

SOUTH AFRICA / JUDGMENT

Solidarity obo Bezuidenhout v Redpath Mining (South Africa) (Pty) Ltd (JS861/13) [2015] ZALCJHB 46 (20 February 2015)

[2015] ZALCJHB 46

COURT

Labour Court Johannesburg

BEFORE

AC Basson

CASE / FILE NUMBER

JS861/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Judgment

Case No: JS 861/13

DATE: 20 FEBRUARY 2015

Not Reportable

In the matter between:

SOLIDARITY OBO D. BEZUIDENHOUT.....Applicant

And

REDPATH MINING (SOUTH AFRICA) (PTY) LTD.....Respondent

Heard : 12,13,16,17 and19 February 2015.

Judgment

: 20 February 2015.

Summary : Retrenchment.

AC BASSON, J

The parties

- [1] The applicant in this matter is Mr D Bezuidenhout (hereinafter referred to as “the applicant”). At the time of his retrenchment he was employed as a mine overseer and stationed at the Ghaghoo Diamond Mine in Botswana. In terms of the applicant’s contract of service he was specifically employed to work at the Ghaghoo Mine. Mr Schultz (the Operation’s Director of the respondent) also confirmed that he had approached the applicant to work at the Ghaghoo Mine after the previous mine overseer was taken off the mine following an incident where two individuals lost their lives. It is common cause that the applicant commenced work on 7 August 2013 and that the date of his retrenchment was 12 April 2013.
- [2] The respondent is Redpath Mining (South Africa) (Pty) Ltd (hereinafter referred to as the “respondent”). The respondent was contracted by Gem Diamonds Botswana (Pty) Ltd (hereinafter referred to as “the client”) to sink a so called sand tunnel at the Ghaghoo Mine. In essence the respondent was required by the client to sink a sand tunnel which was a first of its kind project on the continent of Africa. It was also common cause that this tunnel was excavated manually and that, at the

time, the respondent did not foresee that blasting would be necessary to sink the tunnel as the terrain consisted mainly of sand. (I will return to this issue herein below.)

Summary of the evidence

- [3] It is also common cause that the respondent ceased its mining activities at the Ghaghoo Mine round about July 2013 – that is more or less 3 – 4 months after the applicant’s retrenchment. The applicant confirmed that his position as mine overseer in Botswana no longer existed as from July 2013 as the mine activities had ceased.
- [4] The applicant was in possession of a South African Blasting Licence. This licence is, however not recognised by the Botswana Mining Directorate. However, because it was not foreseen that the respondent would engage in blasting activities at the Ghaghoo Mine, it was not required by the respondent at the time when the applicant was engaged that the applicant had to be in possession of a valid Botswana Blasting Licence. It was further common cause that an individual can only apply for this licence once the

individual is physically in Botswana.

- [5] It was also common cause that a thick layer of calcrete was encountered during the latter part of 2012 which made it impossible to continue to excavate the tunnel with the available machinery. A decision was then taken to commence with blasting as this was the only way in which the calcrete could be removed. In this regard Mr Schultz and Mr Warren Roe (who was in charge of

health, safety and legal compliance on the mine) confirmed that the calcrete layer made it impossible to continue with the tunnel without blasting. The applicant also confirmed that the calcrete layer delayed the excavation process and that the project was falling behind because the machinery could not break the calcrete layer. More importantly, the applicant confirmed that he was part of the decision to commence with the blasting process. This decision that blasting became necessary was taken around September- October 2012.

- [6] When it became necessary to commence with blasting it also became necessary for the client (Gem Diamonds) to apply for a blasting licence with the Botswana Mining Directorate. Because the Botswana Government did not recognise South African Blasting Licences (although they were very similar), it likewise became necessary and in fact urgent, for all supervisors on the Ghaghoo Mine to obtain Botswana Blasting Licences. In this regard it was common cause that the applicant and his team - Mr Badenhorst, Mr Prinsloo and Mr Feyt were required to obtain Botswana Blasting Licences.
- [7] Of importance therefore is the uncontested fact that as of September/ October 2012, there was an operational requirement that the aforementioned four individuals obtain blasting licences from the Botswana Mining Directorate. This requirement arose from the fact that a decision was taken (of which the applicant was a part of) to commence with blasting at the mine.
- [8] It was not disputed that the client informed the respondent that the supervisors employed at the Ghaghoo Mine were required to sit for an exam for the Botswana Blasting Licence. It was also not disputed, as I have already indicated, that a Botswana Blasting Licence could only be obtained in Botswana. In other words, the applicant and his team were not able to obtain such a licence prior to their arrival in Botswana.
- [9] Both Mr Schultz and Mr Roe testified that they had personally informed the applicant and his team that they had to pass the exam and that they only had one opportunity to pass the exam. These two witnesses also confirmed that the applicant and his team had received the material

