THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 805/04

BUSANI KHANYILE & OTHERS **Applicants**

and

AIR CHEFS (PTY) LTD **Respondent**

Heard: **20 to 23 April 2015**

Delivered: **4 August 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicants brought this matter before this Court by way of a statement of claim to challenge the procedural and substantive fairness of their retrenchment by the respondent, which took effect from 31 July 2004.

[2] The applicants' main contention is that there was in general, no reason to retrench as the respondent was not in financial difficulties, and further since their positions were immediately replaced once they were retrenched. In response to these allegations, the respondent's case is that there was a need

to retrench due to increased demands for its in-flight services quality standard, systems and procedures in its Johannesburg unit. Accordingly, the unit under which the applicants fell had to be outsourced.

[3] The applicants further contend that there were no proper consultations held with them or their union, UPUSA. The respondent disputes these allegations, and contends that the applicants and UPUSA were invited to consultations, and that the latter had essentially refused to cooperate or participate meaningfully in the consultation process.

[4] The dismissal took place in July 2004. It is not clear as to the reason it took this matter this long to be finally determined. What is however apparent from the file is that there was an application for condonation in respect of the respondent's late filing of its response, which was considered and granted on 29 November 2005. Thereafter there were further delays consequent upon numerous removals from the roll and a postponement.

Background:

[5] The respondent as its name suggests is in the business of preparation and supply of meals and other in-flight services to airlines. It has numerous departments responsible for various aspects of its business. The affected area where the dispute emanated from is its cleaning department, where the dismissed employees were employed as porters.

[6] The respondent's case was that its business grew, and in order to ensure that the area for the preparation of food was maintained in an acceptable and a hygienic state, its best option was to outsource the cleaning functions to specialists, and to focus on its core business being the preparation and supply of meals on airlines.

[7] As a result of the decision to outsource the cleaning functions to an entity called Ecowise, all the porters in the cleaning department were to be taken over by Ecowise, with their permanent employment being guaranteed on the same terms and conditions as previously enjoyed under it. The respondent further contended that other alternatives were offered to the applicants, and

successful attempts were made to consult with them and UPUSA on these issues, until a decision was finally taken to effect the retrenchments.

The Evidence

[8] Notwithstanding the pre-trial agreement that the respondent would begin, the applicants elected to assume the duty to begin and proceeded to lead oral evidence. The applicants had initially indicated that only one witness, Ms S D Busaka ("Busaka") would testify on their behalf. Having closed their case, the applicants' counsel, during the course of cross- examination of the respondent's sole witness, Adv. Lakale sought to postpone the proceedings on the basis that an application was to be made to re-open the applicants' case and to call a Mr. Luthuli of UPUSA. After the evidence of the respondent's witness was dispensed with, the applicants however chose not to pursue the application to re-open their case. The respondent also called a single witness.

Busaka's evidence on behalf of the applicants:

[9] Busaka was employed by the respondent for about 20 years and at the time that she was retrenched, she was employed as a supervisor. She confirmed having received the initial letter of notification in February 2004 in respect of the contemplated retrenchments and the reasons in that regard. She had also attended a retrenchment meeting with UPUSA and the respondent on 19 March 2004. She was further aware that Ecowise was to take over the entire cleaning department and all the porters in that department.

[10] She however at the same time understood that Ecowise would only take her and others if they satisfied its minimum requirements of a qualification, which she did not have. Her understanding was further that even though they were supposed to go over to Ecowise, they had to apply for those positions.

[11] Busaka further testified that she was aware that in making appointments, Ecowise would consider employees' skills, length of service, service record and qualifications. As she had no qualifications, it was apparent to her that she would not be employed by Ecowise, and further that the respondent was aware of what Ecowise was looking for. She further believed that the selection

criteria Ecowise was using was not in good faith, and also understood that Ecowise would take all the employees, but at a reduced salary.

[12] Under cross examination, she confirmed that the applicants did not raise their concerns about the terms and conditions during a meeting with management where George Redman ("Redman") addressed the employees about the proposed changes. She confirmed that the applicants were represented in that meeting by their union, and conceded that she believed that the applicants would have been willing to transfer to Ecowise if their salaries remained the same.

