REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: JS 960/12

In the matter between:

NHLAMULO NDHLELA Applicant

and

SITA INFORMATION NETWORKING COMPUTING BV (INCORPORATED IN THE NETHERLANDS) Respondent

Heard: **3, 4 and 5 March 2014**

Delivered: **14 March 2014**

Summary: **Test for substantive fairness in dismissals for operational reasons restated. Fairness is the yardstick; no deference to mere say so of the employer. Employer required to produce relevant financial data justifying claims of cost saving where that is a ground for alleged operational requirements. No bright lines separating procedure from substance. Fair procedure serves a substantive purpose.**

JUDGMENT

NGCUKAITOBI AJ

INTRODUCTION

1. The applicant was employed by the respondent with effect from 15 November 2010 as a Sales Director, Sub-Sahara Africa. On 22 June 2012 he was dismissed from his position on the grounds of the operational requirements of the respondent. He has approached this court to seek an order declaring that the dismissal was procedurally and substantively unfair. Consequentially, the applicant seeks an order for appropriate compensation.

2. The respondent opposes the applicant's claim.

3. During October 2013 the respondent offered the applicant (on a with prejudice basis, in terms of Rule 22A of the Rules of the Labour Court), payment of an amount equivalent to five (5) months remuneration, being R653 481,65 (six hundred and fifty-three thousand four hundred and eighty-one rand and sixty-five cents). The applicant rejected the offer.

4. In its statement of defence the respondent admitted that the procedure it followed when dismissing the applicant was unfair because it did not comply with some of the requirements of a fair procedure contained in the Labour Relations Act 66 of 1995 (the "LRA"). I return to this later. The respondent's Counsel urged me to take into account the nature and extent of deviation from a fair process, as well as its offer of settlement which was made with prejudice when determining compensation for the admitted failure to follow a fair process in dismissing the applicant.

MATERIAL FACTS

5. The respondent is a global company with an office in South Africa. Although the events giving rise to this trial took place in the South African office, they were influenced by decisions taken outside South Africa, at the respondent's head office in Geneva, Switzerland. The primary business of the respondent is the provision of information technology and related services to the airline industry. It was established by the major airline companies in the world specifically to cater for their information technology requirements. With the passage of time, it has commercialised and gained financial independence. The major airlines, including South African Airways, are now its main customers. It has also diversified its business and also offers passenger solutions, airport solutions and related services.

6. Because the respondent provides services to airlines, the vicissitudes of the airline industry impact on its sustainability and profitability. While airlines generally spend 1% to 2% of their revenues on investment in information technology, during tough economic times airlines tend to withhold investments in new information technology. When this occurs the business of the respondent can be adversely affected.

7. Prior to the events which gave rise to the present dispute, the respondent was divided into nine regions across the world. On 18 April 2012 the respondent announced the introduction of a new global business strategy which was known as "Fit for Growth" (the Fit for Growth strategy or the business strategy). The adoption of this strategy was influenced by, among others, the declining fortunes of the global airline industry which were experienced in about 2008.

8. The strategy resulted in the reconfiguration of geographies or regions from the original nine to four. The new regions were Americas, Asia Pacific, Europe and Middle East, India and Africa. The South African operations, whose operating costs and profits are integrated with the global structure, falls under Middle East, India and Africa. The decision to introduce the new strategy was taken at head office. The witnesses who gave evidence on behalf of the respondent, Mr John Murphy and Ms Clair Milner were not part of that decision making. They were responsible for executing the strategy in South Africa.

9. The objectives of the Fit for Growth strategy included improving responsiveness to customers; reducing organisational complexity; and delivering recurring cost savings.

10. In the Middle East, India and Africa region the respondent's target was to achieve a cost saving of 15% in operational costs. This was the lowest target among the respondent's four regions. The execution of the strategy had implications for the organisational structure of the South African office. Certain changes were envisaged in the Sales and Management divisions. The strategy stated the following:-

> *"Customers with a revenue potential below [a certain figure] should fully be managed by Sales and not by SITA's direct sales force.*
>
> *All account management staff must have account management responsibilities. In addition, they may also have team management responsibilities.*

- *Apart from the territory VP, there is no "pure" people management role within the account management.*

Sales and account directors should report directly to the territory VP.

