IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

Not Reportable
CASE NUMBER: D25/10

In the matter between

THE SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS UNION (SACTWU) — First Applicant

SIBUSISO NGWENYA — Second Applicant

and

SOUTH AFRICAN FIBRE YARN RUGS (PTY) LTD — Respondent

Date of Hearing: 23 February 2011

Date of Judgment: 07 October 2011

JUDGMENT

CELE J

Introduction

[1] The applicants' claims are for an unfair dismissal of the second to the thirteenth applicants due to the operational needs of the respondent. At the commencement of the trial, the claims of the 12th and the 13th applicants were withdrawn. The claims were opposed by the respondent on the basis that it materially complied with the mandatory provisions of the Act[1] pertaining to retrenchments.

[1]The Labour Relations Act Number 66 of 1995.

Factual background

[2] The respondent is a company duly registered in accordance with the Company Laws of the Republic of South Africa and it carries on business as a manufacturer of polypropylene fibre, yarn and woven polypropylene rugs at 16 van Eck Avenue, Hammarsdale, KwaZulu- Natal. Its premises were divided into two, one for the fibre plant production process, called the Fibre Line Department and the other for the rug production. The Fibre Line Department started its operations in 2002 and employed nine Operators, three Team Leaders and Two Staff employees. The second to further applicants (the applicants) were employed as Operators and Team Leaders. There were other employees utilised by the respondent but through a labour brokerage arrangement. Their positions were of a temporary nature.

[3] On 13 June 2009, the Fibre Line Department (the Department) was gutted down by fire. The result was that the production process in the Department had to be halted for some time. In terms of good business sense and in compliance with a Bargaining Council requirement, the respondent had insurance to cover the plant and gross profit in the event of fire. On 26 June 2009, the respondent wrote a letter to the first applicant (the union) advising the union that: “The company has not made any decision regarding the future of that operation and all employees”.

[4] The respondent then issued another letter dated 8 July 2009, inviting the union to a consultative meeting scheduled for 13 July 2009 to discuss the status of the employees of the Department. A meeting was duly held on 13

July 2009. The respondent indicated that it wanted to deal with an issue by issue of section 189 of the Act. The union pointed out that it behoved the respondent to first issue a section 189 notice after which the union would be able to take part in the consultation process. The meeting which lasted for only 20 minutes ended with the respondent having to follow the proceedings in terms of the Act.

[5] The respondent issued a letter on the same day to the union stating:

> "We refer to a meeting we had with yourselves regarding the employees who were employed in the Fibre Line Department which was destroyed by the fire.
>
> a) These employees were employed as Team Leaders, Operators and Staff Employees and at present they have no job. The Company cannot carry them any longer.
>
> b) The Company has tried to redeploy them to the other departments but this was a temporary arrangement and the Company cannot carry them any longer.
>
> c) Nine Operators, three team Leaders and two staff employees.
>
> d) No selection method because the whole plant burnt down.
>
> e) The process should be completed by the 31st July 2009.
>
> f) The Company proposes a severance pay of one week for every completed year of service with the Company.
>
> g) The Company proposes to give them time off in cases where each person has to attend an interview.
>
> h) These employees will get first preference for positions that may be vacant in the future, provided they have the necessary qualifications.
>
> We therefore propose to meet again on Friday 17th July 2009 at 10h 00.."

[6] The letter of 13 July 2009 was not responded to by the union, probing the issue of another letter dated 20 July 2009 which reads:

"We refer to a meeting we had with yourselves on 13th July 2009 and the notice to consult in terms of Section 189 of the Labour Relations Act 1995 which was faxed to you on the same date.

We are deeply concerned that to-date we have not received any response from yourselves. This is a serious matter which requires urgent attention, especially at this time when all companies are affected by the global economic meltdowm. At present we only have the Rugs division operating and it cannot carry such a large number of employees.

We have already indicated that we would like to have this process completed not later than 31st July 2009.
We need your co-operation in this matter because we don't want to take unilateral decisions. It is not our management style to work without the co-operation of the union, but this may be unavoidable in this matter if it is not given the priority it deserves."

[7] On 27 July 2009, the union and the respondent met. The minutes captured for that meeting recorded, *inter alia* that:

a) "the reason for the proposed dismissals were understood by both parties. Management also explained that the Company is now left with one business which is the carpet business. This business cannot pay such a large number of employees.

b) ...

c) ...

d) Both parties accept that last in first out per department is a better selection method, but it must take into account the skills requirements of the business.

e) The union proposes that the completion date be changed from 31st July 2009 to 14th August 2009

f) The union proposed three weeks severance pay for every completed year of service with the Company.

g) ....

h) The union demanded that the Company must terminate all contractors instead of retrenching the permanent employees.

The Company's view is that permanent employees cannot be saved by temporary positions. They will be retrenched and will be called for temporary positions if they have the necessary skills. They must also be prepared to accept lower rates of pay on their re-employment.

