Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS916/01

2003-03-03

In the matter between

MALIZOLE LARRISTONE NTSHANGA Applicant

and

SOUTH AFRICAN BREWERIES LTD Respondent

---

J U D G M E N T

---

BARRIE, AJ:

INTRODUCTION:

[1] In this matter the applicant ("the applicant" or "Mr Ntshanga"), avers that the respondent ("SAB") unfairly retrenched him in

March 2001. The respondent disputes that.

[2] The grounds for Mr Ntshanga's claim were set out in his statement of claim. Mr Ntshanga alleged that a vehicle accident in which he had been involved with his company vehicle had been regarded as an aggravating factor regarding his retrenchment. He also alleged that no proper consultation had taken place regarding his impending retrenchment - no proper consultation and disclosure of relevant information concerning the impending retrenchment had been undertaken, no prior discussion about any selection criteria had taken place prior to the retrenchment and the date of the retrenchment was never discussed with him prior to the event.

[3] Much of what SAB set out in its answering statement of claim became common cause in terms of a pre-trial conference minute that forms part of the papers. The "Statement of facts that are common cause" in the minute reads as follows:

"3.1. The respondent carries on business as a manufacturer and distributor of beer.

3.2. The applicant was employed by the respondent on 15 June 1998 as a commodity manager: special projects.

3.3. The commercial department is responsible for the purchase of all material necessary for the brewing and packaging of the

respondent's products and all other non-production items necessary for the operation of the respondent.

3.4. In or about July 2000 the respondent requested business consultants to investigate how value could be extracted in the general spend area of the respondent's operation. The consultants believed that a significant cost saving could be realized if the respondent were to reconfigure the non-production spend process in the commercial department.

3.5. In the last quarter of the year 2000 the respondent commissioned the services of Marcus Alexander of the London Business School ("Alexander"), an expert in the role of corporate offices, to investigate how to improve the service provided by its corporate office.

3.6. Alexander made certain recommendations to the respondent, including that -

3.6.1. the corporate head office should have less operational involvement in the regions and give more strategic support;

3.6.2. the corporate head office should give less routine functional support to the regions and more sapiential support;

3.6.3. the corporate head office should focus less on routine services and more on value added services.

3.7. The key implications of these recommendations were that

some work done at the corporate head office would stop, some work would change in scope and focus, and that work in the corporate head office would be less operationally focused.

3.8. On 26 January 2001 the respondent communicated its intention to restructure its corporate office and consulted with all of its employees, including the applicant on the reasons for the proposed restructuring. Employees were encouraged to refer to management if they had any ideas on how to improve management's approach. In addition employees were informed of a number of resources set up to support employees through what was anticipated to be a stressful process. This included support from human resources, counselling support and a 24 hour anonymous support hotline for employees and their families.

3.9. On 30 January 2001 the respondent consulted with its employees on the proposed new structure for the corporate office. In the case of the commercial department the head of the commercial department, Tim Walters, consulted with all of the commercial department employees including the applicant on the proposed new structure for the commercial department. The respondent consulted on the reasons for the proposed restructuring of the commercial department

including the value that could be extracted by the proposed new structure. In addition respondent consulted on the timing of the consultation process, alternatives in the event that individuals were affected and the support that would be given to affected individuals.

3.10. Employees, including the applicant, were given the opportunity during the period 30 January 2001 to 9 February 2001 to communicate their ideas and counter- proposals on the proposed new structure to the respondent. Several representations were made to the respondent in this regard. The applicant, however, did not make any such representations.

3.11. On 13 February 2000 Tim Walters met with the applicant.

3.12. The respondent then advertised all vacant positions within the commercial department and all potential retrenchees were invited to apply for these positions. The advertisements listed the requirements in relation to each advertised position. The applicant applied for two positions, i.e. that of commodity manager and that of commodity specialist. The applicant had interviews for both of these positions but was unfortunately unsuccessful.

3.13. In addition all potential retrenchees including the applicant

were invited to apply for vacant positions elsewhere within the respondent, and were informed that their applications would be given preference.

