THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not reportable
Case No: D543/13

In the matter between:

MTWU obo MBUYELENI JS & GUMEDE WM **Applicant**

and

G4S CASH SOLUTIONS (PTY) LTD **Respondent**

Heard: **08 - 11 October 2019; 09 December 2019; 17 December 2019 and 26 May 2021[1]**

Reserved: **08 February 2022**

Delivered:

Summary: **Dismissal due to operational requirements – dismissal found to be substantively fair, but procedurally unfair – effect of failure to challenge disputed version in cross-examination – principle restated – effect of failure to conclude consultation on important subject raised during consultation – procedural unfairness**

JUDGMENT

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[1] 26 May 2021 is the date on which the applicants filed their closing arguments.

MGAGA, AJ

Introduction

[1] The trade union, Motor Transport Workers Union ("MTWU" or union) instituted an unfair dismissal claim on behalf of its two members, Messrs Justice Sibulelo Mbuyeleni and Mthobisi Wonderboy Gumede who were dismissed by the respondent based on operational requirements. Strictly speaking, MTWU is the applicant. However, for the sake of convenience, in this judgment I will refer to Mr Mbuyeleni as the first applicant, Mr Gumede as the second applicant, and jointly as the applicants.

[2] The trial was held on 08 to 11 October 2019; 09 and 17 December 2019. The applicants were represented by Mr *S.J. Msiza* instructed by Mafa Attorneys, and the respondent was represented by Mr *C. Crafford* of Crafford Attorneys.

[3] In support of its case the respondent called four witnesses, namely, Messrs Anthony Terrence Clark (retired Regional General Manager); Richard Lawrence Manthey (respondent's external consultant on industrial relations matters); Anand Moonsamy [Kevin] Govender (Durban Branch Manager) and Pregalathan Archery (Driver and local shopsteward for MTWU). The applicants testified in support of their case and called Mr Solomon Mothibedi (Regional Co-ordinator for MTWU).

[4] With the permission of this Court, the parties arranged for the transcription of the evidence first before submitting their written closing arguments. The timeframes for submission of closing arguments were arranged and agreed upon. However, after the evidence was duly transcribed, the respondent did not file its closing arguments as agreed. As a result, on 20 January 2021 this Court issued a directive to the effect that the respondent had to file its closing arguments by no later than 19 February 2021 and the applicants by no later than 08 March 2021. Despite this directive, the respondent did not file its closing arguments until 26 May 2021 when the applicants decided to file their closing arguments without the respondent's closing arguments. Even after the

applicants had duly filed their closing arguments, the respondent's closing arguments were not filed, and no explanation was proffered.

[5] This Court received all outstanding documents and the file on 08 February 2022 and reserved judgment. This judgment was prepared and finalized without the benefit of the respondent's closing arguments. I apologize to the parties for the undue delay in finalizing this judgment.

Summary of the parties' cases

[6] The applicants contend that their dismissal due to operational requirements was procedurally and substantively unfair. Broadly speaking, the fairness of the dismissal is challenged on the basis that during consultation the respondent did not engage the applicants in a meaningful joint consensus-seeking process with a view to avoid their retrenchment or find alternative positions, as prescribed in section 189(2) of the Labour Relations Act[2] (LRA). The consultation was abruptly terminated when the respondent did not attend the final consultation meeting scheduled for 07 January 2013. The applicants further contend that they should have been offered available alternative positions or bumped into the positions of other employees who had less service than them. The applicants sought retrospective reinstatement, alternatively, compensation.

[7] The applicants' claim is opposed by the respondent. The respondent contends that the dismissal of the applicants was fair in all material respects. In the main, the respondent contends that the retrenchment of the applicants was justified by the redundancy of their positions due to the restructuring of the Durban branch necessitated by continuous decline of income/revenue after the respondent lost the ABSA service contract in 2010. The respondent further contends that during consultation the applicants were offered alternative positions available outside of Durban, but they refused to accept them. Regarding bumping, the respondent contends that the employees who were candidates for bumping refused to be bumped out on the basis that the

[2] Act 66 of 1995, as amended.

applicants were more likely to find another employment based on their extensive experience and skills.

