THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 639 / 20

In the matter between:

LESEDI KELATWANG **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

LINDOKHULE DLAMINI *N.O.* (AS ARBITRATOR) **Second Respondent**

SYGNIA SECURITIES (PTY) LTD **Third Respondent**

Heard: **22 November 2022**

Delivered: **24 May 2023**

Summary: **Review application – review of proceedings, decisions and award of arbitrator – s 145 of LRA considered – review test considered – entails determination of conduct of arbitrator, gross irregularities and reasonable outcome**

Dismissal – operational requirements – s 189 of the LRA considered – proper and fair commercial rationale for retrenchment shown on evidence – employee's actual position rendered redundant due to failure of new business unit – proper assessment of evidence by arbitrator in this regard – no basis to interfere with arbitrator's conclusions on rationale for retrenchment being fair

Dismissal – operational requirements – reason for retrenchment – employee alleging ulterior motive for retrenchment – no such ulterior motive shown to exist – dismissal of employee properly based on commercial reasons as contemplated by s 189 – no basis to interfere with finding of arbitrator in this regard

Dismissal – s 189 – alternatives considered – no viable alternatives to retrenchment – employee not qualifying for possible available position due to lack of qualification and remuneration structure – employee actually accepting no viable alternative existed – decision to retrench employee fair

Dismissal – operational requirements – procedural fairness considered – object of consultation considered – employer entitled to adopt a predisposition to a resolution – employer must just be open to persuasion and genuinely consult on issue – evidence in this case shows this objective was complied with – retrenchment procedurally fair

Review of award – conclusion of arbitrator reasonable – arbitration award upheld

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JUDGMENT

SNYMAN, AJ

Introduction

[1] I must confess that it is not often that one finds a retrenchment dispute that is arbitrated in the Commission for Conciliation, Mediation and Arbitration (CCMA) coming up for review in this Court, especially where it involves senior and high earning employees. This is however what happened *in casu*. The applicant was dismissed by the third respondent for operational requirements effective 31 May 2019. The applicant pursued an unfair dismissal dispute to the first respondent, being the CCMA, which dispute ultimately ended up before the second respondent as CCMA arbitrator for arbitration. The second respondent found against the applicant, in that the second respondent found that the applicant's dismissal by the third respondent for operational requirements was both substantively and procedurally fair. Dissatisfied with

this outcome, the applicant has brought an application to review and set aside this arbitration award, which application has been brought in terms of section 145 of the Labour Relations Act (LRA)[1].

[2] The arbitration award of the second respondent is dated 4 March 2020. There is unfortunately no indication in the applicant's review application as to when he actually received this arbitration award, and as such, the date when the applicant became aware of the award must be taken to be 4 March 2020. The original notice of motion in the applicant's review application is dated 15 April 2020, but it did not contain a case number, and appears not to have been filed at that time in the Labour Court.

[3] In terms of a service affidavit filed by the applicant as contained in the pleadings bundle, it is explained that the review application without the commissioned founding affidavit and without a case number was served on the respondent parties, on 15 April 2020. It is further explained that due to the COVID-19 restrictions at the time,[2] it was not possible to have the affidavit commissioned. The commissioned founding affidavit was then later served on the third respondent on 18 May 2020. The complete review application itself with a case number was only served and filed on 21 May 2020.

[4] In terms of section 145(1) of the LRA, a review application seeking to challenge an arbitration award by an arbitrator of the CCMA must be brought within 6(six) weeks after the date the applicant became aware of the award. *In casu,* and applying the date of 4 March 2020, this time limit expired on 16 April 2020. It is clear that the applicant, in at least an attempted compliance with this time limit, served an incomplete review application on the respondents on 15 April 2020, which is prior to the expiry of the time limit. But the fact remains that the complete and proper review application, which was only filed in Court on 21 May 2020, is more than a month late.

[5] The applicant has not applied for condonation. Ordinarily, I would have no hesitation in finding that the applicant be non-suited for want of jurisdiction of this Court in the absence of such a condonation application.[3] However, I

[1] Act 66 of 1995 (as amended).
[2] This was still within the initial hard lockdown restrictions placed on the entire county until end April 2020.

cannot simply ignore the prevailing difficulties caused by the hard COVID-19 lockdown restrictions at the time. It is a fact that at this time, there was no access to the Labour Court. It is also correct that in this period, the Labour Court did not open new files and issue new case numbers for review applications. I accept that it is impossible to have filed the review application in the Labour Court in April 2020. But at least the applicant could serve what he had, which he did. The third respondent has not taken any issue with the late filing of the review application, and in my view properly and fairly so.

[6] In my view, and even thought the applicant did not formally apply for condonation, it would simply not be appropriate, in the truly unique circumstances of this case, to non-suit the applicant as a result. One must be alive to the realities of an exceptional and unique occurrence, over which no one had control. As said in *Adams v National Bargaining Council for the Road Freight and Logistics Industry and Others*[4]:

> 'Although it is highly desirable for good order that rules be complied with on their own terms, the function of the rule is the paramount consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way. Mechanical thinking is anathema to our law: cessante ratione legis cessat et ipsa lex. The objectives of the Labour Relations Act 66 of 1995 inform the context of interpretation and its penumbra of pragmatism. Our law is not an ass.'

[7] I am not saying that an applicant that has failed to bring its review application in time is excused from applying for condonation. I reiterate that it remains an imperative that such an applicant must apply for condonation in order to get any assistance from this Court, and what is said above cannot be taken to constitute any precedent to the contrary. There may however be truly exceptional instances where the objectives of the LRA and the right to a hearing cry out for assistance. The current matter is such a case.

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[3] As held in *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others* (2015) 36 ILJ 1841 (LAC) at para 18: *'… where the steps constitutes a jurisdictional step, a time-limit, and the party is out of time then, in the absence of an application for condonation, a court cannot come to the party's assistance. …'*.

[4] (2020) 41 ILJ 2051 (LAC) at para 16.

[8] I will thus now proceed to decide the applicant's review application on the merits, by first setting out the relevant background facts in this matter.