to study for the exam and in fact also had prior exam questions and model answers. Mr Schultz confirmed that the applicant did not express any reservations regarding the requirement to sit for the exam. In fact, as already pointed out, the applicant himself confirmed that he was part of the decision that blasting had to take place in light of the fact that the calcrete layer could not be broken by machinery.

- [10] It was further common cause that the applicant and his team sat for the exam on 7 March 2013 in Gaborone at the office of the Mine Directorate. There is some dispute about what happened at the exam and whether the applicant and his team were instructed to wait for the results after the exam. There is also some dispute whether the applicant was told by Mr Van Antwerp not to wait for the exam results but that they had to return to the mine. Mr Roe explained that he was personally informed by the Inspector Mr Bora that the applicant and his team were advised during the induction just prior to the exam that they had to wait for

the results. The reason being that those candidates that received a mark of between 70% and 90% would be required to sit for an oral exam. Only those who received 90% and over passed the exam. I do not find it necessary to decide this dispute in light of the fact that it was common cause that the applicant received 83% and that he did not wait for the oral exam. The important fact for purposes of this judgment is the fact that the applicant did not pass the examination and that this resulted in his retrenchment.

- [11] It is important to refer to the evidence of Mr Roe who was, as already pointed out, responsible for health safety at the Ghaghoo Mine. He confirmed that legislation in Botswana (which is similar to legislation in South Africa) require that any person who handled explosives at a mine had to be qualified and had to be in possession of a Botswana Blasting Licence. Mr Roe explained that it was always the plan to obtain licenses for the applicant and his team and that he had prepared documentation to this effect. He also

obtained information about the past learning experience of the applicant and the three others which he submitted to the client. He also confirmed that once the calcrete layer was struck blasting became urgent. Mr Roe explained that he had requested more than one postponement for the Blasting Licence exam to afford the applicant and his team sufficient time to study for the exam. Mr Roe confirmed that the applicant did not express any reservations to writing the exam. Both Mr Roe and Mr Schultz confirmed that they had personally informed the applicant and his team on more than one occasion that they only had one chance at the exam and that it was important for them to pass the exam.

- [12] Mr Roe explained why he had requested information from the applicant and his team regarding past learning experience. In this regard Mr Roe explained that in order to qualify to write the exam for the Botswana Blasting Licence and individual had to have a certain amount of underground practical experience. This experience required that an individual must have done 75 shifts underground in a mine in Botswana. The undisputed evidence was that the client (Gem Diamonds) had reached an agreement with the Inspectorate to waive this requirement and to give due recognition to prior learning. As a result of this agreement the applicant and his team were allowed to sit for the blasting licence exam on the strength of the fact that they had 10 years of experience underground. Mr Roe, however, explained that the Inspector made it clear to the client that this extension would only

be for one exam. In other words, if the applicant and his team failed the exam the Inspectorate would reinstate the requirement that the applicant and his team had to do the 75 shifts underground in a mine in Botswana. The waiving of the 75 shifts underground

requirement was therefore granted on condition that the candidate passes with a mark of 90%. Mr Roe therefore explained that it was in light of this agreement that was reached between the client and the Inspectorate that it was therefore of the utmost importance that the applicant and his team pass the exam as there would not be a second opportunity to sit for the exam.