Background and relevant facts

[8] The respondent is a security company which specializes in the collection and transportation of bulk cash from several business entities to several banks. Given the prevalence of cash-in-transit heists in this country, there is no doubt that the business of the respondent is very risky and hazardous. The KwaZulu-Natal region of the respondent consists of five branches with the Durban branch being the biggest one in terms of number of employees employed and revenue generated. The other four branches are in Pietermaritzburg; Richardsbay; Portshepstone and Newcastle.

[9] The first and second applicants were initially employed by Fidelity Security Services in 2000 and 2002 respectively. Later, Fidelity was taken over by the respondent[3]. Both applicants started in junior positions (such as crewman; driver and bank marshal) and progressed through the ranks. As at the date of dismissal the first applicant was occupying the position of Senior Box Room Controller[4], and the second applicant was occupying the position of Senior Tactical Support Officer (STSO). Both applicants were based at the Durban branch.

[10] It is common cause that in 2010 the respondent lost its national service contract with ABSA bank, which was one of its major clients and source of income. This resulted in the loss of revenue and subsequent retrenchment of about twenty-four employees during 2010. Despite the 2010 retrenchment, the respondent continued to lose revenue and profits. Mr Clark testified that the revenue generated by the Durban branch shrunk from R14.7 million to R8.86 in 2011 and shrunk further to R4.86 million in 2012. In order to curb main expenses

[3] It is possible that, other than Fidelity, other entities may have taken over before the respondent. For the purpose of this judgment, nothing turns on the respondent's predecessors because it appears that the previous take overs up to the respondent were in accordance with section 197 of the LRA.
[4] This is recorded in the pre-trial minute as common cause (A68 para 3 and A74 para 3.2), but the first applicant testified that the last position he held was a Radio Controller position (Transcript p 285 lines 4 to 13).

(labour and vehicles) and to realign the drastic reduction of workload, the Durban branch had to be restructured by combining certain functions thereby rendering other positions redundant[5]. The restructuring of the Durban branch in 2012 resulted in the ultimate retrenchment of the applicants.

[11] It is convenient to set out the important relevant facts by having regard to the chronological events that unfolded from about 30 November 2012 to about 26 February 2013, as set out in the pre-trial minute, documentary and oral evidence led at trial. The entire oral evidence is recorded in the transcripts. To the extent necessary, brief reference will be made to the evidence of certain witnesses.

30 November 2012

[12] Mr Clark testified that on 30 November 2012 he issued the section 189(3) letters to the applicants and other affected employees, informing them of the respondent's intention to embark on a retrenchment process[6]. The first applicant was at work on 30 November 2012, and he was called to the boardroom to receive the letter. The second applicant was due to start his shift at 1pm on 30 November 2012. He received a telephone call to report at work at 10am. When he arrived at work he was summoned to the boardroom where he was given the letter.

[13] The letter informed the applicants that the respondent was "contemplating a number of dismissals based upon operational requirements", and should the respondent proceed on that basis, it would "enter into a process of consultation with the affected employees with the aim of jointly seeking consensus on the matters that will arise from such consultations". Under the sub-heading "The reason for the possible dismissals", the letter stated the following:

[5] The evidence of Mr Clark regarding the continuous loss of profits and revenue by the Durban branch and the need for restructuring to reduce expenses was not contested by the applicants.
[6] See first applicant's letter on A9 to A10 and the second applicant's letter on A11 to A12.

> "It has become evident that the current operational structure in the Durban Branch is inefficient in its current form and **the company has made a decision to review the operational structure of the Durban Branch**. As a result of this, we envisage that we may be required to dismiss a number of employees based on operational requirements. No final decisions have yet been made on whether the dismissals are necessary, nor will they be made **until a thorough consultative process has been undertaken with the relevant parties**." (Emphasis added)

[14] The letter also recorded that "approximately nine employees employed in the branch may be affected" in the Administration/Operations job categories. Regarding the proposed method of selecting employees to be dismissed, the letter stated that "the company will employ selection criteria that are fair and objective". It was intended that the consultation process would be finalized by 31 December 2012.

[15] Mr Clark testified that the section 189(3) letters were issued to a total of seven employees including the applicants. The other employees who received the letters were J.D. Padayachee; R. Iyaloo; U. Poran; D. Britz and Mncedwa.