It was also agreed that the Company must also consider voluntary retrenchments..."

[8] A meeting scheduled for 31 July 2009 did not materialise due to the non-availability of the respondent's representative. The next meeting held by the parties was on 3 August 2009. The minutes captured *inter alia* read:

"He (Mr Ngubane) reminded the union that the Fibre Line was burnt down on the 13th of June 2009 and all along these employees have not been doing the job that they were employed to do. This means that the Company has been carrying these people and the Company cannot afford that anymore.

The Company's position is that the process of consultation has to be completed as soon as possible preferably on the 7th August 2009.

Mr Ndawonde stated that the union believes that the 7th August 2009. He then proposed that the Consultation process be finalised on the 14th August 2009.

Mr Ngubane replied by saying that if this process cannot be finalised soon, the Company will be forced to put these employees on short-time until the matter is finalised.

Mr Ndawonde said that the union will not accept that the people be put on short-time because they have families to look after.

Mr Ngubane stated the final offer by the Company is as follows:

a) A list of employees to be retrenched will be sent to the Union as soon as possible.

b) The Company does not have positions available to redeploy these employees.

c) Nine Operators and three Team Leaders are affected since two staff members have been retrenched.

d) Nine Operators are on level 2 and three Supervisors are on Level 4. The Company does not have ant vacant positions available which means that there is no selection method to be used because the whole business unit burnt down.

e) The request to complete the Consultation process on the 14th of August will be discussed with Top Management.

f) The Company is offering 8 days for every completed year of service as the severance pay. This is a once off offer which may not be taken as a precedent (sic) in the future. The Company has taken into consideration the matter of the incidence.

Under these difficult economic circumstances, the Company will normally pay one week for every completed year of service..."

[9] On 5 August 2009, the respondent issued another letter to the union informing it that:

"We wish to put it on record that we were supposed to have a follow up meeting on 4th August 2009 to finalise this matter. As Management we set aside all other businesses and made ourselves available for that meeting. With this we demonstrated that we are really committed to this process.

On the other hand the union has not demonstrated any commitment.

Even though your Mr Ndwandwe arrived, but only one shop steward arrived late for the meeting. The other two shop stewards, including the senior shop steward did not turn up for the meeting. To-date there has been no communication from the union since that scheduled meeting did not take place.

This state of affairs is leaving us with no other alternative but to carry on with the retrenchment process. This is an undesirable situation which cannot be avoided.

This is the final position of the Company:-

a) A list of employees to be retrenched will be sent to you as soon as possible.

b) The Company does not have positions available to redeploy these employees.

c) Nine Operators and three Team Leaders are affected since two staff employees have been retrenched.

d) There is no selection method because the whole plant burnt down which affected this whole business unit.

e) The process will be completed on Friday 7th August 2009.

f) The Company will pay a severance pay of eight (8) days for every completed year of service. This will only apply to this retrenchment and it cannot serve as a precedent in the future.

g) The Company will pay in lieu of notice to enable the employees to start searching for jobs where it is possible.

h) These employees will get first preference for positions that may be vacant in the future, provided they have the necessary qualifications."

[10] On 7 August, a further meeting was held by the parties. The union took the position that the discussion could not be finalised on that day and proposed 14 August 2009 as the last date for a discussion. The respondent said that as there was then only one remaining business unit, the company could not carry such a large number of employees. The more the matter was prolonged further, the greater were chances that the whole company might collapse. The union suggested that the employees in a labour brokerage arrangement be replaced by the applicants who would however retain their rate of pay. That position was to be retained until the insurance claim was processed and a final decision could then be taken. The respondent conceded that it had already filed the insurance claim but pointed out that it could not be predicted if the claim would be met. In the meantime, the company would be bleeding to death, an act that would be akin to committing suicide. The respondent undertook to immediately stop using labour broker employees but to retain two who had been trained as a weaver and a mender.

[11] The respondent had a Twisting Department which it uses for temporary employees who are paid a lower rate of income. They work on a contingency basis, depending on the number of orders received. The respondent offered those positions to the applicants provide they would accept a lower income rate and that their permanency could not be guaranteed. The union could not accept the conditions of such employment.

[12] The last consultative meeting was held on 14 August 2009. The respondent could not agree to revise its offer on the severance pay so that it could be increased to two weeks instead of one week. The union expressed its displeasure at the inflexible attitude of the respondent. At the end of the meeting the parties reached some understanding as a result of which a draft agreement was produced. It reads:

"MEMORANDUM OF AGREEMENT

ON

DISMISSAL BASED ON OPERATIONAL REQUIREMENTS

entered into between

SOUTH AFRICAN FIBRE YARN RUGS (PTY) LTD (SAFYR)

and

SOUTH AFRICAN CLOTHING & TEXTILE WORKERS UNION (SACTWU)

It is regarded that the parties agree in principal (sic) on the following issues:-

a) SAFYR being the employer undertakes to provide the Union with a list of all employees who are affected by the process of dismissal based on operational requirements.

b) The reason why these employees will be dismissed based on operational requirements is because the whole Fibre Line burnt down.The are no positions available and therefore all of them will be dismissed.

c) The whole process will be completed on Friday 14th August 2009, which will be last working day.

d) The retrenchment package will be as follows:-

(i) The severance pay will be eight days for every completed year of service. This is a once off and not a precedent.