Account directors should have at least R10 million revenue responsibility.

All account management staff are on SIP."

11. Of importance in the strategy was the requirement that no position, other than that of the Territory Vice President should have "pure people management" responsibility. By this, it was meant that all positions falling under the Territory Vice President must have both account management and people management functions.

12. But there was a problem with the implementation of the strategy under the prevailing organisational structure. In terms of the old structure, the most senior person responsible for sales and account management in the South African territory was the Sales Territory Director. That position was held by Mr Eta Mothlabi. He had four positions reporting directly under him. These were:-

12.1 The South African Airways and Southern African Development Account Director – the position held by the applicant. (Although there was a dispute about the title of this position, with the applicant insisting that it was always called Sale Director and the respondent contending otherwise, nothing material turns on this.)

12.2 The Central Eastern and West Africa Account Director (held by Mr Sam Munda).

12.3 The Business Development Director (held by Mr Getaneh Wilder-Michael).

12.4 The Senior Account Manager for Government Services (held by Mr Linda Ngcaba. The position of Senior Account Manager for Government Services however was not a director position but a manager position.

13. Under the old structure, Mr Mothlabi had limited sales or account management responsibilities. His main focus was on people management. (The split estimate for this role was 80% people management and 20% account management. By contrast, the applicant's role comprised 80% account management and 20% people management.)

14. According to Mr Murphy, the Fit for Growth strategy favoured a bias towards account management. Mr Murphy stated that this requirement resulted in the operational need for the respondent's decision to "flatten the structure" in order to reduce its managerial levels to become closer to its customers.

15. Flattening the structure, however, still required further decisions to be made including which position(s) should make way for the flat structure. Mr Murphy stated in cross examination, that Sales Territory Director position, held by Mr Mothlabi, did not conform with the Fit for Growth strategy. Its focus was on people management when the strategy required a dedicated focus to customers. Mr Murphy testified that the position previously held by the

applicant, that of Sales Director did not conflict with the Fit for Growth strategy because it had both account and people management responsibilities and in any event its primary focus was account management. The problem, as he saw it, was that the position of Sales Territory director, held by Mr Mothlabi, did not comply with the Fit for Growth strategy. Ms Milner, who worked together with Mr Murphy on the execution of the strategy also confirmed that the position of the applicant was not affected by the Fit for Growth strategy *per se*. The affected position was that of Mr Mothlabi.

16. In making the structural changes required by the Fit for Growth strategy Mr Murphy and Ms Milner did not address the affected position of Mr Mothlabi. Instead, they decided to create a new position, which would comprise three main functions: all of the applicant's former functions; some of Mr Mothlabi's functions; and the government services functions. This new position effectively replaced the position of the Applicant. Mr Mothlabi's previous position was removed from the structure, altogether. This achieved the flat structure and the close proximity to the customers. It also achieved the cost saving which was required by the respondent.

17. Because of the creation of the new position, a choice had to be made to declare either the applicant's position or that or Mr Mothlabi as redundant. The decision was made to make the applicant's position redundant. A new structure was then created, between the end of May and beginning June 2012. Mr Mothlabi's previous role of Sales Territory director was removed from the structure. A new position, including all the functions previously performed by the applicant was created at the same level as the applicant's previous position.

18. Mr Murphy and Ms Milner discussed the restructuring and the new structure with Mr Mothlabi. That occurred during the first week June 2012. At that discussion, which Ms Milner said was not a “consultation” under section 189 of the LRA, Mr Mothlabi was informed of the changes in the structure. In addition, he was advised that since there were two potential employees for the new role, the principle of Last In First Out (LIFO) would be applied. It was also common cause that nothing distinguished the Applicant from Mr Motlhabi in terms of status, qualifications and experience. It was also known that Mr Mothlabi had been in employment longer than the applicant. Accordingly, for all intents and purposes the position was given to Mr Mothlabi. He did not have to compete for it. This is the most sensible construction of the evidence, otherwise the advice given to Mothlabi that LIFO would be applied because he had longer service than the applicant would make no sense.

