THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D 530/2020

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION OBO MADLALA AND 6 OTHERS **APPLICANT**

and

UGU SOUTH COAST TOURISM (PTY) LTD **RESPONDENT**

Heard: **15 – 18 May 2023**
(all heads of argument to be submitted by 13 June 2023)

Delivered: **14 June 2023**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 14 June 2023

JUDGMENT

PRINSLOO, J

Introduction

[1] The individual applicants (Applicants) were dismissed in August 2020 for reasons related to the Respondent's operational requirements. They subsequently referred unfair dismissal disputes to the CCMA and a certificate of outcome was issued on 18 September 2020.

[2] On 1 December 2020, the Applicants filed a statement of claim, challenging the fairness of their dismissal and claiming that their dismissal was in contravention of the provisions of section 189 of the Labour Relations Act[1] (LRA).

The pleadings and pre-trial minute

[3] It is trite law that this Court and the parties are bound by the pleadings and the pre-trial agreement[2] and the issues they agreed to in the pre-trial minute[3]. This Court cannot and should not go beyond the issues it is required to determine, with reference only to the pleadings and the pre-trial minute.

[4] Jacob and Goldrein[4] aptly capture the position as follows:

> 'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings… For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.
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> The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties…

[1] Act 66 of 1995, as amended.
[2] *Chemical, Energy, Paper, Printing, Wood & Allied Workers Union and others v CTP Ltd and another* [2013] 4 BLLR 378 (LC).
[3] *Professional Transport & Allied Workers Union on behalf of Khoza and others v New Kleinfontein Gold Mine (Pty) Ltd* (2016) 37 ILJ 1728 (LC); *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd and another* (2000) 21 ILJ 142 (LAC).
[4] Jacob, Goldrein, '*Pleading: Principles and Practice',* (Sweet & Maxwell) at pp 8 - 9.

> The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.'

[5] In *Candy and others v Coca Cola,*[5] the Court considered the purpose of a statement of claim and held that:

> 'In its simplest terms, the statement of case must at least inform the respondent party what the pertinent facts are on which the applicant will rely in the case, and further, what the cause of action is that the applicant will pursue as founded on these facts. That must be done in sufficient particularity so as to enable the respondent to provide a proper answer to these facts and the related cause of action. The statement of claim and the answering statement thereto are not just for the benefit of the parties. They also serve the court, in that the issues in dispute are properly determined and other possible alternative causes of action are eliminated from having to be considered by the court. A proper statement of claim and answering statement are imperative to the fundamental requirement of expeditious resolution of employment disputes in terms of the LRA. As the court said in *Harmse v City of Cape Town (Harmse):*
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> "[6] The statement of claim serves a dual purpose. The one purpose is to bring a respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.
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> [7] The material facts and the legal issues must be sufficiently detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim."'

[5] (2015) 36 ILJ 677 (LC) at para 38.

[6] In *SA Breweries (Pty) Ltd v Louw*[6] (*Louw*), the Labour Appeal Court (LAC) was required to, *inter alia*, determine a complaint by the appellant that the court *a quo* decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pre-trial conference minute. The LAC held that:[7]

> '[4] To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.
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> [5] The critical complaint in this matter is that the court a quo decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pretrial conference minute. The complaint had been raised during the hearing and in argument at the conclusion of the trial, considered by the court a quo and dismissed. In our view, the complaint is justified and the court a quo was in error.'

[7] The LAC further held that:[8]

> 'The relationship between the pleadings and the pretrial conference minute has been the subject of several judicial pronouncements[9]. In short, a minute

[6] (2018) 39 ILJ 189 (LAC).
[7] Ibid at paras 4 – 5.
[8] Ibid at para 8.

> of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pretrial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving of an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pretrial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pretrial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the straitjacket into which the litigants have confined themselves.'

[8] In *Louw,* the LAC held that the mantra expressed in a statement of claim where an applicant averred that his dismissal was both 'procedurally and substantively unfair', is a stock phrase that is hardly ever useful in communicating what exactly is the *causa* of the unfairness, which is what both court and counsel need to know in order to address it. The terms of the pre-trial minute narrow the permissible grounds upon which the cause of action is to be presented.

[9] In summary, a statement of claim must inform the respondent of the material facts and the legal issues arising from those facts upon which the applicant will rely to succeed in its claims. Those must be sufficiently detailed to enable

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[9] See: *Price NO v Allied - JBS Building Society* 1980 (3) SA 874 (A) at 882D - E; *Zondo and others v St Martin's School* (2015) 36 ILJ 1386 (LC) at paras 10 – 11.

the respondent to respond and to be informed of the nature or essence of the dispute. Each side must be given an unambiguous warning of the case they are to meet.

[10] An applicant's pleaded case must be supported by evidence during the trial. As was held in *Harmse v City of Cape Town:*[10]

> '[8] The rules of this court do not require an elaborate exposition of all facts in their full and complex detail - that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings - the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pretrial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pretrial conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the court is required to decide and the precise relief claimed.
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> [9] Accordingly the rules of this court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The rules of this court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the [pretrial] conference. The rules therefore anticipate that the parties at the pretrial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadow this activity but are not a substitute for it. It is for this reason that the rule on pretrial conferences provides for reaching consensus on the issues that the court is required to decide.'

[11] The issues raised by the Applicants must be considered against the backdrop that pleadings give the architecture and that the evidence at the trial provides the detail and texture.

<u>The Applicant's pleaded case</u>

[10] (2003) 24 ILJ 1130 (LC) at paras 8 – 9.

[12] In their statement of claim, the Applicants' pleaded case is that the Respondent's conduct in retrenching them, was in contravention of the provisions of section 189(2) and (4) of the LRA. The Applicants' case is that the Respondent had failed to meaningfully engage with them and to provide the information required and agreed to and failed to engage them to enable further consultation.

[13] The essence of the Applicants' case is that the Applicant (SAMWU) requested information at the meeting of 4 August 2020, which the Respondent refused to disclose. The decision to dismiss them, despite not engaging meaningfully, is in contravention of the provisions of section 189 of the LRA. The Respondent prematurely closed the consultation process, without calling for a further consultation, which is indicative that it had no intention to reach consensus on the matters listed in section 189(2) of the LRA.

[14] It is evident from the statement of claim that the Applicants did not challenge the substantive fairness of their dismissal and the reason and rationale for their retrenchment is not disputed.

[15] The parties signed a pre-trial minute and the precise relief sought by the Applicants is for an order to declare that their dismissal was procedurally unfair.

[16] The challenge to procedural unfairness is limited to the question of whether there was meaningful consultation and disclosure of information, as contemplated in sections 189(2) and (4) of the LRA.

[17] I have alluded to the importance of pleadings. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings and narrowed in the pre-trial minute.

[18] This Court must decide whether the Applicants' dismissal was procedurally fair, premised on the challenge that the Respondent failed to engage in a meaningful consultation process with the Applicants and that it refused to disclose information.

The background facts

[19] The following facts provide a background to the Respondent's operations and how it came about that the Applicants were retrenched. The reason for retrenchment is not in dispute and substantive fairness is not an issue for this Court to decide, however, these facts provide context to the issues this Court has to decide.

[20] The Respondent is a municipal entity established in terms of Section 86C of the Local Government: Municipal Systems Act[11] and is controlled by the Ugu District Municipality, which owns all the Respondent's issued share capital. The Respondent is run by a board of directors (Board) which retains full control over the entity, its plans and strategy.