[13] It is common cause that the applicant had received a mark of 83% for the exam and that he therefore failed the exam. Mr Badenhorst and Mr Feyt also failed the exam. Only Mr Prinsloo had passed the exam. It was not disputed that Mr Prinsloo continued to work for the respondent. Because the applicant did not wait for the oral exam because he had returned to the mine, he therefore did not sit for the oral exam and was deemed to have failed the exam. I have already referred to the dispute whether or not the applicant was aware that he had to wait for the oral exam and whether or not he was told by Mr Van Antwerp to return to the

mine immediately. Mr Van Antwerp disputed that it was part of the conversation he had with the applicant on 7 March 2012 whether they should wait for the results or return to the mine. I have also referred to the fact that this dispute is largely irrelevant to the dispute before the Court because in the end the fact remains that the applicant had failed the exam. What is important is what followed after it became known that the applicant had failed the exam.

Events after the examination

[14] Following the outcome of the exam the Chief Inspector of Explosives of the Republic of Botswana (Mr Kwena) informed the Manager of the client (Gem Diamonds Botswana) on 8 March 2013 that only one candidate namely Mr Prinsloo had passed the exam. On 25 March 2013 Mr Van Antwerp of the respondent was informed by the client of the fact that the three employees including the applicant did not pass the exam. The following is stated in the letter:

“Acknowledging the aforementioned communication, we are compelled to review the Ghaghoo Diamond Mine management position which allowed these individuals to work as supervisors without blasting licences. Our previous tolerance of this anomaly was based on this individuals

ultimately sitting for examinations and legitimising the supervisory roles by passing. Since these gentlemen have failed, it has become untenable to continue with the position we held.

You are hereby instructed to, within seven days of the date of this letter:

- 1 Provide reasons why the individuals who failed should not be replaced without delay.
2. State how you will manage the Works to continue without being delayed, while maintaining based safety practices, legal compliance and fulfilling your contractual obligations in all respects.

We also need to state that going forward now one without a valid Botswana Blasting Licence will be allowed to operate on the mine, in a supervisory capacity that requires blasting licence; this includes any work to be performed on the sinking of the Ventilation Shaft.”

- [15] It was debated with the witnesses for the respondent whether any submissions were made to the client to persuade the client not to remove the applicant (and Mr Badenhorst and Mr Feyt) from the mine. Mr Van Antwerp was not very clear on this issue in his evidence. He did, however, confirm that because the applicant, Badenhorst and Feyt did not pass the exam, a decision was taken that they were redundant. A retrenchment process followed thereafter.
- [16] After this letter was received from the client, the applicant (and the two others) was instructed to leave the mine operations in Botswana and return to head office in South Africa for a discussion. When they arrived at the offices on 4 April 2013 they were met by Mrs Heidi Douglas – the Human Capital Manager who was in charge of the retrenchment process. The applicant confirmed that the letter from the client addressed to Mr Van Antwerp was discussed with them. The applicant and the two others were then furnished with section 189(3) “Notice of Intention to Retrench” in terms of the Labour Relations Act[1]. The retrenchment process therefore formally commenced on 4 April 2013. There is some dispute as to what was discussed during the meeting on 4 April 2013. The applicant was adamant that this was not a consultation meeting but merely a discussion. He, however, confirmed that the contents of the letter were discussed with them. (I will return to this issue hereinbelow.)
- [17] It was common cause that the union – Solidarity – was not involved or invited to the consultation process. There was some dispute about whether Mrs Douglas was aware of the fact that the applicant was a member of Solidarity. What is, however, clear from the facts is that the applicant did indicate on a form at the commencement of his employment that he was a member of Solidarity. He, however, left open the other sections in respect of his union membership and particulars regarding the date he became a member. No information regarding his membership number and his membership status appeared on the form. Mrs Douglas testified that she was not aware of the fact that the applicant was a member of Solidarity firstly because no Recognition Agreement with Solidarity was in place and secondly because no stop orders were deducted in favour of Solidarity from the applicant’s salary. She also stated that the applicant did not bring it to her attention that he was a member of Solidarity and that if he had done so, she would have involved the union. The applicant confirmed that he did not inform Mrs Douglas that he was a member of Solidarity. It is common cause that the applicant was elected as a representative on behalf of the three individuals who were the subject of the retrenchment process (I will return to this aspect herein below). Suffice to point out that there was, in my view, an obligation on the applicant to inform the respondent that he was a union member and that he wished to have union representation. The section 189(3) notice makes it clear that the applicant was entitled to representation – although it does not state union representation. Although the obligation to consult and to follow the retrenchment process falls primarily on the employer this does not mean that the employee can remain passive. In this instance the applicant was a senior manager and it could in my view have been expected from him to alert the respondent to the fact that he was a union member and that he wished to be represented by a union. Instead

the applicant was chosen by the other two employees to represent them during the consultation process.[2]