19. On 11 June 2011 Mr Murphy and Ms Milner consulted with the applicant. At that meeting, the applicant was informed for the first time of the restructuring decision; its impact on his position; and most significantly that his position had become redundant. There are no minutes of this meeting. The pleadings and the pre-trial minute record that the applicant was informed that his position had become redundant. Although Ms Milner stated that the applicant was informed that his position was “at risk”, I did not understand there to be a dispute that what is recorded in the pleadings and the pre-trial minute is an accurate reflection of what transpired, namely that the applicant was told that his position had become redundant.

20. On 12 June 2012 the respondent wrote a letter to the applicant. The title of the letter is “Proposed Restructure and Possible Termination for Operational Reasons”. The letter purported to invite the applicant to consult on the possibility of the redundancy of his position and his dismissal for operational reasons. In paragraph 4 of the letter, under the heading “Selection Criteria” it is stated:

> “*[T]he criterion that has been applied is based on the restructuring exercise under the Fit for Growth programme, which has lead [sic] to your position being redundant.*”

21. Three things are clear from this letter and the evidence. First, the letter confirmed what the applicant had been verbally advised of on 11 June 2012, namely, that his position was redundant. Second, the letter made it clear that the reason for the redundancy is the restructuring exercise “under the Fit for Growth programme.” Third, the letter made it clear that the selection criterion “had been applied”. At this stage the new position was no longer vacant and had been given to Mr Mothlabi, ostensibly by the application of the LIFO principle.

22. On 14 June 2012 the respondent met with the applicant. The applicant proposed a reduction in salary and a reconfiguration of his position to focus on the business of South African Airways in order to avoid his dismissal. The respondent undertook to consider the proposal made by the applicant and to revert to him in that regard. (During the trial there was a debate as to whether the respondent had ever informed the applicant at this meeting that one of the reasons for the redundancy of his position was the flattening of the structure

because of the Fit for Growth strategy. The applicant denied this and stated that the reason given to him for the redundancy of his position was the saving of costs by the respondent. It is clear, however, that both reasons were advanced to the applicant, although not necessarily in the same meeting. The letter of 12 June 2012 says that the reason for the redundancy is the restructuring caused by the Fit for Growth strategy. The minutes of the meeting of 14 June 2012 reveal that the reason for the redundancy of the applicant' position was the need to reduce costs.)

23. On 18 June 2012 there was a further meeting between the applicant and the respondent. The proposal concerning the salary reduction on the applicant's side was rejected on the basis that "[t]he entire role costs relating to this role needed to be cut". The minutes of this meeting also record that there was a possibility that a position at a lower grade – Grade 6[1] – could become available at the respondent's office in Addis Ababa, Ethiopia. The applicant refused the proposal to consider him for this possible position because it would entail the lowering of his grade. However, Mr Murphy accepted in evidence that this position did not constitute an alternative to dismissal. This was because the applicant would be retrenched first and, if a position became available in the future, would be entitled to apply for it. The position was accordingly not being offered to the applicant as a measure to avoid his dismissal. Ms Milner, on the other hand, testified that as far as she was concerned there was a real likelihood of the position being confirmed. But she did not mention this to the applicant because no final decision had been taken. In light of the ambivalent

[1] It was common cause that the applicant's position was graded at Grade 8.

stances taken by the respondent in regard to this offer, the applicant's refusal to consider the offer is of no moment.

24. The further business discussed on 18 June 2012 pertains to payment of the commission and the severance package of the applicant. Although the applicant expressed some dissatisfaction with the commission paid to him, the issue of the commission is not before me.

25. The final meeting held with the applicant was on 22 June 2012. On this date the applicant was informed of the decision to terminate his services on operational grounds. The decision was confirmed in writing on the same date.

26. The respondent led evidence concerning surveys conducted about customer satisfaction and increased profitability subsequent to the implementation of the Fit for Growth strategy and the dismissal of the applicant. It is not clear that this evidence is relevant to the issue of the fairness of the dismissal of the applicant. On the assumption, however, that it is relevant, the evidence shows higher levels of customer satisfaction and higher profitability margins compared to the targets set by the respondent. However, it seems to me that the evidence does not prove the success of the respondent's business consequent upon the removal of the applicant from his position or the success of the Fit for Growth strategy necessarily. That is because no evidence was led showing the levels of customer satisfaction or indeed profitability levels before to the introduction of the Fit for Growth strategy or before the dismissal of the applicant. Moreover, the evidence is not specific to the South African situation where the applicant was employed. It is of a generic nature, covering the whole of the respondent's global enterprise.

