultations were held with the impacted employees, including the applicant, where the way forward was discussed on an individual basis regarding the online application for available roles from 15 to 19 October 2022. The respondent considered the feedback from employees that the online application process was too short, after which the process was extended to 22 October 2020.
- [15] On 30 October 2020, feedback on the changes was provided to Franchisees and Global Business.
- [16] The evidence of Ms Qengqe was that as there was reduction of roles, the proposed selection criteria were the following: relevant experience or skills counted for 40% of what was considered, relevant qualifications counted for 35%, and performance counted for 25%.[11] With respect to the latter, the performance in the previous year of 2019 was considered. Her evidence was that the selection criteria

were objective. While experience and skills comprised greater percentages of what was considered, qualifications were critical, and it was important to appoint employees who performed well.

- [17] The current and proposed HR structure was shared with the employees.[12] Nine roles were impacted, including the two HR Field Manager roles and two Equity HR Business Partners, which were each reduced to one, as the duplicate roles were reduced to one. The new

proposed structure showed the creation of new roles, including the HRBP Franchise role, which supported South African franchises and a junior HRBP Equity role. There were also changes in reporting lines. The two HR Field Manager roles became the HR Field Manager ROSSA role, as the South African and ROSSA markets are separate, and therefore, there was a need for a strategic role to support the ROSSA region. The applicant applied for both the HR Field Manager ROSSA role, a level 10 role and the HRBP Franchise role, a level 8.[13] Staff were restricted to apply for two roles only.

[18] Ms Qengqe sent an email to staff on 5 October 2020 at 17:31 pm[14] incorporating the old and proposed structure. On 6 October at 08:07 am, the applicant responded to this email and inter alia, sought clarity regarding the application of the selection process and inquired whether it would be possible to share the proposed structures to aid in decision-making of which roles would be most suitable for her to apply for. The applicant also sought clarity on the composition of the new HRBP Franchise role.[15] In response to the applicant's queries, Ms Qengqe stated that the respondent would reply through the FAQs. She referred to such FAQ, which was posted on 6 October 2020,[16] where the response by the respondent to the consolidated questions, including that of the applicant, were as follows:

‘10. What is the process for applying for roles where there are more people than roles?

Once the consultation process has been concluded, affected individuals will be invited to submit an expression of interest setting out their 1st and 2nd preference for roles. A desktop exercise, based on the expression of interest and applying the proposed election criteria, will be done to determine the best fit for the role.

...

16. Will it be possible to share the other proposed structure so as to assist me in deciding which roles to apply for?

Once the consultation process has been completed on the 13th October, all affected individuals i.e. individuals whose roles are confirmed as impacted in the final structure within their function, based on the availability of suitable roles in a different function, may be considered. The aim will be to limit the impact within the Function first before opening up for people from other functions.

17. Please clarify how the selection process will work.

The proposed criteria as shared in the 1st Engagement is as follows; Experience, Qualifications, Performance. These criteria are subject to any counter proposals that the business may receive during the consultation process.’

[19] On 8 October 2020, following the second consultation meeting, the applicant sent an email to Ms Qengqe, in which the applicant inter alia, provided several counterproposals, asked questions relating to the proposed structure, and sought clarity on the weighting of the selection criteria, demotions, bonus payments, and the short timeline.[17]

[20] On 9 October 2020, the respondent replied in the FAQ as follows with respect to the applicant's query on the application of the selection criteria:

'11. Please provide more clarity on the proposed selection criteria. Will the 3 elements (Experience (40%) / Qualification (35%) / Performance (25%)) that have been presented have a weighting to them?

Yes the 3 elements in the selection criteria are proposed to be weighted as presented on the 5th October as follows:

Experience (40%) Qualification (35%) Performance (25%)

Once agreed on, or at least attempts have been made to agree on, the selection criteria will be applied in the case where there are more people than roles available.'[18]

[21] The applicant's other queries were also responded to in the FAQs posted on 9 October 2020.

[22] Following the applicant's one-on-one session on 15 October 2020, the applicant sent an email to Ms Qengqe requiring clarity on the proposed structure, selection criteria, demotion, redeployment, an option for affected employees to purchase cell phones and laptops, and timelines. Ms Qengqe's evidence is that these counterproposals were a repetition of what had already been canvassed in the team consultation process.

