IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.

JS 902/2001

In the matter between:

MABASO AND 9 OTHERS
APPLICANTS

and

UNIVERSAL PRODUCT NETWORK (PTY) LIMITED
RESPONDENT

JUDGMENT

NDLOVU AJ

INTRODUCTION

[1] The applicants are former employees of Universal Product Network (Pty) Ltd (the respondent herein). They were dismissed

by the respondent on 15 May 2001, and they claim that the dismissal was both substantively and procedurally unfair. For that, they seek an order against the respondent for compensation in terms of section 193(1)(c) of the Labour Relations Act 66 of 1995 ("the Act"). The respondent alleges that the dismissal was based on its operational requirements and contends that it was fair.

[2] The fact of the applicants' dismissal was not in dispute, but only its fairness. Hence, the respondent had the duty to prove, on a balance of probabilities, that the dismissal was fair. (Section 192(2)).

[3] The respondent operated the business of product distribution and was a subsidiary company of, and wholly owned by, Woolworths (Pty) Ltd. It had three distribution centres throughout the Republic and the applicants were stationed at the distribution centre situated at the City Deep, Johannesburg ("the City Deep"). They, except the first applicant, held the positions of shift managers. The first applicant held a higher position of liaison manager, which was equivalent to that of deputy operations manager. The respondent's managerial structure consisted of six hierarchical job levels (the "job levels"), namely, M1 to M6. The former was the highest rank in the management structure and the latter, the lowest. The shift managers (and so, the 2nd to 10th applicants) occupied M6 levels, whilst the first applicant was ranked at M4 level.

SUMMARY OF EVIDENCE

[4] The respondent's evidence was adduced from a single witness,

Mark van Buuren, the respondent's general manager. The applicants' testimony came from Cornelius Mabaso (the first applicant) and Prince Rathogwa (the sixth applicant).

THE RESPONDENT'S VERSION

[5] Van Buuren's testimony sought to establish, firstly, that there was a compelling need, based on commercial and operational rationale, on the part of the respondent, to restructure and reorganise its middle to lower management personnel. In his testimony he referred to various communication between, on the one hand, the respondent and the potentially affected employees (including the applicants) and, on the other hand, the respondent and the applicants' representative trade union, the South African Commercial Catering and Allied Workers' Union (the union), which was the majority representative trade union at the respondent's workplace. He also referred to minutes of several meetings, which were held between these parties. According to him this constituted a consultation process as envisaged in section 189 of the Act. In other words, the large part of van Buuren's testimony was based on the documentation which formed part of the court file, the large part of the contents of which documentation, was either common cause or not in dispute.

[6] On 2 March 2001 the respondent sent out memoranda to individual managers, under the hand and signature of the respondent's general manager, Jean Bakomito. The memoranda served as invitation to all managers for a meeting to be held on 5 March 2001. The applicants and some other managers attended.

[7] The meeting was addressed by Bakomito and the respondent's human resources manager, Florence Chadinho. Remarkably, van Buuren, the only witness for respondent did not attend this meeting. However much of his evidence about this meeting was accepted because it involved common cause facts. The managers were informed about the respondent having gone through a poor-performance spell in terms of its contractual obligations towards its clients, which had reasonably brought about some fear to the top management of a potential risk of the respondent losing its contract with its man contractual partner, Woolworths. Van Buuren testified that although the respondent was the subsidiary company of Woolworths, the latter was free to contract with any other product distribution company which could offer better quality service and cheaper prices.

[8] According to the one-page document headed "the Communication Brief" (hereinafter the first document) which was handed out to the managers at the start of the meeting, it was stated that the project known as "Delivery Excellence", which had been implemented by the respondent, had attained good results for the respondent, in that the respondent's service levels to its clients had improved. This was in comparison to the slump which the respondent had encountered in the recent past. The respondent, however, felt that despite the "Delivery Excellence" project, it was still necessary to restructure and reorganise the middle to lower management echelon, in order to sustain and improve the current service levels and ensure the respondent's future viability. The restructuring would result in certain management posts becoming redundant, thus necessitating retrenchment of the incumbents of those posts.

[9] Thereafter Bakomito handed out the second document dated 5 March 2001, with the main heading : “Possible Re-Organisation of City Deep Management Structures” (hereinafter the second document). The second document was also addressed to individual managers. A copy, to serve as example was included in the court record, which was a copy addressed to the first applicant. The second document outlined in more detail the respondent’s perspective on the matter. It had, *inter alia*, the following sub-headings: “Business Rationale”; “Consultations”; “Issues for Consultations” and “Selection Criteria”. The opening paragraph of the document read *“As you are aware the company introduced the project “Delivery Excellence” at City Deep due to the below standard service levels which created the possibility of the company losing the Wentworth contract”.* I refer specifically to this paragraph because the applicants refuted the allegation that they were ever aware that the respondent had operational problems.