[13] Busaka further testified that she did not know why the respondent had decided to outsource the cleaning department, as there had been no concerns raised previously about their performance. Busaka was referred to the clients' requirements expected to be met by the respondent in the provision of meals according to the increased number of flights which had to be catered for. She conceded that there was an indeed an increase in work demands, and further that the respondent had to ensure that certain quality standards were met. She further conceded that the retrenchments had nothing to do with their performance as this was never at any stage discussed with them or raised as an issue.

[14] Busaka was again referred to copies of the minutes of meetings held between the respondent, UPUSA, and other employee representatives. She conceded that the respondent had in those meetings, indicated that the employees' salaries would not be reduced once they were under the employ of Ecowise.

[15] She further conceded that UPUSA had refused to take part in the consultations until the respondent had made an undertaking that the applicants would all be absorbed into Ecowise. She further acknowledged when it was put to her that it was difficult to consult when one of the consulting parties refused to participate in consultations.

[16] Busaka further conceded that alternative positions were looked at including vacancies in the ESU; inventory, dock and liquor departments. She also acknowledged that the reason for the retrenchments was not as a result of

financial difficulties experienced by the respondent, but was due to an increase in its workload and the requirements of the clients.

[17] During re-examination, Busaka further acknowledged that the employees were given letters relating to the retrenchments, which they had then taken to their union, and which had in turn explained their contents to them.

[18] Under re-examination however, Busaka testified that it was specifically explained to the employees by UPUSA that they would be taken over by Ecowise on the same terms and conditions as had applied under the respondent. She nevertheless contended that this was merely 'talk' from the respondent, as she had not seen any confirmation of documentation in that regard.

Linda Raoleka's evidence's on behalf of the respondent:

[19] Raoleka was employed by the respondent as its Human Resources Manager from September 2003 until January 2005, and was involved in the restructuring process during 2004. Her testimony was essentially that;

[20] The decision to outsource the cleaning functions to Ecowise was based on the increased demands on the respondent. The transfer of the employees to Ecowise would have been on the same terms and conditions as they had enjoyed with the respondent. All the employees were to be absorbed and any selection criteria applied by Ecowise would have only been in circumstances where employees were competing for a particular position.

[21] Following discussions with employees and their union, final letters were then sent to the applicants by the respondent, wherein the terms and conditions of the absorption into Ecowise were clarified and the other options available to the employees further clarified. She had also personally handed the letters to the employees and explained the contents of the letters to them.

[22] She further confirmed that UPUSA had demanded to be provided with financial statements, and that these were not provided as they were not relevant to the retrenchments, since the redundancies were not due to financial difficulties experienced by the respondent.

[23] Under cross-examination, Raoleka denied that the retrenchment exercise was rushed and that the respondent was pressurised to complete it. She conceded that the timing of the retrenchments was a factor, but that even though it was envisaged that the process would have been completed by April 2004, the consultations and finalisation of the process continued into June 2004.

[24] Raoleka confirmed that Ecowise was already engaged by the respondent as early as March 2004. This however was only for the purposes of performing 'Deep Cleans', a specialised function which was not ordinarily performed by the employees affected by the retrenchments.

[25] Raoleka further acknowledged that the contract between the respondent and Ecowise was for a period of 24 months. She however contended that irrespective of the existence and duration of the contract, the applicants would have remained employed by Ecowise, and on the same terms and conditions as previously applicable to them.

[26] Raoleka further testified that attempts were made to consult with UPUSA between February and June 2004, but that the latter was not interested. Another union, SACCAWU was also involved in the consultations, and some of its members were taken over by Ecowise. Eventually, the respondent had to consider the consultation process as being finalised, hence the retrenchments were effected with the payment of severance packages.

The legal framework:

[27] Section 23(1) of the Constitution[1] provides that *"everyone has the right to fair labour practices".* The Labour Relations Act[2] (The LRA) gives effect to this constitutional right, and provides in section 185, that every employee has the right not to be unfairly dismissed. Section 188(1) (a)(ii) of the LRA provides that a dismissal is not fair if the employer fails to prove, *inter alia*, that *'the reason for dismissal is a fair reason based on the employer's operational requirements'*. Furthermore, section 188(1)(b) provides that a dismissal which was not effected in accordance with the fair procedure is unfair.

[1] Act 108 of 1996
[2] Act 66 of 1995 as amended

[28] Section 213 of the LRA defines *'operational requirements'* to mean requirements based on economic, technological, structural or similar needs of an employer. Item 1 of the Code of Good practice on dismissal based on operational requirements states that:

> "…..As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."