The relevant background

[9] The third respondent is part of a group of companies called Sygnia Group (the Group). The Group does business in the financial services sector. Where it comes to the third respondent itself, it was established as the stockbroking business in the Group, and had the main function of managing assets and / or funds for clients which consisted mainly of pension funds and individuals. What the third respondent did was to give the Group an edge, in that it was able to provide stock broking services to clients at a much lower cost, as it was done effectively in house and external stockbrokers did not have to be used. The entire business of the third respondent consisted of five full-time individual employees, of which four were traders.

[10] In 2018, it was reported to the Chief Executive Officer of the Group, Magdalena Wierzycka (Wierzycka), by the Chief Executive Officer of the third respondent, Max Koep (Koep) that the Head: Trading of the third respondent, Malcolm Moller (Moller), was due to retire in April 2019, and needed to be replaced.

[11] In seeking a replacement for Moller, the applicant came to be interviewed by Koep. But in this interview, matters took a different turn. The applicant and Koep ended up discussing an alternative form of trading called Index Arbitrage (IA). In his interview with Koep, and later also in a further interview with Wierzycka, the applicant indicated that he had particular expertise in IA, and this could be a highly profitable business for the third respondent. As this point, the third respondent had not even contemplated an IA trading business. According to the applicant, and at his previous employer Credit Suisse, he earned significant revenue through IA trading. The applicant explained that he would be able to replicate this source of revenue at the third respondent, provided that the third respondent operated a unit trust with an excess of R1 billion in client funds invested in it, which funds would need to be procured / utilized to establish the revenue stream. Based on the promises made by the applicant with regard to securing funds, and establishing the IA trading

business with resulting revenue, the third respondent saw this as an opportunity for a new business venture headed up by the applicant. It appears that this was the most important reason for the third respondent ultimately offering employment to the applicant.

[12] To put matters in perspective, the applicant stated that he generated R100 million in revenue at his previous employer (Credit Suisse) and was paid a salary of around R4.5 million per annum by it. In this context, and with all the above considered, the applicant was then offered employment at the third respondent, at a salary of R3 million per annum, plus a 25% profit share. This made him the third highest paid employee in the Group. The simple reason for this offer at such a high salary was because of the promises made by the applicant with regard to the IA trading business and related revenue he would establish for the third respondent. By comparison, Moller, who had run the trading desk at the third respondent as Head: Trading for some 40 years, was earning a salary of R1.5 million per annum.

[13] According to the third respondent, the primary reason for employing the applicant and the focus of his employment would be to establish the IA trading business as a new lucrative source of revenue at the third respondent. That was why he was being paid the salary that he was. He was not employed to simply replace Moller when he retired in April 2019, and if that was so, he would not have been offered close to the salary he was employed at.

[14] It is true that in terms of his employment contract signed on 16 May 2018, the applicant was employed in the capacity of Head: Trading. He commenced employment on 1 August 2018 pursuant to that contract. However, and before even starting employment at the third respondent, the applicant sent an e-mail to Wierzycka on 22 May 2018, stating that *'… The key priority is to get the delta 1 business up and running …*', and he then set out in detail what this business entailed. The IA trading business was also referred to as 'Delta 1' in the third respondent. After the applicant started on 1 August 2018, he did not take up any responsibilities of or even got to know the position of Head: Trading. Instead it was expected that he establish the IA trading business, and he then launched into the same. It is also clear from the documentary evidence that the applicant was responsible to make the presentations on

'Delta 1' in management / report meetings, throughout. He was not responsible for ordinary trading.

[15] However, and in October 2018, it became apparent that there was a fundamental misunderstanding between the applicant on the one hand, and Wierzycka and Koep on the other, about the nature of the R1 billion unit trust requirement to make the IA business workable and viable. What Wierzycka and Koep understood from the applicant was that the R1 billion unit trust could be in the form of a unit trust product in existence at the third respondent, thus being the R1 billion (and more) in client funds that was being managed by the third respondent. The truth of the matter however was that R1 billion of unencumbered working capital belonging to the third respondent itself was required. The reality was that the third respondent did not meet this requirement, which was a material setback.

[16] Having come to this realization, the next step would be for the third respondent to try and source such working capital. This entailed the Group then expending considerable efforts as from October 2018 in trying to secure such capital. Ultimately however, the third respondent was not able to secure the capital needed, and could only secure some R30 million, of which R20 million was a short-term loan. This was insufficient to make the IA trading business viable.

[17] In an e-mail dated 31 December 2018, the applicant sought to set out his strategy for finally establishing and growing the IA trading business in 2019. He stated that '*… I think we were successful in demonstrating the natural opportunity set and the basis of how an index arb book works …*'. He also stated that preceding quarter of operating the business gave him the opportunity to tests systems and flows in this context. He then indicated what he would need for the business in 2019.

[18] However, the reality confronting the third respondent with regard to the IA trading business was the subject matter of a strategy meeting of the third respondent in January 2019. In this meeting, Koep conveyed that it was impossible for the third respondent to secure the capital required to render the IA trading business viable. He indicated that at the very least, R100 million was needed to get the business off the ground, but only R30 million could be raised. But not only that, further difficulties which the third respondent did not

anticipate had come to the fore. In order to conduct the IA trading business, the third respondent would either have to acquire a new risk management system, called FIS, which was extremely costly, or would have to engage a specialist software developer to upgrade the third respondent's existing risk management system at a cost of some R1.5 million, which upgrade would take about a year to complete. It was also apparent that in the preceding four months of trading, the IA trading business made a loss of R2 162 270.00, and a further loss of more than R2.4 million was expected in the immediate future.

[19] In the course of January 2019, the applicant continued to advance the capital needs of the IA trading business and how this could be obtained, to Koep and Wierzycka. The applicant continued to operate only the IA trading business in January and February 2019 and continued to report on the same. He did very little other trading.

[20] By middle February 2019, it was apparent to Wierzycka and Koep that the IA trading business was turning out not to be a viable proposition, and pointed this out to the applicant along with the reasons why they believed it was not the case. The applicant did not take kindly to these views, and made certain negative assertions about the third respondent's business, which is simply not important to consider in deciding this matter. The applicant was however asked to make concrete proposals as to the way forward. The applicant suggested that he remain employed in the third respondent with the task to grow the business, however he would need to be employed at the CEO and the name of the business would have to be changed. Wierzycka considered this proposal, and explored it with Koep. E-mail communication between Koep and Wierzycka on 25 February 2019 intimated that appointing the applicant as CEO may be viable, but a name change would not be. It was however still unclear how this would resolve the problem with the requirements needed for a viable IA trading business.