3.14. On 1 March 2001 the applicant was informed that as, in the opinion of the respondent, there were no suitable alternatives for the applicant, he would be retrenched with effect from 31 March 2001. The applicant was simultaneously informed of the details of his severance package as per the respondent's "redundancy guidelines" practice and policy.

3.15. The applicant was retrenched with effect from 31 March 2001.

3.16. The applicant referred a dispute concerning his alleged unfair dismissal to the commission for conciliation, mediation and arbitration, ("the CCMA") for conciliation under case number GA1147-01. However, the dispute remained unresolved and a certificate of outcome to this effect was issued on 9 May 2001."

[4] Paragraph 3.13. of the pre-trial conference minute appears to have been extracted from the respondent's statement of case. Paragraph 4.14. of that document reads:

" 4.14. In addition, all potential retrenchees, including the applicant, were invited to apply for vacant positions elsewhere within the respondent, and were informed that their

applications would be given preference. **The applicant did not apply for any positions outside of the commercial department**."

(Emphasis added).

[5] Paragraph 4.14. of the statement of case adds meaning to paragraph 3.13. of the pre-trial conference minute. I interpret paragraph 3.13. of the pre-trial conference minute as relating to employment outside of SAB's commercial department at its central office in Johannesburg.

THE LEGALWISE STATEMENT:

[6] At the outset of the proceedings I was requested to make a ruling regarding a document contained in the bundle of documents that was handed up for purposes of the trial. The document is headed "Statement for Legalwise" and is dated 29 March 2001. It was disclosed by SAB in the prescribed list of documents that accompanied its statement of case. Mr West, who appeared on behalf of the applicant, informed me that this document had been obtained by the respondent from a computer that the applicant had utilized while still in the respondent's employ, at his place of employment. That was confirmed by Mr Todd who appeared on behalf of the respondent. I was also informed that Legalwise was an

insurance company that provided insurance cover against the costs of litigation that might be incurred by its members. Mr West argued that the document was inadmissible because it had been submitted to Legalwise to obtain legal advice and had to be accorded the protection accorded to communications between clients and their legal representatives. He argued further that the respondent's accessing the document on the computer constituted a breach of Mr Ntshanga's rights of privacy and that that should render the document inadmissible.

[7] I was told by Mr West that Legalwise required their members to provide a statement regarding the facts pertaining to their alleged cases to enable Legalwise to determine whether the member had a *prima facie* case and to decide whether to afford him or her legal representation by an attorney.

[8] I ruled that the document was admissible in evidence and stated that I would provide reasons for my ruling with the reasons for my judgment in the matter itself.

[9] The document does not qualify for protection as a privileged communication between client and his professional legal adviser. The alleged ground for claiming privilege is not applicable. Legalwise is an insurance company and not a

professional legal adviser. Moreover, the document was not submitted to obtain legal advice, but to enable Legalwise to assess Mr Ntshanga's request for legal assistance in terms of the provisions of the agreement that operated between Mr Ntshanga and Legalwise.

[10] I also do not consider that SAB's obtaining the document constituted a breach of Mr Ntshanga's rights of privacy. The subject matter of the document does not relate to anything that can be said to be relevant to the applicant's rights of personal privacy. (See *Bernstein and Others v Bester* 1996 2 SA 751 (CC) at 787E-H and 795E-F.)

[11] Furthermore, the document was not obtained unlawfully and there are no reasons of law or public policy why it should be rendered inadmissible in proceedings that relate to the subject matter of the document.

[12] Despite the fact that the Legalwise statement was ruled to be admissible, as events turned out, it did not play any part in the trial.

THE RESPONDENT'S CASE:

[13] The respondent presented its case first. It first led the evidence of Mr P L Nieman, the respondent's "commercial manager: non-production spend".