27. Mr Murphy led some evidence about the financial position of the respondent before the dismissal. He stated that in 2008 the "revenues were flat, and operating costs were increasing". However, even this evidence was not specific to the South African operations, but pertained to the global business. Furthermore, Mr Murphy's evidence was that between 2009 and 2010 the respondent's South African office experienced a "buoyant" year as a result of the demand for its services associated with the FIFA Soccer World Cup. Although a contract was lost in 2011, no evidence has been led to demonstrate the financial impact of that loss of contract. And finally, the evidence was that the respondent gained a new contract in 2012. Ms Milner stated that she was not aware of any loss of contract in 2011.

THE LAW

28. The point of departure is section 23(1) of the Constitution. This section provides that "everyone has the right to fair labour practices". The LRA gives effect to this right.[2] It provides, in section 185, that every employee has the right not to be unfairly dismissed. In section 188 the LRA provides that a dismissal is not fair if the employer fails to prove, inter alia, that "the reason for dismissal is a fair reason" based on the employer's operational requirements.[3] section 188(1)(b) provides that a dismissal which was not effected in accordance with the a fair procedure is unfair.

29. The term "operational requirement" is defined in section 213 of the LRA to mean "requirements based on the economic, technological, structural or similar

[2] See section 1 of the LRA

[3] Section 188(1)(a)(ii)

needs of an employer." This definition is further expanded upon in the Code of Good Practice on Operational Requirements passed under the LRA. The Code says:

> "*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.*"

30. Dismissals based on the employer's operational requirements are covered by section 189 of the LRA. That section provides for the following:-

30.1 When an employer contemplates dismissing an employee based on operational requirements, the employer is required to consult the person whose dismissal is contemplated.

30.2 The consultation process envisaged in section 189(1) – which must be "a meaningful joint consensus seeking process" – must attempt to reach consensus on several items which include measures to avoid dismissals; changing the timing of the dismissal; and the mitigation of the adverse effects of the dismissal. The consultation process must include discussions on the method for selection of employees to be dismissed and the severance pay of those employees to be dismissed.

30.3 The employer is required to issue a written notice inviting the person whose dismissal is contemplated to a consultation. The employer must make a full and adequate disclosure on relevant information which must include the reasons for the proposed dismissals; the alternatives considered before the proposal to dismiss; the reasons for rejecting each of the alternatives; the proposed method for selecting employees to be dismissed; and several other items which are not germane for the present matter.

30.4 The employer must allow the person whose dismissal is contemplated an opportunity to make representations about the subject matter of the consultation. Representations must be considered and where they are rejected, reasons for the rejection must be provided.

30.5 An employee to be dismissed must be selected according to criteria which are to be agreed and if no criteria have been agreed, criteria which are "fair and objective" must be agreed upon. The LIFO principle is regarded as a fair selection criterion.

31. Section 189 of the LRA sits alongside a cluster of statutory rights which give practical meaning to the right not to be unfairly dismissed which is contained in section 185 of the LRA. Although crafted in procedural terms, the object of section 189 is substantive.[4] It is aimed at the retention of jobs and if the jobs cannot be retained, at ensuring that any processes resulting in job losses are fair and the adverse effects of job losses are mitigated. In *National Education*

[4] In *Super Group Trading (Pty) Ltd v Andries Hendrik Janse van Rensburg* Case No: JA50/09 (unreported, delivered on 25 April 2012) Landman AJA explained that the purpose of the consultation process in section 189 is "to try and save a job or position." (At para 4)

Health and Allied Workers Union v University of Cape Town & Others[5] the Constitutional Court stated that the LRA must be interpreted in a manner which respects security of employment as a "core value" of the Constitution.[6]

Fair reason for dismissal based on employer's operational requirements

32. To return to section 189 of the LRA, I have to decide the substantive and procedural fairness of the dismissal. It is trite that the employer bears the onus to prove the fairness of a dismissal. An issue which was debated before me concerns the parameters of judicial examination of the substantive justification provided by an employer in a dismissal based on operational requirements. Counsel for the employer argued that it is sufficient for the employer to show that it intended reducing costs and decided to reduce headcount as a result. It was also argued that a court is not entitled to enquire into the reasons which informed the employer's decision to reduce costs. Cost reduction, it was said, is always a rational business strategy.