[21] Nonetheless, all options as to the way forward for the entire business of the third respondent was tabled for discussion at a strategy meeting held in Cape Town on 12 March 2019. This would include as an agenda item the IA trading business. The applicant was actually involved in the preparation for this strategy meeting, but did not attend it himself. In the meeting, Koep conducted

a presentation, which showed that the IA trading business was loss-making, would continue to be loss-making in the foreseeable future, and suggested it be abandoned. Wierzycka however adopted the view that the IA trading business should be given one last chance over a number of weeks to see if revenue at least increased. It may be stated that the decision of Wierzycka was against the recommendations of the Group investment team.

[22] Unfortunately, the demise of the IA trading business came quicker than the indulgence Wierzycka was prepared to afford it. On 9 April 2019, the third respondent's newly appointed compliance and risk management officer (he was appointed at the end of March 2019), Brett Landman (Landman), flew to Cape Town to urgently meet Wierzycka. In this meeting, he informed Wierzycka that as a result of IA trades, the third respondent's trading costs had tripled. He also reported that as a result of leveraging, the R30 million raised and assigned to the IA trading business was creating exposure in the market of up to R600 million and that on certain days the third respondent could not even buy shares on the JSE because funds were exhausted by IA trading. He lastly reported that the IA trading business was being conducted without an adequate risk management system, exposing the third respondent to significant risk. Landman actually recommended that from a risk management perspective, the IA trading business should be closed immediately.

[23] On 9 April 2019, Wierzycka called the investment team together, and the entire IA trading business was again discussed, with inputs provided by Landman. It was then resolved that the IA trading business needed to be closed with immediate effect. Wierzycka informed Koep accordingly, and the operating of the IA trading business was ceased with immediate effect.

[24] As to where this left the applicant, it obviously meant that the position for which he was employed, being the establishment and conducting of the IA trading business, had become redundant. However, Wierzycka did not envisage that the applicant would be retrenched, as he could possibly still take up the position of Head: Trading when Moller retired in April 2019. But then another difficulty was discovered. On 10 April 2019, Koep informed Wierzycka that the applicant did not possess the necessary JSE qualifications to take up

the position of Head: Trading as it existed in the third respondent, of which fact he said he was until then unaware.

[25] In a stock broking undertaking conducting business on the JSE, it is necessary, by way of JSE regulation, for the business to have what is called a '*stockbroker in control*'. It is true that the person who occupies a position like Head: Trading does not have to be the stockbroker in control, but then there must still be another employee that is appointed as the stockbroker in control. In the third respondent, Moller was both the Head: Trading and the stockbroker in control. In other words, the position of Head: Trading in the third respondent also encompassed the position of stockbroker in control. In order for the applicant to be the stockbroker in control, he would need to pass six regulatory exams at the JSE, and this would take at least a year.

[26] In a very small stock broking business like the third respondent, it would simply not be financially viable nor feasible to separate the positions of Head: Trading and stockbroker in control. It did not make financial sense for the third respondent to employ a separate stockbroker in control, whilst at the same time keeping the applicant employed as Head: Trading at the highest salary in the Group. In short, and in the third respondent, for proper operational and financial reasons, the position of Head: Trading and stockbroker in control was one and the same position. The applicant did not qualify for this position, which would in any event be at a much lesser salary.

[27] The only possible other option in the third respondent was for the applicant to remain employed as an ordinary trader. However, no trader in the third respondent earned R3 million per annum. This extremely high salary was simply completely out of kilter with what traders were being paid. The highest paid trader earned less than half to what the applicant was earning.

[28] In the end, the third respondent was left with the following operational challenges. The applicant had been employed at an extremely high salary with the view to establish and then operate the IA trading business. This business however turned out not to be viable and needed to be closed. This left this position the applicant was employed for as being redundant. As to the applicant taking over as Head: Trading from Moller at the end of April 2019, the applicant however did not meet the requisite qualifications for that position,

as the position was coupled with the position of stockbroker in control. And finally, the salary earned by the applicant was not commensurate to the position of Head: Trading. As a result, Wierzycka then envisaged that if may to necessary to retrench the applicant.

[29] Wierzycka met with the applicant on 10 April 2019. In this meeting the applicant was presented with a notice as contemplated by section 189(3) of the LRA. In terms of this notice, it was stated that the applicant was appointed as Head: Trading which position entailed him trading stocks and futures to make profit by deploying the third respondent's own capital and by employing the 'index arbitrage' strategy, and that this formed the basis of his high remuneration. It was recorded in the notice that the IA trading business incurred losses as a result of a cost heavy structure and a lack of income, and there was no scope for the business to become profitable, considering the capital requirements, costs, and risks associated with the business. It was indicated that the in principle decision was to close the IA trading business.

[30] Further in the section 189(3) notice, it was indicated that the closure of the IA trading business would render the role effectively performed by the applicant in the third respondent's business to be redundant, considering he was an index arbitrage specialist. The notice dealt with the possibility of the applicant simply assisting with ordinary trading but recorded that this would not be cost effective and unprofitable. According to the third respondent, it did not foresee viable alternatives to retrenchment at this stage, considering the applicant's particular expertise, experience and high salary cost.

[31] In the consultation on 10 April 2019, the applicant took issue with what he termed the sudden decision to close the IA trading business, and indicated that with a large capital investment, it could be profitable. It was explained to him by Wierzycka that the third respondent simply did not have the capital and it was not allowed to use client funds. The applicant was asked to put any specific questions he may have in writing, and the next consultation was scheduled for 12 April 2019.

[32] What is apparent from all the consultations that later ensued, the applicant spent quite some time and effort in debating why the IA trading business should not be closed. In the first consultation on 12 April 2019, the applicant

disputed the business rationale of closing the IA trading business. He suggested that more effort should be spent in raising capital. He became quite agitated in the consultation when confronted with the reality that as matters stood, the IA trading business was not viable or profitable. In the end, and to diffuse the tension, the consultation was adjourned to 16 April 2019, and the applicant was once again asked to put all his questions and alternatives in writing before the next consultation.