[21] The Board is primarily responsible for the Respondent's strategy, compliance with internal policies, external laws and regulations, effective risk management and performance measurement, transparency and effective communication, both internally and externally.

[22] The Respondent commenced operations on 1 July 2009 when the Applicants joined the Respondent, having been transferred from the Hibiscus Coast Tourism Association to the Respondent, as a going concern.

[23] The core business of the Respondent is to grow tourism in the district, address and unlock obstacles that hinder tourism growth, to develop and implement programs to attract tourists and ultimately contribute to the economy of the district tourism. To meet its obligations, the respondent depended primarily on three streams of income, namely: municipal grants and subsidies, commission generated from the sale of tourism bus tickets and membership fees from tourism facilities and establishments, including guest houses and lodges.

[24] To fulfil its mandate of tourism development and marketing in the Ugu district, the Respondent established Visitor Information Centres (VICs). The VICs

[11] Act 32 of 2000.

were run and supervised by the applicants, in their capacity as 'visitor information officers'.

[25] On 15 March 2020, the coronavirus pandemic was declared a national disaster in South Africa and the government announced a package of extraordinary measures to combat this grave public health emergency. On 23 March 2020,[12] President Cyril Ramaphosa (President) announced a nationwide lockdown for 21 days with effect from midnight on 26 March 2020, which was to be enacted in terms of the Disaster Management Act[13]. The three-week lockdown entailed that all South Africans were required to stay at home, except a handful of categories of workers who were regarded as necessary and essential in the response to the pandemic.

[26] The President made it clear that South Africa found itself confronted not only by a virus that has infected millions of people across the globe but also by the prospects of a very deep economic recession that will cause businesses to close and that will result in many people losing their jobs. As a first phase of the government's economic response, measures were announced and these interventions included support for persons whose livelihoods would be affected.

[27] On 9 April 2020,[14] the President announced that the National Coronavirus Command Council decided to extend the nationwide lockdown by a further two weeks beyond the initial 21 days and the lockdown measures remained in force until the end of April 2020.

[28] On 21 April 2020,[15] the President announced economic and social measures in response to the Covid-19 epidemic. He confirmed that the coronavirus pandemic has damaged the economy, it resulted in a sudden loss of income for businesses and individuals and that it was to continue in months to come.

[12] Statement by President Cyril Ramaphosa on escalation of measures to combat Covid-19 epidemic, Union Buildings, Tshwane, 23 March 2020.
[13] Act 57 of 2002.
[14] Message by President Cyril Ramaphosa on Covid-19 epidemic, 9 April 2020.
[15] Statement by President Cyril Ramaphosa on further economic and social in response to the Covid-19 epidemic, Union Buildings, Tshwane, 21 April 2020.

[29] On 23 April 2020,[16] the President announced that the nationwide lockdown could not be sustained indefinitely as people need to earn a living and companies need to be able to produce and trade, they need to generate revenue and keep their employees in employment. A gradual and phased recovery of economic activity was announced to commence after 30 April 2020 when the lockdown restrictions were eased gradually. The President announced that as of 1 May 2020, the country would operate on alert level 4, which allowed some businesses to resume operations under specific conditions, including that they would not be able to return to full production and the workforce only able to return in limited batches.

[30] On 13 May 2020,[17] the President announced that by the end of May 2020, most of the country would be placed on alert level 3 and this was confirmed on 24 May 2020[18]. It had been said over and over that the Covid-19 crisis presented an unprecedented challenge, unmatched since the Spanish Flu and the Great Depression. It has depressed global economies and caused a material shrinkage in global trade.

[31] During this period, international and inter-provincial travel for leisure was not allowed and businesses that operated in the tourism industry were not allowed to operate. It is a well-known fact that the tourism industry had been hit very hard by the impact of the Covid-19 pandemic.

[32] The Covid-19 pandemic had hit the world and South Africa without much warning and there was not much time between the declaration of the state of disaster and the announcement of the lockdown for companies to plan or budget for the most unforeseen event, which transpired to hit even harder and with more brutal force than what was initially expected or anticipated.

[33] In was within this context the Respondent had to reconsider its business operations, being an entity that focussed on tourism.

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[16] Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 23 April 2020.
[17] Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 13 May 2020.
[18] Address by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 24 May 2020.

The evidence adduced

The Respondent's case

[34] Ms Mangcu, the Respondent's CEO, testified that on 1 June 2020, there was a meeting held with the Respondent's employees, which included the Applicants, and during this meeting, she communicated to them that the Covid-19 pandemic had severely impacted the country, businesses and particularly, the tourism industry. The Respondent was forced to reconsider the way it operated and how it served its customers, which would impact the way the Respondent operated. The employees were informed that the Respondent's Board would meet at the end of June 2020 to reconsider the 'Tourism Strategy and Annual Performance Plan' (plan) due to the impact of Covid-19 and that *"a number of programs would have to be relooked and a new way of doing things to communicate with our markets will need to be found".*

[35] The Board held a special meeting on 3 July 2020 and the tourism recovery strategy was discussed. The strategy was developed due to the severe negative impact that the Covid-19 pandemic had on the KZN south coast. The effect of the Covid-19 pandemic forced the Respondent to restructure the organisation and reconsider its operational requirements. The approved organogram, which was approved in December 2018, based on the then 'destination management framework' had to be re-looked as the Respondent would be shifting focus to digitised platforms, there would be no membership drives in the foreseeable future as members were struggling financially and there were no VICs, however, there would be a requirement for an information platform, which could be in the form of a call centre. The call centre could be based at one of the VIC sites or at the head office.

[36] The tourism recovery strategy was necessary as the Respondent had to do things differently in growing tourism in the district and had to develop a plan to do that under the changed circumstances. Ms Mangcu explained that the Respondent's strategy and plan were reviewed every year, but in 2020 it had

to be re-looked at in its entirety because of Covid-19 and the changes in the tourism industry.

[37] Ms Mangcu explained that the strategy goes with a plan, which sets out the activities to deliver on the strategy. As a result of Covid-19, there was a need to have a recovery strategy, with a plan to respond to the impact and consequences of Covid-19.

[38] The Board further discussed that the closing of the VICs and suspending membership, would result in a section 189 process and there would be a need to start the section 189 discussions with the affected employees. It was recorded that when tourism started to ignite, there could be a possibility of re-appointing and that the section 189 process had to be managed properly, with consultations with the staff to *"see if ways can be found to stay together..."*

[39] The Board agreed and recorded that:

> 'The primary reason for the possible retrenchment was that tourism was gearing toward a modern tourism environment, which was digital in nature and not the VICs. Affordability was the second reason. The restructure would be in line with the re-engineering of the business, which while we have talked about for a few years, are now forced to do because of the impact of Covid-19 and budget constraints. USCT would expect in the s 189 process that other ideas and suggestions will be put forward which will be considered.'

[40] Ms Mangcu explained that the Respondent's Board had approved an organogram for the Respondent in October or November 2018, which was referred to as the 'old structure'. As a result of the recovery strategy, there had to be a plan and an organogram which would support the delivery of the strategy. When the Board had the meeting in July 2020, the VICs were no longer functional, due to the changed circumstances caused by the Covid-19 pandemic and they became dysfunctional, as digital platforms were taking over the industry. The functions would be digitised in a call centre. The Respondent had to develop a recovery strategy to address the circumstances and to ensure that the KZN east coast remained relevant and on the map and that things are done differently to adapt the Respondent's operations to

ensure that it remained operational and sustainable in the face of the new circumstances.