(ii) The company will pay in lieu of 4 weeks notice which starts on Monday 17th August 2009 up to Friday 11th September 2009.

(iii) The company undertakes to pay for all accumulated leave due to the retrenched employees.

(iv) The annual bonus will be paid pro-rata of four weeks.

All these monies will be paid on Friday 28th August 2009.

(e) These retrenched employees will get first preference for positions that may be vacant in the future; provided they have the necessary qualifications.

These provisions will have force and effect for a period of six months."

[13] The respondent finally terminated the employment of the applicants through a retrenchment letter sent to each applicant which then reads:

"RE: NOTICE OF RETRENCHMENT

This letter serves to confirm that as a result of the fire which destroyed the whole Fibre Line, your position is non-existent. We have had a number of consultation meetings with Union regarding this situation.

We regret to inform you that your services are to be terminated due to operational requirements.

In terms of the agreement with the Union, your payment details will be as follows.

(a) Four weeks pay in lieu of notice, which is effective from Monday 17th August 2009.

(b) Eight days (8) pay for every completed year of service or part thereof (pro-rata)

(c) Accumulated leave that is due to you.

(d) Bonus pro-rata up to the end of August 2009.

Payment will be made directly into personal banking account." (sic).

[14] The union acted on behalf of its members referred a dispute of unfair dismissal for conciliation. When the dispute could not be resolved, it was referred to this Court in terms of section 191(5) (2)(b) of the Act.

The issue

[15] The applicants conceded that as a result of the fire having gutted the Department, there was a need for the respondent to resort to retrenchment. At the most general level, the applicants contended that the selection of the individual applicants was premised on the circumstance of their being employees of that doomed Department. The applicants contended that even *ex facie* the documentation submitted of record, other than a suggestion in the meeting of 27 July 2009, that "last in first out" (LIFO) criterion would be employed, the respondent did not give any thought to accommodate the affected individual applicants within its business. Simply stated, the applicants contended that they could have been retained in the employment while other employees were retrenched in their places if fair and proper selection criteria were applied. According to the applicants, the respondent retained employees with less service than them and some performed jobs which the applicants were suitably skilled to do.

[16] The respondent contended that at all times the applicants were represented by a trade union during the consultation process. At no stage was any objection raised to the process in any form or manner nor was there evidence that skills were placed before the respondent to enable them to consider the applicants for alternative posts. The applicants refused alternative positions albeit at lower levels.

Evidence

[17] The respondent bore the onus of proving that the dismissal of the applicants was substantively and procedurally fair.

Respondent's version

The evidence of Mr van Niekerk

[18] Mr van Niekerk described the fibre plant's production process as being an independent unit with no relationship with the rug production department. Different raw material was bought for the fibre plant and its end products were sold into markets that were different from that of the rug division. The fibre plant operated separate financial accounts. The fibre plant's production process entailed the extrusion of polypropylene granules creating filaments which were gathered by hand and fed through a system of rollers. The filaments were stretched to a finer diameter and eventually cured. The production process required knowledge and control of temperatures as well as the correct monitoring of the cool air, the speed of the spinneret and rollers. Temperatures on the surface of the rollers ought to be monitored to manage the tension of the filaments.

[19] He described the process as robust and that it entailed a lot of manual work. The stretching, curing and cooling of the product was all done manually. He estimated that it would take between six to twelve months of training before anyone would be competent to work as an operator in the fibre division. Mr van Niekerk said that the rug production on the other hand was significantly different and that the process included weaving, mending as well as a backing

process. The rug operation also included yarn manufacturing in which the determination of the product colour was important as it involved an extrusion process. The product was either sent to heating and twisting where it was wound onto bobbins or sent to weaving where it was woven on a loom. That was a highly specialised job which required at least eighteen months of training. The entire rug operation was far more automated than that of the fibre line. Mr van Niekerk disputed any suggestion that the applicants had previously been employed in the rug division and had transferred to the fibre operation in 2002.