[33] The applicant then indeed sent written questions to the third respondent on 15 April 2019. These questions all related to what appeared to be the continued disagreement by the applicant that the IA trading business was not profitable and viable. He complained about not being part of the strategy session on 12 March 2019, despite him being the 'head of the project', referring to the IA trading business. Ironically, and as the IA trading expert, the applicant would be the one in the best position to answer many of the questions he posed to the third respondent. None of what the applicant had to say could legitimately contradict the operational decision by the third respondent that the IA trading business was not financially viable to it as a business, and simply created too much risk for the ordinary trading business of the third respondent, which was a successful business.

[34] Ironically, the applicant's own questions indicate that he appreciated that as matters stook, the IA trading business was not profitable. What the applicant however did was to blame the third respondent for the predicament, in that he suggested the third respondent did not do enough to raise funding and attend to client concerns. He suggested the third respondent should take responsibility for what happened. But obviously whose fault it may be still did not change the reality. As to suggestions on alternatives to retrenchment, the applicant suggested that the third respondent agree to what the applicant called 'a solid transformation strategy' and that he be allowed a further opportunity to raise capital. It may be said that the transformation strategy proposed by the applicant entailed that Wierzycka give him 45% of the business, give another black employee Teboho Mosoahle (Mosoahle) 3% of the business, and then give 3% to the empowerment trust operated by the third respondent, which would make the business 51% back owned and therefore it could attract capital.

[35] Wierzycka, on 16 April 2019, answered each of the applicant's questions in writing. It was comprehensively set out, in this answer, why the third respondent considered that to continue with the IA trading business was not a viable proposition for it. These reasons were, in short, that it was not likely that the third respondent would be able to raise sufficient capital, the costs associated with conducting that business was too high, the third respondent not having an adequate risk management system for such a business, and that overall considered the business itself was simply too risky for the third respondent. As to the alternatives proposed by the applicant, Wierzycka indicated that she was not willing to effectively give 51% of the business away to the applicant and make him the CEO, which is quite understandable, as it can never be suggested that the third respondent be compelled to alienate part of its business in essence for free, with the hope that it could generate capital, just to try and save a new business venture where its traditional trading business was successful without these measures. Wierzycka in any event explained that any BEE transaction could only be done at Group level, and not within the third respondent as a 100% Group subsidiary.

[36] The next consultation with the applicant was contemplated for 16 April 2019, but because of reasons that need not concern this judgment, the consultation on 16 April 2019 was aborted, and reconvened for 23 April 2019. On 18 April 2019, Wierzycka sent an e-mail to the applicant, indicating that the consultations on the issue of the closure of the IA trading business had been concluded, and that the decision to close this business was now final. She also indicated in this e-mail that in the next consultation, it was required that the parties constructively engage on alternatives to retrenchment.

[37] The next consultation indeed convened on 23 April 2019. Despite what had been said by Wierzycka, the applicant once again, in this consultation on 23 April 2019, focussed his proposals on his opposition to the closure of the IA trading business. The applicant was not willing to discuss any other alternatives to retrenchment. The consultation was then adjourned to 26 April 2019.

[38] The applicant's attorneys then came into the picture, and wrote to the third respondent on 25 April 2019. Ironically, for the reasons set out below, the

applicant's attorneys in this letter made no reference to the applicant actually fulfilling any functions as Head: Trading. What the letter does raise is that Wierzycka allegedly confronted the applicant on 19 February 2019 about BEE strategies and comments about BEE he had raised earlier, and that she had proceeded to accuse him of calling her a racist. It was suggested that this confrontation was followed by the section 189(3) notice, that he was the only person targeted for retrenchment, and he was so targeted for the very reason that Wierzycka accused him of calling her a racist. The applicant then raised what is called a 'formal grievance' against Wierzycka in this letter, as a result of the accusations she allegedly made about the applicant. The third respondent was also asked in this letter if it considered bumping the applicant into another position, even at a reduced salary.

[39] The next consultation convened on 26 April 2019. In this consultation, the applicant raised the issue that Mosoahle, who held the position of cash execution trader, be retrenched in his stead, and that he could take up that position. Wierzycka pointed out that Mosoahle earned a salary that was significantly lower than the salary earned by the applicant, and if the applicant took up that position, he would earn that salary. This considered, the applicant then agreed this was not a viable proposition. No other alternatives were proposed. The applicant then asked for one last opportunity to consider his position for the purposes of making final proposals, and the consultation was then adjourned to 29 April 2019 for that purpose.

[40] The consultation on 29 April 2019 was then the final consultation between the parties. Yet again, the bulk of the consultation was focused on the applicant yet again disputing the validity of the rationale for his retrenchment, being the decision by the third respondent to close the IA trading business. The third respondent however indicated that it still considered the IA trading business not to be viable, for the reasons already given, and that this business would not be conducted going forward. The applicant then confirmed in the consultation that he had no other alternatives to retrenchment to propose. That left the retrenchment of the applicant as the only viable proposition.

[41] The applicant was then given written notice of 30 April 2019 of his termination of employment due to operational requirements, which notice was effective 31

May 2019. In reaction, the applicant referred an unfair dismissal dispute to the CCMA on 30 May 2019, for conciliation. In this referral, it was contended that the applicant was retrenched for ulterior motives as a result of a personal vendetta against him by Wierzycka. The dispute remained unresolved and was referred to arbitration.

[42] The dispute then ended up before the second respondent for arbitration. It was first set down on 27 November 2019. It appears that the parties did not conduct an arbitration on that date, but instead a pre-arbitration was held. The actual arbitration took place on 10, 11 and 12 February 2020. In his award dated 4 March 2020, the second respondent held that the applicant's dismissal by the third respondent for operational requirements was substantively and procedurally fair. The reasons for these findings of the second respondent will be dealt with later in this judgment. Suffice it to say, the applicant was not satisfied with this outcome, leading to the review application now before me, which I will now turn to deciding by first setting out the applicable test for review.