[10] Upon a suggestion by Bakomito, the affected managers who attended the meeting elected, from their midst, three representatives who would represent them at the consultation process with the respondent’s management. The first applicant was one of the representatives. However, this arrangement was short-lived because, as it will become apparent hereafter, the union soon assumed the leading role in the representation of the applicants at the consultation.

[11] The affected managers were, however, informed that their retrenchment would not disqualify them from applying for positions in the new structures. They were further assured that

their applications would be treated on merit. As will appear later, this proposal did not auger well for the applicants. Van Burren also told the Court that the respondent assured the managers concerned that the new structure would not be implemented before the consultation process was completed.

[12] The affected managers were then given an option either to come to work or stay at home for two weeks. This break would be on full pay. According to van Buuren, by their staying at home was intended to facilitate the consultation process, by affording them time to prepare for the consultation.

[13] In terms of the second document the restructuring would see the current 16 shift managers (including 2nd to 6th applicants) and 4 deputy operations managers being replaced by 12 functional managers and one planning manager. In other words, the post of shift manager was to be abolished. Van Buuren stated that the position of functional manager required more skills, especially in leadership and planning, as compared to the position of shift manager, which was a much lower managerial level. He said whilst the post of shft manager was at M6 level, that of functional manager would be at M4 level.

[14] There was several correspondence between the respondent and the union, with a view to schedule a meeting at which the union would be represented. Eventually, a meeting was held on 16 March 2001 at which all parties were represented, namely, Chadinho and Bakomito (for the respondent), the affected managers, including the applicants, and at least five union officials (for the applicants). The union representatives demanded more clarity on the proposed management

restructuring. Chadinho confirmed that all 16 shift managers and 4 deputy operations managers were affected. Further. that in terms of the new structure, there would be 18 new positions created. The affected managers were entitled to apply for the positions.

[15] When the union inquired why the current shift managers were not simply absorbed into the new positions, Chadinho replied that the job content of functional managers would be substantially different from that of shift managers. She reiterated that the position of functional manager required more responsibility and skill. She further stated that the respondent had already issued out advertisements, inviting applications for the new posts. In this regard, she explained that the respondent had started on the recruitment process when the union had dragged its feet after being invited by the respondent to the consultation process. The union criticised the respondent's move to advertise the new posts and labelled it as consultation in bad faith. At this meeting the union requested the respondent to furnish it with more information, including a comparative schedule on the job responsibilities and requirements in respect of both the current and the new structures, the list of its affected members and their qualifications, the respondent's Employment Equity Plan and the Skills Development Plan. The respondent undertook to furnish the requested information by 19 March 2001.

[16] What followed thereafter were accusations and counter accusations between the respondent and the union over allegations by either party that the other was stalling progress in the process. For instance, on 23 March 2001 the respondent gave the union a written ultimatum that unless the union made

itself available for a meeting not later than 27 March 2001, the respondent would proceed and consult with the affected members on individual basis. The union responded to this letter and proposed a meeting for 28 March 2001. On that day the parties met and the consultation proceeded. The union pointed out to van Buuren that the information it had requested from the respondent was not furnished in full by the respondent. The union cited, for example, several tertiary educational and skills diplomas and certificates which the first applicant held, but which were not included in the respondent's response. Van Buuren conceded that it was possible his administration department made the omission.

[17] On 4 April 2001 another meeting was held where the union submitted its written counter-proposals dated 3 April 2001 for consideration by the respondent. The union's proposals differentiated between two categories of their members who were affected by the proposed retrenchment. The first category involved four of its members (subsequently reduced to three) whom the union suggested should be retained within the respondent's new structure, but without being subjected to interviews for reappointment. The respondent declined the idea of not interviewing the four persons, arguing that the interview process would ensure that they met the required standard. In any event, the respondent undertook to look into the matter.

[18] The second category involved the union members who were opting for voluntary retrenchment. They were originally eight in number but were subsequently increased to ten. These ten persons are now the applicants herein. The respondent contended, that by offering themselves for voluntary

retrenchment the union had thereby accepted the redundancy principle, which then justified the retrenchment of the affected employees. As will become clear, the applicants vehemently challenged that contention.

[19] On 9 April 2001 the respondent advised the union that the three employees, from the first category had been interviewed, but were all not successful. The respondent was, however, prepared to consider them for supervisory positions. The union's consultants conceded, with the employees this suggestion was accepted by the three employees concerned and at the subsequent meeting of 2 May 2001 their case was finalised. In other words, the 3 employees accepted demotion from shift managers to supervisors. The reduction of their salaries would be effected by not granting them increments for a certain limited period.