[20] Mr van Niekerk testified that the issue of skills and suitability to perform existing jobs was never raised during the consultation process. He pointed out that the respondent offered level 1 posts to the applicants provided they accepted level 1 rates of pay. That offer was refused. He said that he looked at the alternative posts within the business and was satisfied that there were no positions available to the applicants which would allow them to operate immediately without having a negative impact on the efficiency of the respondent. Mr van Niekerk said that the respondent wished to retain skills suitable to the production of rugs and on that basis he was not prepared to accept the applicants' proposal to use LIFO across the board. He said that the information that was placed before him including that given to him during the consultation process did not indicate that any of the applicants had weaving or BCF extruder experience. He believed that it was impossible to place any of the applicants into any skilled post in the rug division as they did not have the appropriate skills and would therefore negatively affect production.

The evidence of Mr Ngubane

[21] Mr Ngubane began working for the respondent on the 3rd August 1998 but left the company in April 2000 to rejoin it on 18 June 2001 as an HR Manager. His recollection was that except for Mr Ngwenya, all applicants had been employed by a labour broker known as IRS prior to 2005 and were employed in the fibre plant. Mr Ngubane conceded that Mr Ngwenya did work in the rug division previously. On 4 April 2005, there was a change. All labour broker employees became permanent employees of the respondent, including the applicants in the fibre plant.

[22] Mr Ngubane confirmed that the letters issued to the union before and during the consultation process were issued by him and the respondent's proposals therein outlined were never cast in stone. He said that he expected the union to provide counter proposals. The Respondent had been carrying the Applicants since 13 June 2009 in that they were performing menial tasks but were paid at their skilled rates. The financial situation of the company was serious as the economy was in recession and the textile industry was suffering enormously. One of the largest textile companies, Frame, had even closed down due to such financial difficulties. His understanding was that consultation was a two way joint consensus seeking process. His view was that the union was initially dragging its heels which required him to send another letter to them dated 20 July 2009. The letter confirmed that the respondent wished to avoid taking a unilateral decision but that they would be forced to do so if the union did not give this matter the priority it deserves.

[23] Mr Ngubane confirmed that all posts from skills level 2 and above required a skill which the applicants did not have. In his opinion, the applicants' skills could not be used in weaving, the boiler house or engineering. The remaining posts at the respondent were level 1. He understood that the parties had agreed that the selection criteria would be LIFO subject to skills as this had been the criteria used in previous retrenchments. When parties met on 3 August 2009, the applicants did not make any specific representations in regard to the selection process. He said that the offer of employment made by the respondent for jobs at level 1 posts and level 1 pay, was rejected out of hand by the union. Due to the urgency of the matter and a need to finalise the process, he warned the union that short time would have to be considered as the company could not continue to pay the applicants at the skilled rate. The short time option was also rejected by the trade union. When Mr Ngubane said that there were no suitable posts for the applicants' skills available in the company that was not disputed by the applicants or the union. Nor did they put up any details of the applicants' experience at that time.

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[24] The minute of the meeting of the 3rd August 2009 indicates a movement by the respondent in regard to the timing of the retrenchment and to the amount of severance pay to be paid. This is indicative of the respondent's *bona fide* attempts to consult properly.

[25] Again, notwithstanding the urgency of the matter, a meeting arranged for 3 August 2009 resulted in only the union organiser and one shop steward arriving for that meeting. As a result, the meeting could not continue and had to be reconvened on the next day. The only explanation given for not

attending was that other shop stewards were confused as to the time of the meeting. This was not corroborated by other witnesses called by the applicants. As a result, the applicants' *bona fides* in regard to the consultation process was questionable. As a result of that, Mr Ngubane addressed a letter to the union setting out what he described as its final position. He confirmed that the words "final position" were used in an attempt to indicate to the union that the company could not go on indefinitely with the consultation process and that the matter had to be concluded soon.

[26] When the parties met on 7 August 2009 in a final attempt to finalise the process, at no stage did the union point out the skills set of the individual applicants. Instead, the union emphasised that it could not allow its members to be retrenched when the respondent continued to use employees through a labour broker. The respondent then undertook to terminate the labour broker's mandate. The union responded that if any positions were to be taken up by individual applicants, they would have to do so on their existing rates of pay. At that meeting an offer was made to the applicants to accept the labour broking posts but to accept a lower rate of pay. It was further emphasised that the permanency of those posts could not be guaranteed. The applicants suggested in their evidence that all except two, were prepared to accept those posts at the lower rate of pay. Mr Ngubane testified that none of the applicants came forward with their particular skills. There was no evidence before him to show that any of the applicants could operate in the rug division without supervision.

[27] Mr Ngubane said that after each meeting, a copy of the minutes would be faxed to the trade union and that the minutes were never challenged as being incorrect.

Mr Govender's testimony

[28] The policy taken by the respondent did not cover the direct costs of employees' wages but wages as cost of turnover. If the turnover was reduced because there was no production the amount allocated to wages would also be correspondingly reduced. In calculating the pay out, the six months trading period prior to the fire was to be considered and that period had been extremely poor. The result was that the pay out, made only in November 2010, was very low and it barely covered the retrenchment costs paid to the individual applicants. As he testified the claim was still being processed.