The test for review

[43] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[5] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[6]. Thus, the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[7] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[8] In *Herholdt v Nedbank Ltd and Another*[9] the Court said:

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[5] (2007) 28 ILJ 2405 (CC).
[6] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[7] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.
[8] Id at para 41.
[9] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing*

> '… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[44] In sum, applying the correct review test has a logical chronology. First, it is ascertained whether there is a failure or error on the part of the arbitrator. Second, and only where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator.[10] It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[11]

Grounds of review

[45] An applicant for review is required to identify and articulate the grounds for review in the founding affidavit, and the review application is then decided on the review grounds as pleaded. It is not for this Court to make out a case for review for an applicant. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[12]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[10] *Fidelity Cash Management Service (supra)* at para 102.

[11] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

[12] (2010) 31 ILJ 713 (LC) at para 27.

[46] Because the record of the proceedings before the arbitrator is essential to deciding a review application, and this record only comes to hand after the review application has been filed, a review applicant is afforded the opportunity, after the record has been discovered, to supplement the grounds of review in a supplementary affidavit.[13] In this case, the applicant also filed a supplementary affidavit. In the founding and supplementary affidavits, the applicant raised a number of core review grounds, summarized below.

[47] The first ground of review is that the second respondent committed a reviewable irregularity by failing to appreciate that the issue of an alternative position for the applicant was not properly considered, and the applicant was not afforded an opportunity to meaningfully consult on it. In this context, the applicant in particular advances the case that he was employed to replace the Head: Trading and therefore the closure of the IA trading business should have no impact on this position and was not material to his continued employment. The applicant submits that his high salary was actually budgeted for without taking into account the IA trading business. The applicant thus contended that he should have been accommodated in the position of Head: Trading.

[48] The second ground of review relates to the reason for retrenchment. The applicant contends that for the first time in the arbitration, the third respondent sought to rely on the reason for his retrenchment as being that he did not meet the requirements of being appointed as stockbroker in control and his high salary, whilst throughout the retrenchment consultation, the only reason for his retrenchment was stated to be the closure of the IA trading business. According to the applicant, and on the facts, it was always anticipated that whilst he was obtaining the qualifications for stockbroker in control, another employee would act as caretaker in that position. The applicant avers that the second respondent committed a reviewable irregularity by failing to appreciate the aforesaid.

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[13] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

[49] The third ground of review relates to the fact that the closure of the IA trading business was presented to the applicant as a fait accompli, and was decided before the retrenchment process was even initiated.

[50] The fourth ground of review concerns a contention by the applicant that the second respondent failed to appreciate that on the facts, the true reason for his dismissal was because of the position he had adopted with regard to BEE, which the third respondent did not take kindly to, and which caused the third respondent to distrust him and pursue a vendetta against him. According to the applicant, the reasons given for his retrenchment was thus a sham and the third respondent had ulterior motives in dismissing him.

[51] The final ground of review is that the applicant was not properly consulted as contemplated by section 189 of the LRA, in that he was not properly consulted on the issues relating to the closure of the IA trading business and on alternatives to retrenchment.

Analysis

[52] In my view, this matter is simple and straight forward, and can be disposed of based on what was in the end either undisputed or undeniable facts. In fact, and for the reasons reflected below, I tend to agree with the second respondent that much of the case the applicant sought to make out to challenge his retrenchment were simply based on his own personal views, his own misconceptions, and had little merit at all.

[53] The starting point in considering the applicant's challenge of the substantive fairness of his retrenchment is the issue of the actual position he was employed to fill in the third respondent. In this context, it is true that his contract of employment reflected that he was employed as Head: Trading. I accept that it was envisaged that the applicant would ultimately take over the functions of Head: Trading, but this would not the same position as Moller would leave it when he retired. This is because one cannot turn a blind eye to what actually happened once the applicant became associated with the third respondent, as what he was in reality employed as and then dedicated to, by

the third respondent. In simple terms, the applicant was not just employed as the Head: Trading in waiting. He was employed to do far more than that.

[54] It must be remembered that the third respondent is a long standing and successful traditional stockbroker trading business. It never had in mind to even start an IA trading business, until it met the applicant. It is in my view clear from the testimony that when first interviewed, the third respondent was quite impressed with the applicant and in particular the opportunities for increased revenue by way of a new business venture, being the IA trading business, he could offer. Before interviewing the applicant, the third respondent had no inclination of IA trading and had no intention of pursuing such business. I am convinced, as was the second respondent, that it was largely due to what the applicant presented to the respondent when he was recruited that the third respondent chose to pursue this opportunity, and on the undeniable facts, put the applicant in charge of it as being an expert in the field. The finding that this was his primary task for which he was employed and then lucratively remunerated, as made by the second respondent in his award, cannot be faulted.

[55] There are two important probabilities that also indicate that the applicant was never employed to just be the Head: Trading. The first is, as already mentioned, his salary. He would earn more than double (R3 million as opposed to R1.5 million), as a brand-new employee of the third respondent, than what was earned by Moller who served as Head: Trading for 40 years. It is highly unlikely that the third respondent would simply replace the Head: Trading with a new employee that does not have that experience at such a substantial increase in cost. This is especially so if regard is had to the fact that the third respondent indicated that its business edge came in from its cost effective structure where it could offer clients trading services at a much lower cost, which would be defeated by employing the applicant in the ordinary trading business at such a high cost. The second probability is the fact that it is equally clear from the evidence that when hitting the ground at the third respondent, so to speak, the applicant was immediately dedicated to the new IA trading business. He even described himself as the ‘head of project’ of that business. He spent no time whatsoever working with Moller getting to know the ordinary trading business and what the position of Head: Trading even

entailed, which would surely be expected if all he was going to do was to take over from Moller. The applicant also did little ordinary trading, and the bulk of his trades were on the IA platform. All said, all the applicant did was to seek to establish and operate the new IA trading business. Once again, this would not be so if he was only employed to replace the retiring Head: Trading.