[20] At the next meeting of 4 May 2001 the respondent tabled what it called its final proposals and requested the union to respond thereto by 8 May 2001. The proposals included a variety of issues. However, only the issue of the severance package appeared to remain controversial between the parties. Hence, that issue was the one of pertinent focus. The respondent's final proposal in this regard stood as follows:

Year's service	Paid period
0 - 3	4 weeks
4 - 5	1 week per year
6 - 10	1.5 weeks per year
11 - upwards	2 weeks per year

[21] There was no response from the union by the deadline given, that is, 8 May 2001. Instead, on 10 May 2001 the union, in its letter to the respondent, explained that its representative Dumisani Dakile had been off-sick from 4 May 2001, that apparently being the reason for the delay in responding to the

respondent's final proposals. Whilst acknowledging some progress in the consultation process, the respondent did not seem convinced by the union's explanation. On 14 May 2001 it delivered a letter requiring the union to submit its further input, if any, by close of business on 15 May 2001. The union replied on 15 May 2001 and counter-proposed that the severance package formula should be *"two weeks of pay for each and every year of service to all affected employees"*. In its letter of the same date the respondent rejected the counter-proposal on the ground that the respondent applied the "sliding scale" formula which, in anyway, favoured the long-serving employees. It further argued that the majority of the union's members affected by the retrenchment exercise consisted of such long serving employees.

[22] It is remarkable that in the same letter of 15 May 2001 (addressed for the attention of Dakile) the respondent (per van Buuren) sounded a tone of treating the process as finalised and closed, when it said:

"We wish to thank the union and yourself in particular for the positive attitude adopted throughout this difficult process, and for your proposal in respect of managing the change from manager to supervisor for those employees who have decided to accept these positions, as well as generating proposals that were useful in agreeing severance packages e.g. the issue of pro rata bonus payment etc.".

[23] Under cross examination it was put to van Buuren that the first applicant contended that the applicants preferred the voluntary retrenchment option when they realised that they had no alternative, but that whether they liked it or not they would be retrenched. He said it was clear to them that the respondent had

made its decision in the matter and that its professed desire to engage in consultation with the union and the applicants was a mere sham and cover up. Van Buuren denied this.

[24] It was further put to van Buuren that when the applicants arrived at the respondent's place for the meeting on 16 March 2001 they noticed an advertisement on the notice board, inviting applications for vacancies in respect of the new managerial structure. These advertisements were illustrated by copies filed with the court record. The advertisements further indicated that the closing date to receive applications was 16 March 2001, which was the very same date on which the applicants and the union representatives had come for the meeting.

[25] Van Buuren conceded, that the advertisements were, indeed, on the notice board on the day of the meeting on 16 March 2001. He stated, however, that the advertisements would not have affected the consultation process and the negotiated solution resulting from the process. He further admitted that, on the same day, some interviews did go underway in respect of candidates for the new posts.

[26] Van Buuren further stated that a shift manager was only one level above a supervisor. That was far below the level of functional manager. He reiterated that a functional manager was at least at M4 level, which was the first applicant's level. It was put to van Buuren that in terms of the respondent's policy an employee could not be elevated more than one job level above the one the employee currently occupied. In other words, an M6 manager could only be promoted to M5 level, but not M4. That was also another reason why the other nine applicants, who were

shift managers did not, and could not, apply for the new positions of functional managers. Van Buuren disputed this and stated that this "job level skipping" had always been permissible.

[27] Van Buuren could not, however, explain why, if the first "urgent and important" meeting of 5 March 2001 was intended "for all managers", certain managers did not attend. It was put to him that the absent managers included Lamola (M6), Makore (M4), Tshitshi (M5) and Noel Harris (M4). He did not deny this. It was further put to van Buuren that after Bakomito had dealt with the first document (at the same meeting of 5 March 2001) and before he (Bakomito) handed out the second document, he had requested all those managers "who were not affected" by the new structure to leave and, indeed, certain managers had then left. This suggested that the matter had already been discussed with certain managers. For this reason, some of them did not even attend the meeting and those who attended knew that they were not affected, hence they left when they were requested to do so.

[28] The list of all the managers who attended was shown on pages 2 and 3 of Bundle "A". It was put to van Buuren that the managers who left included Berty Maropefela (M4), A Huisamen (M2), S Maphosa (M?), Sam Matsimane (M4), Bennie Nienaber (M?), Sylvia Schlemmer (M6), I Reynolds (M1), John Zwane (M6), Nico Els (M2), Abel Mashigo (M2) and Joe Berry (M2). Since he was not present at that meeting, van Buuren was unable to dispute the suggestion that these managers left the meeting at that stage. It was further put to him that Bakomito never explained to the applicants and other affected managers that they would stay at home in order to facilitate the consultation process.

[29] Van Buuren further conceded that despite the union having stated its availability for a meeting on 16 March 2001, the respondent had proceeded and met the affected employees on a "one-on-one" basis on 13 March 2001.