[14] Mr Nieman testified that he was appointed as manager of the respondent's "non-production spend" department, which came into being on 1 March 2001 as part of the respondent's central office in Johannesburg, arising from the restructuring that had been implemented. He had not earlier been involved with the functions that were put into the department. He was previously the executive assistant to SAB's marketing director, and accordingly did not have knowledge of the work performance, skills and personal attributes of employees who had previously performed the functions that were transferred into the non-production spend department. The non-production spend department in the new structure of the respondent's commercial department was a combination of the functions that had previously fallen under the "commercial development manager: marketing and transport", "the commercial development manager: IS engineering general spend" and the "procurement development manager". These managers had previously reported to the "commercial supply chain manager". The "commercial manager: packaging" and the "commercial manager: brewing material" had also reported to the commercial supply chain manager.

[15] The essence of the restructuring was that the functions that

had previously been carried out by employees reporting to the first-mentioned three managers, would be put in one department reporting to one manager, i.e. Mr Nieman. The consequence was that the procurement of all commodities that were not part of the respondent's product (the beverage itself) or attached to the product (the packaging) would be placed in one department.

[16] One of the important procurement functions that would be housed in the new department, was that of so-called "BTL" or "below the line" products. These are promotional items such as T-shirts, golf caps, sports bags and what not that SAB uses in its marketing endeavours.

[17] The emphasis of the procurement functions would change. Whereas purchasing of the non-production spend items had previously occurred via the central office, orders would in future be placed on suppliers directly by the respondent's "regions", i.e. the operating divisions in the various regions of Southern Africa. The main responsibility of the central office would be to put the contracts in place in terms of which the regions would then be able to do their direct purchasing. The contracts could operate nationally or regionally. The notion was that the central office would be better placed to negotiate

advantageous contractual terms, whether the contracts operated nationally or regionally.

[18] In the prior structures "commodity managers" reported to the commercial managers. The commodity managers were responsible for the procurement function relating to the products or services that had been assigned to them, including the administration of the purchasing by the regions in terms of the contract that had been concluded with the supplier. They did so in conjunction with the commercial managers and with the assistance of "sourcing analysts". The sourcing analysts were essentially market canvassers whose task was to gather and stay abreast of information regarding what products and services that SAB might utilize were available in the market, from whom they were available and at what price.

[19] In the new structure commodity managers would be retained. However, they would be expected to take "total ownership" of the commodities and services that had been assigned to them. Negotiation and putting into place of supply contracts would be their primary obligation and they would in principle no longer rely on their superior, the manager of the non-production spend department, in the process. They would still have the assistance of sourcing analysts.

[20] Because the commodity managers would now be "total owners" of the commodities assigned to them, in principle without the need for intervention or assistance of their superior manager, it was proposed to create a new post of "commodity specialist". The commodity specialists would have the same function as the commodity managers, also reporting directly to the manager non-production spend. However,they would have more limited authority in regard to the negotiation of procurement contracts. Contracts of lesser complexity and value would be assigned to the commodity specialists.

[21] The seniority grades that were eventually attached to these posts were "executive 4" for the commodity managers, "I" for the commodity specialists and "H" for the sourcing analysts. These gradings were in terms of a grading structure that graded from the lowest graded posts to the highest from "A" to "I" and then from "executive 4" to "executive 1".

[22] According to Mr Nieman it was his sole responsibility to put the non-production spend department together. He was looking for seasoned people who would be able to deliver the most advantageous contracts to SAB. Nevertheless, it was sought to fill the available posts first from applicants within SAB that

were affected by the restructuring, i.e. preference had to be given to employees at central office affected by the restructure.

[23] The applicant (who carried an "I" grading in his previous post) had applied for the positions of commodity manager and commodity specialist in the new structure. Mr Nieman interviewed him on 26 February 2001. According to Mr Nieman certain Messrs Sam Oved and John Davies were also part of the interview panel. Mr Oved had been the commercial development manager: marketing and transport in the previous structure. The applicant had reported to him. Mr Davies was the "HR specialist" for the commercial department.