[16] It is common cause that after the applicants were issued with the letters they were effectively relieved of their duties from that day onwards. They were told to go back home and come back on 07 December 2012 for a consultation meeting[7]. MWTU was also invited to the consultation meeting scheduled for 07 December 2012[8]. The applicants testified that their access codes were suddenly deactivated, and they were escorted out of the building. The first applicant testified that as he was leaving, he saw Mr B. Dunn seated on the same seat he had been seating on before going to the boardroom and he (Mr Dunn) was performing his duties[9].

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[7] Letters informing the affected employees of the consultation meeting on 07 December 2012 were also issued to them on the 30th of November 2012 – see B4 to B8. These letters also inform the affected employees of their right to be represented by a trade union representative and that the respondent would give the union a notice of the consultation meeting.

[8] The (unsigned) letter inviting the union is at A13. Mr Mothibedi testified that the union did not receive the invitation. He attended the consultation meetings because he was requested by the applicants and mandated by the union to represent them.

[9] It was also alleged that Mr Llewellyn Crowie replaced the second applicant.

[17] Regarding the events of the 30th of November 2012 the evidence revealed that:

17.1 As at that date the restructuring of the Durban branch had effectively taken place. This is probably why the services of the applicants were no longer required from 30 November 2012 and their duties had been allocated to the remaining employees.

17.2 Letters were issued to the seven affected employees separately, and MTWU had not been invited to the handing over of the letters[10]. It is common cause that, other than the handing over of letters, no consultation took place on this date.

17.3 On the same day the respondent offered junior positions of Bank Marshal to J.D. Padayachee; R. Iyaloo; and U. Poran[11]. These employees accepted the Bank Marshal positions with effective date of 01 December 2012. It is common cause that the applicants were not offered these positions. The respondent's case is that Bank Marshal positions were offered to these three employees because of their longer service than the applicants and the specific skills set required to perform in these positions[12]. It is clear that even before starting the consultation process the respondent had already applied the Last In First Out (LIFO) selection criterion[13].

07 December 2012

[18] It is common cause that the meeting that took place on 07 December 2012 was the first consultation meeting regarding retrenchment. At this meeting the

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[10] Under cross examination, Mr Clark conceded that it was an oversight not to invite the union to the handing over of the letters (Transcript p 90 lines 10 to 15). It is also clear that prior to the 30th of November 2012 the respondent had not yet informed the union of the imminent retrenchment.

[11] See B1 to B4

[12] The applicants did not challenge this allegation. Mr Clark testified that these employees had more than 30 years' service. Mr Govender estimated their service to be around 27 to 28 years.

[13] Mr Manthey testified that applicants had shortest service than other Radio Controllers and Tactical Support Officers (TSOs). That is why the other Radio Controllers and TSOs were not included in the group of affected employees that received letters on 30 November 2012 – Transcript p123 line 24 to p124 line 7 and p141 line 2 to p142 line 6.

applicants were present, and they were represented by Mr Mothibedi, assisted by Ms Z. Zama from MTWU. The respondent was represented by its external consultant, Mr Manthey. Also present were the local shopstewards, Mr Archery and Mr Shandu.

[19] A lot is in dispute about what took place at the consultation meeting of 07 December 2012. This court will rely heavily on the minutes of the meeting taken by Ms Vereen Niewoudt, Mr Clark's secretary[14], and the unchallenged versions of both parties.

[20] According to the minutes Mr Manthey explained the rationale behind the proposed retrenchment and further explained that those affected employees were selected based on the "LIFO principle, operational requirements and specific skills". Mr Manthey emphasized that no final decisions have been taken yet and the respondent was ready to listen to the applicants' submissions and then make a final decision. Mr Mothibedi raised several concerns which are recorded in seven bullet points in the minutes of the meeting[15]. Mr Manthey responded by saying that the respondent would look at all submissions made and respond in writing. It is common cause that the respondent did not respond in writing, but another consultation meeting was held on 12 December 2012.