[30] He also could not dispute the averment that on 14 March 2001 the sixth Applicant was called to the office by Bakomito and Chadinho, because he (van Buuren) was himself not there. He only described as "crazy" any suggestion that Bakomito and Chadinho could have told the sixth applicant that the respondent intended to rid itself of all employees with 10 years of service or above.

[31] Mr Rossouw (for the applicants) further pointed out to van Buuren that according to the particulars furnished by the respondent to the union, in terms of the union's request (at the 1st meeting of 16 March 2001), the first applicant was reflected as possessing only a Standard 10 certificate, whereas, in addition, he had three diplomas, namely: the Diploma in Public Relations; the Diploma in Personnel Training and the Diploma in Manager Development, all of which he had long produced to the respondent, but which were not mentioned under his qualifications in the respondent's response. Van Buuren had no answer to this discrepancy, save to say that he could only speculate on the issue since he was not responsible for the compilation of that list.

[32] The Court inquired from van Buuren whether the interviews did actually carry on 16 March 2001, despite there being a meeting with the union on the same day. He said no interviews were conducted on that day. However, it was pointed out to him that

the common cause facts, as recorded in the pre-trial minutes, included the fact *"that respondent went ahead and advertised the new positions in the new staff structure and held interviews with candidates on 15 and 16 March 2001" (at page 43, paragraph 2.13 of the Pleadings Bundle).* In response, van Buuren then said he was not sure about that aspect.

THE APPLICANTS' VERSION

[33] Cornelius Mabaso (the first applicant) was the main witness for the applicants. He was in the employ of the respondent since 1 December 1996. At the time of his dismissal on 15 May 2001 he held the position of liaison manager, which was equivalent to that of deputy operations manager. He was one of three representatives who were elected by the affected employees on 5 March 2001 to represent them during the talks with the management before the union came to the picture and took over that role.

[34] He told the Court that, firstly, the applicants were not aware of the respondent's state of affairs as stated in the second document, especially to the extent that it would necessitate a possible retrenchment exercise. Secondly, the applicants were surprised why the respondent had not consulted with the union in this regard, as required by Section 189 of the Act. On 2 March 2001 the applicants received individual memoranda, inviting them to attend *"an urgent important general meeting for all managers"* (this was the heading of the memorandum), scheduled for 5 March 2001. No agenda of the meeting was

stated, nor was there any indication *ex facie* the memorandum of what the meeting was all about, save that it was urgent and important. The applicants attended the meeting, which was addressed by Bakomito and Chadinho on the issues as testified to by van Buuren. In all, some 28 managers of different grades attended.

[35] Although the invitation had indicated reference to all managers, he noticed that there were certain managers who did not attend. After they were addressed on the first document and before the second document was introduced, Bakomito requested all those managers who were not affected by the restructuring process to leave the meeting room. Indeed, quite a number of managers left. He and co-applicants remained as they did not know whether they were affected or not.

[36] The managers who did not attend at all included Thami Mdluli (M6 level manager), Noel Harris (M4), Utukile Makoro (M4), Fanny Tsitsi (M5), Steven Lamula (M6) and Michael Mutara (M6). Those who attended but left as being not affected included Berty Maropefela (M4), A Huisamen (M2), S Maphosa (M?), Sam Matsimane (M4), Bennie Nienaber (M?), Sylvia Schlemmer (M6), I Reynolds (M1), John Zwane (M6), Nico Els (M2), Abel Mashigo (M2) and Joe Berry (M2).

[37] He and co-applicants could not comprehend how the managers who left had come to know that they were not affected. He and co-accused immediately suspected that some of their colleagues had already been apprised by the respondent's management of what was going to happen. They, therefore, concluded that they were the ones who were affected.

[38] Bakomito then addressed the remaining managers (including the applicants) on the second document. Thereafter, Chadinho asked them if they wanted to hold consultations as individuals or as a group. They briefly held a caucus meeting at which they decided to act as a group. Three of them were elected to represent the group, namely: Esau Mathebula, Isaac Ndlovu and himself. Chadinho then gave them the option to stay at home and not to come to work, but on full pay. This was yet another factor which convinced them that their services were no longer required by the respondent. The next meeting was agreed upon to be held on 7 March 2001.

[39] It was suggested to them to go and see Irvin Reynolds who was waiting to address them individually. Reynolds was the respondent's deputy general manager and the one to whom the first applicant personally reported. The witness then cited the virtual verbatim communication which he had with Reynolds, which included the following:

"Q Irvin, does it mean I'm fired from the company?"
"A Yes, Cornelius, you know Jean Bakomito is a man of his word". I'm sorry, Cornelius, there's nothing I can do for you".
"Q What do you want me to do, Irvin? Must I come to work or stay at home?"
"A I suggest you stay at home, Cornelius. Try to get a job as soon as possible, and use my name as reference".