[29] In this case, it being common cause that the retrenchment had taken place, the onus[3] is on the respondent to show that these retrenchments were substantively fair and further that they were effected in accordance with a fair process[4]. The onus will be satisfied if the employer can show that its reasons are operationally justifiable on rational grounds, and further that all alternatives to retrenchments were looked at and considered in earnest.

[30] Central to disputes pertaining to dismissals related to the employer's operational requirements is the substantive justification provided by an employer. The debates have always been whether the courts should adopt a 'hands-off' approach when dealing with employers' reasons for retrenchments (On the basis that Courts did not want to interfere in decisions of the organisation due to the fact that they do not possess the necessary expertise to make an informed decision which is one that should be best left with the employer)[5], or be interventionist.

[3] Section 192 (2) of the LRA
[4] *4Seas Worldwide (Pty) Ltd. v The Commission for Conciliation Mediation & Arbitration & Others* Case no: CA15/2011 (13 November 2013)
[5] See *SA Clothing & Textile Workers Union & others v Discreto - A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC); *Forecourt Express (Pty) Ltd v SA Transport & Allied Workers Union & Another* (2006) 27 ILJ 2537 (LAC).

[31] In *NUM and Another v Black Mountain Mining (Pty) Ltd*[6] the Labour Appeal Court in addressing the correct approach to be followed in determining the substantive fairness held that;

> "The deferential approach is no longer part of our law. It was called into question and rejected in *BMD Knitting Mills (Pty) Ltd v SACTWU and in CWIU and Others v Algorax (Pty) Ltd*. In *BMD Knitting Mills*, this Court observed at paragraph 18 that the test enunciated in Discreto was one amounting to the judicial review of an administrative action akin to that utilised in applications for review under section 145 of the LRA as then understood following *Carephone (Pty) Ltd v Marcus NO and Others*, namely that the courts should not impose value judgments or concepts of correctness on administrative bodies. The true test was whether the decision was rationally justifiable. The court then proceeded as follows at paragraph 19:
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> > 'I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicably to a decision by an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, 'the reason for the dismissal is a fair reason'.
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> > The word 'fair' introduces a comparator, that is, a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness, is the mandated test.'"[7] (Citations omitted)

[32] The Labour Appeal Court in *NUM* as above further made reference to *CWIU and Others v Algorax*[8] in concluding that the deferential approach to operational requirements was to be rejected, preferring instead an objective

[6] (CA22/2012) [2014] ZALAC 78 (10 December 2014)
[7] At para [33]
[8] [2003] 11 BLLR 1081 (LAC)at paragraphs [69]-[70]

approach where a court must determine what was fair. In this regard, the LAC in *Algorax* had held that;

> "The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair . . . Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic."

Outsourcing as a reason leading to redundancies:

[33] The basis for challenging the respondent's reasons for the retrenchment as gleaned from the statement of case and the pre-trial minute is materially different from the evidence presented by Busaka and further submissions made on the applicants' behalf by their counsel. In the statement of case, the applicants' case was that there was no reason to retrench as the respondent had not experienced financial problems and further since the applicants' jobs were still available. Essentially, it was contended that there was no reason to retrench the applicants, and that the respondent had simply replaced them with contractors.

[34] When the proceedings commenced however, the applicants' case as elucidated by Adv Lekale on their behalf took a different tune. He contended that the applicants' case was that they were retrenched on the basis of performance issues, and/or allegations of misconduct, and/or on the basis of financial considerations. The allegation that the applicants were replaced with contractors was not even pursued.

[35] The general purpose of pre-trial conferences was explained by the Labour Appeal Court in *Peach and Hatton Heritage (Pty) Ltd v Neethling & others*[9] in the following terms:

> "Generally speaking the function of a pre-trial conference is to limit issues and not widen them. In so far as first respondent contends in paragraph 5 that he persists in his claim that there was no commercial rationale for his

[9] [2001] 5 BLLR 528 (LAC)

> retrenchment, such claim did not form part of his statement of case. Whilst it may have been the respondent's legal representative's intention to raise the substantive fairness of the dismissal of the respondents, it was not an issue on the statement of case. The assertion by the respondents' legal representative that the respondents persist in their claim that there was no commercial rationale for his retrenchment in the pre-trial minutes, does not result in it being a triable issue. The pre-trial minute does not go far enough to evidence the existence of an agreement to widen the issues. … in considering that the reasons for the dismissal were not based on the appellant's operational requirements, the Court *a quo* widened the dispute between the parties. It was not entitled to do so."[10]