[21] One of the issues in dispute about the goings on of the meeting of 07 December 2012 is whether the applicants were extremely disruptive and the reason therefor. Since the minutes of the meeting, which were accepted by Mr Manthey to be a true reflection of the meeting, do not record any disruptive behaviour by the applicants, this Court does not accept the respondent's version in this regard. In any event, nothing much turns on this as there was another consultation meeting on 12 December 2012, and there is no suggestion that this meeting was also infested with disruptive behaviour.

[14] These minutes appear at A14 to A15
[15] Ibid p 14

[22] What is not in dispute is that at this meeting the applicants were informed that their positions had become redundant, and they were asked to make representations. The applicants raised at least three critical issues which were going to be considered by the respondent and be responded to in writing. The first issue was about the vacant positions outside Durban that had been recently advertised by the respondent. Mr Mothibedi wanted to know why these positions could not be offered to the applicants. The second issue was about bumping. Mr Mothibedi proposed that the applicants be bumped into the junior positions of the employees recently employed by the respondent[16]. The third issue was about the two employees who had been recently dismissed for misconduct[17]. The applicants proposed that those positions be offered to them in order to avoid their retrenchment. However, it must be emphasized that this third issue was not put to the respondent's witnesses when they testified, but it was canvassed extensively by the applicants and Mr Mothibedi when they testified. The respondent's version recorded in the pre-trial minute is that a decision was taken not to fill those two vacant positions because the business was not doing well[18].

12 December 2012

[23] There are no minutes recording the consultation meeting of 12 December 2012, but it is common cause that it took place. Mr Mncedwa, who in the meantime had accepted the retrenchment, and the three employees who accepted Bank Marshal positions, were not present at this meeting[19]. The applicants and the respondent had same representation as in the consultation meeting of 07 December 2012[20].

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[16] These employees (mainly drivers and crewmen) were commonly referred to as 'road staff'.
[17] Messrs Deon Steyn (a.k.a 'Judge Steyn') and S.A. Mdingi.
[18] A68 para 6
[19] There is an indication that by this time Mr Britz had also accepted the retrenchment and he was also not present at this meeting.
[20] It is not clear whether the local shopstewards (Archery and Shandu) were present at this meeting.

[24] Mr Manthey testified that at this meeting the respondent tabled a list of available positions, including TSO positions in Ladysmith and Richardsbay, but the applicants rejected these positions outright and indicated that they were not interested in positions outside of Durban[21]. This version was left unchallenged during cross examination. Mr Govender also confirmed that applicants were offered these alternative positions, but they were not willing to accept any position outside Durban. Again, this evidence was left unchallenged.

[25] Regarding bumping, Mr Manthey testified that after the meeting of 07 December 2012 he met with the local shopstewards, Messrs Shandu and Archery, and they reported that the road staff had rejected the bumping proposal on the basis that they were unlikely to find another employment whereas the applicants had better chances of future employment because of their experience and skills. The shopstewards agreed with the road staff on bumping. He further testified that at the meeting of 12 December 2012 the applicants were informed of the position taken by the road staff and shopstewards regarding bumping. According to Mr Manthey, the respondent had reached consensus with the local shopstewards and the road staff on the issue of bumping[22], and it was up to the union to convince them to agree to bumping[23]. Despite that, Mr Manthey accepted that bumping remained the only outstanding issue to be discussed further with the applicants. It was agreed that another consultation meeting would take place on 07 January 2013.

[26] When answering questions put to him by the court Mr Manthey testified that had the road staff and local shopstewards agreed to the bumping proposal the applicants would have been bumped into those positions of the road staff employees who had been recently appointed[24]. It is clear that, according to the respondent, bumping did not take place because the local shopstewards and road staff were against it.

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[21] Transcript p126 lines 5 to 19; p139 line 14 to p140 line 9 and p142 lines 9 to 11
[22] Transcript p161 lines 23 to 25; p162 lines 13 to 15 and lines 20 to 22
[23] Transcript p166 lines 7 to 9 and p167 lines 6 to 9
[24] Transcript p183 lines 10 to 16

[27] Mr Archery (local shopsteward) also testified on behalf of the respondent about the bumping issue. He confirmed that him and Mr Shandu met with management after the consultation meeting of 07 December 2012, and they informed management that they were against the idea of bumping the applicants into road staff positions. During cross examination by Mr *Siza* and questioning by the Court, Mr Archery testified that:

27.1 At the consultation meeting of 07 December 2012 Mr Shandu and him were just observers, and the applicants were represented by the union official, Mr Mothibedi[25].