[56] It was undisputed that in the third respondent, the position of Head: Trading was always coupled with the position of stockbroker in control. Or in other works, the Head: Trading and stockbroker in control is one and the same position. It does not matter if these two positions could be separated into two separate positions. The fact is that in the third respondent, both were always consolidated into one position. Next, and also on the undisputed evidence, the applicant did not meet the JSE requirements to be stockbroker in control. He thus did not qualify for the position of Head: Trading as it existed in the third respondent at the time and as it was occupied by Moller. On face value, it seems to make little sense to then employ the applicant and designate his title as Head: Trading in his employment contract. But on the facts, properly considered, there is a logical explanation for this. This explanation is that the third respondent, who was looking to only replace Moller as Head: Trading, was so taken in by the applicant and what he said he could offer that it did not matter if he could do that job and it simply did not come up. As Wierzycka explained when giving evidence, it was expected and envisaged that the applicant would more than pay for himself whilst earning substantial new revenue for the third respondent, which was clearly the overriding consideration at the time. I am convinced that if matters had turned out the way the applicant and the third respondent both envisaged and hoped it would, the third respondent would have employed a separate stockbroker in control, and the applicant would be Head: Trading of all trading activities, which would include both traditional and IA trading, without the need for him also being stockbroker in control. But this opportunity in the end did not materialise, and that changed everything.

[57] On the evidence, it cannot be gainsaid that the IA trading business turned out not to be viable. The capital, risk and infrastructure requirements for that business proved to be far too much for the third respondent to raise, bear and

cater for. There were additional management systems required which were too costly, and to operate the business under the circumstances as it existed without making all these investments simply exposed the third respondent to far too much risk. Added to the aforesaid, and in its first four months of operation, the IA trading business suffered a loss of in excess of R2 million with a similar loss envisaged going forward in the immediate future. But despite this, Wierzycka still did not want to give up on the business, until she was informed by the third respondent's newly employed risk manager in April 2019 of the material risk caused by the IA trading business to its current business. A frank and open discussion with the Group investment committee made it clear to Wierzycka that it was essential to mitigate the significant risk caused to the existing business of the third respondent, to discontinue the IA trading business.

[58] The business decision made by the third respondent to close the IA trading business for the reasons it provided was a decision it was entitled to make. It is not for the second respondent or this Court to manage the third respondent's business for it, or to decide if there was perhaps an alternative and better approach the third respondent could have adopted to save the IA trading business. All that the second respondent and this Court needs to consider is whether the decision by the third respondent to discontinue the IA trading business was genuine, bona fide and made commercial sense. Undoubtedly, this was the case *in casu*. As the Court said in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*[14]:

> 'The function of the court in scrutinizing the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process. …'

Similarly, and in *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[15] it was held:

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[14] (2006) 27 ILJ 292 (LAC) at para 18.
[15] (2000) 21 ILJ 129 (LAC) at para 36. See *also SA Clothing and Textile Workers Union and Others v Discreto A Division of Trump and Springbok Holdings* (1998) 19 ILJ 1451 (LAC) at para 8; *BMD*

> '… What we have to do is to decide whether the respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry …'

[59] In conducting his case before the second respondent, the applicant tried to counter this obviously valid and fair commercial rationale for his ultimate retrenchment in ways that can only be described, as the second respondent in effect correctly did, as being contrived. One of these ways was to say that because he was employed as Head: Trading in terms of his employment contract and Moller in fact retired, the whole IA trading business and what happened to it was not relevant. He called the IA trading business, in this context, a '*side issue*'. However, and considering what I have set out above, this is simply not a correct or justified proposition. In short, the IA trading business was effectively the applicant's only job, no matter what his contract of employment said, and upon its demise for a valid and operationally justified reason, his position as it practically existed became redundant. Once that was so, and as part of any restructuring exercise under section 189 of the LRA, the issue of alternatives to retrenchment became relevant. It is in that context that the immanent vacant position of Head: Trading, as it stood in the third respondent at the time, became relevant, but this was not as the rationale for retrenchment, but rather as an alternative to retrenchment. This issue will be addressed later in this judgment.

[60] The real situation can perhaps best be described by setting out practically how the restructuring process unfolded. The section 189(3) notice issued to the applicant is clear. The retrenchment exercise came about because the third respondent decided that the IA trading business needed to be closed, and that rendered the applicant's position redundant. The applicant clearly understood this to be the case. That being so, the applicant never came forward in any consultation and challenged the third respondent by asking why this retrenchment exercise was even being conducted in the first place, since the closure of the IA trading business was not an important issue and that as Head: Trading he was not affected by the closure of that business. In fact, a proper consideration of everything the applicant did in the consultations,

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Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union (2001) 22 ILJ 2264 (LAC) at paras 17 – 19.

revealed that most of his efforts went into challenging the decision of the third respondent to close the IA trading business and what needed to be done to retain it and make it viable. It is thus an entirely contrived proposition for the applicant to say that the IA trading business and his activities in it was a 'side issue' of no moment in considering his future. In his award, the second respondent appreciated this fallacy, made specific reference to it, and cannot be legitimately criticized for doing so. The second respondent's conclusions in this regard are entirely reasonable.

[61] It is my view that the applicant misconceived the issue of him not qualifying to be the Head: Trading because he was not qualified to be the stockbroker in control, as coupled with his high salary package, as being raised in the arbitration for the first time by the third respondent as a rationale (reason) for his retrenchment. Properly considered, that was not what the third respondent was doing when presenting this evidence. The issue of the applicant not being qualified to be the stockbroker in control, as coupled with his high salary package, relates to the issue of an alternative to him being retrenched as a result of the failure of the IA trading business, to which he was dedicated. This is an entirely different question to the question of a justified and fair commercial rationale. The applicant therefore incorrectly, in his grounds of review, classified this issue as a rationale for his retrenchment first raised in the arbitration, when it was actually an alternative to his retrenchment which was, as discussed below, indeed dealt with in the consultations.

[62] As said, this misconception by the applicant is evident from what happened in the consultation process, where the parties canvassed the issue of alternatives. In fact, one of the alternatives explored was that the applicant takes up the position of Head: Trading. The fact that this position, in the third respondent, was coupled with the position of stockbroker in control was explored, and as such it was indicated that the applicant did not qualify for the position. It was explained that if the third respondent separated the positions and placed the applicant in the Head: Trading position, it would have to appoint a separate stockbroker in control at a substantial extra cost, whilst still retaining not only the total cost associated with the position of Head: Trading but the added cost of the applicant's extremely high salary. After consulting on these issues, the third respondent then adopted the view that it was not

financially viable to separate the position of Head: Trading into two positions. Therefore, and simply put, the applicant, on the facts, did not qualify for the position of Head: Trading as it existed in the third respondent, and it was not finically viable to separate that position into two positions and then accommodate the applicant in the Head: Trading position without being stockbroker in control. Two conclusions flow from these facts. The first is that Head: Trading was not a viable alternative in this case to avoid the applicant's retrenchment. The second is that the applicant's assertion that he was unaware that the issue of him not qualifying for the Head: Trading position until he heard this in the arbitration is false.