[23] Following the applicant's termination notice dated 26 October 2020, when she was unsuccessful in the two roles that she applied for, the applicant posed further questions to Ms Qengqe seeking clarity on why she was not successful in the two positions she had applied for, as she had more experience than what was required. The applicant also wanted to understand what rating scale was used. Ms Qengqe referred to the scoring sheet[19] in the application process, which revealed that the applicant's qualifications were in line with the expectations of both roles, however, her limited experience in ROSSA and average performance put her at a disadvantage in respect of both roles. Ms Qengqe also clarified to the applicant that a scale of 1 to 10 was used and although the applicant was a strong candidate, the best fit for the role was considered. [20] In this regard, Ms Qengqe stated that the level 8 role of HRBP Franchise is a junior role and is more operational than strategic.

The successful candidate in this role, Ms Revell, worked in the role since the COVID-19 temporary changes, and her experience was more relevant. In relation to the HR Field Manager role, although the applicant had 15 years of experience, the successful candidate, Ms Ncunyana, had more KFC and ROSSA experience than the applicant.

[24] During cross-examination, it was put to Ms Qengqe that the consultation on 5 October 2020 was not meaningful in that the employees were called to the first consultation on the day they received the section 189 notice[21] and could not provide input. Ms Qengqe had no comment to what was put to her. It was further put to her that the employees complained that information was inadequate and not freely shared, and they did not have a full view of the available vacancies for which they could apply. Ms Qengqe could not dispute this. Ms

Qengqe did not dispute that the respondent could not share the other structures and stated that this could not be done until the structures had been finalised.

- [25] It was further put to Ms Qengqe that the applicant queried the responsibilities of the ROSSA role and asked whether the role could be broadened, and in response was only told about the structure after the consultations and could not make any input. Ms Qengqe responded that the consultation was kept in the function to minimise the impact of the restructuring. It was put to her that it is little comfort for an employee whose job is impacted to be unable to consult on unavailable positions only to be told about the structure at the time when the consultations had ended. Further, there was no consultation on employees being limited to applying for two roles. Ms Qengqe admitted that this was not considered during the consultation and it was only considered after the consultation.
- [26] Ms Qengqe was challenged during cross-examination that the FAQs did not comprise proper consultation, to which she responded that the consultation was to obtain inputs. Ms Qengqe disagreed and stated that the engagements were meaningful. Ms Qengqe admitted that the one-on-one consultation was not part of the consultation process as the consultation process ended on 13 October 2020, and this is common cause. It was put to Ms Qengqe that the alternatives that the respondent considered to dismissal were irrelevant as they had nothing to do with the advancement of the strategic or structural changes. Ms Qengqe disagreed. Ms Qengqe stated that the selection criteria were objective.
- [27] The evidence of the applicant was that in her role as HR Field Manager, she oversaw the franchisees in South Africa and the ROSSA markets for a period of three years. Following the temporary changes due to the COVID-19 pandemic, in 2020, she was allocated only to oversee the South African franchisees. She confirmed her experience as a human resources generalist, operations manager and senior HR business partner. After her retrenchment, she obtained a consulting role in a franchisee and was paid an eighth of her previous total earnings and it is only in July 2024 that she came to earn the salary that she earned in 2020. The applicant further confirmed her qualifications as being a BCOM degree in human resources management, marketing and IT, a BCOM honours degree in human resource management and a master's degree in business administration with a dissertation in human
- [28] According to the applicant, only two consultation meetings were held, the first being on 8 October 2020 and the second on 13 October
2020. Her evidence was that on 5 October 2020, information was shared only, and she could not reasonably consult on the content of the section 189 LRA notice later on the same day. At the next meeting on 8 October 2020, which meeting lasted online for approximately 30 minutes, a number of questions were posed by the employees. It was the evidence of the applicant that the engagement on 8 October 2020 was not open and welcoming, and that the respondent was not open to listening to the views of the impacted employees. Given the duration of the meeting, the applicant stated that this consultation was not meaningful. According to the applicant, a more meaningful engagement would entail listening to the

proposals of the employees as opposed to posting FAQs where there is no engagement. The applicant stated that, still to this date, she is uncertain as to what the rating scale was that was used by the respondent in the selection process.

- [29] The applicant confirmed that she was comfortable with the percentages as proposed by the respondent but was not clear on what the rating scale was. She confirmed that in her question, she wanted to understand how the respondent came to this eventual structure and that this question remains unanswered today. Further, she wanted to understand how the selection criteria worked, but no meaningful engagement took place, and therefore, she did not understand how the selection criteria were applied.
- [30] Her further evidence was that she inquired post-retrenchment how employees would obtain the list of vacancies, and this was not responded to. The applicant further denied being consulted on the appropriate alternatives to dismissal. She stated that the alternatives, in any event, were not linked to the structural change, which was the respondent's rationale of the change. She stated that the burning issue in the retrenchment process was the application of the selection criteria. The applicant was adamant that she had more experience than the successful candidates, and she stated that there was no input in respect of what the job descriptions would be in the new structure.
- [31] The evidence of the applicant was that during her one-on-one meeting with Ms Qengqe on 15 October 2020 after the consultations had closed, this was the only opportunity for her to clarify the available roles in respect of experience and to ask questions and during this one-on-one meeting. Ms Qengqe did not inform her that she was overqualified for the HRPP franchise role. With respect to the evidence of Ms Qengqe that it was an oversight on the part of the respondent not to invite the applicant to apply for the available role post her retrenchment, and she stated that she was denied the opportunity to apply for this role. The applicant stated