27.2 After the meeting they (Archery and Shandu) met with management who explained to them the concept of bumping. Once they understood what bumping meant, they rejected it outright. He also confirmed that their stance on bumping was not communicated to the union[26], nor the applicants[27].

27.3 In early January 2013 they had a general meeting with the road staff and they told them that the union wanted to bump the applicants into their positions. Unsurprisingly, the road staff also objected to bumping. Mr Archery went back to management to report about the road staff's reaction to bumping[28].

07 January 2013 to 06 March 2013

[28] It is common cause that the next consultation meeting was scheduled to take place on 07 January 2013 to discuss the outstanding issue of bumping. It is also common cause that this meeting did not take place. The respondent's witnesses were not very clear about the reason why this meeting did not take

[25] Transcript p277 lines 3 to 13
[26] Ibid p272 lines 16 to 20
[27] Ibid p275 lines 8 to 18
[28] Ibid p277 line 19 to p278 line 6

place. It is the applicants and Mr Mothibedi who led clear evidence in this regard which was not undermined by cross examination.

[29] The applicants and Mr Mothibedi testified that they attended at the premises of the respondent in the morning of 07 January 2013. After waiting for a while outside the premises Mr Clint Dipenaar came to inform them that the meeting would not take place because Mr Govender was urgently attending to a robbery or cash-in-transit heist that had taken place in Portshepstone. Mr Dipenaar advised the applicants and Mr Mothibedi that another meeting would be scheduled. They then left. They waited to be informed of the next date of the meeting, but nothing happened until 25 February 2013.

[30] The applicants testified that on 25 February 2013 they were not paid their salaries. They went to the respondent's premises to enquire as to the reason for non-payment of their salaries. Mr Dipenaar informed them that they had been dismissed with effect from 15 February 2013, and the dismissal letters were sent to the union. Mr Dipenaar gave them copies of unsigned retrenchment letters[29]. The applicants were shocked to hear this as they were still waiting for the date of the next consultation meeting, and they had not received the dismissal letters.

[31] On 06 March 2013 the applicants attended at the respondent's premises again. They collected the signed retrenchment letters[30] and returned the respondent's uniform. The first applicant needed a signed letter to show to his creditors as proof that he had been retrenched.

Discussion and analysis

[32] The most remarkable feature of this trial has been the applicants' representative's failure to put the applicants' contrary versions to the respondent's witnesses during cross examination and failure to challenge certain material aspects of the respondent's case. Like a mantra, this was

[29] A16 to A17
[30] B23

highlighted ad nauseum by Mr Crafford when he cross examined the applicants and Mr Mothibedi. Also, to a certain extent, the applicants (and Mr Mothibedi) even deviated from their pleaded averments. The first applicant testified that they explained their full story to the union official, but they did not have adequate time to do so to the instructing attorney[31].

[33] Unfortunately for the applicants, this Court is left with no option but to accept those aspects of the respondent's case which have not been properly challenged by the applicants. Regarding the impact of the failure to challenge a disputed version under cross examination, the Constitutional Court had the following to say in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[32]:

> "The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts." (Footnotes omitted and underlining added)[33]

[31] Transcript p334 lines 5 to 20
[32] 2000 (1) SA 1 (CC) at para 61
[33] See also *Absa Brokers (Pty) Ltd v Moshoana NO & Others* (2005) 26 ILJ 1652 (LAC) at paras 39 to 41 and *Trio Glass t/a the Glass Group v Molapo NO & Others* (2013) 34 ILJ 2662 (LC) at para 41

Was the retrenchment substantively fair?

[34] Mr Clark testified at length about the operational requirements or commercial rationale which necessitated the retrenchment of the applicants. Mr Clark's testimony in this regard was, to a certain extent, corroborated by Mr Govender. As summarized in paragraph 10 above, the commercial rationale boils down to continuous loss of revenue and profits as a result of the termination of the ABSA contract in 2010. Mr Clark testified that the revenue generated by the Durban branch dropped from R14.7 million to R8.86 in 2011 and dropped further to R4.86 million in 2012. In order to mitigate the continuous loss of revenue and profit the Durban branch had to be restructured by combining certain functions thereby rendering some positions redundant. It is clear that, generally, there was a bona fide and justifiable reason to retrench.