[63] In one of his grounds of review, the applicant suggested that it was always contemplated that the position of stockbroker in control would be occupied by another employee in the third respondent in a caretaker role until the applicant qualified. That was however not the evidence. On the evidence, the third respondent never contemplated such a situation. In fact, and on 10 April 2019, Koep reported to Wierzycka that he had only just become aware that the applicant did not qualify for the position of stockbroker in control, when the possible future role of the applicant in the third respondent was up for consideration because of the decision to close the IA trading business. It was also revealed that it would take the applicant about a year to pass all the exams. Wierzycka was shocked at this revelation by Koep, and Koep was in fact subsequently dismissed for failing to establish this *lacuna* at the outset of the applicant's employment. In my view, the actual evidence was that until the third respondent had to decide what else to do with the applicant because of the failure of the IA trading business, it never knew of the applicant's shortcomings for the Head: Trading position and certainly never contemplated another employee in a caretaker role until the applicant qualified, especially not at a salary of R3 million per annum. This ground of review raised by the applicant thus has no substance.

[64] Having considered the applicant's testimony as it appears in the transcript, I am convinced that any alternative position that would entail reduction in his salary was not going to be acceptable to him. Even taking the Head: Trading position at it stood vacant when Moller retired, the applicant would have to

more than halve his salary to take it up. The unwillingness of the applicant to consider a reduction in salary is evident from his proposal that he in fact be appointed as CEO of the third respondent, that the business change its name in pursuit of a transformation objective, and that he in fact be given almost half the shareholding in the third respondent. A normal trading position was discussed, but considering the salary associated with it, the applicant had no interest in it. The applicant ultimately agreed there were no viable alternatives to his retrenchment. In my view, he so agreed because it was apparent to him that this was indeed the case. As stated above, the third respondent is a small business, with a CEO, Head: Trading and four traders, excluding the applicant, numbering a total of six employees at the time of the applicant's retrenchment. There was simply no other position the applicant could fill, once the IA trading business went the way of the Dodo. It must follow that the applicant was properly and fairly selected for retrenchment. As said in *Latex Surgical Products supra*[16]:

> 'Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place.'

[65] Another issue that arose is that the applicant suggested he was retrenched because he pressed the BEE agenda and as a result, Wierzycka had a vendetta against him and accused him of calling her a racist. There is little merit in this suggestion by the applicant. There were a number of e-mails exchanged between the applicant, Koep and Wierzycka about the issue of BEE. According to the second respondent, none of these e-mails and the facts relating to the issue of BEE established that this was the real reason for the retrenchment of the applicant. These conclusions of the second respondent

[16] Id at para 55.

are in my view quite correct. The issue of an alleged ulterior motive for his retrenchment is one of the issues conjured up by the applicant as a basis to challenge the rationale for his retrenchment, which did not exist. In his award, the second respondent expressed criticism of the manner in which the applicant behaved with regard to the BEE issue. I must say that some of the applicant's communication in this regard is quite impertinent and even insolent, but it does not appear that anyone at the third respondent reciprocated in a similar matter. All Koep did was to express surprise at the tone of the applicant's e-mails. But nothing turns on the applicant's attitude, as unacceptable as it may be. His views on BEE had absolutely nothing to do with his retrenchment, a conclusion the second respondent rationally and reasonably arrived at.

[66] It appears that in the course of an e-mail discussion in February 2019 as to a possible manner in which to make the IA business viable, the applicant states that Wierzycka should 'give' him 45% and Mosoahle 3% of the third respondent's business, which according to the applicant would give the third respondent the requisite BEE credentials to open up the ability to obtain the necessary capital. This issue also featured in the retrenchment consultations as an issue raised by the applicant. It was fully dealt with in the consultations why this was simply not a viable proposition, and rightly so. It is a ludicrous proposition to suggest that Wierzycka basically gift almost half of the existing viable and profitable traditional trading business of the third respondent to the applicant with the hope that the BEE credentials it would bring with it, may cause the generation of sufficient capital to save the failing and loss making new IS trading business. As the second respondent correctly appreciated, this makes no economic sense.

[67] Overall considered, and on the facts, I am satisfied that there was a proper and fair commercial rationale to have retrenched the applicant, and he was properly and fairly selected for retrenchment. This put paid to both the general and specific questions articulated in *Latex Surgical Products supra*. The dismissal of the applicant for operational requirements was thus substantively fair. Considering the content of the award of the second respondent, I am satisfied that he rationally and reasonably considered and determined the

evidence in a manner consistent with what I have discussed above, appreciated the applicable legal principles, and cannot be faulted where it came to the conclusions he arrived at in this regard. His finding of substantive fairness is thus unassailable on review.

[68] Turning finally to the issue of procedural unfairness, the case of the applicant was that he was not properly consulted. He contended in the arbitration that throughout the consultation process, he was not even aware of the real reason for his retrenchment. The second respondent considered this argument, and found it to be, using his words, 'preposterous'. I am compelled to agree. As the second respondent correctly appreciated, the reasons why the applicant was retrenched was fully canvassed not only in the consultations held with him, but in the written answers he received to the questions he posed. As addressed above, it was always made clear to him that his primary job at the third respondent was to head up the IA trading business, and the failure of that business led to his retrenchment. The viability of him only being the Head: Trading as it stood as a possible alternative to retrenchment was explored with him in the consultations, and found not to be viable. The second respondent's conclusion that: *'… the Applicant was fully aware of the issues that gave rise to the closure of IA and his then pending retrenchment …*' cannot be faulted, and is not only reasonable, but actually correct on the facts before the second respondent.