- [18] The applicant sent an e-mail dated 5 April 2012 to Mrs Douglas. The following part of the e-mail is important for purposes of this

judgment:

“We as employees or (sic) Redpathmining does not agree to what is happening at this point of time. But we understand that the client

Gemdiamond requested to remove us from site and for Redpathmining to comply to the letter that was sent to Redpathmining management as we are the contractor on site although Redpathmining could argue that having a Botswana blasting licence is not part of the Bill and part of the contract agreement and scope of work there is we were not suppose (sic) to do any blasting work on this project. But for the potential of getting more ore additional work from Gemdiamond it make (sic) seems not to fight the issue and for that purpose we understand the reason of removing us from the site.”

- [19] The applicant confirmed in his evidence that he had understood why a decision was taken to remove him from the site. He also testified that he understood that the client had placed pressure on the respondent to remove them from the mine because they did not pass the exam. The applicant therefore conceded in his evidence that he understood the reasons for his removal from the project and that by asking for alternative work with the respondent, he in fact conceded that the respondent had to remove them from the Mine. The applicant, however, refused to concede that the respondent had a reason to retrench him.
- [20] The applicant also stated in his email of 5 April 2013 that he was informed by Mr Roe that the three people who had failed the test had another chance to obtain the Botswana Blasting Licence. Mr Roe had a different version in respect of what had in fact happened when he discussed this request with the Inspectorate in Botswana. In this regard it is important to refer to the uncontested evidence of both Mr Shultz and Mr Roe. Mr Roe explained that he personally met with Mr Bora of the Mine Inspectorate to plead with him to afford the applicant and his team a second chance at sitting for the exam. He explained that Mr Bora was prepared to afford them a second opportunity to sit for the exam on condition that the applicant and the other two do the 75 shifts underground at a mine in Botswana. Mr Roe was specifically informed by the Inspector that the exemption, which the applicant previously had in terms of the agreement between the Inspectorate and the client that their prior learning would be considered, no longer applied. Mr Roe explained that the only mine in Botswana that could have accommodated the applicant and the other two to do the 75 shifts was not willing to allow the applicant and the other two to work underground. He explained that the mine in Botswana was not willing to take the legal responsibility for the applicant and his team. According to Mr Roe the respondent was therefore unable to assist the applicant to comply with the conditions set by the Inspectorate.

- [21] Mr Shultz explained that he was disappointed by the results. He explained that he had personally approached the Inspectorate on three occasions to try to arrange that the Inspectorate afford the applicant another opportunity to sit for the exam. His appeals were unsuccessful. He also confirmed that the Inspectorate had informed him of the condition that the applicant and the two others had to do 75 shifts underground prior to re-sitting for the exam. Mr Shultz therefore also confirmed that he had tried to accommodate the applicant. It is also important to refer to the meetings Mr Shultz had with the client in Gaborone. The very issue of the applicant's failing of the exam was raised during a meeting after the letter was sent to the respondent by the client. Subsequent thereto, as already pointed out, Mr Schultz had lodged more than one appeal to the Mine Directorate. Mr Warren Roe was thereafter sent to meet with Mr Bora and plead with him to afford the applicant a further opportunity to sit for the exam. I have already referred to the discussions between Mr Bora and Mr Roe.
- [22] In light of the fact that the evidence of Mr Schultz and Mr Roe regarding their efforts to secure a further opportunity for the applicant to write the exam was uncontested, it is therefore accepted that the respondent had tried on various occasions to persuade the Inspectorate to afford the applicant a further opportunity to sit for the exam. The Court also accepts that because the respondent was unable to place the applicant at a mine in Botswana to fulfil the condition of 75 shifts underground (in a Botswana Mine) that the respondent had exhausted its efforts to secure a second chance for the applicant to rewrite the exam. The Court must therefore also accept that the respondent had to remove the applicant (and the two others) on the instruction of the client who insisted that the supervisors be in possession of a Botswana Blasting Licence. I have already pointed out that it is a legal requirement that any person who handles explosives must be in possession of a Botswana Blasting Licence. Lastly, it should be borne in mind that the applicant was employed in a senior position as a mine overseer. It can hardly be argued that he would have been able to oversee the mine and handle explosives if he was not in possession of a Botswana Blasting Licence.
- [23] I am therefore of the view that the respondent had a valid operational rationale to remove the applicant from Botswana and commence a retrenchment process. As a result of the applicant's failure to obtain a Botswana Blasting Licence, he was no longer fit to be employed at the Ghaghoo Mine.