33. The employee's Counsel took a contrary view. He stated that it is not sufficient for an employer to say that it intended to reduce costs and identified headcount reduction as a means to give effect to its decision. He submitted that the fact that there was ultimately a cost saving achieved should not influence the court in relation to its decision to assess the substantive fairness of the decision. A court must enquire whether there was in fact a genuine reason behind the decision to reduce operating costs.

[5] 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC).

[6] *NEHAWU v UCT* at para 41.

34. As I see it, the issue is not so much whether a court must consider the rationality of business strategies taken by employers. Business decisions taken by employers may be economically rational. But they are not insulated from judicial scrutiny on that account alone where they affect employment security. The issue is the appropriate level of judicial scrutiny. The Constitution and the LRA install fairness as the touchstone in this regard.

35. Until the decision of the Labour Appeal Court in *BMD Knitting Mills (Pty) Ltd. v SA Clothing & Textile Workers' Union*[7] various terms had been employed to articulate the test for assessing the substantive fairness of an employer's decision to dismiss based on operational grounds.[8] In *BMD Knitting Mills*, Davis AJA departed from the approach in *SA Clothing & Textile Workers Union & Others v Discreto-A division of Trump & Springbok Holdings*[9] and stated:-

> "*I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees, particularly in light of the wording of the section of the Act, namely, 'The reason for dismissal is a fair reason'. The word 'fair' introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value,*

[7] (2001) *ILJ* 2264 (LAC).

[8] See the review of the case law by Pak Le Roux in "Assessing employer decisions to dismiss based on operational requirements: a review of the LAC's approach to substantive fairness" *Contemporary Labour Law* Vol 21 No. 6 January 2012.

[9] (1998) 19 *ILJ* 1451 (LAC). Although the test of the LAC in the *SACTWU v Discreto* case has been called "deferential", in application Froneman DJP (as he then was), in fact carefully scrutinized the reasons advanced by the employer and concluded that it had failed to provide sufficient evidence to show that the reasons for the dismissal were justifiable based on rational economic considerations of the employer.

a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To the extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test".[10]

36. On the facts of that case the reason for the dismissal was cost saving. And the reason behind the cost saving was a downturn in production. Clear figures were presented to the court to prove the claim of downturn in production. Based on this the LAC could draw the connections between the operational justification and the decision to dismiss. The court concluded:-

"*Appellant thus placed evidence before the court which substantiated its reason for retrenchment, namely the downturn in production which necessitated a saving of costs. To the extent that the reason for cost saving was disputed by the respondent, a cogent explanation was given … namely when the services offered by Combat Force was compared to the amount which such service would have cost appellant to run internally, there was a clear cost saving*".

[10] *BMD Knitting Mills* at para 19.

37. This issue was also considered in *Forecourt Express (Pty) Ltd. v SA Transport & Allied Workers Union & Another*[11]. Zondo JP[12] (as he then was) considered the evidence which was presented before him as justification for the employer's decision and concluded:

> "*[39] I have in effect said above that the appellant was entitled to choose the manner in which it would run its business provided that it did not change the terms and conditions of employment of the employees without their consent, and provided that, if it contemplated the dismissal of the employees, it complied with its obligations provided for in sec 189 of the Act. If it is accepted that the appellant was entitled to decide to run the Fauna operation in a way that was different from the manner in which the Krugers had run it and was entitled to insist on running it in the way it proposed to run it, then there can be no doubt that a necessary consequence of such decision or choice was that it had no work for the second and further respondents. … Incontestably the fact that an employer has no work itself to give to workers to perform is a fair reason to dismiss.*"

38. From this passage, it is apparent that a court is not entitled to dictate to an employer as to the most commercially viable way of running its business. But this does not mean the path chosen by an employer should not be tested for justification, it should. This is clear from the finding of Zondo JP when stating

[11] (2006) 27 ILJ 2537 (LAC).