that had she known that she was overqualified for the HRBP franchise role, she would have reconsidered her application.

Evaluation

Was the dismissal of the applicant procedurally fair?

- [32] The Code of Good Practice on Dismissal based on Operational Requirements[22] (Code) reads as follows:

‘(1) The Labour Relations Act … (“the Act”) defines a dismissal based on the operational requirements of an employer as one that is based on the economic, technological, structural or similar needs of the employer. ... As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of

the employer's enterprise.

- (3) The obligations placed on an employer are both procedural and substantive. The purpose of consultation is to enable the parties, in the form of a joint problem-solving exercise, to strive for consensus if that is possible. The matters on which consultation is necessary are listed in section 189 (2). This section requires the parties to attempt to reach consensus on, amongst other things, appropriate measures to avoid dismissals. In order for this to be effective, the consultation process must commence as soon as a reduction of the workforce, through retrenchments or redundancies, is contemplated by the employer, so that possible alternatives can be explored. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.
- (4) The Act also provides for the disclosure by the employer of information on matters relevant to the consultation. Although the matters on which information for the purposes of consultation is required are specified in section 189(3), the list in that section is not a closed one. If considerations other than those that are listed are relevant to the proposed dismissal or the development of alternative proposals, they should be disclosed to the consulting party....
- (5) The period over which consultation should extend is not defined in the Act. The circumstances surrounding the consultation process are relevant to a determination of a reasonable period. Proper consultation will include:
 - (a) the opportunity to meet and report back to employees;
 - (b) the opportunity to meet with the employer; and
 - (c) the request, receipt and consideration of information.
- (6) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. On the other hand, the parties who are entitled to be consulted must meet, as soon, and as frequently, as may be reasonably practicable during the consultation process.
- (7) If one or more employees are to be selected for dismissal from a number of employees, the Act requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria.
- (9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the "last in, first out" (LIFO) principle. ...Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution.

(12)(1) Employees dismissed for reasons based on the employer's operational requirements should be given preference if the employer again hires employees with comparable qualifications, subject to:

- (a) the employee, after having been asked by the employer, having expressed within a reasonable time from the date of dismissal a desire to be rehired.
- (b) a time limit on preferential rehiring. The time limit must be reasonable and must be the subject of consultation.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of re-employment.' (Own emphasis added)

[33] A notice in terms of section 189(3) of the LRA commences a retrenchment process. In casu, this notice was issued to the impacted employees on 5 October 2020, the same date on which the first consultation was held. However, the reduction of the workforce through redundancies was contemplated in the week prior to 31 August 2020, with the leadership team alignment session held on 30 September 2020.

[34] It is common cause that the date of 5 October 2020 marked the start of the consultation process.[23]

[35] In *NEHAWU v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic*, [24] this Court held that a notice in terms of section 189(3) of the LRA must be given a reasonable time before the commencement of the consultations.

[36] In *Louw v Micor Shipping* [25], this Court emphasised the importance of reasonable notice before commencing consultations as follows:

'In my view, the failure to give timeous notice to enable the applicant time to ponder her situation and to come up with suggestions on alternatives, was a fatal one. The whole structure of section 189 is that there should be a notification period which enables those to be consulted to prepare and be ready to meaningfully take part in the discussions envisaged in that section. The section envisages meaningful participation. There can only be meaningful participation if those consulted have had enough time to ponder on the reasons provided as well as to prepare themselves to ask for information and to make informed suggestions. An employee who does not get the benefit of a notification period is in no position to meaningfully take part in a proper consultation

process as he or she is given no notice and he attends that meeting unprepared. In my view, therefore, the dismissal of the applicant was procedurally unfair.' (Own emphasis added)

[37] In view of the afore-going, there was insufficient notice to the employees, including the applicant, to prepare for meaningful engagement during the first consultation meeting on 5 October 2020. Having received the notice on 5 October 2020, and being called to a consultation meeting on the same date was an ambush, as the applicant was not afforded a

reasonable opportunity to consider the content of the section 189(3) notice in order to be prepared to consult meaningfully in the first consultation meeting. It is not disputed that the first consultation meeting on 5 October 2020 was an information-sharing session and was for the duration was 38 minutes.[26] Therefore, in my view, there was no meaningful engagement on that occasion to achieve the objective of joint problem-solving or

consensus-seeking.