[40] Although the first applicant and Reynolds did not discuss the proposed new structure, Reynolds made it clear to the first applicant that the new structure was there to stay and that the first applicant had simply to live with that fact.

[41] He and co-applicants phoned the union and advised it of the developments. They were asked to come to the union offices on the following day, which they did. Their matter was handled by the union official, Dumisani Dakile. They showed Dakile the first and second documents given to them at the meeting of 5 March 2001. Thereupon the union addressed a letter to the respondent complaining about the manner the respondent had treated the matter, by not consulting with the union. The applicants were advised by the union to proceed and attend their meeting with the respondent on 7 March 2001, although the union would not be represented.

[42] At the meeting the first applicant inquired if the union had been consulted. Chadinho answered 'yes', but added that it served no purpose because the union only had three members who were affected by the restructuring process. Those three affected members were Percy Nhlapho (second applicant), Moses Mabogo (third applicant) and Prince Rathogwa (sixth applicant). The first applicant "felt very cold", as he described it, when he heard his name not being mentioned, because he was also a union member.

[43] As one of them, Clement Mboyi (the tenth applicant) happened to have a pay slip in his possession which reflected that his union subscription was being deducted from his salary, this pay slip was shown to Chadinho who, after a brief check, returned to the applicants and apologised and conceded that there were in fact far more union members who were affected. She undertook that the union would be engaged in the negotiations. During this meeting Chadinho further confirmed that the option of staying at home was on a full-pay basis. However, she did not explain to

them why they had to stay at home and not come to work.

[44] Chadinho further told them that on the following day certain persons would come to counsel the affected employees on the emotional impact which the managers concerned might encounter. According to the first applicant, this idea of counselling clearly dealt with their emotional state outside of the respondent's employment, further entrenching the applicants' impression that they were no longer required by the respondent. On the advice of the union, the applicants opted to stay at home.

[45] The sixth applicant later told him and co-applicants that on 14 March 2001 he was called to the respondent's office. Chadinho asked him how he felt about the restructuring process, to which he said he felt "very bad". The sixth applicant pleaded with Chadinho to spare him and utilise him within the new structure. However, Bakomito informed him that respondent was no longer interested in employees who had 10 years' service or more. The sixth applicant was already over 15 years with the respondent - having started on 19 August 1985. Chadinho supported Bakomito and added that the respondent was intending to use brokers on a contractual basis, instead of permanent employees.

[46] The meeting was arranged between respondent and union and set for 16 March 2001. When the applicants and union officials arrived for the meeting they saw advertisements on the notice board inviting applications from suitable candidates to fill vacancies in the new positions of functional managers. The closing date for the applications was that same day of the meeting, that is 16 March 2001. The shift managers were mainly level M6 managers. According to the first applicant's knowledge

the respondent's policy did not allow the skipping of levels. Therefore, it could not be possible for the shift managers to jump from their level (M6) to the positions of functional managers (M4). He had himself previously experienced a problem in that when he was an M5 manager he applied for an M3 managerial position. He was told by management that his application would not be favourably considered on the basis that he could not skip a job level.

[47] On 28 March 2001 another meeting was held at which, among other things, the applicants questioned the top management as to why the respondent could not co-opt them into the new positions. When they were told about the new positions being vastly different from the ones they currently held, they drew comparison with a certain project manager who was appointed an operations manager. In its response the management told them that the respondent had decided to utilise the resources available within the respondent's structure.

[48] To the applicants, the project manager's case was no different from theirs. Similarly, the applicants argued at the meeting that the respondent should, therefore, utilise them as functional managers, because they were the available resources within the respondent's current staff structure. To this, van Buuren simply said: "It's impossible". He (van Buuren) told them that they were simply wasting his time. Van Buuren's remarks outraged them and there was commotion in the house and the meeting came to an abrupt end.

[49] The respondent's attitude towards, and treatment of, the applicants was, to the applicants, conclusive that their services

were no longer required by the respondent and that, in fact, their presence within the respondent's premises was then unwelcome. For that reason, they felt they should rather opt for "voluntary retrenchment", which, truly speaking, was not voluntary because it was actuated by forced circumstances beyond their control. Hence, they submitted their names through the union's letter dated 3 April 2001 whereby they accepted to be retrenched.

[50] The four members on whose behalf the union requested to be retained within the respondent's structures, were destitute and desperate people with huge family commitments. Those four members were willing even to accept demotions as long as they remained employed. Indeed, they ended up being demoted to the positions of supervisors, which they accepted.

[51] The first applicant submitted that there was very little difference between shift managers and the proposed functional managers, in terms of their respective job descriptions. He said such difference only lay in the wording used in the duty sheets. He was confident that the shift managers could fit well as functional managers.