[69] As also touched on above, much of the effort expended by the applicant in the course of the consultations was to convince the third respondent to continue with the IA trading business. He seemed to intimate that he was not in agreement that it be closed, and as such, what was happening was unfair. But as the Court said in *Solidarity on Behalf of Members v Barloworld Equipment Southern Africa and Others*[17]:

> '… the purpose of consultations is to seek consensus and there is no requirement that the parties should reach agreement …'.

[17] (2022) 43 ILJ 1757 (CC) at para 49.

The fact is that the applicant was properly consulted on the closure of the IA trading business. His views were requested and considered. He was given reason why it was not accepted. He did not have to agree to it.

[70] In the arbitration, the applicant also pressed the issue that the third respondent came into the consultations predisposed where it came to the decision of the closure of the IA trading business, which he considered unfair. It is true, on the facts, that prior to initiating the retrenchment process, it was made clear to Wierzycka by the Group investment team and the risk manager that the closure of the IA trading business was an imperative, both from a financial and risk perspective. But I am not convinced that her decision was final, before issuing the section 189(3) to the applicant. Even if she was predisposed to this solution, and as the second respondent correctly reasoned, it does not render the process unfair. This is aptly demonstrated by the following *dicta* in *SA Commercial Catering and Allied Workers Union and Others v JDG Trading (Pty) Ltd*[18]:

> 'It is trite that s 189(1) of the LRA obliges an employer to consult on contemplation of retrenchments. Du Toit et al *Labour Law Through the Cases*, after a discussion of the authorities, accurately capture the prevailing legal position about what is required as follows:
> 'It would therefore seem that the weight of authority has shifted from a broader to a narrower interpretation of the term "contemplates". Having initially accepted that contemplation of dismissal as one of various options was sufficient to trigger the employer's duty to consult, the courts now appear to take the view that, for purposes of section 189, "contemplates" refers to dismissal as the preferred or most likely option from the employer's point of view rather than a mere possibility. It follows that the employer is entitled to go through a process of weighing up various alternatives before dismissal can be said to be "contemplated". However, the employer may not embark on

[18] (2019) 40 ILJ 140 (LAC) at paras 26 and 29. See also *National Education Health and Allied Workers Union and Others v University of Pretoria* (2006) 27 ILJ 117 (LAC) at para 55, where it was said: *'… 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 …*'.

> consultation with a closed mind but must be willing to seriously consider any further alternatives to dismissal that may emerge in the process.' …
>
> JDG's conduct belies any description of the process as a fait accompli. The most probable inference to be drawn regarding the resolution is that JDG had merely formed a prima facie view on the likelihood of retrenchments. An employer in such situations invariably will form a prima facie view on the need for retrenchments. It is unrealistic, technical and formalistic to seize upon the word 'must' in the initiating resolution and to divorce it from its context. That context includes the process stipulated in the job security agreement and the subsequent engagement of the parties in a s 189(3) consultation exercise. The perhaps injudicious use of language in the resolution does not lead inescapably to the conclusion that the employer had closed its mind to alternatives. An employer cannot be held to a standard of a genuine commercial rationale for retrenchment if it would be prejudiced in subsequent court proceedings precisely for making such an assessment of its commercial realities. The employer must be entitled to form a prima facie view on retrenchment, even a firm one, provided it demonstrates and keeps an open mind in the subsequent process of consultation, which was the case here. …'

[71] The second respondent, having considered the content of all the consultations that had been held, accepted that the applicant had been properly consulted as contemplated by section 189(1) of the LRA. This conclusion is reasonable. The facts show that all the consultation topics as contemplated by section 189(2) of the LRA were canvassed with the applicant in the course of the consultations, and he clearly had the opportunity to make representations on the same. Where the applicant asked questions and sought information, the questions were answered, and the information was provided. Where the third respondent adopted contrary views to what was proposed by the applicant, it gave the applicant reasons why that was the case. That is what is contemplated by a fair process under section 189 of the LRA. As held in *Van Rooyen and Others v Blue Financial Services (SA) (Pty) Ltd*[19]:

> '… the employer must invite representations on these issues from the appropriate consulting party, seriously consider and respond to any representations that are made. Both parties are required, in good faith, to seek

[19] (2010) 31 ILJ 2735 (LC) at para 19.

> consensus. This is not a mechanical process - meaningful joint decision-making requires that the parties act with the honest intention of exploring the prospects of agreement. …'

[72] Therefore, the second respondent's finding on procedural fairness is equally unassailable on review. It is a determination arrived which properly accounts for the facts before the second respondent as a whole, and is fully in line with the relevant legal principles as to what constituted a fair consultation process.

Conclusion

[73] Therefore, based on all the reasons set out above, I conclude that the second respondent's arbitration award is simply not reviewable. I am satisfied that the second respondent's findings of facts are properly supported by the evidence before him, in particular the common cause / undisputed facts and uncontested documentary evidence. His views that the applicant's retrenchment '*is justifiable on a rational ground*' and that such retrenchment was arrived at for a fair reason and following a fair procedure are justified, and his conclusion that the dismissal of the applicant was fair as a result, in the circumstances, is unassailable. Insofar as the issue of the outcome arrived at by the second respondent is considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicant's review application thus falls to be dismissed.

Costs

[74] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. I refer to what the Court said with regard to costs in employment disputes in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[20] which is that when making a costs order in a labour matter, a Judge is required to consider that costs are not ordinarily awarded, the principle of fairness must be considered, and due regard must be had to the conduct of the parties. *In casu*, I do not believe any

[20] (2021) 42 ILJ 2371 (CC) at para 35. See also *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC) at para 25.

of the parties acted unreasonably in bringing this application, or in opposing the same. Whilst the applicant may be open to some criticism for some of the review grounds that he raised and the basis on which he challenged his retrenchment, I do not believe this is sufficient to visit him with a costs award. It is my view that the ordinary principle as set out above that costs do not follow the result should carry the day. Therefore, I am satisfied in this case that no order as to costs is appropriate and fair.

[75] In the premises, the following order is made:

Order

1. The applicant's review application is dismissed.

2. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate A Redding SC
Instructed by:	Solomon Holmes Attorneys
For the Third Respondent:	Advocate G Leslie SC
Instructed by:	Mcaciso Stansfield Inc Attorneys