[41] The Board resolved that all the VICs would be closed and that the Respondent would have a call centre. Ms Mangcu explained that the said resolution did not translate to a final decision to retrench the affected employees and that the setting up of a call centre, could have provided an alternative to dismissal and that is why a consultation process was necessary.

[42] On 10 July 2020, the Board held another special meeting, which followed the discussions of 3 July 2020. The Respondent consulted a lawyer to understand the process of retrenchment based on the functions and structures of the Covid-19 recovery plan. The Respondent had discussed the possibility of furloughing employees, which intended the alternation of staff, but it was not implemented as the Respondent did not want to pre-empt the process.

[43] In cross-examination, Ms Mangcu conceded that when the Board had approved the new structure or organogram in July 2020, it did not include the positions occupied by the retrenched employees, as the functions performed by those positions, became irrelevant to the recovery strategy.

[44] On 21 July 2020, a section 189(3) notice was issued to the Applicants and SAMWU. It was recorded that the Respondent faced a number of challenges, relating to its operational requirements and that, while no firm decision had been made, a form of intervention was necessary. The Applicants were informed that the retrenchment of some employees was being considered, but before a final decision could be taken and in accordance with section 189(3) of the LRA, they were invited to consult with the Respondent on possible alternatives to avoid retrenchment. The Applicants and SAMWU were invited to a consultation meeting which was scheduled for 24 July 2020 and they were informed that the purpose of the consultation was to reach consensus on ways to avoid dismissal, where possible to change the timing of any dismissal and to mitigate the adverse effect of dismissal. It was also stated that the proposed consultation would be a joint consensus-seeking process to attempt to reach consensus on alternatives, the number of employees likely to

be affected, criteria for selecting employees, the timing of retrenchment, severance pay, assistance to be offered and the possibility of future employment.

[45] The anticipated date of retrenchment was 31 August 2020, but Ms Mangcu explained that no definitive decision was made on that, it was merely anticipated and included as it was required by the provisions of section 189(3) of the LRA.

[46] In the section 189(3) notice, the Respondent recorded that the job categories likely to be affected by the proposed retrenchment were: information supervisor, visitor services officer, information officer, stakeholder relations officer and executive assistant. Ms Mangcu explained that the job categories of information supervisor, visitor services officer and information officer were located in the VICs, the stakeholder relations officer dealt with members, who were not paying fees or contributing due to the state of the tourism industry and due to their lack of income, membership fees could not be collected and the executive assistant was her personal assistant. As the VICs were affected, the employees working in the VICs were also affected.

[47] Ms Mangcu's executive assistant was Ms Moodley and she was offered two alternatives, to wit a voluntary retrenchment package or a reduction in her working hours. The reduction in her working hours was an attempt to avoid dismissal, but Ms Moodley did not accept the alternative.

[48] The meeting of 24 July 2020 was attended by Ms Mangcu, the Applicants and representatives from SAMWU. Ms Mangcu indicated that the issues to be discussed would be covered in a presentation. The SAMWU provincial chairperson, Mr Dlamini, objected and stated that the section 189(3) notice indicated that the Respondent was far in the process and that the employer's mind was already made up as an anticipated retrenchment date was recorded. He was supported by another SAMWU representative, Mr Shinga, who explicitly stated on record that they had a caucus discussion and that they had concluded not to be part of the presentation of 24 July 2020. He also objected to the wording of the section 189(3) notice (notice) because the

document referred to retrenchment and dismissal and already identified the individuals who might have been affected by the process. To SAMWU this was unfair and they expressly distanced themselves from it on behalf of the affected employees.

[49] SAMWU stated that they would not be part of the meeting as long as the section 189(3) notice was in place and demanded that a letter be written, stating that the notice was null and void. SAMWU went further to state that it was an explicit condition: withdraw the notice in writing and *"then we will start to talk".*

[50] The Respondent had not withdrawn the notice and Ms Mangcu explained that there was no decision taken that the retrenchment would take place by 31 August 2020, it was only a likelihood. She further explained to the meeting that the Respondent wanted to do a presentation to present the circumstances and to consult on the issues and that the meeting was intended as a consultation. The SAMWU chairperson reiterated that they would not be part of the meeting if the notice is not withdrawn and that *"we are done with this meeting".* Ms Mangcu once again stated that the Respondent wanted to consult with the employees, explain where the organisation found itself and consult on the issues. SAMWU made it clear that the Applicants were represented by the union in the process.

[51] Ms Mangcu testified that it was clear that SAMWU had set a condition, namely that they would only participate in the section 189 process if the section 189 notice of 21 July 2020 was withdrawn. She explained that the consultation process could not commence without a section 189(3) notice and as such, the notice could not be withdrawn and was indeed not withdrawn.

[52] It was put to Ms Mangcu in cross-examination that as at 24 July 2020, when the first consultation meeting was held, the decision was already taken about the retrenched employees and they were no longer part of the structure, which was approved by the Board. Ms Mangcu testified that no decision had been taken. The reality was that the VIC function no longer existed as no one visited the VICs, there was no travel at all and people moved to digital

platforms to find the information they were looking for. The function became irrelevant, as was dictated by the changed circumstances and it was removed from the structure.

[53] Ms Mangcu was asked whether the Respondent had a plan of what to do with the employees who were employed in the VICs, after the decision was taken that the VICs would be closed and no longer needed. Ms Mangcu explained that there was a head office and VICs, which were closed, but the potential plan was to have a call centre as there was still a need to provide information to tourists, just on another platform. She emphasized that it was for this reason that consultation was necessary, as there was a plan for a call centre and there was a need to engage to find possible ways to resolve the situation and to place the VIC employees elsewhere. No final decision was made and a solution could have been found during the consultation process. There was a duty on SAMWU and the Applicants to present ideas and proposals to avoid retrenchment and the Respondent wanted to engage on those, but no proposals were made. Ms Mangcu made it clear in cross-examination that she could not speculate as to whether any ideas or proposals would have been accepted and could have changed the outcome of the retrenchment process, as no proposals were made by SAMWU or the Applicants and therefore none was rejected or could have been accepted by the Respondent.

[54] On 28 July 2020, SAMWU addressed a letter to Ms Mangcu, following the notice of 21 July 2020 and the meeting held on 24 July 2020. The letter recorded that SAMWU's concern was that the heading of the notice suggested that the Respondent approached the union with a 'predetermined view' and that the only conclusion was that the engagement was not intended to be meaningful as envisaged in section 189 of the LRA.

[55] Ms Mangcu responded to SAMWU's letter of 28 July 2020 on 31 July 2020 in an attempt to address the concerns raised by SAMWU. The Respondent clarified that the section 189 notice did not suggest or confirm a decision to retrench, but rather that retrenchment was identified as a possible remedial measure and that consultation was necessary and the outcome of the consultation process would lead to the final decision on whether or not

retrenchment was unavoidable. SAMWU was informed that meaningful consultation could only be achieved if the union could allow the Respondent to present the entity's situation and to receive proposals or representations from the union or affected employees and consider same.

[56] In respect of the issue raised regarding the heading of the notice, the Respondent stated that:

> 'It is not clear how the union finds the heading of the letter that was issued to affected employees 'Notification regarding possible retrenchments in terms of section 189(3) of the Labour Relations Act' to suggest a predetermined view / decision to retrench employees. The heading of the letter is aligned with the relevant section of the Labour Relations Act and the union is urged to read the said heading objectively and without developing any interpretations as such interpretations may differ from one person to another.'