[52] According to the respondent's old establishment ***(see: diagram at page 31 of Bundle "B")*** there were four posts of deputy operations managers. Three of these were vacant and only one was occupied by David Xaba. However, the first applicant insisted that his position was equivalent to that of deputy operations manager. Inexplicably, however, his post did not appear on the diagram. It was never explained to them that only those managers in the operations departments were affected. He did not know how he got affected because his post did not,

after all, appear in the diagram, as well as in the second document. Further, he could not understand why one John Zwane, a shift manager, was not affected. He was one of those managers who left the meeting on 5 March 2001. It was, mysterious to them how Zwane had known that he was not affected.

[53] When Bakomito addressed the meeting on 5 March 2001 and said those who were not affected should leave, it became clear to him that this was a done deal and it created a conclusive impression on him that he "had come to the end of the road" with the respondent.

[54] The first applicant further submitted that there was no need for him to have applied for the functional manager's post, which was at an M4 level, because he was himself an M4 manager. However, he would have considered applying for the post if it was explained to him why this was necessary in his case. Over and above his Standard 10 certificate he also held several tertiary educational diplomas and certificates. These included the following (copies of which the first applicant later produced to Court):-

(a) Diploma in Security Supervision (Distinction) (1987, Damelin College)
(b) Diploma in Public Relations (1990, Damelin)
(c) Diploma in Personnel and Training Management (1991, Damelin)
(d) Certificate in Sales and Marketing Management (1996, Damelin)
(e) Certificate in Basic Principles of Public Relations Practice (1990, Damelin)
(f) Single-Subject Diploma in Marketing (1996, Institute of Commercial Management)

[55] Mr Redding (for the respondent) later confirmed having been instructed that the first three of the first applicant's qualifications mentioned above, were, indeed, captured in the respondent's computer, namely; the Diplomas in Sales and Marketing, in Personnel and Training Management and in Manager Development.

[56] The second witness for the applicants was Prince Rathogwa (the sixth applicant) who was one of the retrenched shift managers. He attended the meeting on 5 March 2001. On 14 March 2001 he was called by Chadinho to her office, where he met her and Bakomito. She asked him how he felt about the impending retrenchment. He pleaded with her not to be retrenched and that he was prepared to accept any type of work which the respondent could offer him. At that stage Bakomito made it clear to him that if his service was ten years or above he was no longer required by the respondent. Chadinho added that the respondent's new policy was to hire workers on a contractual basis and do away with permanent employees.

[57] From Chadinho's office Rathogwa returned to his fellow employees and told them what Bakomito and Chadinho had said to him. Mr Redding suggested to Rathogwa that what he had told the Court was a made up story, which the witness refuted.

ANALYSIS AND EVALUATION OF EVIDENCE

[58] As indicated earlier in this judgment the applicants' dismissal *per se* was not in dispute. In dispute was whether or not the

dismissal was fair. The respondent bore the onus in this regard. (***Section 192(2)).***

[59] The respondent contended that the dismissal was necessary for its operational requirements and that, therefore, there was a compelling commercial rationale which justified the retrenchment of the lower to middle management staff, particularly the shift managers.

[60] Dismissals based on operational requirements must comply with the provisions of section 189 of the Act, which provides, broadly, that when an employer "contemplates" dismissing one or more of his/her employees for operational requirements of the business, the employer must consult with the potentially affected employee(s), with a view to achieving the objects envisaged in the section, including the possibility of complete avoidance of the retrenchments, minimizing the number of dismissals, changing the timing of dismissals and mitigating the adverse impact of the retrenchment on the affected employees. (Section 189(2)(a)).

[61] Operational requirements are defined as meaning:

"Requirements based on the economic, technological, structural or similar needs of an employer". (Section 213).

[62] In the natural course of things, an employer is the one who suffers most upon his business operation failing and collapsing. The employer is, therefore, the first person who is, at all times reasonably expected to take such steps as are necessary to ensure the continued survival and viability of the business. At times and in appropriate instances the retrenchment of staff becomes the only plausible option to resort to in order to sustain

the commercial viability of the business. The courts will therefore ordinarily not interfere with decisions taken by business managements where the decision taken (even if it involved staff retrenchment) was clearly and objectively in the best commercial interests of the business concerned. Our courts have recognised situations of this kind and made appropriate rulings in regard thereto.

[63] **In Kotze v Rebel Discount Liquor Group (Pty) Ltd., [2000] 21 ILJ 129 (LAC)** the Court held:

"At some stage management may perceive or recognise that its business enterprise is ailing or failing, consider the causes and possible remedies, appreciate the need to take remedial steps and identify retrenchment as a possible remedial measure" (**at 132C**).

and that:

"The process's fairness to the employer finds expression in the recognition of its prerogative to make the final decision to retrench". (**at 133C**).

and further that:

"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". (**at 133E-G**).