[36] In *Zondo & others v St Martins School*[11], Molahlehi J also held that;

> "It is well established in our law that a pre-trial minute is no different to any other agreement concluded consequent to deliberations between the parties or those that they may have expressly or impliedly authorised to represent them. It follows therefore that a pre-trial minute constitutes a binding agreement between the parties. It is for that reason that the courts ordinarily hold the parties to the contents of their pre-trial minute. A party can only resile from a pre-trial minute on condition special circumstances exist to do so". (Citation omitted)

[37] It therefore follows from the above legal principles that a party cannot seek to advance a case not foreshadowed in its pleadings or in the pre-trial minutes, nor can a case be made out in written closing arguments. The pre-trial minute as signed by the parties, even in its supplementary form does not go far enough to evidence the existence of an agreement to widen the issues to include a dispute surrounding whether the applicants' retrenchment was as a consequence of performance issues, misconduct or financial constraints. In the absence of an application to resile from the signed pre-trial minute, the applicants are therefore bound by those minutes, and no consideration shall be had to any submissions made or evidence tendered that falls outside the ambit of the statement of case or the pre-trial minute.

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[10] At paragraphs [16] and [17]. See also *Strauss and Another v Plessey (Pty) Limited* (J2192/00) [2001] ZALC 191 (29 October 2001) at para [7]

[11] Case no: J3020/12 at para [11]

[38] The respondent's basis for effecting the retrenchments was that the positions in which the applicants were employed following the outsourcing of its cleaning functions to Ecowise became redundant. It was further submitted that based on Busaka's evidence and the concessions she had made, the only issue for determination was whether or not alternative positions were offered to the applicants.

[39] In this case, nothing from Busaka's evidence could gainsay the respondent's contention that the retrenchments were consequent upon its decision to outsource its cleaning unit in order to concentrate on its core function. This decision also followed upon the realisation that its business was growing and it needed specialists to take over its cleaning functions.

[40] Notwithstanding the submissions made on the applicant's behalf that Busaka's evidence should be treated leniently on account of her and others being of *'below average literacy'*, it is my view that on the facts, as pleaded and admitted, there is no reason to doubt the respondent's contentions in regards to the reasons that led to the outsourcing of the cleaning unit.

[41] It was further common cause that the applicants were informed individually on 27 February 2004 that as a result of an increase in demand for its in-flight services, the respondent had considered outsourcing the cleaning functions to a specialist company, Ecowise. The letters were also forwarded to the applicants' union, UPUSA on the same date, inviting it to attend scheduled consultation meetings

[42] Busaka confirmed attending consultation meetings where the issue of outsourcing to Ecowise amongst other things was discussed together with other proposals. She confirmed being informed of being taken over by Ecowise, and other than raising issues of qualifications which were conflated with other reasons as to why she did not take up employment with Ecowise, her concern was that she was not prepared to go over to Ecowise as that would have meant joining a new company. These issues nevertheless do not add any value to the dispute whether there was a need to outsource or not. Be that as it may, there is no reason to doubt that in the light of the

requirements to adhere to health and safety, and quality standards as set by the civil aviation, the respondent's option in the light of the porters not offering a specialised service, was to outsource these services. This was also meant to enable it to ensure that it met and maintained required cleaning and hygienic standards given the increased demand for its services.

[43] Other than contending that the porters could have been trained to perform these tasks, nothing however controverted the respondent's submissions and evidence that there was indeed a need and reason to outsource.

[44] The issue however remains whether the decision to outsource, which led to the retrenchments was a genuine decision linked to a rational commercial or operational reason for the purposes of the definition of operational requirements as contemplated in section 213 of the LRA. To put it differently, the question is whether an employer can dismiss employees for a reason based on its operational requirements even in circumstances where its business was not struggling financially.