[38] The second consultation on 8 October 2020 lasted for 39 minutes. Given the extent of the structural changes and that the amended proposed structure being communicated at 19:34 pm on 7 October 2020 by Ms Qengqe, the respondent did not fully appreciate that not all employees would have had sight of it to consider it before 08:00 am, the scheduled time of the second consultation on the following day. In my view, the information was not provided with sufficient time for the employees, including the applicant, to consider the proposed structure and provide meaningful and informed inputs during the second consultation meeting.

[39] The applicant submitted her detailed counterproposals in an email following this second consultation process, shortly after 09:00 am on 8 October 2020. The applicant's questions and counterproposals and those of other employees were deferred to the FAQs, where counterproposals and questions were consolidated, and generalised responses were provided by the respondent. Thus, the counterproposals of the employees and the applicant were not seriously considered by the respondent. No reasons were provided for rejecting the applicant's detailed counterproposals. In my view, this does not constitute meaningful consultation.

[40] In *Solidarity on behalf of Members v Barloworld Equipment Southern Africa and Others*[27] (Barloworld), the Constitutional Court restated the principles for a meaningful consensus-seeking consultation as follows:

‘... for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations, and seriously consider the representations.

This entails that the employer is under an obligation to furnish reasons for rejecting representations after it has considered them carefully. Approaching the consultation with a pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful.’ (Own emphasis added)

[41] The Constitutional Court in Barloworld described sufficient information to include information that would assist an employee party to make contributions about ways of avoiding dismissals.[28]

- [42] In *National Education Health and Allied Workers Union v Minister of Trade, Industry and Competition and Another*[29], this Court held that the purpose of consultation should be considered as a process which entrenches the values of social partnership and joint problem-solving, aimed at affording all parties a proper opportunity to make contributions towards a consensus-seeking process.
- [43] In *SA Commercial Catering and Allied Workers Union v JDG Trading (Proprietary) Ltd*[30], the Labour Appeal Court (LAC) held that the requirements of a meaningful joint consensus-seeking process were satisfied where an employer showed a willingness to respond to requests for further information, considered the proposals received, and provided reasons for rejecting proposals. The LAC further held that information must be disclosed to make the process of consultation meaningful, and this includes information concerning the need for retrenchment, as well as information that will assist employees or the trade union, as the case may be, in making contributions about the ways of avoiding retrenchment.
- [44] The Code provides that for consensus-seeking to avoid dismissals to be effective, the consultation process must commence as soon as the reduction of the workforce through retrenchments or redundancies is contemplated by the employer, and the employer must keep an open mind and seriously consider the proposals put forward.
- [45] The section 189(3) notice stated that employees could be considered for re-employment within six months of retrenchment if a role which requires their specific skill set becomes available. This is in line with item 12 of the Code. In February 2021, one such role became available, however, not only did the respondent fail to consult within the time frame of six months with dismissed employees for possible future re-employment, but it did not consider the mechanics of recalling employees for re-employment and it failed to give preference to the applicant and failed to take reasonable steps to inform the applicant of this role for possible re-employment. Various reasons were provided for such failure, ranging from an oversight to the re-employment process not being thought through to the applicant being employed by a franchisee at the time. None of these reasons are cogent in view of the applicant's question posed in her email of 15 October 2020 regarding how dismissed employees would be contacted about possible re-employment.[31]
- [46] The applicant contends that the application of the selection criteria was not fair and objective. She did not dispute the percentages accorded to each of the selection criteria being experience, qualifications and performance – her contestation is that the respondent was not able to demonstrate how it applied the selection criteria and was not able to provide ratings in the application of the selection criteria.
- [47] The respondent failed to consult meaningfully on the selection criteria. The applicant made a counterproposal on the performance element of the selection criteria following the second consultation meeting on 8 October 2020 and suggested an average score of 2 or 3 years should be considered.[32] No reason was provided for rejecting this counterproposal.

The applicant once again, made the same counterproposal following the one-on-one session on 15 October 2020[33] and stated an average of 3 years' performance should be considered. Mrs Qengqe stated that this was a mere repetition. The problem with this stance is that there was no meaningful engagement; hence, the same questions by the applicant resurfaced. The applicant's questions for clarity on the application of the selection criteria and the rating scale used continued after she received the termination notice on 26 October 2020. Her evidence is that to date, she is unclear on the rating scale that was used and applied. Had this issue been consulted on meaningfully, the applicant would still not have been in the dark as to how she was selected for dismissal.