[24] Prior to his interview with the applicant Mr Nieman perused Mr Ntshanga's *curriculum vitae* that accompanied his application. This was only to satisfy himself that Mr Ntshanga met the minimum requirements of the posts that he had applied for. Despite the fact that Mr Ntshanga boasted an impressive *curriculum vitae* which, *inter alia*, listed his educational qualifications as B.Sc. Metallurgy and B.Comm and his previous experience as encompassing positions such as contracts official and procurement officer with a large gold mining group and metals and mining sector consultant and

industrial market research manager with ESKOM, the contents of the *curriculum vitae* were not canvassed in any detail at the interview. Mr Nieman's primary requirement for the posts of commodity manager and commodity specialist was contract negotiating experience. He was looking for people with at least seven years' experience of contract negotiations for the commodity manager positions, and at least five years for the commodity specialist position. Mr Ntshanga did not meet these requirements. According to Mr Nieman Mr Ntshanga informed him that he had on only one occasion negotiated a contract. That was a bread supply contract negotiated at middle management level when Mr Ntshanga was working in the gold mining industry. Moreover, Mr Ntshanga was cautious of and did not have high expectations that "e-procurement" (which was to play a large role in the future of the department) would succeed. Also, when he had been responsible as commodity manager for BTL products he did not have a good relationship with SAB's regions in terms of forcing them to buy via the national contracts. Mr Ntshanga also stated that he tried to avoid conflict where possible, which Mr Nieman regarded as a negative attribute for a negotiator. Finally, Mr Oved, Mr Ntshanga's immediate superior, had confirmed that

Mr Ntshanga had not negotiated any contracts while in SAB's employ. Mr Nieman could not recall whether this occurred when Mr Ntshanga was still present or whether Mr Oved made the observation after Mr Ntshanga had left. The latter seems likely.

[25] Despite Mr Oved's presence during the interview, Mr Nieman e-mailed him the following day on SAB's intranet system as follows:

"The above mentioned employee applied for the commodity manager position in the commercial department at central office. An interview was held with the employee on Monday 26 February 2001.

Kindly furnish me with your comments in respect of this employee, especially issues relating to performance, delivering of quality requirements, goals, working and performing under pressure and dealing with other team members."

The e-mail referred to Mr Ntshanga.

[26] Mr Oved replied on 28 February 2001. His reply reads as follows:

"The followings are some comments in regard to Zola Ntshanga.

Zola is a clever and good analytical person who knows the SAB

business well.

In regard to his performance I will divide it into two periods:

June 1999 to Feb 2000 Zola was engaged in the implementation of SAP into the BTL process. In that role his performance was "under average".

Feb 2000 to present, Zola assisted me to manage some of the indirect spends commodities. During this period he performed on a scale from 1-6 on but close to 3.

From the point of his communication skills and dealing with people I think Zola is lacking of flexibility and good manners. This caused him to be confronted with a few of his customers, and in some cases also with the supplier.

I hope the above will help you to make the right selection of your candidates."

[27] In these circumstances the applicant's application to be appointed as a commodity manager or a commodity specialist in the new structure failed. He was so informed by letter on 1 March 2001 as is recorded in the pre-trial conference minute.

[28] On the same day, 1 March 2001, Mr Ntshanga was informed of his retrenchment in another letter. It was signed by the same person, albeit that the signature on the two letters were appended on behalf of different persons. (In the first letter on

behalf of Mr Nieman and in the second on behalf of SAB's financial director.) The signature appears to be the signature of Mr Davies, but whether it is his signature or not is in final analysis neither here nor there.

[29] In the second letter Mr Ntshanga was *inter alia* informed:

"As part of the reorganisation exercise in Central Office all efforts were made to find you alternate employment because your current position became redundant.

This however was not possible, and we are now offering you a retrenchment package as per the redundancy guidelines of the company.

... ".

[30] On 19 March 2001 the applicant e-mailed Mr Nieman. He requested reasons for his not being appointed to the positions he had applied for. Mr Nieman replied on 20 March 2001 as follows:

"Your e-mail dated 19 March 2001 refers.

The reasons for you being unsuccessful in your application for the above mentioned positions are as follows:

1. Lacking in interpersonal skills, as you try to avoid conflict. Conflict resolution is a key element of negotiation.
2. Lack of technical skills on terms of your negotiating skills.

3. Lack of business related knowledge, especially on e-procurement. You expressed little or no confidence in the e-procurement process, and did not have any expectation of e-procurement succeeding in the business.