[12] Davis AJA concurring and Mlambo AJA dissenting.

that it could not be fair for an employer to choose a solution to its operational needs which would lead to job losses when another solution which would not lead to job losses was available.[13] This shows, in my view, that a court is required to conduct a qualitative examination of the reasons – and the evidence tendered in support thereof – given by the employer in support of its claim that a dismissal based on operational requirements is fair.[14]

39. The purpose of this exercise is not to determine whether the employer is making economically rational business decisions. It is to establish factually the existence of a genuine operational requirement for the restructuring. Once this has been done, the court must consider the fairness of the decision to dismiss based on the proven operational requirement. It is here that an employer's decision must be compared to other available measures other than a dismissal which could address the operational requirement but were not considered. This approach strikes a fair balance between the interests of employees who will be affected by the decision and the interests of the employer which may be affected by a genuine operational need to dismiss employees.

40. I have also been referred to the recent decision by the LAC in 4Seas *Worldwide (Pty) Ltd. v The Commission for Conciliation Mediation & Arbitration & Others*.[15] In that case, the LAC confirmed that in a retrenchment dispute the employer bears the onus to prove that the dismissal was fair and that a fair process was followed before the termination. Discharging the onus to prove the fairness of

[13] *Forecourt Express* at para 28

[14] *BMD Knitting Mills* at para 23

[15] Case no: CA15/2011 (unreported, judgment delivered on 13 November 2013)

the dismissal includes proving that, "the redundancy … and the termination of [the employment] is not a *fait accompli* …"[16].

41. Although the LAC referred to the test in *SACTWU v Discreto*, it is clear that in applying the test, the LAC did not defer to the mere say so of the employer. This is apparent from its treatment of the evidence when it stated:-

> "*In this matter, no-one of the appellant, who had direct and personal knowledge of its commercial or financial dealings, testified. Beukes was clearly not such a person. Consequently, the appellant could not even establish a proper and legally acceptable rationale for the decision to dismiss van den Berg.*"[17]

42. Therefore, the correct approach is that laid down in *BMD Knitting Mills*, which has received explicit endorsement by the Constitutional Court[18] the LAC[19] and has been followed in this Court.[20] The LAC decision in *4Seas* did not change this. Its reference to *Discreto* must be placed in proper context. In substance, *4Seas* did not defer to the views of the employer. In any event, Murphy AJ in *SATAWU v Old Mutual Life Assurance Company, South Africa*[21] has correctly observed that *BMD Knitting Mills* and *Discreto* are not necessarily at odds with each other. Both are "elucidations of the governing principle" namely that a

[16] *4Seas* at para 23.

[17] *4Seas* at para 25.

[18] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* at para 71.

[19] *CWIU and others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

[20] *SATAWU v Old Mutual Life Assurance Company South Africa* [2005] 4 BLLR 378 (LC) is the most comprehensive exposition of the law in this area, which I could find. Although his decision turned on the provisions of section 189A of the LRA, it remains instructive in relation to the test for judicial intervention in employer decisions to dismiss for operational requirements.

[21] *SATAWU v Old Mutual* at para 85.

decision to dismiss must be premised by operationally rational grounds. An employer is required to prove that the dismissal of an employee based on operational reasons is for a fair reason. Unless there is a proper explanation of the reasons for the dismissal, supported by credible evidence, the employer will not discharge the onus to prove the existence of a substantively fair reason for the dismissal of an employee.

43. This does not entitle the court to decide if the reasons given by an employer are the best reasons available. The Labour Court is constitutionally and statutorily required to supervise the fairness of reasons given by employers where they dismiss employees on operational grounds. This cannot happen *in vacuo*. Where an employer contends that the operational justification for its decision to dismiss is reduction of operating costs, it must at least put forward evidence showing the actual operating costs which it sought to reduce. This can be done by producing financial information which demonstrates the relevant operating costs. This should not been an onerous task. Any sensible employer wishing to reduce costs must first know what costs are to be reduced.

44. In addition, where an employer wishes to cut operating costs by reducing its headcount, it must at least produce evidence of the costs associated with the headcount and how this will meet the overall target of cost reduction. In the absence of this information, it is not possible for a court to decide if the decision is not arbitrary or capricious. Nor is it possible to decide if the decision is a rational or reasonable one, based on the information which was available to an employer at the time it decided to embark on a restructuring exercise.