[57] On 30 July 2020, Ms Mangcu addressed a letter to the affected employees and SAMWU regarding a second consultation meeting to be held in terms of section 189. She testified that the purpose of the letter was to confirm that the Respondent wanted to engage in a joint problem-solving process. At that stage, no decision was taken. The letter confirmed that the purpose of the consultation was to engage in a process to attempt to reach consensus on *inter alia* appropriate measures to avoid dismissals.

[58] In the letter, Ms Mangcu recorded that SAMWU was not 'happy' to participate in the previous consultation meeting and did not allow the business of the day to unfold and therefore no representations were made by the union or any of the affected employees on alternatives to avoid retrenchment. It was reiterated that the Respondent believed that consultation was key to finding alternatives to retrenchment and that the Respondent preferred a consensus-driven process as opposed to making a decision. No decision was made and the employees and SAMWU were once again invited to consult on possible alternatives to avoid retrenchment. A meeting was scheduled for 4 August 2020.

[59] Ms Mangcu testified that the objective of having a second consultation was because it was important to consult with the affected employees and SAMWU.

[60] A second consultation meeting took place on 4 August 2020, which was attended by Ms Mangcu, the Applicants and SAMWU representatives. Ms Mangcu testified that she was going to make a presentation and she envisaged that SAMWU would be given the presentation after it was presented, would go and consult on it and come back with submissions, but instead, the SAMWU representatives at the meeting insisted to have the presentation beforehand and to have access to it, even before it was presented.

[61] It was later agreed that the CEO would do the presentation and that the union would have a separate meeting on it and get back to the Respondent with submissions and consult going forward. The presentation was done and Ms Mangcu stated that SAMWU should make submissions and get back to the Respondent. Ms Mangcu testified that as a result of this agreement, they expected that the union would consider the presentation and come back with inputs. It was explained to SAMWU that it was not only the finances that posed a problem to the Respondent, it was also the functions that were affected and the union was urged to consider not only the finances but also the functions affected.

[62] The SAMWU chairperson thanked the CEO for the presentation and indicated that the union would need more information on the Respondent's financial position and once they had an understanding of that, they could consult. It is evident from the minutes that the SAMWU representatives asked questions about possible solutions prior to retrenchments, the selection criteria and the new structure. Ms Mangcu explained that the new structure was an approved structure and that the VICs did not fit into the new way of conducting business and the changed nature of the tourism business.

[63] Ms Mangcu testified that the Respondent had to come up with a tourism recovery strategy and as such, a new structure became necessary. The new

structure was informed by the new strategy, and it was approved by the Board in July 2020. The VICs did not fit into the new strategy or structure as the functions they performed would not deliver on the strategy, due to the changed nature of the tourism business. The CEO indicated that the process was one of consultation and if the employees had an alternative that could work with the strategy, they could submit it for consideration.

[64] The meeting of 4 August 2020 concluded with SAMWU's Mr Shinga stating that they had welcomed the presentation, that the questions asked were asked in seeking clarity and that they would go through the presentation and make submissions. Initially, the Respondent wanted the submissions 'by Friday', but after SAMWU indicated that it would be impossible as they needed time to consider the presentation and information and to consult, and after some deliberation, the parties agreed that the union would be afforded an opportunity to consult and that the submissions were to be made in writing, within 10 days after receipt of the documents requested from the Respondent. SAMWU wanted two years' financial statements and other documents. The Respondent agreed to make the documents available, as well as the recovery strategy and minutes of the meeting of 4 August 2020.

[65] Ms Mangcu testified that the Respondent did not refuse to make the documents requested available, but indeed agreed to provide it. The expectation after the meeting of 4 August 2020 was that the documents would be made available and that after 10 days, SAMWU would make written submissions and that the consultation process would move forward.

[66] The very next day, 5 August 2020, the Respondent received a letter from SAMWU's attorneys wherein reference was made to the notice of 21 July 2020 and the meetings of 24 July and 4 August 2020. The Respondent was informed *inter alia* that the Applicants were participating in a predetermined outcome, that the consultations of 24 July and 4 August 2020 were conducted in contravention of section 189 of the LRA, that the Respondent engaged in predetermined outcomes, that the selection process is flawed, that there is no effort to avoid retrenchment and that the engagements were *mala fide* as the retrenchments are a *fait accompli.* The Applicants' attorneys demanded that

the Respondent withdraws the letter of retrenchment, the organogram and the process and that the section 189 process start *de novo.* The Respondent was warned that a failure to withdraw the letter of retrenchment and the retrenchment process by 6 August 2020, would result in an urgent application to interdict the Respondent from proceeding with the retrenchment process.

[67] Ms Mangcu testified that the aforesaid letter was received the day after the meeting where the parties agreed that the Respondent would provide the requested information to SAMWU, which information would be considered and consulted on, whereafter SAMWU's submissions would be made, and the consultation process would proceed. In the letter, the Respondent was threatened to either withdraw the process or face urgent litigation to interdict the process. This letter indicated that SAMWU was pulling out of the consultation process and was no longer participating or cooperating. The letter went against everything the parties had agreed to the day before.

[68] In cross-examination, it was put to Ms Mangcu that the Applicants' case was that the information requested was never provided. Ms Mangcu responded that on 5 August 2020, the Respondent received a letter from the Applicants' attorneys, which was indicative of the fact that SAMWU was not prepared to continue with the consultation process and therefore the information was not provided, not because the Respondent refused to provide it.

[69] On 6 August 2020, Ms Mangcu responded to the Applicant's attorneys and requested an extension to respond by 7 August 2020. On 7 August 2020, the Respondent responded *inter alia* that no letter of retrenchment was issued to anyone, but what was rather issued was a section 189(3) notice, inviting the affected employees to consult and engage meaningfully on issues pertaining to the contemplated retrenchment. The meetings that were held on 24 July and 4 August 2020 were consultation meetings, with the purpose to find ways to avoid retrenchments, that the Respondent was committed to full compliance with section 189 of the LRA, that the outcome of the consultation process was not predetermined and that a number of alternatives were considered. The Respondent did not accede to the demand to withdraw the notice or the organogram and to start the process *de novo.*

[70] The Respondent advised the Applicants' attorneys that the consultation process has not been finalised and that no employee was dismissed for operational reasons. It was recorded that SAMWU, by making the demands made in the letter of 5 August 2020, had moved away from the request for further disclosure of information and timelines and as such, the Respondent would continue to implement alternatives to avoid retrenchment.

[71] The Respondent recorded that SAMWU's lack of cooperation, countless objections in the consultation process, demands for disclosure of information, demand for prolonged timelines, demand for withdrawal of the process and threat of court interdicts were all clear indicators of SAMWU's failure to engage in the consultation process. It was further recorded that the Respondent was concerned about SAMWU's conduct and stated that it should not later claim that the consultation process was inadequate.

[72] The Respondent regarded SAMWU's conduct as a withdrawal from the consultation process and the process was regarded as closed as from 7 August 2020. The Applicants' services were terminated on 12 August 2020 for operational requirements.

[73] It was put to Ms Mangcu in cross-examination that nowhere in the letter of 5 August 2020 did the Applicants' attorneys state that the Applicants did not want to continue with the consultation process and the reality was that the Applicants always wanted to engage in the process and they were prepared to consult. Ms Mangcu disputed this and explained that the union demanded that the Respondent withdrew the notice, the organogram and the process, failing which it was threatened with an urgent interdict application. To Ms Mangcu, this was not the conduct of a party who was willing and prepared to engage and negotiate, but rather of a party who wanted to withdraw from the pending process. The tone of the letter was such that SAMWU was done with the current process and made demands for a different process.