4. Lacking in management skills in terms of gaining the buy-in and adoption from regions to comply with national contracts.

All the above mentioned are key competencies and job requirements for a commodity manager/specialist."

[31] What is important for the decision of this matter is that whereas there had been two commodity manager posts in the previous structure, the new structure provided for eight commodity managers/commodity specialists. Moreover, where there had previously been posts for three sourcing analysts there would be four sourcing analysts in future. What was also established during Mr Nieman's testimony was that, of the eight commodity managers/commodity specialist positions, two were filled immediately. The two prior commodity managers were re-appointed. A further two were filled during March with effect from 1 April 2001 from within SAB (but from outside the affected employee category). Of the remaining four posts, by June 2001 one had not been filled at all and three had been filled by outside applicants being

appointed.

[32] As regards the four sourcing analyst posts one incumbent remained in her post and two new appointments were made, one from within the SAB ranks (again not from the affected employee category). By the beginning of June one post was still vacant.

[33] When it was suggested to Mr Nieman that the applicant could have been appointed as a sourcing analyst he did not dispute it. His response was that nothing had prevented Mr Ntshanga from applying for a post as sourcing analyst. Accordingly, Mr Nieman clearly did not regard it as part of his responsibilities to make any effort to retain Mr Ntshanga's services, after his application for appointment to the commodity manager and commodity analyst posts had been turned down.

[34] The respondent's second and final witness was Mr S Oved. As already stated, he had been the applicant's manager since approximately June 1999. Mr Oved was appointed as the respondent's commercial manager: indirect spend in 1996 and became responsible for the BTL products in June 1999. Mr Ntshanga, in his position of commodity manager: special projects, was responsible at the time to manage the BTL logistics subcontractor. SAB had appointed a subcontractor

who was responsible for the receiving, warehousing, packing and distribution of BTL items. Mr Ntshanga was responsible for purchasing BTL items in terms of existing contracts, to oversee the subcontractor and to manage the interface between the subcontractor and SAB, more particularly SAB's brand managers and regions that required BTL items in their marketing efforts. In this position he had also been responsible to manage and oversee the installation and implementation of a new computer software system for material management and stock control relating to the BTL items.

[35] According to Mr Oved it soon became apparent to him that the situation regarding the BTL logistics was highly unsatisfactory. Records and deliveries to the regions were running months behind, substantial values of stock were unaccounted for, data capturing on the new system was far behind and there was a high level of tension between senior managers in the regions and managers of SAB's various brands on the one hand, and Mr Ntshanga, on the other. In these circumstances he decided at the beginning of 2000 to remove Mr Ntshanga from the BTL logistics function and to utilize him at the central office as a sourcing analyst. Mr Oved also contemplated that Mr

Ntshanga would assist him, Mr Oved, in his functions. Mr Oved testified that Mr Ntshanga's original title of commodity manager had actually been a misnomer. A commodity manager negotiates contracts for the supply of commodities, something that Mr Ntshanga never did. However, Mr Oved regarded Mr Ntshanga as a talented, intelligent and very systematic person and he believed that Mr Ntshanga could, with the necessary exposure, be groomed to become a successful commodity manager, i.e. to be able to take "full ownership" of the commodities he had to manage.

[36] Mr Oved accordingly had Mr Ntshanga sit in on negotiations that he conducted and he had Mr Ntshanga assist him with the drafting of contract documents and supply procedures. From Mr Oved's perspective Mr Ntshanga was from 1 February 2000 undergoing training to become a commodity manager. Formally he was the "sourcing analyst: refrigeration and transport" and his job designation on his pay slip changed from "commodity manager" to "analyst". Mr Ntshanga's remuneration, however, remained the same as did his "I" level job grading.

[37] Although Mr Oved's actions constituted a demotion of Mr Ntshanga, no formal discussions in this regard took place. Mr

Oved had reassigned Mr Ntshanga and Mr Ntshanga had accepted it. Mr Ntshanga did, however, raise objections to the changing of his job title to that of sourcing analyst. Mr Oved had discussions with him about this during which he impressed on Mr Ntshanga that he was actually a sourcing analyst and not a commodity manager. The issue was never finally resolved and Mr Ntshanga kept on referring to himself as a commodity manager.