The position of Mr Tom Rogers

- [24] Mr Roe confirmed that another individual with the name of Mr Tom Rogers was appointed on the mine in the applicant's position after the applicant was removed. He confirmed that Mr Rogers likewise did not hold a Botswana Blasting Licence. The exemption in respect of the 75 shifts, however, now applied to Mr Rogers. In this respect Mr Rogers was in the exact same position that the applicant and the three others were when they had arrived in Botswana. Mr Rogers therefore also had an opportunity to sit for the exam. The condition that he only had one chance to sit for the exam equally applied to Mr Rogers. Is common

cause that Mr Rogers never sat for the exam as the operations at the mine ceased towards the middle of 2013.

The procedural fairness of the dismissal

- [25] Turning to the procedure that was followed prior to the dismissal of the applicant. I have already referred to the fact that one discussion was held on 4 April 2013 during which the 189 (3) notice was handed to the applicant and the two others. Although it was accepted by the applicant that the contents were brought to his attention I am in agreement with the applicant's evidence that this could not have constituted a consultation meeting.
- [26] After the email of 5 April 2013 the parties never met again until 12 April 2013 when the applicant was handed his dismissal letter. Mrs Douglas testified that it was agreed between the parties that they would consult via correspondence because the applicant resided in Rustenburg.
- [27] Although I do accept that this may have been the agreement, it is clear from the evidence and the documents before this Court that no consultation via correspondence had in fact taken place. In fact, Mrs Douglas never communicated with the applicant since she had received the email. She also confirmed that no correspondence was forwarded to the applicant after receipt of the email. It was common cause that on 12 April 2013 Mrs Douglas met with the applicant individually. According to her some issues were discussed. There is a dispute about whether anything was discussed and in the absence of any minutes of this meeting; the Court must accept that nothing of substance was in fact discussed. In fact, what is common cause is the notice of termination due to retrenchment – which was prepared before the commencement of the meeting - was handed to the applicant. His notice period ran from 12 April to 12 May 2013. On the face of the evidence before this Court it cannot be concluded that a fair consultation process had

been followed. (I will refer to relevant case law in this regard herein below.)

- [28] However, although no formal consultation meetings took place, it is necessary to point out that Mrs Douglas did in fact discuss the e-mail with her superiors. She explained that after she had received the email dated 5 April 2013, she discussed the email with her superiors and more in particular with Mr Shultz. As a result of these discussions two alternative positions were

identified and offered to Mr Badenhorst and Mr Feyt. They were offered the alternative positions because they had longer service than the applicant. These positions arose after the initial discussions on 4 April 2013 when a new contract came to light. Mrs Douglas testified that LIFO was applied and that that was the reason why Mr Badenhorst and Mr Feyt and not the applicant were offered these positions. The fact, however remains that no feedback was given to the applicant during this time. No feedback was even given to the applicant about the efforts that were made to secure a second examination.