The Applicants' case

[74] Mr Madlala testified that he was employed by the Respondent as a tourism visitor information supervisor and he was retrenched in August 2020.

[75] Mr Madlala confirmed that he had received the notice of 21 July 2020 and that he had attended the meeting on 24 July 2020, with the other Applicants and SAMWU representatives. During the meeting, the CEO welcomed everyone and the union insisted that the Respondent should withdraw the notice of 21 July 2020. The CEO requested an opportunity to consult and after her consultation, she said that the notice would not be withdrawn. SAMWU stood up and said that issues were already decided without the union's input and that the section 189(3) notice had a predetermined outcome as the employer already decided which employees would be retrenched. SAMWU wanted the process to start afresh and after the CEO indicated that the notice would not be withdrawn, SAMWU said that it would not be part of the process.

[76] Mr Madlala testified that the Respondent's decision was pre-determined as the notice already set out the date on which the retrenchment was to be finalised and the selected candidates were already identified. In cross-examination, Mr Madlala conceded that by law, the Respondent was required to indicate in the section 189(3) notice the alternatives considered, the number of employees likely to be affected and their job categories, the proposed selection criteria, the time when the retrenchment is likely to take effect, proposed severance pay, the assistance to employees and the possibility of future employment. He conceded that all these issues were to be indicated by law and the fact that they were addressed in the notice of 21 July 2020, did not mean that the Respondent had made up its mind. He further agreed that the Respondent was required to propose its selection process and to afford the union and employees an opportunity to make submissions and if the submissions or proposals were rejected, to provide reasons to the union or the employees.

[77] Mr Madlala testified that another meeting was held on 4 August 2020 and the CEO was supposed to do a presentation. Before the presentation could be done, SAMWU requested to be provided with the presentation before it was presented. In cross-examination, he conceded that a section 189 retrenchment process was a legal process and that there was nothing in law which required of the Respondent to make the presentation available before it

was presented and that it was merely what the union had preferred and wanted when the meeting commenced. He further conceded that it was rather a matter of difference in approach and preference and that the issue was ultimately resolved on 4 August 2020.

[78] After the CEO presented, SAMWU thanked her for the presentation and there was an opportunity for questions. SAMWU said that the presentation was just used to tick the necessary boxes as a decision was already taken. The decision so taken was the approval of the new structure or organogram, which was approved by the Board, without the employees being informed about it.

[79] In terms of the old structure, all the Applicants were placed in positions. Mr Madlala became aware of the new structure in the meeting of 4 August 2020, when the CEO explained that the new structure related to the Respondent's recovery strategy. Mr Madlala testified that they were shocked to see a new structure and to realise that the employer already took the decision on the new structure without the involvement or input of the employees.

[80] Mr Madlala's version was that, because the CEO came to the meeting with a strategy and organogram which were approved by the Board, she came to the consultation with a predetermined outcome. In cross-examination, he conceded that matters of strategy fall within the ambit of the powers of the Board and that the CEO cannot act or negotiate on matters not approved by the Board.

[81] The presentation was made available to SAMWU and the employees at the end of the meeting. It was agreed at the conclusion of the meeting that the financial statements, balance sheet and minutes of the meeting would be made available to SAMWU, within 10 days of the meeting. SAMWU indicated that they would peruse the presentation and the documents requested and after perusal thereof, they would provide the Respondent with their inputs. The documents were requested by SAMWU to ensure that what the Respondent told them about the financial position, was indeed correct. The CEO emphasized that it was not only the finances that caused a problem, but also the fact that some functions were no longer needed.

[82] Mr Madlala confirmed that there was an agreement at the end of the meeting that the CEO would provide the documents requested, but until today SAMWU had not received the documents and it made it difficult for SAMWU to make submissions without the requested information. SAMWU was supposed to receive the documents within 10 days from the date of the meeting and had a further 10 working days thereafter to make submissions, but the documents were not provided. Mr Madlala conceded that there was no agreement on when exactly the Respondent had to provide the requested documents, but that there was an agreement that it would be provided within 10 days.

[83] Mr Madlala testified that the Applicants were dismissed without any discussion on alternatives to avoid retrenchment. He explained that reducing working hours could have avoided retrenchments, but they were never given the opportunity to put something on the table to avoid retrenchment. He further testified that in the notice a date was provided for the finalisation of the retrenchment process and they were not at ease with that, as it indicated that the Respondent had already taken a decision about the retrenchment.

[84] In cross-examination, he conceded that an agreement was reached on 4 August 2020 to the effect that SAMWU would be provided with the information to consider and to get back to the Respondent to engage further. Mr Madlala further conceded that an invitation was extended to SAMWU to make submissions to the Respondent, as the union did not make any submissions during the meeting, and that on 4 August 2020, there was no retrenchment, but an opportunity to respond to the presentation of Ms Mangcu.

[85] Regarding the letter by SAMWU's attorneys, dated 5 August 2020, Mr Mdladla testified that there was no withdrawal from the retrenchment process. The said letter claimed that the entire retrenchment process was flawed, and that the outcome was predetermined, without SAMWU making any submissions or proposals, as per the agreement of 4 August 2020.

[86] In cross-examination, Mr Madlala conceded that the letter of 5 August 2020 wherein the attorneys on behalf of SAMWU demanded the withdrawal of the

section 189 notice, the organogram and the process was inconsistent with the agreement that was reached on 4 August 2020 in terms of which the union had to make submissions and proposals and further engage with the employer. He further agreed that the approach taken on 5 August 2020 was drawing a red line through the entire process and that SAMWU was not willing to participate in the process until its demands were met.

[87] Mr Madlala received a letter of termination on 12 August 2020.

Analysis

[88] Before I deal with the specific questions this Court has to decide, it is necessary to set out relevant general principles, which find application on the facts before this Court.

[89] Modern businesses and entities are part of a global value chain and do not operate in a static environment. It will be difficult to escape the ripples caused by a shock induced in the global system, desirable or otherwise. It is not unusual for these shocks to leave a mark on the size and shape of a business. As a result, businesses and entities need to reinvent themselves constantly.[19]

[90] The LRA defines a dismissal based on the operational requirements of an employer as one that is based on the economic, technological, structural or similar needs of the employer. In the 'Code of Good Practice on Dismissal Based on Operational Requirements'[20] (Code) a dismissal based on operational requirements is understood to include a dismissal as a result of redundancy due to a restructuring of the workplace. The redundancy of posts consequent to restructuring is regarded as a structural need of the employer.

[91] The Code suggests that an employer's structural needs imply that posts have become redundant as a result of restructuring. An employer has the right to decide how to run its business and the employer does not need the employees' permission or blessing to make such a policy shift to

[19] R Le Roux '*Retrenchment law in South Africa*', (LexisNexis South Africa) pp 1-3.
[20] Published under GN 1517 in GG 20254 of 16 July 1999.

accommodate its operational requirements. An employer does not need to consult on the decision to restructure but where the new structure is advanced as a reason for retrenchment, the affected employees must be consulted.

[92] *In SAA v Bogopa and others* (*Bogopa*)21 the LAC held that where the employer made the decision to declare the employees' positions redundant before there could be consultation with them, it was procedurally wrong.