- [48] Therefore, in view of the rushed consultations; insufficient notice and information being provided to employees to enable them to make meaningful contributions in the consultations; the final structure being released on 13 October 2020;[34] job descriptions being made available after the functional consultations closed on 13 October 2020; the applicant not having had an opportunity to consult meaningfully on the the proposed structure notwithstanding her detailed contributions and the lack of clarity on her questions regarding the application of the selection criteria; and the generalised responses to counterproposals embodied in the FAQs, I am of the view that there was no meaningful consultation as no reasons were provided for rejecting the counterproposals of the applicant, hence she continued to ask questions on the application of the selection criteria after she was unsuccessful in her applications for the two available roles. Therefore, the dismissal of the applicant was procedurally unfair.

Was there a genuine rationale for change?

- [49] The rationale for the change was based on the need to align the organisational structure to meet and achieve the strategic objectives of the respondent, driven by the global business. In my view, this structural change was geared to make the respondent deliver on its strategy and to eradicate a duplication of functions.
- [50] The applicant contends that the cost-saving initiatives implemented by the respondent were economic and, therefore, not related to the structural need for change. It is not disputed that the structural change involved a change in organizational structure; however, as there was no meaningful consultation on this rationale for change, there was no fair reason for dismissal.
- [51] In the circumstances, I find that the applicant's dismissal was both procedurally and substantively unfair.
- [52] The applicant does not seek reinstatement. She seeks compensation equivalent to nine months' remuneration as she obtained permanent employment in 2021 at the level that she occupied before she was dismissed from the applicant. In my view, nine months' compensation is just and equitable in the circumstances.
- [53] In the premises, the following order is made:

Order

1. The dismissal of the applicant/plaintiff is both substantively and procedurally unfair.
2. The respondent is to pay the applicant/plaintiff compensation equivalent to nine months' remuneration calculated at the date of the applicant's/plaintiff's dismissal.
3. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv F. Sangoni

Instructed by:

Malcom Lyons Brivik Inc.

For the Respondent: A. Dippenaar of Kichmanns Inc.

[1] This was the evidence of Ms Akhona Qengqe for the respondent, with reference to the
communique by the respondent's HR Field

Director, Mr Rudi Richards on p 1 of the trial bundle.

[2] Trial bundle at p 2.

[3] Trial bundle at p 2.

[4] Act 66 of 1995, as amended.

[5] Trial bundle at pp 19 to 22.

[6] Trail bundle at pp 3 to 18.

[7] Trial bundle at p 5.

[8] trial bundle at p 40.

[9] Trial bundle at p 51.

[10] Trial bundle at pp 67 to 80.

[11] Trial bundle at pp 14 an 15.

[12] Trial bundle at pages 17 to 18 and 34 to 35.

[13] Trial bundle at pp 135 and 136.

[14] Trial bundle at p 27.

[15] Trial bundle at pp 26 to 27.

[16] Trial bundle at pp 30 to 31.

[17] Trial bundle at pp 37, 41 and 42.

[18] Trial bundle at p 44.

[19] Trial bundle p 134.

[20] Trial bundle pp 96 and 97.

[21] Section 189 of the Labour Relations Act 66 of 1995, as amended (LRA).

[22] Published under GN1517 in GG 20254 of 16 July 1999.

[23] See: Pre-trial minute at para 2.7.

[24]

[2005] 1 BLLR 10 (LC) at paras [69] to [73].

[25] (P86/98) [1999] ZALC 188 (14 June 1999) at para [23].

[26] Trial bundle at p 24.

[27]

[2022] ZACC 15: (2022) 43 ILJ 1757 (CC) at para [46].

[28] Ibid at para [44].

[29]

(2021) 42 ILJ 1992 (LC) at para [21].

[30]

[2018] ZALAC 38; (2019) 40 ILJ 140 (LAC) at para [28].

[31] See: trial bundle at p 88.

[32] See: trial bundle at p 37.

[33] See trial bundle at p 88.

[34] See: pre-trial minute at para 2.9.2, where the common cause fact is stated that the final structure was released on 13 October 2020. Parties are bound to the content of their pre-trial minute. I emphasize that the evidence of Ms Qengqe and the applicant is the team consultations closed on 13 October 2020 and the one-on-one consultation between them took place on 15 October 2020. See also: the email by Ms Qengqe dated October 2020 at p 51 of the trial bundle, which she testified on, which confirms the position that the functional team consultation meetings ended on 13 October 2020.

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