See also: ***SA Clothing & Textile Workers Union & Others v Discreto - A Division of Trump and Springbok Holdings [1998] 19 ILJ 1451 (LAC) at 1451 J-1454 A/C.***

[64] Section 189 envisages that as soon as the employer identifies retrenchment as a possibly viable option to save and sustain the business, then the duty arises on the part of the employer to

embark on the consultation process with the potentially affected employees and/or their union representatives.

[65] **In Kotze v Rebel Discount Liquor Group,** supra, the Court put it thus:

"Having foreseen the need for retrenchment, and while still contemplating it, the duty to consult the employees or their union then arises (*emphasis*)" **at 132D**.

[66] Of the utmost importance, in this regard, must be the realisation and recognition by the employer that the consultation process must be undertaken before the final decision to retrench is taken. Otherwise the consultation process becomes a farce. Where the Court finds that the consultation process was undertaken only after the employer had made the final decision to retrench, such dismissal will be rendered procedurally unfair by virtue of non-compliance with section 189. This was the case in ***Goldfields Trust (Pty) Ltd., & Another v Stander and Others [2002] 9 BLLR 797 (LAC),*** where the learned Zondo JP concluded:

"In those circumstances I am satisfied, like the court a quo, that a final decision of the respondents was taken before the consultation process was initiated and that, for that reason, the consultation process that took place in this matter did not comply with the requirements of section 189. This rendered the dismissal procedurally unfair". (**at 806 A-C**).

See also:
Unilever SA (Pty) Ltd v Salence [1996] 5 BLLR 547 (LAC), at 561 G-H;
Ocgawu & Another v County Fair Foods (Pty) Ltd [2001] 22 ILJ 2708 (LC) at 2729 [para 91].

Procedural fairness aspect of the dismissals

[67] Several instances obtain in this case which tend to lend credence that the respondent had already made up its mind and finally

decided to retrench the applicants when it (the respondent) called the first meeting on 5 March 2001. Indeed, it would appear that on the evidence, the respondent had not only come to this decision in general terms, but had even identified the employees to be retrenched.

[68] The evidence established, *inter alia*, the following:

[68.1] Although the invitations purported to invite to the meeting (of 5 March 2001) all managers, there were some managers who were conspicuous by their absence, and the circumstances tended to show that they knew that the agenda of the meeting was not relevant to them. Van Buuren could not sufficiently explain why these managers did not attend.

[68.2] During the same meeting of 5 March 2001 Bakomito, without having called out or identified anyone either by name or occupation, requested “those managers who were not affected” to leave the meeting room. Indeed, several managers stood up and left. Van Buuren could also not explain this conduct. The inference, and the only reasonable one, is that those managers who left had been apprised of the developments and that they were not affected.

[68.3] Again on the same day (5 March 2001) the applicants were given an option of either to continue working or staying at home for two weeks, with full pay. In my view, the payment for the two week’s break was an inducement to them to opt for staying at home, since they were no longer required at the respondent’s workplace.

[68.4.1] After the same meeting, the first applicant went to the

respondent's deputy general manager, Irvin Reynolds, who was also his immediate supervisor. They held what appeared to be a frank, honest and open conversation on this subject. The conversation included a verbatim exchange which is cited elsewhere in this judgment. During the conversation Reynolds made it unambiguously clear to the first applicant that he (the first applicant) was then "fired" and that the decision to dismiss him was final, because Bakomito (who had taken the decision) "was a man of his word". In other words, no degree of persuasion and no consultation process would make Bakomito change his mind.

[68.4.2] Reynolds's response to the question of whether to come to work or stay at home, also made it patently clear that the idea was not to allow the applicants to prepare themselves for the consultation process, as suggested by van Buuren. Instead, it was a clear manifestation of the respondents' intent and attitude towards the applicants at that time, namely, that the respondent wanted the applicants completely off its workplace premises. In my view, the circumstances justified the conclusion that the respondent needed the opportunity to manoeuvre the implementation of the restructuring process, including the recruitment of new staff.

[68.5.1] The fact that the respondent was not interested in the consultative talks, as envisaged in section 189, was further confirmed by the advertisements on the respondent's notice board, inviting applications from suitable candidates to fill vacancies under the new proposed structure. These advertisements were already on the notice board on 16 March 2001, being the date when the respondent was scheduled to hold a consultative meeting with the applicants' union

representatives. The closing date to receive the applications was the same date (16 March 2001), being indicative of the fact that the advertisements had been on the notice board for at least some number of days.

[68.5.2] On the same day when the applicants and their union representatives arrived for the meeting on 16 March 2001, the interviews were carrying on in respect of candidates who had applied to fill the new posts of functional managers under the new structure.

[68.5.3] Van Buuren tried to explain this by saying that the recruitment process was subject to the outcome of the consultative process. In other words, if the consultative process succeeded the recruitment process would be reversed and everything done to be undone. Then what was the purpose of engaging in a costly exercise of holding interviews if these still faced the potential of being done away with? I am unable to find an explanation thereof.