[93] Whether something was procedurally wrong, is different from the question of whether it was procedurally unfair. In *Bogopa*, the LAC considered a case where the employees' positions were declared redundant before the consultation. It was held that[22]:

> 'There may well be circumstances where the consultation offered after the declaration is even fairer than the consultation to which such employee was entitled before the declaration. In such a case, if the employee rejects an offer of such consultation, and a dismissal follows, the dismissal might not be procedurally unfair… However, where the employee agrees to consult with the employer after the employer has declared his position redundant prior to consultation, the procedural fairness or otherwise of any subsequent dismissal would depend largely on what happens during the consultation process. The initial unfairness which would have taken the form of the declaration of the employee's post or position redundant without prior consultation may be cured if the consultation becomes successful or if its ultimate failure has nothing to do with the initial unfairness but results from the conduct of the employee or his union during the consultation process. Where, for example, the consultation begins but fails to reach finality as a result of blameworthy conduct on the part of the employee or his trade union, the dismissal would be procedurally fair even though the consultation process may have started on a wrong footing. However, there may be a situation where the employer goes through the motions of a consultation process to try and cure the procedural defect, which occurred when it declared the employee's position redundant without prior consultation with the employee. In such a case, the subsequent dismissal may still be procedurally unfair

[21] [2007] 11 BLLR 1065 (LAC).
[22] Ibid at para 44.

because the employer participated in the consultation process with no intention of reaching consensus with the employee or his trade union.'

Was there meaningful consultation?

[94] The first question to be decided is whether there was meaningful consultation as contemplated in section 189(2) of the LRA.

[95] Section 189(1) of the LRA requires an employer to consult with certain parties when it contemplates retrenchment. The employer must invite the relevant parties to consult by way of a notice issued in terms of section 189(3). Section 189(3) enumerates the relevant information that is required to be disclosed to the consulting parties.

[96] Section 189 (2) provides that:

'(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –

(a) appropriate measures –

(i) to avoid the dismissals;

(ii) to minimize the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals

(b) the method for selecting the employees to be dismissed;and

(c) the severance pay for dismissed employees.'

[97] Section 189(2)(a) of the LRA provides that the employer and other consulting parties must consult and engage in a meaningful joint consensus-seeking process to attempt to reach consensus on appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing and to mitigate the adverse effect of the dismissals. SAMWU was invited to consult on these issues.

[98] The main objective of consultation before a final decision on retrenchment is taken must be to avoid retrenchments altogether, alternatively to reduce the number of retrenchments and to mitigate the consequences[23]. The objective is not to ensure that the *status quo* be maintained.

[99] Section 189 of the LRA imposes a number of obligations in peremptory terms, for instance the employer 'must consult', 'must issue a written notice' and that the employer and the other consulting parties 'must' engage in a meaningful joint consensus-seeking process.

[100] Consultation in a retrenchment process must be distinguished from negotiations during a collective bargaining process. Consultation in anticipation of retrenchment calls for a joint problem-solving approach, so that the needs of all the parties can be explored[24]. Section 189(2) places an obligation on both parties to consult. The employer has to invite the other parties to consult, but the consultation process is a two-way street and requires engagement by all the consulting parties, with the aim to reach consensus. There is a duty on the other consulting party to put alternatives on the table and to make an effort to participate in a meaningful way. Adopting an obstructive attitude is not assisting the process.

[101] The employer has a duty to consult, but it has no duty to reach consensus, as is reflected in the wording of section 189(2) that the parties must 'attempt' to reach consensus. Consultation may be terminated by the employer if a deadlock is reached, that would be a point where the employer may proceed unilaterally.

[102] In the pre-trial minute, the parties recorded that meetings were held on 24 July 2020 and 4 August 2020 and that those meetings constituted consultations, as contemplated in section 189(2) of the LRA.

<u>The consultation meeting of 24 July 2020</u>

[23] *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A).
[24] *Karachi v Porter Motor Group* (2000) 21 ILJ 2043 (LC)

[103] The Respondent issued as section 189(3) notice on 21 July 2020, inviting SAMWU and the Applicants to a consultation meeting on 24 July 2020.

[104] It is evident from the evidence adduced that SAMWU and the Applicants did not have a proper understanding of the provisions of section 189(3) of the LRA, at the time when the notice was issued to the Applicants in July 2020. The Respondent was required by law to disclose in the section 189(3) notice *inter alia* the number of employees to be affected and the job categories in which they are employed as well as the time when the dismissals are likely to take effect. SAMWU and the Applicants however interpreted those disclosures in the notice as an indication that the Respondent already took a decision and that the process was predetermined.

[105] The incorrect understanding of the law culminated in an insistence by SAMWU that the process was predetermined and resulted in an unreasonable and untenable demand that the notice issued on 21 July 2020 be withdrawn. The attitude adopted by SAMWU derailed the first consultation meeting that was scheduled for 24 July 2020 and as a result, there was no engagement on 24 July 2020, as contemplated in the LRA.

[106] It is evident that the Respondent was willing and prepared to consult on the issues on 24 July 2020, but SAMWU made it clear that it was not participating in the process, until its demands, that the notice be withdrawn and that the entire process starts afresh, were met.

[107] On 28 July 2020, SAMWU addressed a letter to Ms Mangcu, stating that SAMWU's concern was that the heading of the notice suggested that the Respondent approached the union with a 'predetermined view' and that the only conclusion was that the engagement was not intended to be meaningful as envisaged in section 189 of the LRA. Ms Mangcu responded to SAMWU's letter on 31 July 2020 and clarified that the section 189 notice did not suggest or confirm a decision to retrench and that consultation was necessary and the outcome of the consultation process would lead to the final decision on whether or not retrenchment was unavoidable. SAMWU was informed that meaningful consultation could only be achieved if the union could allow the

Respondent to present the entity's situation and to receive proposals or representations from the union or affected employees and consider same.

[108] The Respondent recorded that it was not clear how the union could find the heading of the notice terms of section 189(3) to suggest a predetermined view or to be a decision to retrench employees, as the heading was aligned with the relevant section of the LRA.

[109] On 30 July 2020, Ms Mangcu addressed a letter to the affected employees and SAMWU regarding a second consultation meeting to be held in terms of section 189. The letter confirmed that the purpose of the consultation was to engage in a process to attempt to reach consensus on *inter alia* appropriate measures to avoid dismissals. It was reiterated that the Respondent believed that consultation was key to finding alternatives to retrenchment and that the Respondent preferred a consensus-driven process as opposed to making a decision. No decision was made and the employees and SAMWU were once again invited to consult on possible alternatives to avoid retrenchment. A meeting was scheduled for 4 August 2020.

[110] SAMWU adopted an obstructive attitude on 24 July 2020 and did not participate in a meaningful way in the consultation process. The Respondent, on the other hand, wanted to consult, but as alluded to, the consultation process is a two-way street and not much can be achieved if one of the consulting parties is not prepared to consult.

<u>The consultation meeting of 4 August 2020</u>

[111] A second consultation meeting took place on 4 August 2020, and once again the proceedings were disrupted by objections raised and demands made by SAMWU. However, at some stage, it was agreed that the CEO would do the presentation, that the union would have a separate meeting on it and get back to the Respondent with submissions and proposals and that the parties would consult going forward.

[112] The meeting of 4 August 2020 concluded with SAMWU's Mr Shinga stating that they had welcomed the presentation, that the questions asked were

asked in seeking clarity and that they would go through the presentation and make submissions. The parties agreed that the union would be afforded an opportunity to consult and that the submissions were to be made in writing, within 10 days after receipt of the documents requested from the Respondent, which the Respondent agreed to make available.