The applicants' version

Mr Sibusiso Ngwenya

[29] Mr Ngwenya testified that he had been employed by the respondent in various capacities since 15 July 1997. He had been an extruder operator for a period of six years from 1998 to 2004. He had never been employed by a labour broker while tendering his service with the respondent. At the time of his retrenchment, he was a shop steward working on the fibre line.

[30] During the retrenchment consultations, the union had tried to raise the issues of the peoples' skills and length of service, applicants had more skills and longer service than some of the employees. The issue was raised as a

collective but individual debate around each person's skills had not taken place due to the company having adopted an attitude that employees in the fibre line had to go. He said that applicants felt that they were under suspicion of having deliberately set the Department on fire and Mr van Niekerk had made words to that effect. The applicants felt that was the reason why they were dismissed.

[31] He said that he had knowledge of the skills of the various individual applicants which predated 2005. The applicants who started work on the fibre line in 2002 had been employed in the carpet section before the transfer. The applicants had been willing to accept the lower grade positions offered to them. During the negotiations, Mr Govender had called him from the finishing line to work at the weaving section and had promised to keep him there. When the union tried to raise the issue of skills, the company had rejected everything. He was part of the team that had prepared the schedule setting out individual applicants' experience based on what applicants told him but no documents were produced to support the schedule.

[32] He said that he attended the consultation meeting of 3 August 2009 when his colleagues failed to attend due to confusion as to its time. He said that the minutes were largely accurate even though they did not reflect everything discussed. He also accepted that copies of the minutes were faxed to the trade union after each meeting and that the union never queried the minutes.

Mr Kweyama

[33] Kweyama testified that he was employed by the respondent in 1999 although it was known as Lotus at that time. He was in the weaving department and had occupied various positions. At the time of his dismissal, he was employed as a Shift Leader. He produced documents he said he had obtained from the Department of Labour in Camperdown which indicated that he started work in 2001. He also produced documents he said he had obtained from the respondent after he had queried his length of service specified in his UIF claim form. He had gone to a Ms Sherona employed by the respondent and had spoken to Mr Ngubane about his length of service. A letter dated 9 October 2009 was then issued by the Human Resources Administrator according to which his date of engagement with the respondent was 25 September 2001. He conceded though that in 2003, he was employed by a labour broker IRS and that he assumed full time employment with the respondent in 2005 in its fibre plant. He insisted that he had weaving experience with skills which were in short supply at the respondent.

Mr Noel Dlamini

[34] Mr Dlamini gave evidence that he began work with the respondent in 1995. He said he began employment in the BCF/CF line as an extruder operator. He had an accident with the hyster and he left the respondent's employ in 1999 but he returned to work in 2002, joining the fibre line. When he was retrenched, he had worked as a Shift Leader. He said that if management had agreed to skills criteria, he would have indicated his skills level to them to ensure that he was considered for appropriate jobs. There appeared to be very little discussion amongst the individual applicants in regard to their individual skills. Mr Dlamini said that no one told him that his

skills were unacceptable. His evidence was that he did not refuse any level 1 post.

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Mr Victor Sishi

[35] Mr Sishi said that he was employed in 1999 as a casual employee in the positions of a forklift Driver and a DCF Operator through the services of a labour broker IRS until 2001. He was then employed directly by the respondent as an Operator and a Warehouse Manager. During 2006, he received a driver's licence and he would sometimes thereafter drive company motor vehicles. He had had a motor vehicle accident at the end of 2008 and then worked as a Data Capturer and in the "colour" kitchen doing quality control work. He indicated that he had payslips from the respondent. He conceded that he did not receive formal training on the extruder and simply was trained on the job.

[36] He also conceded that whilst he raised the issue of his skills during consultations he did not get into the details thereof as workers raised LIFO and skills in the collective. He testified that all applicants except him and Mr Ngwenya accepted to work at a lower rate. He said that employees with shorter service than his still occupied level 2 positions.

Mr Fortune Khomo

[37] Mr Khomo testified that he was employed by the company when it was owned by Lotus from Singapore. After six to seven years, a new owner, Zaraphina took over in about the year 2000 to later hand the company over to Mr Govender and the Independent Development Co-operation the respondent.

He was a weaver and also a shop steward since 1997. He said that he was aware of all applicants' skills and further that the applicants Ngwenya, Gwala, Dlamini, Kweyama and Sishi had started work at the respondent on a fixed term contract of 3 years and they were then employed on a permanent basis.

[38] Mr Khomo conceded that the company had gone through a series of changes since 1999. He testified that the company had taken a final position and did not approach the consultation process in a flexible manner. He denied that alternatives to dismissals were ever discussed and that level 1 positions were offered to employees. He said that the union had raised the issue of LIFO and bumping but Mr Ngubane had said that bumping would be unfair to other employees. He said that his members were prepared to work at a lower rate. He also conceded that the respondent's pay roll would reflect a broken service and that Mr Govender took over the business and made all labour broking employees permanent. He also conceded that the employees association with the Respondent prior to 2005 might have been under the guise of a labour broking arrangement. He could not put up any documents to support the periods of employment.