[45] In *General Food Industries Ltd v FAWU*[12], the Labour Appeal Court, per Nicholson JA (Zondo JP and Jafta AJA concurring), held that the LRA recognises the right of an employer to dismiss employees for a reason based on its operational requirements without distinguishing between a business struggling to survive and a profitable business wanting to increase its profits. In this regard, the LAC stated that;

> '….a company is entitled to insist by economic restructuring that a profitable centre becomes even more profitable'[13]

[46] In *Adcock Ingram*[14] this court in considering the same issue stated that:

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> "If an employer can show that a good profit is to be made in accordance with sound economic rationale and it follows that fair process to retrench an

[12] [2004] 7 BLLR 667 (LAC)

[13] At para [62] See also *Hendry v Adcock (Pty) Ltd* (1998) 19 ILJ 85 (LC); *Enterprise Foods Ltd v Allen & Others* (2004) 25 ILJ 1251 (LAC); *CEPPWAWU v Astrapak Manufacturing Holdings Pty (Ltd) t/a East Rand* Plastics Case no: JS878/10 at para [129] where the Labour Court (Per Mokoena AJ) held that;

> *"I am therefore satisfied that an entity such as the Respondent is entitled to retrench in order to make more profit and to avoid closure of those entities which their profit margins has drastically dropped".*

[14] *Supra*

> employee as a result thereof it is entitled to retrench. When judging and evaluating an employer's decision to retrench an employee this court must be cautious not to interfere in the legitimate business decisions taken by employers who are entitled to make a profit and who, in so doing, are entitled to restructure their business"

[47] It follows therefore from the above principles that the employer's quest to improve its profit margins and its efficiencies relate to the economic well-being of the business. These are acceptable grounds to embark on a restructuring process, as they would ordinarily fall within the all-encompassing concept of "economic reasons" as contemplated in the definition of 'operational requirements' in section 213 of the LRA.

[48] In this case therefore, the respondent had outsourced the cleaning unit as it did not form the core of its business, and further in order to meet the standards set by its clients and civil aviation. In these circumstances, it is concluded that there was a sound and valid commercial and business rationale to effect restructuring. The outsourcing was meant for the respondent to realise the need to meet its clients' obligations. There is therefore no merit in the applicants' contention that there was no need in general, to restructure or that the respondent was motivated by other extraneous reasons to outsource.

The reason for dismissals:

[49] In the light of the conclusions reached that the outsourcing of the cleaning unit had led to redundancies, the next issue to be considered is whether the dismissals were substantively fair. The mere fact that an employer has a genuine operational requirement does not however necessarily imply that the retrenchment that follows would be fair. As Francis AJA had stated in *NUM*;

> "……..An employer must first establish on a balance of probabilities that the dismissal of the employee contributed in a meaningful way to the realisation of that need. In my view, dismissals for operational requirements must be a

> measure of last resort, or at least fair under all of the circumstances. A dismissal can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons. The selection of an employee for retrenchment can only be fair if regard is had to the employee's personal circumstances and the effect that the dismissal will have on him or her compared to the benefit to the employer. This takes into account the principles that dismissal for an employee constitutes the proverbial "death sentence".[15]

[50] In this regard then, the question is whether the ultimate retrenchments themselves were justifiable. The respondent's contention was even on Busaka's version, the outsourcing of the cleaning function to Ecowise would result in the positions of the employees being redundant. Furthermore, unless the employees could be accommodated elsewhere within the respondent, they would have to be retrenched.

[51] Amongst the lengthy submissions made on behalf of the applicants was that they were dismissed as a result of their refusal to accept unreasonable alternatives presented to them. It was further submitted that the concessions made by Busaka were in respect of collateral issues and irrespective of same, the consultation process followed did "not embrace the principle of *audi alteram partem* rule, as the whole process was too subjective, one-sided and without regard to any counter-proposal made by the applicants. It was further submitted that concessions made by Busaka should be considered irrelevant when determining the matter.

[52] In regards to Busaka's testimony, it needs to be stated that other than the reluctant concessions she had made, I had found her to be extremely evasive even when confronted with simple questions under cross-examination. Her cross-examination proved to be an excruciating affair in the light of her propensity to either deny the obvious, or make concessions and retract from those in one sentence, or even fail to directly answer simple questions. She was indeed uncooperative and obstructive, and this could not have been as a consequence of her alleged average literacy or simplicity. She confirmed

[15] At para [37]

under re-examination that she could read and write in English, and in the light of this concession I fail to appreciate any contention that she is not literate. She had deliberately chosen an obstructionist and prevarication path during the course of her entire cross-examination, and in the end, had contradicted herself in material ways, thus raising doubts about her credibility. There is therefore no basis upon which the damning concessions she had made can be ignored, as she was chosen amongst the applicants to present their case.