In accordance with a fair procedure

45. Although as a matter or practice, we tend to separate process from substance, there are no bright lines distinguishing process from substance in the area of dismissals for operational requirements. The procedure mandated by section 189 has a substantive purpose. Its purpose is to save jobs. This is done by considering alternative means by which the operational problem identified by the employer can be addressed without resorting to dismissals. In a case such as the present, where the proffered substantive justification is the need to reduce operating costs, the issue to be discussed at the consultations is whether there are no other areas of the employer's business where the costs can be reduced without affecting employment security.

46. The purpose behind the need to discuss the selection criterion and to implement a fair selection criterion is also the avoidance of loss of employment. If the job or position cannot be saved, then the focus shifts to other means of mitigating the adverse effects of dismissal.[22]

47. It is because of this substantive angle to process than an employer must approach any consultation with an open mind. If an employer approaches a consultation with a fixed outcome in mind, the consultation is futile. It is a sham. Landman AJA has stated:

> "*If the decision to make a post redundant is set in stone and not open to revision or discussion then the aim of the consultation has been thwarted before it has begun. If the decision to retrench a certain*

[22] *Super Group Trading (Pty) Ltd v Van Rensburg* at para 4

person has been pre-decided, consultation about whether this person should be chosen is a sham. What remains is consultation on the mitigation of retrenchment."[23]

48. In order to achieve the substantive purpose of consultation there must be a proper and timeous disclosure of relevant and pertinent information by the employer. It is not fair that an employer should keep an employee in the dark about the possibility of dismissal until it is too late to make any meaningful proposals, as it appears to be the case in the present matter.

APPLICATION OF THE LAW TO THE FACTS

Was the dismissal substantively fair?

49. The first issue is whether the respondent has discharged the onus to prove that the dismissal was for a fair reason based on its operational requirements. The justification advanced by the respondent was two-fold. First, it was stated that the reason for the redundancy of the applicant's position was the need to align the structure with the Fit for Growth strategy. This is according to Mr Murphy's evidence and the letter given to the applicant on 12 June 2012. Second, emphasis was placed on the need to save costs by 15%. During argument, however, Counsel for the respondent submitted that the justification based on the Fit for Growth strategy must be regarded as something of a "red-herring" and that the focus must be on the justification based on cost reduction.

50. I accept that the need for the reduction of costs might constitute a legitimate operational requirement leading to dismissal of an employee. But when the

[23] *Super Group Trading (Pty) Ltd v Van Rensburg* at para 5

LRA requires a court to decide the substantive fairness of dismissals based on operational requirements, it does not require abdication to mere factual assertions by an employer. It requires a court to be satisfied, on the evidence, that there are genuine operational requirements and that the dismissal based on those operational requirements is fair. Based on the grounds set out below, the employer has failed to prove the existence of genuine operational reasons for the dismissal.

50.1 The respondent's proffered basis for the dismissal is the need to reduce costs. The evidence presented does not establish a fair reason based on the employer's operational requirements. The evidence of Mr Murphy and Ms Milner did not establish that the applicant's position became redundant as a consequence of the implementation of the Fit for Growth strategy. The position which became redundant was that of Mr Mothlabi. It was his position which did not fit with the requirement in the Fit for Growth strategy that no position must comprise only people management functions, except for the Vice President of a territory. The applicant's position performed both people management and account functions.

50.2 The cause of the redundancy of the applicant's position was the decision taken by Mr Murphy and Ms Milner to create a new position by stripping the applicant's position of all content, adding some functions of Mr Mothlabi's old position and the government services functions. This decision was not required by the Fit for Growth strategy. The functions of the applicant were in fact needed under the

strategy and were retained without any alterations in the newly created position.

50.3 Although I accept that the respondent was entitled to adopt the Fit for Growth strategy, I find that the abolition of the applicant's position was not a rational way of giving effect to the strategy. Both witnesses of the respondent accepted that the position was not affected at all by the strategy. If this was so, then the decision to strip the position of all its functions was not based on any rational explanation. The decision to declare the applicant's position redundant based on the business strategy was therefore irrational and unfair.

51. I now consider the second substantive justification – the cost reduction. During the trial I enquired from both witnesses of the respondent about any financial information of the respondent, either in South Africa or globally to show the actual operating costs which were of concern to the respondent. Neither witness had access to the relevant financial data. In addition, the witnesses could not shed any light as to the reasons behind the reduction of costs. Ms Milner stated that she was informed that the target for South Africa was to reduce costs by 15%. But she was not sure of the targets for other regions or the reasons why 15% was chosen for South Africa. Equally Mr Murphy could not give any explanation for the decision.