[38] In terms of the company's proposals for restructuring, which were made available at the end of January 2001, Mr Oved's position would become redundant. He had surmised that he would become redundant and had started looking for alternative employment. Eventually however, although Mr Oved had procured an offer for employment from another employer, he did not leave SAB. SAB's "manager: e-procurement and commercial strategy" had passed away and that position was offered to Mr Oved, which offer he accepted.

[39] When Mr Nieman sought Mr Oved's input about Mr Ntshanga's suitability for the new commodity manager and commodity specialist posts in February 2001, Mr Oved was of the opinion that Mr Ntshanga was not yet ready to undertake the responsibilities attaching to the positions. That had prompted

Mr Oved's responses to Mr Nieman at the interview on 26 February and in his e-mail of 28 February 2001. Mr Oved was, however, of the opinion that there was no reason why Mr Ntshanga could not be appointed to one of the new sourcing analyst positions. The responsibilities attaching to these posts were in principle no different from that that had pertained before. Although Mr Ntshanga's former position of sourcing analyst: refrigeration and transport, had formally become redundant, nothing disqualified Mr Ntshanga from undertaking the new sourcing analysts' roles, in any event, not in Mr Oved's opinion.

[40] The sourcing analysts' roles did differ somewhat from those in the prior structure. There had been three sourcing analysts before, a "sourcing analyst: BTL", a "sourcing analyst: refrigeration and transport" (Mr Ntshanga) and a "sourcing analyst: engineering spares." As already stated there were four sourcing analysts in the new structure. An additional BTL sourcing analyst's post was created. The other two sourcing analysts would be a roving resource for the commodity managers and commodity specialists. They would not necessarily be dedicated to particular commodities. The point, however, is that the essence of the resourcing analysts's

functions had not changed.

THE APPLICANT'S CASE:

[41] After conclusion of Mr Oved's testimony, the respondent closed its case. The applicant's case was closed without leading any evidence. A copy of an e-mail from Mr Ntshanga to his attorneys was however handed up. In it Mr Ntshanga provided particulars of his employment after his retrenchment to the effect that he had been unemployed for five months and then found employment at a salary that was on the face of it comparable to the salary he had received at SAB. The respondent accepted the correctness of these particulars.

DISMISSAL FOR A FAIR REASON IN ACCORDANCE WITH A FAIR PROCEDURE?

[42] Mr West argued that the consultations referred to in paragraph 3.8., 3.9. and 3.10. of the "Statement of facts that are common cause" in the pre-trial conference minute, did not constitute consultations as contemplated in Section 189 of the Labour Relations Act ("the LRA") (prior to its amendment by Act 12 of 2002) in relation to the matters that are referred to in the minute. I do, however, consider that the agreed facts constitutes *prima facie* evidence of consultations regarding the reasons for the redundancy that gave rise to the

retrenchments, the number of employees that were affected and their job categories, the method for selecting potential retrenchees, the timing of the retrenchments and the assistance that SAB had offered to retrenchees. In the absence of contradictory evidence I have to accept that SAB "consulted" i.e. gave affected employees sufficient opportunity to put forward suggestions and make representations to influence SAB's decisions regarding the restructuring and its consequences.

[43] SAB did not put forward any evidence to show that it consulted in a meaningful manner about severance pay. It appears that it simply informed employees of the severance pay that they would receive in terms of SAB's redundancy guidelines.

[44] Although this was a deficiency in the consultation process it did not of itself render Mr Ntshanga's retrenchment unfair. Large employers often have retrenchment packages in place in terms of an existing retrenchment policy or guideline. These packages are usually the product of consultation and negotiation that occurred in prior rationalisation drives and the employer's scope to agree special terms for subsequent retrenchees is usually limited by a fear for precedent setting and for being accused of differential treatment of employees.

Nevertheless, employers that fail to canvass these issues with their potentially affected employees or their representatives during retrenchment consultations, do so at their peril and run self-evident risks of *ex post facto* condemnation that their conduct had been unfair.