[53] Busaka's testimony under cross-examination, and despite her equivocation, was that she understood that the alternative of Ecowise meant that they would be employed on the same terms and conditions, or alternatively be retrenched. She further understood that being taken over by Ecowise would not have impacted on her salary even though UPUSA did not give the employees feedback about what the respondent had said about their salaries.

[54] It was submitted on the applicants' behalf that an offer of employment on the same terms and conditions is impossible in law unless made within the context of section 197 of the LRA. This point was however raised in argument despite the fact that it was never the applicants' case that there was a transfer of a business as a going concern.

[55] It was again submitted on their behalf that the offers made to them outside of the consultation process unreasonably placed enormous pressure on them to consider and decide on matters. In this respect it was contended that it was too complex to expect an employee to make an election as required by the respondent in their final letter to the applicants, which had read;

> *"I _____ hereby declare that I wish/ do not wish (delete what is not applicable) to be taken up in the Ecowise structure as from July 2004".* In this regard, it was further submitted that expecting the applicants to make an election had the effect of *"undermining constructive advice that should be given by the Union to the employee".*

[56] In the light of Busaka's evidence and concessions made, I have difficulties in comprehending how it could be said that the Ecowise alternative was

unreasonable, or that the applicants were placed in an invidious position in that the respondent was not *bona fide*, or even that they were faced with a decision which had already been taken rather than an intention to discuss a proposal.

[57] Raoleka had testified that the services of Ecowise were previously engaged in order for it to perform 'deep clean' services. She had further confirmed that the respondent had already signed a contract with Ecowise before issuing notices. It is however instructive to note that the discussions surrounding Ecowise taking over had been ongoing since February 2004. Up to the stage that the retrenchments were effected, it was not apparent from Busaka's testimony as to what other alternatives they had proposed other than that Ecowise must absorb all of them on the same terms and conditions. This in any event was what the respondent had offered.

[58] It is accepted that the retrenchments were effected when the applicants refused to be taken over by Ecowise. Prior to the eventual retrenchments however, Busaka conceded that other than the Ecowise alternative, the employees were offered other alternative positions within the respondent's employ in other various positions, *albeit* at the rate of pay applicable to those positions. This was evinced by correspondence to UPUSA on 28 April 2004, in terms of which in the light of UPUSA's rejection of the Ecowise alternative, the respondent had indicated that alternative positions existed in the Sanitation Department, ESU, Inventory, Dock and Liquor.

[59] Following a meeting held with UPUSA on 9 June 2004, it was made clear to the respondent that no UPUSA members would be transferred to Ecowise, or agree to salary cuts, or agree to be retrenched. Busaka had conceded that these alternative positions were offered, but her contention was that the employees would have taken them up on condition that they would not have their salaries cut.

[60] On 10 June 2004 the respondent had made its final offer to the employees by issuing the letters as already indicated. Essentially, employees were requested to make a choice between being retrenched and being taken over

by Ecowise. Busaka conceded that she and others sought advice from UPUSA on the offer, and the response was that the union would represent them in respect of payments to be made to them.

[61] In the light of the consultations with UPUSA and the employees, the various alternatives offered to the employees, and further in the light of the unreasonable rejection of each and every alternative that the respondent had come up with, it cannot in these circumstances be said that the retrenchments as a consequence of outsourcing of the cleaning unit were substantively unfair. It is trite that an employee who unreasonably refuses to consider available options to a retrenchment cannot claim unfair treatment if the employer ultimately retrenches him or her[16]. In the end the decision to dismiss the applicants was operationally justifiable on rational grounds as it was suitably linked to the respondent's achievement of the end goal for rational reasons.

Procedural fairness:

[62] The requirements for fair procedure that apply in the case of a dismissal based on a reason related to an employer's operational requirements are specified under section 189 of the LRA, and whenever it applies, in section 189A of the LRA. The role of this court in circumstances such as these is to exercise a proactive and supervisory role in relation to the procedural obligations on the employer prior to effecting retrenchments[17]. The enquiry into whether the retrenchments were justifiable requires a determination into whether the respondent had adopted a fair process as contemplated in section 189 of the LRA.

[16] See *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 935 (LAC) at para [45]
[17] See *Banks and another v Coca Cola SA (A division of Coca Cola Africa (Pty) Ltd* [2007] 10 BLLR 929 (LC).