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[39] He said that the union received correspondences from the company in an attempt to address the problems caused by the fire. He said that there was a feeling of general suspicion on the part of the respondent that employees in the fibre line had been the cause of the fire. He indicated that he did not receive copies of the minutes. He said that after a lengthy discussion, the applicants went to management to say that they would accept the lower rated jobs at the lower rate of pay except Messrs Ngwenya and Sishi. His evidence

was that the union had raised the issue of the insurance payment to be used to avoid retrenchment but that Mr Ngubane was very destructive of whatever they had discussed. He also accepted that no jobs were guaranteed.

Mr Sbusiso Ndawonde

[40] Mr Ndawonde was the Branch Organiser of the first applicant in whose employment he was for some 23 years. The union would prefer to use LIFO as the first point of departure in a retrenchment exercise. The counter balancing factor would be a necessity to retain necessary skills. Although the company had agreed to use LIFO across the board it reverted to its original position that there were no selection criteria.

[41] He testified that it was his impression that the respondent was suspicious of the applicants having been involved in setting up the fire which destroyed the fibre line. He said that Mr van Niekerk had remarked that he could not have peaceful nights while the applicants were at the premises of the respondent.

[42] He conceded that until the time of the fire incident, the union had a good relationship with the company and had no reason to doubt its *bona fides*. He admitted that he did not respond to the company's correspondence immediately as he was very busy at the time and accepted that the first engagement with the company was one month after being notified of the fire. Mr Ndawonde accepted that the rrespondent would not be able to carry employees indefinitely. He said that the company was getting more and more impatient as the retrenchment process progressed. Mr Ndawonde agreed

that an agreement was reached with the company in regard to the employment of Mr Moloi and Ms Gloria Ndlovu.

Mr Gwala

[43] Mr Gwala testified that he was employed by the respondent from 1999 to 2000. He was then recruited when the respondent opened the fibre line. He handed in various pay slips and pay envelops which he said were used by the respondent to pay him. He accepted that none of the brown envelopes purporting to be pay slips bore the respondent's stamp or particulars. Mr Gwala conceded that one of the printed pay slips indicated that the employer was Imvusa which was a labour broker. He confirmed that the official pay slips from the respodent bore the name SAFYR. He agreed that his skill set was limited to level 1.

Evaluation

[44] In this matter, the respondent accepted that it dismissed the applicants and therefore that in terms of section 192 (2) of the Act it had to prove that a fair reason existed on the bases of which it dismissed them and in doing so, it followed a fair procedure. The issues between the parties turn on whether there was a material compliance with the provisions of section 189 of the Act when the applicants were retrenched.

[45] As already pointed out, the applicants conceded that as a result of the fire having gutted the fibre line, there was a need for the respondent to resort to retrenchment. At the most general level, the applicants contended that the selection of the individual applicants was premised on the circumstance of

their being employees of that doomed department. There is a submission by the applicants that retrenchment might have been avoided through a recourse to the insurance claim. This was their pleaded case. During the trial, it was never disputed that it took more than a year for the insurance claim to be met and that the claim had not even been finalised when the matter was heard by this Court. It must therefore follow that the position taken by the parties at the commencement of and during the trial, that retrenchment was inevitable due to the guttering down of the fibre line, was a correct stance in the circumstances of the case.

[46] Section 189 (1) (b) (ii) of the Act was applicable in this matter. To the extent relevant, it provides that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult, in the absence of a collective agreement that requires consultation, a registered trade union whose members are likely to be affected by the proposed dismissal, in terms of.

[47] From 13 to 26 June 2009, there is irrefutable evidence that the respondent had not decided on the steps it had to take after the fibre line was destroyed by fire. The letter of 8 July 2009 is an indication that the respondent had then made up its mind on how the problem it faces had to be resolved. The letter dated 8 July 2009 issued by the respondent was certainly a notice as envisaged by section 189 (3) of the Act, even though it failed to disclose all relevant information prescribed in that sub-section. In the first meeting of the parties held on 13 July 2009, the union correctly pointed out the deficiency in the notice issued by the respondent. The letter immediately issued on 13 July

2009 by the respondent materially cured the defect in the initial notice. Paragraphs (a) to (d) of the second letter are capable of an interpretation that the respondent approached the negotiating table with a made up mind on how it would resolve the impasse as they read:

> 1) "These employees were employed as Team Leaders, Operators and Staff Employees and at present they have no job. The Company cannot carry them any longer.
> 2) The Company has tried to redeploy them to the other departments but this was a temporary arrangement and the Company cannot carry them any longer.
> 3) Nine Operators, three team Leaders and two staff employees.
> 4) No selection method because the whole the whole plant burnt down.
> 5) The process should be completed by the 31st July 2009."