[45] SAB's consultations with its employees until 9 February 2001 served to put forward SAB's proposed restructuring, to elicit the input from employees in that regard and eventually to establish the method for selecting potential retrenchees. Those employees whose positions no longer existed in the new structure would be retrenched unless their dismissal could be avoided. The measure that SAB had tabled to avoid dismissal of employees earmarked for retrenchment was that they could apply for vacant posts in the new structure. Mr Ntshanga acted in terms of this measure. His application for appointment to the commodity manager/commodity specialist posts, was a proposal from his side that his dismissal could be avoided by his being appointed to these positions. This proposal was rejected on 1 March 2001 and Mr Ntshanga was informed on the same day that his services were being terminated.

[46] No actual consensus-seeking consultations to avoid Mr

Ntshanga's dismissal had taken place. He was not given any opportunity to respond to the negative comments about his performance that had been raised by Mr Oved. No efforts to explore other potential means of accommodating him in SAB were made. If SAB had had any real intention or desire to try to avoid Mr Ntshanga's dismissal, one would have expected that discussion would have occurred with him not only to point out and elicit his response to his perceived shortcomings for the posts for which he had applied, but also to identify posts in the new structure for which he would be better suited. (See *Wolfaardt & Another v Industrial Development Corporation of SA Ltd* 2002 11 BLLR LC at 1134G-I, and *Grieg v Afrox Limited* 2001 22 ILJ 2102 ARB at 2110G-H.)

[47] Section 189 of the LRA (as it read prior to amendment) proceeds from the premise that fair labour practice requires that the dismissal of an employee for operational reasons should be avoided if it is reasonably possible within the parameters of the commercial or business dictates of the enterprise. Section 189 posits consultation as the avenue that has to be followed to try to find means to prevent dismissals that can be avoided. (See *Kotze v Rebel Discount Liquor Group (Pty) Ltd.* 2000 2 BLLR 138 LAC at 142B-143F and the

authorities there cited.)

[48] If proper consensus-seeking consultations to avoid dismissal did not take place, it is primarily a procedural failure. However, such failure can be a serious obstacle to the employer's ability to prove that the dismissal occurred for a fair substantive reason based on the employer's operational requirements.

[49] In the premises of the present case SAB's failure to conduct further consultations with Mr Ntshanga after Mr Nieman had decided that he should not be appointed as a commodity manager or commodity specialist, constituted procedural unfairness. It is possible that if such consultations did occur and it had been suggested to Mr Ntshanga that he could possibly apply for a resourcing analyst post he would have done so. On the other hand he might have declined to do so. The diminution in status, grading and remuneration that appointment as a sourcing analyst would have encompassed might have been unpalatable to him. However, we do not know. Because the consultations did not occur, SAB has been unable to prove that Mr Ntshanga dismissal occurred for a fair reason based on its operational requirements. The fact of the matter is that there were positions available in the new

structure for which Mr Ntshanga was suited and no attempt was made in consultation with him to accommodate him in those posts.

[50] My conclusion is accordingly that Mr Ntshanga's retrenchment constituted an unfair dismissal and that he is *prima facie* entitled to compensation for the infringement of his right not to be unfairly dismissed.

COMPENSATION:

[51] The amended section 194 of the LRA which applies from 1 August 2002, reads as follows:

"(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

[52] In *Fouldien & Others v House of Trucks (Pty) Ltd.* 2002 23 ILJ 2259 LC, LANDMAN J held that the amended section applies to unfair dismissals that occurred even before 1 August 2002. No

argument was addressed to me that I should depart from that decision and I intend to follow it.

[53] I take into account that Mr Ntshanga was unemployed for five months after his dismissal. However, if he had remained in SAB's employ it would probably have been in a post with an H grading and with a lesser salary. That needs to be kept in mind.