[63] In disputing that any consultation took place, or that the process was fair, the lengthy submissions made on behalf of the applicants can be condensed as follows;

a) The whole process of retrenchment was superficial and a sham.

b) UPUSA was co-operative with the Respondent throughout the consultation process and that it was pro-active in suggesting alternatives. This was despite the contention that there was no genuine consultation or any attempt by the respondent to attempt to reach consensus on matters.

c) The respondent failed to provide relevant information in order for the Union to make an informed decision.

d) The respondent consulted or communicated with the applicants themselves without their union being present and that this was *mala fide.*

e) The respondent failed to afford them the opportunity to consult, and denied several requests by UPUSA to have proper consultations. It was submitted that the decision was a *fait accompli* before the first consultation, and as a result, the unfair conduct of the respondent left the applicants "*desperate and confused without direction*".

f) Consultations did not occur, and the meetings which took place did not constitute consultations in the result that the applicants were deprived of an opportunity to provide representations, and that the cleaning department was not affected.

[64] The submissions made on behalf of the respondent on the other hand were that it had tried to consult but that UPUSA's conduct in refusing to participate, and refusing to suggest meaningful alternatives made a joint consensus seeking exercise impossible. Reliance was placed on *Johnson & Johnson v CWIU*[18] for the proposition that where an employee or a union frustrates a consultation process to the extent that the employer is unable to consult with

[18] (1999) 20 ILJ 89 (LAC) at para [28]

the employee on all the issues contemplated in section 189 of the LRA, the employer may be excused from any procedural non-compliance arising from the employee's recalcitrant behaviour.

[65] It was further submitted on behalf of the respondent that the applicants and their chosen union representatives were given sufficient opportunity to consult and to make representations, but that at the time, they had refused to participate in consultations and failed to engage in a joint consensus seeking exercise. In this regard, it was contended that the respondent could not have done any more than it did, and that the applicants' dismissals were ultimately their own fault, and also as a result of their conduct or the conduct of their chosen representatives, in refusing to participate meaningfully in the consultation process.

[66] In *Nhlamulo Ndhela v Sita Information Networking Computing BV (Incorporated in the Netherlands)*[19] Ngcukaitobi AJ stated that;

> "Section 189 of the LRA sits alongside a cluster of statutory rights which give practical meaning to the right not to be unfairly dismissed which is contained in section 185 of the LRA. Although crafted in procedural terms, the object of section 189 is substantive. It is aimed at the retention of jobs and if the jobs cannot be retained, at ensuring that any processes resulting in job losses are fair and the adverse effects of job losses are mitigated. In *National Education Health and Allied Workers Union v University of Cape Town & Others*, the Constitutional Court stated that the LRA must be interpreted in a manner which respects security of employment as a "core value" of the Constitution" (Citations omitted)[20]

[67] I am in agreement with the above principle that there is a substantive component aligned to section 189 of the LRA, in that ultimately, it is from that process that it can be determined and decided whether any effort was made to save jobs. It is however accepted that in order for a consultative process to achieve its objectives, this requires an effort on both parties to ensure that ultimately, if any job losses occur, this would have been in a fair manner. As it

[19] CASE NO: JS 960/12
[20] At para [31]

was held in *South African Commercial Catering and Allied Workers Union (SACCAWU) and Others v Gallo Africa*[21]*;*

> "Consultation in terms of section 189 of the Act, is a two-way process. No meaningful consultation can take place if one party withdraws from the process. There should also ultimately be finality in the consultation process. It cannot be held in abeyance by a party who insists that the process is not finalised when it is quite clear that the process had been."

[68] The applicants' contentions that the respondent failed to properly consult with them or their union are belied by the following concessions made by Busaka;

a) UPUSA and the individual employees were notified as early as February 2004 of the contemplated retrenchment and the need to consult.

b) All the employees in the cleaning department were affected by outsourcing, and Busaka understood that the subsequent redundancies could result in retrenchments;

c) She had attended consultation meetings with UPUSA where alternatives, including the move to Ecowise were proposed by the respondent, and where UPUSA had in turn proposed that the employees should be transferred internally without a reduction in salary;

d) UPUSA failed to give employees feedback on its discussions with the respondent. At some point, UPUSA had refused to participate or be involved in the consultation process as it was of the view that the retrenchments were meant to get 'rid of black employees';

e) She confirmed that the claims by UPUSA that no proper consultations were held were not true, and conceded that between 27 February 2004 and 19 June 2004, the respondent had made attempts to meet with the employees and UPUSA;