[113] It is evident from the evidence that on 4 August 2020, the Respondent made a presentation to SAMWU and the Applicants, that there was an agreement that the requested documents would be made available, that the union would have an opportunity to study those and consult on it, before submissions and proposals would be made to the Respondent. No proposals or submissions were made by SAMWU on 4 August 2020, but the parties had a firm understanding that it would be done within the timeframes agreed to between the parties.

[114] The expectation after the meeting of 4 August 2020 was that the documents would be made available and that after 10 days, SAMWU would make written submissions and that the consultation process would move forward.

[115] Ms Mangcu testified that the aforesaid letter indicated that SAMWU was pulling out of the consultation process and was no longer participating or cooperating in the process, as the demands were that the notice, the organogram and the process be set aside, failing which SAMWU would seek an interdict to halt the process. The letter went against everything the parties had agreed to the day before.

[116] In cross-examination, Mr Madlala conceded that the letter of 5 August 2020 was inconsistent with the agreement that was reached on 4 August 2020 and that it was effectively drawing a red line through the entire process and that SAMWU was not willing to participate in the process until its demands were met.

[117] The Respondent in a letter to the attorneys, recorded that SAMWU's lack of cooperation, countless objections in the consultation process, demands for disclosure of information, demand for prolonged timelines, demand for withdrawal of the process and threat of a court interdict were all clear

indicators of SAMWU's failure to engage in the consultation process. It was further recorded that the Respondent was concerned about SAMWU's conduct and stated that it should not later claim that the consultation process was inadequate. The Respondent regarded SAMWU's conduct as a withdrawal from the consultation process and the process was regarded as closed as from 7 August 2020.

[118] In my view, the letter of 5 August 2020, demanding a withdrawal of the notice, the organogram and the entire process, flies in the face of the agreement which the parties had reached just the day before and was not indicative of an intention to consult any further, but was rather drawing a line in the sand and telling the employer to accede to the Applicants' demands or face litigation and a possible interdict.

[119] There was no evidence placed before this Court to support the Applicants' case that the Respondent approached the process with a predetermined outcome or that a decision was already reached and that they were faced with a *fait accompli.* In *National Education Health and Allied Workers Union and others v University of Pretoria,*[25] the LAC considered a matter where the employees challenged the fairness of their dismissals *inter alia* on the ground that their union was faced with a *fait accompli* by the time the consultation in terms of section 189 of the LRA commenced. were held that:

> '[51] Section 189 of the Act does envisage that the employer may come to the first consultation table with a proposal that can be said to be not only his preferred proposal but, indeed, one that he strongly views as the solution to the problem. The obligation placed upon the employer to consult only arises in terms of s 189(1) of the Act when a situation has been reached where he "contemplates dismissing one or more employees" for operational requirements. In other words, before he reaches such stage, he is under no obligation to consult and is within his rights to try and deal with the problem on his own with such assistance and advice as he may in his discretion feel he needs which need not be that of the consulting parties envisaged in s 189(1). This is because the employer is entitled to deal with the problems of his business without consulting the parties envisaged in s 189(1) as long as

[25] (2006) 27 ILJ 117 (LAC) at paras 51 – 53.

he is not contemplating the dismissal of any employees for operational requirements. It would be natural for him to form a view or even a strong view about one or other possible solution to the problem out of all those that he might have applied his mind to while trying to solve the problem before contemplating the dismissal. Section 189(1)(b), (c),(3)(c) and (g) refer to "employees likely to be affected." The frequent reference in those provisions to "employees likely to be affected" is an indication that it is permissible for the employer to have already grappled with the problem to the extent that he has in mind "employees likely to be affected by the proposed dismissal."

[52] Section 189(3) requires the employer to disclose the reason for the proposed dismissals, the alternatives that he considered *before* proposing the dismissals and the reasons for rejecting each one of those alternatives, the number of employees likely to be affected and the categories in which they are employed, the time when or the period during which the dismissals are likely to take effect. The content of what s 189(3) requires the employer to disclose suggests quite clearly that the employer is allowed to initiate the consultation process after he has done a lot of work to try and resolve the problem on his own. He is permitted to have done so much work that –

a) he is in a position to propose dismissal because in his view there are no other acceptable alternatives that can address the problem satisfactorily without dismissals.

b) he has reasons for proposing dismissals as opposed to other alternatives.

c) before proposing the dismissal, he has considered other alternatives and has rejected them.

d) he has reasons for rejecting other alternatives and is ready to articulate them.

Section 189 contemplates that, when the employer initiates the s 189 consultation process, he contemplates the dismissal of one or more of his employees for operational requirements; that is why already in paragraph (b), (c) and (d) of sec 189(1) there are references to "proposed dismissals". So what s 189(1) contemplates is that the employer is already proposing a dismissal or dismissals when he initiates the s 189 consultation process.

[53] The fact that s 189(3)(b) contemplates that, when the employer initiates the consultation process in terms of s 189(1) of the Act, he has already considered alternatives to dismissals which he has rejected for certain reasons and requires him to disclose the reasons why he rejected such alternatives does not mean that such alternatives cannot be revisited in the consultation process. Of course, they can be because the other consulting party or parties may view them as potentially viable solutions. Obviously, the employer may have strong views on such alternatives because he will have had an opportunity to consider them already and will have already rejected them before. For the employer to pretend as if he has no views on such alternatives would be dishonest because he will already have formed some or other view on them. However, what will be required is that the employer should consider honestly and properly whatever the other consulting party may have to say on such alternatives and change its mind or view on them if the other consulting party comes up with sufficiently persuasive arguments for the employer to change. Before considering such alternatives, the employer may have found it necessary to launch some or other research or investigation into the viability of such alternatives and may, therefore, seem to have strong views on them because it has considered them properly and thoroughly.'

[120] The LAC concluded that[26]:

'In the light of the above I conclude that there is nothing wrong with an employer coming to the consultation table with a predisposition towards a particular method of solving the problem which has given rise to the contemplation of dismissal of employees for operational requirements. What is critical is that the employer should nevertheless be open to change its mind if persuasive argument is presented to it that that method is wrong or is not the best or that there is or may be another one that can address the problem either equally well or even in a better way. He should engage in a joint problem-solving exercise with the other consulting party or parties.'

[121] In short, the LAC found that an employer may have strong views on alternatives because the employer would have had an opportunity to consider and reject them already and for the employer to pretend as if it has no views

[26] Ibid at para 55.

on such alternatives would be dishonest, because it would already have formed some or other view on them. However, what will be required is that the employer should consider honestly and properly whatever the other consulting party may have to say on such alternatives and change its mind or view on them if the other consulting party comes up with sufficiently persuasive arguments for the employer to change.

[122] In *Fletcher v Elna Sewing Machine Centres (Pty) Ltd,*[27] a similar sentiment was expressed:

> 'In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and *bona fide* reason to reorganize, restructure or in some other manner, redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so. What I consider to be the legitimate purpose of consultation with employees who might thereby be affected therefore, is not to assist them in making up their minds, but to determine, by way of consensus, whether there is any practical and viable basis for changing them. There is, to my mind, nothing unfair in that concept. In its broad context, it is a realistic and prevailing phenomenon of commercial life.'

[123] It is evident from the evidence that by 4 August 2020, the Respondent had adopted a new structure and organogram, as the VIC function and positions were no longer needed. The Respondent attempted to consult with the Applicants and SAMWU on alternatives and measures to avoid dismissal. As was held in *Bogopa,* where a position was declared redundant prior to consultation, the procedural fairness or otherwise of any subsequent dismissal would depend largely on what happens during the consultation process. The initial unfairness which would have taken the form of the declaration of the employee's post or position redundant without prior consultation may be cured if the consultation becomes successful or if its ultimate failure has nothing to do with the initial unfairness but results from the conduct of the employee or his union during the consultation process. Where, for example, the consultation begins but fails to reach finality as a result of

[27] (2000) 21 ILJ 603 (LC) at para 39.

blameworthy conduct on the part of the employee or his trade union, the dismissal would be procedurally fair even though the consultation process may have started on a wrong footing.