[35] Mr Manthey testified that the selection criteria applied was LIFO, operational requirements and specific skills. The evidence has established that the applicants had the shortest service compared to other TSOs and Radio Controllers[34]. According to section 189(7) of the LRA the employer must select the employees to be retrenched according to selection criteria which have been agreed by the consulting parties or one that is fair and objective. It has been held in numerous cases that, generally, LIFO is a fair and objective criterion. The respondent cannot be faulted for identifying the applicants as retrenchment candidates by applying LIFO. Whether there was adequate consultation on the selection criteria, in particular bumping, will be considered below when dealing with procedural fairness.

[36] The evidence also established that the applicants were offered alternative employment in the form of TSO positions in Ladysmith and Richardsbay, but the applicants rejected same.

[37] Having regard to the totality of evidence, this Court is satisfied that the retrenchment of the applicants was substantively fair.

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[34] This is so because the applicants did not contest the respondent's version to this effect.

Was the dismissal procedurally fair?

[38] In considering whether the dismissal of the applicants was procedurally fair, the main bone of contention is whether the consultation process was adequate and taken to its logical conclusion. As prescribed by section 189(2) of the LRA, this entails examining whether the respondent engaged in a meaningful joint consensus-seeking process and attempted to reach consensus on, *inter alia*, the selection criteria. In this regard the main controversial issue is the applicants' proposal to be bumped into the road staff positions. Was there adequate consultation on the issue of bumping?

[39] Before dealing with the consultation on the issue of bumping, it is worth mentioning that the consultation process which, on both parties' versions, started on 07 December 2012, may have commenced a little too late. I make this observation because it is clear that by then the respondent had already restructured the Durban branch[35], and had already applied LIFO to exclude other TSOs and Radio Controllers from the list of affected employees. Even offering Bank Marshal positions to the other three employees to the exclusion of the applicants was not a subject of consultation. This also taints the consultation process conducted by the respondent.

[40] Bumping is one of the possible means to avoid retrenchment of employees with long service. Bumping entails the replacement of a shorter serving employee by a longer serving employee. It is an extension of the LIFO principle[36]. In this case it is clear that, but for the anti-bumping stance adopted by the local shopstewards and road staff, bumping would have taken place and the retrenchment of the applicants would have been avoided. Therefore, adequate consultation on this issue was of paramount importance.

[35] The section 189(3) letter dated 30 November 2012 states that the company has made a decision to review the operational structure of the Durban branch - A9.
[36] *Porter Motor Group v Karachi* [2002] 4 BLLR 357 (LAC) at paras 6 and 16

[41] There is no doubt that at the first consultation meeting of 07 December 2012 the applicants raised the issue of bumping by proposing to be bumped into road staff positions, and the respondent undertook to revert on that issue. At the second consultation meeting of 12 December 2012 the respondent reported that the local shopstewards and road staff were against bumping. This was based on the meeting Mr Manthey had with Mr Archery and Mr Shandu in the absence of the applicants and their union representative. It was agreed that the issue of bumping would be discussed further at the next consultation meeting to be held on 07 January 2013. As indicated above, that consultation meeting never saw the light of day because on that day (07 January 2013) Mr Govender had to urgently deal with a cash-in-transit heist which had taken place in Portshepstone, and the respondent did not reschedule the meeting despite Mr Dipenaar's undertaking that the respondent would do so.

[42] The respondent's witnesses could not provide an acceptable reason as to why the consultation meeting, which was aborted at the instance of the respondent, was not rescheduled. To proceed to dismiss the applicants with effect from 15 February 2013 without concluding consultation on the outstanding issue of bumping was premature. Mr Manthey testified that whenever he met Mothibedi in other fora he kept on talking to him about the need for the union to resolve the issue of bumping with the local shopstewards. He could not provide exact details of when and where he met Mr Mothibedi. This is not good enough. The issue of bumping was raised by the applicants in a formal consultation meeting. It could not be concluded through corridor talks between Mr Manthey and Mr Mothibedi in the absence of the applicants. In any event, Mr Mothibedi denied these corridor talks.