[48] The respondent and the union were obliged to engage in a meaningful joint consensus-seeking process and to attempt to reach consensus on a number of factors including, but not limited to the method for selecting the employees to be retrenched. Minutes were kept of the consultation process adopted by the parties. The letters written by the respondent and the minutes it kept of the meetings show without doubt what the respondent brought to the negotiating table. There is a glaring absence of what the applicants brought to the table. All that the applicants did during the trial, in showing what their contribution was in the negotiations, was to point out that the minutes were incomplete. Even as the trial has come to a finish, there is no evidence of what they were referring to as not contained in the minutes and what they did when they realised that the minutes were not a true reflection of the discussion they had had with the respondent.

[49] There is certainly nothing wrong in an employer approaching a negotiating table with a made up mind on how it seeks to resolve the problem when it contemplates a retrenchment, provided it approaches the negotiation table with a flexible mind that is open to persuasion to other solutions, such as avoiding or delaying retrenchment, minimising the number of dismissals and mitigating the adverse effects of the dismissals. From the beginning of discussions, it was open to the union to challenge the respondent on its position that no selection method was to be agreed upon because the whole plant had burnt down. Instead, some of the shop stewards stayed out of some of the meeting for no clear reasons at all when their future employment was at stake. Apart from parties agreeing on LIFO as a selection criterion, the scope of which is also in issue, the union failed totally to identify the individual skills of the applicants with a view to showing the respondent during negotiations that some applicants could have been retained for being better equipped than those employees who were in the rug production or any other line. As an afterthought, the applicants came to Court with a version of having raised their skills as a collective, a clearly vague concept which they could not even explain.

[50] It has to be borne in mind that the joint consensus-seeking process required by section 189 of the Act may be foiled by either party, where one of them refuses to take a meaningful part in any of the stages of the consultation process or by deliberately delaying the process, see *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union*[2]

[2] (1999) 20 ILJ 89 (LAC).

[51] The probabilities of this matter favour the acceptance of the respondent's version that during the negotiations, the union did not raise the issue of the applicants being better skilled than employees who were not affected by the retrenchment. The issue of skills in the collective was raised for the first time in Court. It was not part of the case pleaded by the applicants. Bumping too was raised for the first time during the trial as the applicants did not plead any fact in support of its application during retrenchment.

[52] The period of employment of the applicants is another issue for consideration. The version of the applicants was that apart from skills, they had a longer service dating before April 2005 with the respondent and should have been retained instead of the other unaffected employees. The version of the respondent was that the fibre line was opened in 2002. According to Mr Ngubane, all applicants except for Mr Ngwenya had been employed by a labour broker known as IRS prior to 2005 and were employed in the fibre plant. On 4 April 2005, there was a change. All labour broker procured employees became permanent employees of the respondent, including the applicants. It remained common cause that the applicants did sign employment contracts with the respondent in April 2005.

[53] There is undisputed evidence that the respondent was utilising services of a labour broker and that a number of applicants worked for the respondent through such arrangements. In this respect, there are two versions that are contradictory. The numerical superiority of one version over the other, that is the number of witnesses, is not of assistance in determining the probable version. Even the mere say so of the parties without documentary evidence

will not produce reliable evidence. A number of the applicants testified that they commenced employment with the respondent in 1999 but through a labour broker. How and exactly when transition came about from that arrangement to being employed directly by the respondent, before April 2005, was not testified to. The very existence of a labour brokerage arrangement creates an opportunity for the manipulation of the facts by either party. In the absence of any documentary evidence linking any applicant's employment prior to 2005 directly with the respondent, other than through a labour broker, the version of the applicants has become weaker. The documents produced did not create such a link. The version of the respondent is favoured by the probabilities and must accordingly be upheld.

[54] Mr Ngwenya's case is however different from that of other applicants. He said that he was never employed through a labour broker. His evidence was never contradicted. Instead part of his evidence was corroborated by Mg Ngubane who said that Mr Ngwenya was an employee of the respondent before April 2005. The respondent led no evidence to rebut Mr Ngwenya's evidence that even before 2002, when the fibre line was opened, he was not employed by the respondent. I hold therefore that Mr Ngwenya was at all times material to this matter, in the employ of the respondent. This finding indicates that Mr Ngwenya would have acquired certain skills with the respondent before he was transferred to the fibre line. His evidence stands uncontroverted about himself. As to the skills of other applicants he gave a bold but unsubstantiated statement which left a room that he might have been honest but mistaken about them. He would probably know more about himself than about others.