[124] In my view, it is clear from the evidence that SAMWU had an incorrect understanding of the law and the process, made unrealistic demands and was instrumental in derailing the process and preventing consultation on the issues it was required to consult on.

[125] At no point did SAMWU or the Applicants suggest any alternatives or provide any proposals on how to avoid or minimise dismissals. SAMWU was stuck on its view that the Respondent's decision was already taken and that the process was predetermined and that because it demanded so, for the entire process to start *de novo.* That was the true reason for SAMWU's failure to engage with the Respondent in a meaningful joint consensus-seeking process.

[126] SAMWU was invited more than once to engage in a section 189 process and to make representations. In fact, SAMWU had a duty to engage and participate in the section 189 process and the Respondent made all reasonable attempts to engage the Applicants in consultation, but SAMWU failed to do so.

[127] Consultation may be terminated by the employer if a deadlock is reached and in my view, that was the position which was clearly conveyed in the wording, tone and content of SAMWU's attorneys' letter of 5 August 2020.

[128] The Respondent had indeed reached the point where it could have proceeded unilaterally. The conduct displayed by SAMWU was not the conduct of a party who was willing and prepared to engage and negotiate, but rather of a party who was not interested to comply with the agreement of 4 June 2020, but who wanted to dictate a different process on its own terms.

[129] SAMWU's incorrect understanding of the law and the applicable principles informed the approach that was adopted, which in turn motivated SAMWU not to participate in the consultation process.

[130] SAMWU did not engage in a meaningful joint consensus-seeking process, despite the fact that it was not only invited to do so on more than one occasion, with the intention to have further engagement, after the information was provided and SAMWU had submitted its submissions and proposals, but it also had an obligation to consult.

[131] SAMWU and the representatives who acted on behalf of the Applicants have a lot to answer as the dismissal of the Applicants could have been avoided had they acted differently, reasonably and responsibly with the interest of the workers in mind. This cost the individual Applicants dearly and left them unemployed. Whether there were alternatives available and whether the Applicants' dismissals could have been avoided, are matters that should have been consulted on, and are matters that could now only be speculated on.

Was there disclosure of information?

[132] The second challenge to procedural unfairness is that the Respondent failed or refused to accede to the request to disclose relevant information, as contemplated in section 189(4) of the LRA.

[133] The Applicants' case is that at the meeting of 4 August 2020, SAMWU requested that relevant information be disclosed, which the Respondent conceded to, but such information was not disclosed.

[134] Ms Mangcu testified that the Respondent did not refuse to make the documents requested available, but indeed agreed to provide it. The expectation after the meeting of 4 August 2020 was that the documents would be made available and that after 10 days, SAMWU would make written submissions and that the consultation process would move forward.

[135] Mr Madlala also testified that the Respondent agreed to make the requested information available.

[136] It is evident from the facts placed before this Court that the Respondent did not refuse to make the requested information available, but indeed agreed to make it available. It is further common cause that the information was not

made available, notwithstanding an agreement and undertaking from the Respondent to make it available.

[137] Ms Mangcu explained that the Respondent agreed to make the information available on 4 August 2020, but on 5 August 2020, the Respondent received a letter from the Applicants' attorneys, which was indicative of the fact that SAMWU was not prepared to continue with the consultation process and therefore the information was not provided, not because the Respondent refused to provide it.

[138] The Respondent, after receiving the aforesaid letter, advised the Applicants' attorneys that SAMWU, by making the demands made in the letter of 5 August 2020, had moved away from the request for further disclosure of information and timelines.

[139] There is no merit in this attack on the procedural fairness of the Applicants' dismissals.

[140] Instead of affording the Respondent an opportunity to provide the requested documents, the Applicants' attorneys addressed a letter to the Respondent on the very next day, 5 August 2020, wherein the Respondent was informed *inter alia* that the Applicants were participating in a predetermined outcome, that the consultations of 24 July and 4 August 2020 were conducted in contravention of section 189 of the LRA, that the Respondent engaged in predetermined outcomes, that the selection process is flawed, that there is no effort to avoid retrenchment and that the engagements were *mala fide* as the retrenchments are *fait accompli.* The Applicants' attorneys demanded that the Respondent withdraws the letter of retrenchment, the organogram and the process and that the section 189 process starts *de novo.* The Respondent was warned that a failure to withdraw the letter of retrenchment and the retrenchment process by 6 August 2020, would result in an urgent application interdicting the Respondent from proceeding with the retrenchment process.

[141] Even Mr Madlala's conceded that the letter of 5 August 2020 was inconsistent with the agreement that was reached on 4 August 2020 and that it was

effectively drawing a red line through the entire process and that SAMWU was not willing to participate in the process until its demands were met.

[142] Under those circumstances, the agreement to provide the information was overtaken by subsequent events, being a demand that the section 189 notice, the organogram and the process be withdrawn, or else urgent litigation would follow. SAMWU cannot under those circumstances claim that they were still entitled to the information, which would have been provided for the sole purpose of further engagement and consultation.

[143] The Applicants were not interested in consulting on the issues prescribed by the LRA, until and unless SAMWU's unreasonable and misplaced demands were met, notwithstanding the Respondent's efforts to engage them in a joint consensus-seeking process.

[144] This is a case where SAMWU steered the vessel in the wrong direction, despite pleas and efforts from the Respondent for them to stay on course, and they cannot come to Court to lament the fact that they have reached a destination which could have been avoided and where their members are left destitute.

[145] Considering the applicable principles, authorities and the evidence adduced this Court cannot find that the Applicants' dismissal was procedurally unfair.

Costs

[146] Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness.

[147] This Court has a broad discretion to make orders for costs.

[148] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and* others,[28] it was emphasized that:

[28] (2012) 33 ILJ 2117 (LC) at para 176.

> '……unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

[149] Mr Xulu for the Applicant submitted that costs should follow the result.

[150] Mr Luthuli for the Respondent too submitted that cost should follow the result. There is no longer an employer - employee relationship between the parties.

[151] In *Zungu v Premier of Province of Kwazulu-Natal and others,*[29] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[152] This is a case where I have to strike a balance. The Respondent was compelled to engage in litigation, which will be funded from the public purse, in circumstances where SAMWU's attitude and unwillingness to consult and engage the Respondent at a time it was required by law to engage and consult, was the cause of the complaints they had raised before this Court. The unfair conduct of the SAMWU caused the Applicants suffering and hardship and to approach this Court and blame the Respondent for the consequences of SAMWU's conduct, is disingenuous and warrants a cost order. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

[153] The Applicants were unsuccessful in their claim and I can see no reason why the taxpayers should pay for this litigation or why I should deviate from the

[29] (2018) 39 ILJ 523 (CC).

general rule that the cost should follow the result, more so where no submissions were made to justify a deviation.

[154] In the premises, I make the following order:

Order

1. The Applicant's case is dismissed;

2. SAMWU is ordered to pay the Respondent's taxed costs on a scale as between party and party.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate S Xulu

Instructed by: M Dlamini Attorneys

For the Respondent: Advocate S Luthuli

Instructed by: Mapholoba Gwabini Attorneys