- [29] Mrs Douglas disputed that a fair procedure was not followed. She also disputed that a decision was taken to retrench prior to the commencement of the consultation process. In this regard she testified that the fact that two alternative positions were in fact found for Mr Badenhorst and Mr Feyt was indicative of the fact, firstly that the applicant and the two others were not confronted with a fait a complit decision and, secondly, that the respondent had applied its mind to the contents of the letter of 5 April 2013 and had endeavoured to find alternative positions. She testified that if the respondent had made up its mind to retrench the three employees it would not have endeavoured to find alternative employment which it did in respect of the two employees. The applicant was consequently the only one to be retrenched.
- [30] It was further common cause that Mr Badenhorst subsequently resigned from the position that he was offered as an alternative. The date of his resignation was 29 May 2013. It was common cause that Mr Badenhorst's position was thereafter offered to the applicant by Mr Nkuna. According to Mr Nkuna applicant told him that he did not want the position as it paid "little" and that he wanted to be paid what he was paid in Botswana. It is also common cause that the applicant was following his retrenchment also invited to apply for a position in Zambia. The applicant was unsuccessful with his application.
- [31] There was also some debate about whether the applicant ought to have been offered the position that was occupied by a certain Mr Francois Huyser who was employed as a master sinker at another mine. Mr Shultz's uncontested evidence was that it was not possible to have bumped out Mr Huyser and employ the applicant in the position of master sinker because he did not have the necessary qualifications for this position that required specific experience. Mr Schultz explained that the incumbent had relevant prior experience for that position and that he was found to be suitable for the position. He also explained that the decision to appoint Mr Huyser was taken together with the client on the basis that Mr Huyser had the necessary qualifications and experience to fill that position. The applicant also presented no evidence to the Court as to why he would have been able to occupy the position of Mr Huyser.

Fairness of the dismissal

- [32] Was there a valid and fair reason for the dismissal of the applicant. I have already dealt with this issue in some detail hereinabove. This question must be decided against the background that the applicant had failed the exam for a Botswana Blasting Licence and that he therefore did not have the necessary qualifications - which was also a legal requirement - to remain on site. Although this requirement to have a blasting licence was not initially a contractual requirement it was common course that as a result of changes at the Ghanghoo Mine it became necessary to blast and therefore necessary that the supervisors were in possession of a Botswana Blasting Licence.

[33] It is concluded that there was a valid economic rationale for the requirement that the applicant had to be in possession of a Botswana Blasting Licence. I also reiterate the fact that the applicant conceded that he was part of the decision that it was necessary to commence blasting at the Ghaghoo Mine. It is also accepted on the undisputed evidence that the respondent had done everything in its power to persuade the client and the Inspectorate of the Botswana Department of Mines to allow for the applicant to resit for the examination. It is further also accepted that it was not possible to fulfil the conditions set by the Inspectorate that the applicant now had to complete 75 shifts underground in a Botswana mine.

[34] On the evidence I am therefore satisfied that the respondent had a valid economic rationale to commence the retrenchment process.

Although I am not persuaded that the retrenchment process was fair in all respects, it is in my view clear from the evidence that the respondent had endeavoured and had in fact been successful in respect of two employees to find alternative employment – although these efforts were not made in consultation with the applicant. Although the process was in my view unfair in some respects It cannot be ignored that the respondent did in fact consider alternatives to retrenchment. The Court also cannot ignore the fact that the applicant was offered the position of Mr Badenhorst and that he had declined this offer. This was not an unreasonable alternative although it was only offered after the applicant's retrenchment date. The Court also cannot ignore the fact that the Applicant was afforded an opportunity to apply for a post in Zambia. It should be pointed out that it is not the function of this Court to second guess the decision of the employer but to consider whether the ultimate decision to retrench was based on a rational commercial or operational reason. See *SACTWU and others v Discreto (A Division of Trump and Springbok Holdings)*: [3]

"[8] Every person has the constitutional right to fair labour practices (section 27(1) of the interim Constitution; section 23(1) of the final Constitution). As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the

employer's ultimate competence to make a final decision on whether to retrench or not (cf the *Atlantis Diesel* case at 1252H (ILJ); 28I (SA)). For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This

requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive

purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational

requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation

process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process."

[35] As already pointed out, the Court cannot ignore the fact that a consensus seeking process was not followed by the respondent. The applicant was given no feedback during the process. In fact, there is no evidence before this Court that the applicant was informed of all the efforts made on behalf of the respondent to obtain a second chance to sit for the exam. Consultation has a specific purpose in the context of a retrenchment. See in this regard the well known decision of the Labour Appeal Court in *Johnson and Johnson (Pty) Ltd v CWIU*[4] where the Court emphasised the importance of a joint consensus-seeking process and the obligation of the employer:

"[26] The section places some primary obligations on an employer in order to ensure that an employee is not unfairly dismissed. The employer must initiate the consultation process when it contemplates dismissals for operational reasons (section 189(1); cf FAWU and another v National Sorghum Breweries [1997] 11 BLLR 1410 (LC) at 1420F-1421B;

(1998) 19 ILJ 613 (LC) at 623C-I). It must also disclose relevant information to the other consulting party (section 189(3)); it must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting (section 189(5)); it must consider those representations and, if it does not agree with them, it must give its reasons (section 189(6)).