[54] I also take into account that at the end of the day the indelible impression left by the evidence was that SAB had no desire to retain Mr Ntshanga's services. He was regarded as someone who had been unsuccessful in the post of commodity manager and who had for the year he had performed the functions of a sourcing analyst performed merely at an average level. It is probable that further consultations with him after 1 March 2001 did not occur simply because SAB wanted to rid itself of an employee who was perceived to be underperforming. It is not permissible for an employer to utilise retrenchment as a tool to sidestep the obligations that it owes underperforming employees to attempt to remedy their deficient performance. (See the *Wolfaardt* and *Grieg* cases cited above.)

[55] Finally, however, I also take into account that on the evidence before me Mr Ntshanga took no steps after 1 March 2001 to

try to avoid his dismissal. The obligation to participate in consultation to avoid dismissal also rests on employees and their representatives and not on employers alone. If Mr Ntshanga had had a serious desire to retain his employment with SAB I would have expected him to engage his employer about it. If he had done so, even after notice of termination of his services on 1 March 2001, he might well have been appointed to a sourcing analyst's position.

[56] In all the circumstances I consider that it would be just and equitable if Mr Ntshanga be awarded compensation equal to four months' remuneration to be calculated at the remuneration level that applied to Mr Ntshanga at the time of his retrenchment.

COSTS:

[57] Costs should follow the event. However, it is possible that offers of settlement were made to Mr Ntshanga exceeding the award of compensation in his favour. I do not know. I will accordingly make a costs order that is provisional, to enable information about any formal offers of settlement that were made to Mr Ntshanga to be brought to my attention via the registrar. I do so because of the deficiencies of the provisions of rule 22A of the rules of this court. Rule 22A does not

contain provisions of similar import to those in rules 34(21) and 34(23) of the rules of the high court. Accordingly, if parties have addressed the court on the question of costs and a costs order has been made, the court is *functus officio* and cannot revisit its costs order if an earlier offer of settlement is only then brought to its attention.

[58] Rule 22A(6) is moreover in all probability *ultra vires.* The rules board for labour courts have powers in terms of Section 159(3) of the LRA to make rules to regulate the conduct of proceedings in the labour court, not to alter the substantive law pertaining to the privilege that attaches to offers of settlement.

[59] There are self-evident reasons why litigating parties would not wish to bring an offer of settlement to the court's attention prior to judgment, including by not asking the court not to address the issue of costs prior to judgment. The court should be able to give its judgment and make an order uncluttered in its thinking by issues such as the costs implications of prior offers of settlement.

[60] A defending party should be able to safeguard its position regarding the costs of a trial by making a realistic secret offer of settlement to an applicant. If applicants realise that they

run the risk of having to pay their counter-party's costs if a realistic offer is not accepted and is not exceeded by the relief that the court eventually grants, I believe that many more cases will be settled before trial.

[61] The necessity for a regime such as that that pertains in the high court is accentuated by the amendment of Section 189 with effect from 1 August 2002. However, the implications of that amendment for unfair dismissals prior to 1 August 2002 would not have been reasonably apparent to litigants before publication of the *Fouldien* judgment. It would be unfair to penalise an applicant for his or her failure to accept an offer of settlement if, at the time, the applicant would not have been able to recognise the risks associated with not accepting the offer. In principle, therefor, unaccepted offers of settlement that had been made prior to 1 January 2003, should not cause a provisional costs order to be amended. Nevertheless, there is no fixed rule that can be formulated and the matter remains in the court's discretion, to be exercised in the light of the circumstances that pertain to each individual case.

ORDER:

[62] The order that I make in this matter is:

1. The respondent is ordered to pay compensation to the

applicant equal to four months' remuneration calculated at the remuneration level that applied to the applicant at the time of termination of his services on 31 March 2001.

2. The respondent is ordered to pay the applicant's party and party costs.

3. The order in terms of paragraph 2 shall be provisional for a period of 10 days. If any written offer of settlement that the respondent had made to the applicant is brought to the notice of the registrar within 5 days of this judgment, in writing, the question of costs shall be considered afresh in the light of the offer.

_____

F G BARRIE

Acting Judge of the Labour Court

29 May 2004

REPRESENTATION:

APPLICANT: ADV. H P WEST

RESPONDENT: ATTORNEY C.F.N. TODD