[55] The final issue turns on whether the respondent attempted to avoid dismissing the applicants by offering them an alternative, albeit lower rate employment. The respondent was under an obligation to attempt to avoid a dismissal based in its operational requirements if the employees could perform either without any additional training or with minimal training, see *Oosthuizen v Telkom SA Limited*[3]*and Sacwu and Others v Afrox Limited*[4]*.*

[56] At the time of retrenchment, the respondent had employees engaged through a labour broker in temporary employment. The respondent's version was that such positions were offered to the applicants but they declined to accept them. The applicants said that all except Messrs Ngwenya and Sishi accepted the alternative employment. The respondent conceded though that the offer was not for permanent employment. It is in this respect that the respondent failed in its obligation to avoid a dismissal. In my view, had the tender to alternative employment been for permanent positions, the respondent would have succeeded in discharging the obligation on it. Added to this consideration was the failure of the respondent to offer permanent positions at the rate of pay which the applicants were enjoying at the time, when the respondent was well aware that it had filed a claim for the loss it had incurred. It had undertaken to terminate the contract with the labour broker, another source of its financial ability to retain the applicants. Parts of the minutes captures for the meeting held by the parties on 27 July 2009 reveal the following recorded information:

[3] (2007) 28 ILJ 2531 (LAC)
[4] (1999) 2 ILJ 1718 (LAC).

6) "The union demanded that the Company must terminate all contractors instead of retrenching the permanent employees.
The Company's view is that permanent employees cannot be saved by temporary positions. They will be retrenched and will be called for temporary positions if they have the necessary skills. They must also be prepared to accept lower rates of pay on their re-employment.

It was also agreed that the Company must also consider voluntary retrenchments..."

[57] The respondent can hardly describe itself as having been open to persuasion from the stance it had initially adopted about retrenchment. It was common cause that temporary positions were available after the applicants were retrenched and some of them were employed. That goes to show that the respondent acted with more haste in retrenching when soon thereafter it was in need of labour. Parties are in dispute as to the applicants' acceptance of the alternative employment at level 1. If the acceptance, assuming there was, included acceptance of a lower rate of pay, both parties would have been in agreement and there would probably have been no issue between them in this regard. If there was acceptance, the probability is that it did not include acceptance of a lower rate of earnings. In that case, the respondent might not have accepted the counter- offer.

[58] No record of the reaction to the offer was either kept or, if kept, it was not produced in Court. It is surprising that the respondent which had been keeping records of the consultation process did not produce any records of the reaction to its alternative employment offer. While the evidential burden has been shifting during the trial, the party bearing the main burden has to carry the consequences of there being paucity of evidence in this regard. Put

differently, the respondent had to show Court that in its obligation to avoid a dismissal, it considered an alternative to dismissal but that it was the applicants who rejected it. Had the respondent succeeded in this regard, it would have shown that a fair reason existed which justified it to resort to a dismissal of the 10 applicants, to the exclusion of other employees, and in the absence of an alternative thereto. The respondent has clearly not been successful in this regard.

[59] The fairness of the application of the selection criterion LIFO would come for consideration had it been found that there was no reasonable alternative to dismissal. In my view, it is not necessary to embark on this investigation. What needs to be considered is the relief which the applicants are entitled to. Section 192 (2) of the Act directs this Court to require of the respondent to re-instate or re-employ the dismissed applicants who have asked for that relief, unless it is not reasonably practicable for the respondent to re-instate or re-employ them.

[60] The reason for the respondent to consider retrenchment has always stood beyond doubt as the fibre line was burnt down. The undisputed evidence of the respondent was that insurance claim had not been finalised and that the line had not been reconstructed. The relationship between the parties was never broken down. Even though there might have been some suspicion on the cause of the fire, the dismissal remained one without blame. Yet the respondent never acted capriciously or with *mala fides* throughout the proceedings. In my view, and with the exception of Mr Ngwenya, neither re-instatement nor re-employment of the other applicants will be practicable in

the circumstances. As for Mr Ngwenya, he should not have been included as a candidate for retrenchment, due to his long employment by the respondent when clearly there were employees of much shorter experience to his.

[61] In conclusion, the dismissal of the 10 applicants by the respondent was substantively unfair and the following order will consequently issue:

1. The respondent is directed to re-instate the employment of Mr Ngwenya with retrospective effect from the date of his dismissal, with no loss of earnings or benefits;

2. The respondent is directed to compensate each of the other 9 applicants listed in annexure A of the pleadings, in an amount of money equivalent to six months of the salary each earned on the date of dismissal.

3. Mr Ngwenya is to report for duty on 17 October 2011, at 08h00.

4. Payment of compensation in terms of paragraph 2 hereof is to be made to the applicants on or before 21 October 2011.

5. No costs order is made.

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Cele J.

Appearances:

For the Applicants: Mr B Purdon
Instructed by Brett Purdon Attorneys

For the Respondent: Mr M G Maeso.
Instructed by Shepstone & Wylie Attorneys