[27] But all these primary formal obligations of an employer are geared to a specific purpose, namely to attempt to reach consensus on the objects listed in section 189(2). The ultimate purpose of section 189 is thus to achieve a joint consensus-seeking process. In this manner the section implicitly recognises the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed. This is also apparent from section 189(7) which provides that the employer must select the employees to be dismissed on criteria either agreed to, or if that is not possible, on criteria that are fair and objective.

- [28] The achievement of a joint consensus-seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under section 189(1), (3), (5), (6) and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process (cf *NEHAWU v University of Fort Hare* [1997] 8 BLLR 1054 (LC); *UPUSA and others v Grinaker Duraset* [1998] 2 BLLR 190 (LC) at 204D; *Fowlds v SA Housing Trust Ltd* and another, unreported case no J561/98 (LC) at paragraph 11). It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues discussed. These different possibilities depend on the facts of each particular case.
- [29] The important implication of this is that a mechanical, “checklist” kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved (cf *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 464; *Ceramic Industries Ltd t/a Betta Sanitaryware* (supra) at 701G–702H (BLLR); 676B–677C (ILJ); *Ex parte Mohuloe* (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H–1138D).”
- [36] Although it is accepted that an employer need not consult exhaustively over all the issues stipulated in the 189(3) notice, it is accepted that the employer cannot be relieved of its obligation to consult. Affording an employee one opportunity to write a letter, giving no feedback to the letter and thereafter merely retrenching an employee, even in circumstances where an economic or commercial rationale existed, does not in my view constitute compliance with the obligations placed on the employer by the Labour Relations Act. See in this regard: *Whall v Brandadd Marketing (Pty) Ltd*: [5]

“[23] The respondent claims, in essence, that it had no option under these circumstances but to act with extreme decisiveness. While an employer in extremis may not be required to consult as comprehensively over the various issues stipulated in section 189(2) as it would otherwise be obliged to do, it does not follow that it is relieved entirely of its obligation to consult with affected

employees.

- [37] I am not persuaded that the respondent had fulfilled this statutory obligation. It is for this reason that I find that the dismissal of the applicant was procedurally unfair. I have decided that it is fair to afford the applicant compensation equal to 3 months’ remuneration. This remuneration to exclude the cross-border allowance which the applicant received whilst he was employed in Botswana. I make no order as to costs.

Order

- [38] In the event the following order is made:

38.1 The dismissal of the applicant was substantively fair.

38.2 The dismissal of the applicant was procedurally unfair.

38.3 The respondent is ordered to pay the applicant compensation equal to 3 month's remuneration, which remuneration excludes the cross-border allowance.

38.4 There is no order as to costs.

AC Basson

Judge of the Labour Court of South Africa

Appearances

For the Applicant : Mr Visser of Solidarity

For the Respondent : Advocate Matyolo

Instructed by : Ms Anika Groenewald Attorneys.

[1] Act 66 of 1995.

[2] See: UPUSA and others v Grinaker Duraset

[1998] 2 BLLR 190 (LC) at page 204: "The obligation to consult placed on the employer by section 189 places a correlative duty on the other consulting party to co-operate in the attempt to reach consensus before the employer ultimately

exercises its right to take the final decision. A union cannot by claiming its right to information seek unreasonably to delay a bona fide retrenchment exercise: Danster v D J and Sun Engineering CC

(1989) 10 ILJ 435 (LAC); Chemical Workers Industrial Union of SA v Lennon Ltd (1994) 15 ILJ 1037 (LAC).¹ See also NEHAWU v University of Fort Hare [1997] 8 BLLR 1054 (LC). The impression created by the evidence as a whole is that this was precisely what the first applicant was seeking to do."

[3] [1998] 12 BLLR 1228 (LAC).

[4] [1998] 12 BLLR 1209 (LAC).

[5] [1999] 6 BLLR 62 (LC)

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