52. Counsel for the respondent submitted that it was sufficient for the employer to state that it intended to reduce operating costs by 15% and that by dismissing the applicant, that cost saving was in fact achieved. He submitted that it is not

necessary for a court to know the cost base from which the respondent proceeded. But this cannot be so. Were this to be the full extent of what is required under the law, the objects of the LRA would be stultified. A court would never know if there is a genuine operational requirement. It would also not know if any dismissal based on that operational requirement was fair. It would effectively depend on the views of management, which is in conflict with what is required under the LRA.

53. In the absence of any information about the extant operational costs of the respondent and any explanation as to any connection between the supposed need to save costs and the dismissal decision, I cannot find that the cost reduction reason is rational, reasonable or a fair reason for making the position of the applicant redundant.

54. The respondent has failed to prove that the dismissal of the applicant is for a fair reason based on its operational requirements.

Fair procedure

55. The respondent admitted that its decision did not comply with a fair procedure in certain respects. These respects were: the failure to consult with the applicant before the introduction of the Fit for Growth strategy; the failure disclose the reason for the proposed dismissal in the letter in terms of section 189(3) of the LRA; and the failure to disclose the alternatives which were considered before the dismissal of the applicant.

56. These admissions do not give a full and proper account of the respects in which the respondent did not comply with a fair procedure.

57. The respondent took the decision to restructure and to declare the position of the applicant redundant during the first week of June 2012 before the first consultation meeting with the applicant. After the decision was taken, the respondent met with Mr Mothlabi and gave him the position which appears, he accepted. The structure which was presented in Court created in the first week of June 2012 had the name of Mr Mothlabi although it was stated that the name was. The applicant was not present at this meeting. There was simply no contest based on LIFO or any ground before the position was given to Mr Motlhabi.

58. When the respondent consulted with the applicant on 11 June 2012, it informed the applicant that his position was redundant. This was the first time the applicant was informed of any restructuring. At this stage the decision to make the applicant's position as redundant was not subject to change. It was final. And so was the decision to adopt a new structure. The consultation which followed thereafter concerned alternatives to dismissal. There was no possibility of discussions about saving the applicant's position.

59. The respondent did not consider any alternatives to address its concern of saving costs, other than the reduction of headcount by the dismissal of the applicant. In evidence, Ms Milner, when called upon to explain any alternatives considered focused on other positions which could have been made redundant, instead of the applicant's position. When the respondent rejected the proposal made by the applicant to reduce his salary, it made no counter-proposals of its own underscoring the fact that its sole focus was dismissal.

60. These deficiencies in process were of a fundamental nature. They went far beyond the admissions made by the respondent. They defeated the purpose of section 189.

61. I find that the dismissal of the applicant was not effected in accordance with a fair procedure.

REMEDY

62. The applicant did not ask for reinstatement. I must therefore consider appropriate compensation in terms of section 194 of the LRA. Having found that the dismissal was not for a fair reason and was not effected in accordance with a fair procedure, I consider that the applicant is entitled to maximum compensation allowed by the LRA. The dismissal is substantively unfair. Quite apart from this factor, the respondent's departure from a fair process was of a serious nature, resulting in a futile consultation process in conflict with the objects of section 189 of the LRA. I could not find any mitigating factor for the respondent's departure from a fair process which I could take into account in deciding compensation. The respondent's offer of settlement is not sufficient to meet the procedural lapses identified in this judgment.

63. I intend ordering the respondent to pay the applicant compensation equivalent to 12 months remuneration, on the scale of remuneration which was applicable at the time of his dismissal.

ORDER

I make the following order:-

[1] The dismissal of the applicant for operational requirements was substantively and procedurally unfair.

[2] The respondent is ordered to pay the applicant compensation equivalent to 12 months' remuneration, on the scale of remuneration which was applicable at the date of the applicant's dismissal.

[3] The respondent is ordered to pay the costs of the applicant, on a party and party scale, such costs to include the costs of the trial.

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NGCUKAITOBI AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr GN Moshoana

(Of GN MOSHOANA ATTORNEYS)

For the Respondents: Mr GF Malan

(Of EDWARD NATHAN SONNENBERGS INC)