[21] (JS1495/01) [2005] ZALC 93 (17 October 2005) at para 29

f) She conceded that where the respondent sought to consult, and UPUSA had not cooperated, this had created problems for the respondent;

g) The employees were issued with the final letters in terms of which they were required to make an election. The contents of those letters were explained to them by Radney and Raoleka. She however did not respond to the letter, and she and the other expected the union to do so on their behalf.

h) Even under re-examination, she conceded that the union informed them that they were to be transferred to Ecowise on the same terms and conditions. The letters from the respondent were also explained to them.

[69] In the light of the above concessions, there is no basis upon which it can be concluded that the decision to retrench was taken without any meaningful attempts at engaging the union and the employees in a consultation process. It was apparent that the respondent had explored all possible alternatives prior to effecting the retrenchments, and the employees not only unreasonably refused to apply their minds to the alternatives, but their union also failed to approach the consultation process with an open mind and good faith.

[70] For the employees and the union, it was either they were trained properly to perform cleaning functions as specialists would do, but this was however not an option in the light of the respondent's core business. When they were offered alternative positions within the respondent, their demand was that they could accept those positions but without a reduced salary. This was untenable in that as porters, they could not have been offered any other position commensurate with the salaries they had previously earned. When they were similarly offered continued employment on the same terms and conditions with Ecowise, their response was equally uncompromising and unreasonable.

[71] An employer cannot be held to have acted unfairly in circumstances where the employees and the union's approach to the consultation process is erratic, unreasonable and not in the spirit of finding common solutions. In these

circumstances, where the purpose of section 189 of the LRA, which is a joint consensus-seeking process has not been achieve, this cannot be blamed on the respondent. In the light of the dictum in *Johnson & Johnson*[22]*,* if the employer was not at fault and did all it could, from its side, to achieve consensus seeking, the purpose of the section would also have been achieved.

[72] UPUSA's approach to the consultation process was detrimental to the applicants, and I have no hesitation in concluding that it simply went through the entire process with no intention whatsoever of ever genuinely reaching agreement on the issues discussed with the respondent Even more detrimental to the applicants was the fact that on Busaka's version, UPUSA failed at times to give employees feedback in regards to its engagements with the respondent.

[73] The evidence of the respondent, and in particular of Raoleka demonstrated that it was not its intention to dismiss any of the applicants. It was further not the intention of the respondent to leave the applicants in a lurch following its decision to outsource its cleaning unit. All possible alternatives were looked at and unreasonably rejected by UPUSA and the applicants. Based on the evidence adduced before me, I am satisfied and persuaded that there was indeed a valid commercial and business rationale for the respondent's decision to retrench the applicants, and that this was done in a procedurally fair manner.

[74] There was no evidence adduced by Busaka in particular to demonstrate that the respondent had acted in bad faith, or that its decision to outsource and ultimately retrench was meant to serve an ulterior motive. Furthermore, it should be stated that even though the applicants were not entitled to any severance pay in the light of their unreasonable rejection of alternatives offered, they were nevertheless still paid their severance packages. These could not have been the actions of an employer that wished to act in bad faith or for ulterior motives. To this end, I am satisfied that the respondent had proven on a balance of probabilities that the dismissals were for a fair reason,

[22] *ibid*

and that all reasonable attempts were made to ensure that the retrenchments were effected in accordance with a fair procedure as contemplated in section 189 of the LRA.

[75] The respondent sought a cost order against the applicants in the event that it was concluded that their case should be dismissed. In this regard, it was argued that the challenge to the dismissal was not only without merit but was also spurious and vexatious. I am in agreement with the respondent that this case had no merit whatsoever in the light of conclusions reached in that regard. Even though I am of the view that a cost order is warranted in this case, having taken into account the history of this matter, I am of the view that considerations of law and fairness militate against such an order. Accordingly, the following order is made;

Order:

i. The applicants' claim that their dismissal on the grounds of the respondent's operational requirements was procedurally and substantively unfair is dismissed.

ii. There is no order as to costs.

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:	Adv R Lekala
Instructed by:	Harry Ramatshimbila Attorney
On behalf of the Respondent:	Mr Ludwig Frahm-Arp of Fasken Martineau