[43] It is obvious that the consultation was unduly curtailed or abruptly ended by the respondent. In *Blinkwater Mills (Pty) Ltd v Kgalegi*[37] the Labour Appeal Court had the following to say about consultation and the effect of not concluding same:

[37] (JA67/2015 [2016] ZALAC 51 (22 November 2016)

"[30] Section 189(2) requires that the consultation process takes the form of a "meaningful joint consensus-seeking process" *inter alia* to avoid dismissal or seek alternatives to it where these are available. To be meaningful, the consultation must be genuine and may not be a sham with the purpose of seeking alternatives to dismissal being to avoid dismissal if reasonably possible. Counsel for the appellant correctly accepted at the hearing of this appeal that **the consultation process had been concluded prematurely when the respondent's employment was terminated on 10 March 2011**...

[31] **The finding of procedural unfairness can equally not be faulted given the evidence that the appellant failed to comply with the provisions of section 189(2) of the LRA in not engaging in a meaningful joint consensus-seeking process when it bailed out of the consultation process**." (Emphasis added)

[44] In the circumstances, this Court concludes that the dismissal of the applicants was procedurally unfair, mainly because the respondent proceeded to dismiss the applicants without concluding the consultation on the important issue of bumping which could have saved the applicants' jobs.

Relief

[45] Having concluded that the dismissal of the applicants was procedurally unfair, the only appropriate remedy available to them is compensation, which must be just and equitable in all the circumstances but may not be more than the equivalent of 12 months' remuneration calculated at the applicants' rate of remuneration on the date dismissal[38]. The vexed question is the quantification of that compensation.

[38] Section 194 of the LRA.

[46] Determining an accurate amount of compensation is not an exact science. It has been observed by the LAC that determining *'just and equitable'* compensation is an unruly horse to ride[39]. An extremely delicate balance has to be struck between appearing to be unduly punishing an employer and attempting to adequately compensate an employee whose dismissal has been found to be procedurally unfair.

[47] In this case, having regard to all relevant factors including the nature and extent of procedural irregularity (which is not insignificant), I am of the view that compensation equivalent to 9 months' remuneration to each applicant is just and equitable. As at the date of dismissal the first applicant's monthly remuneration was R 9 830.11, and the second applicant's monthly remuneration was R 9 743.10[40]. Therefore, the compensation for the first applicant amounts to R 88 470.99 (R 9 743.10 x 9 months) and that of the second applicant amounts to R 87 687.90 (R 9 743.10 x 9 months).

Costs

[48] With regard to costs, there is nothing that warrants a departure from the norm of not mulcting a losing party with costs in labour matters. It is also an important consideration that both parties achieved some measure of success. In the circumstances, it is in accordance with the requirements of law and fairness that each party pays its own costs. Therefore, I intend to make no order as to costs.

[49] As a result, I make the following order:

[39] *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC) at para 24.
[40] The applicants' pay slips for January 2013 are attached to the applicants' closing arguments.

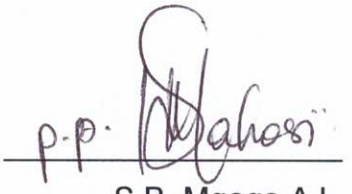
Order

1. The dismissal of the applicants due to operational requirements was substantively fair, but procedurally unfair.

2. The respondent is ordered to pay to each applicant compensation equivalent to 9 months' remuneration calculated at the rate of the applicants' remuneration on the date of dismissal. In respect of the first applicant (Mr J.S. Mbuyeleni) the compensation amount is R 88 470.99, and in respect of the second applicant (Mr W.M. Gumede) the compensation amount is R 87 687.90.

3. The compensation amounts must be paid to the applicants within 21 (calendar) days of the delivery of this judgment.

5. There is no order as to costs.



S.B. Mgaga AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: Mr *S.J. Msiza* instructed by Mafa Attorneys

For the respondent: Mr *C. Crafford* of Crafford Attorneys