[68.5.4] In my view, this exercise served as further cogent evidence that the respondent had already made its final decision to retrench the applicants. The attempted explanation by van Buuren of the advertisements was simplistic and absurd. He apparently merely thought it better to say something, regardless of what he said, in response to the query about advertisements on the notice board.

[68.6] Despite being in possession of the records that most of the affected employees (including the applicants) were members of the union, the respondent issued invitations to the individual employees for the meeting of 5 March 2001, which meeting went

ahead. The meeting was thereafter adjourned to 7 March 2001 and the respondent continued and "consulted" with the applicants in the absence of their union representatives. This was a flagrant disregard of the requirements of section 189. The fact that the union was later engaged in the process, cannot serve to wipe out the earlier procedural misconduct on the part of the respondent.

[68.7] Despite the union having proposed a date of the first meeting with the respondent (which subsequently took place on 16 March 2001) the respondent still found it fit and appropriate to issue letters on 13 March 2001 to all applicants, inviting them for a meeting on 14 March 2001 on an individual one-on-one basis, exclusive of the union. This was yet another violation of section 189.

[69] In the light of the above, it cannot be held that the applicants' dismissal was procedurally fair. What purported to be a consultative process was, in actual fact, a sham.

Substantive fairness aspect of the dismissals

[70] It seems to me that the reason for restructuring and reorganising the respondent's lower to middle management was not seriously called to question. It appears that, in principle, the applicants had no problem with the abolition of the post of shift manager and the introduction of the post of functional manager in the former's stead. All that they legitimately expected to happen was to see themselves being absorbed in the new posts of functional managers, which they regarded as equivalent to shift managers in terms of the job content.

[71] The reason and need to restructure the management levels concerned was explained to the affected employees (including the applicants) at the meeting of 5 March 2001 by Bakomito, through the first and second documents, referred to earlier. The job descriptions in respect of the post of shift manager and that of the functional manager were spelt out in the documents presented before me. These were not challenged. The first applicant's argument was that the new post of functional manager was, in content, simply and basically repetitive and the same as that of shift manager. He argued that with regard to the new post, different words were used, but meaning the same thing as in the old post. In other words, he submitted that the difference was merely semantic.

[72] The shift manager's job description (picking and receiving sections) involved the following (as shown on page 40 of Bundle A):

[72.1] Main Purpose:

To control picking/receiving and supervise the discipline team in order to ensure effective picking/receiving operation whilst maintaining productivity and picking/receiving accuracy in a safe working environment.

[72.2] Key Responsibilities:

Control picking/receiving productivity
Monitor performance
Reduce fixed and variable costs
Pick/receive stock accurately
Control picking/receiving accuracy
Provide customer service
Control breakage's/damage during picking/receiving
Maintain a safe and healthy work environment
Ensure safe working practice
Manage IR

Support implementation of performance management
Staff development
Shrinkage control

[72.3] Key Requirements:

At least three (3) years experience in FMCG environment
High level of literacy and numeracy
Leadership skills, drive and determination
Attention to detail
High energy levels
Participative management style
Prepared to work shifts

[73] The new post of functional manager (picking and receiving sections) involved the following (as shown on page 29 of Bundle A):

[73.1] Main Purpose;

Accurately and timeously execute operational plan to meet Distribution Centre and customer requirements.

[73.2] Key Responsibilities;

Lead and manage human resources in own section
Manage accurate and timeous receiving/picking/storage/dispatch processes as per operating standards
Compile daily operations reports as per operating standards
Maintain effective and efficient relationships with internal customers
Comply with processes as per operating standards
Manage human resources budge in own section.

[73.3] Key Competencies:

High level of literacy/numeracy plus related logistics experience
Ability to work under pressure with attention to detail
Ability to do short term planning
Ability to control and direct a team
Ability to handle diversity and conflict
Interpersonal skills

Good communication
Decision making judgment
Prepared to work shifts

[74] Indeed, the two posts do appear to overlap in some respects. However, I am not prepared to declare that they are the same. The job content in respect of a functional manager does appear to require more advanced skills than that of shift manager. Be that as it may, it does not seem unreasonable to argue that a shift manager could, subject to an appropriate in-service training, be suitable for appointment as a functional manager. The respondent submitted that if the retrenched shift managers (2nd to 10th applicants) had applied for the posts of functional managers their applications would have been considered on merit. However, it is common cause that those applicants did not apply. None of them was called to testify and explain this point. The 6th applicant testified only about his interview with Bakomito and Chadinho on 14 March 2001.

[75] It was only the 1st applicant who testified about the two posts being the same. In my view, his submission in this regard was not unconvincing. Although he was once himself a shift manager, it was not indicated how long ago that was. He had already been promoted twice since his days as shift manager, to reach his current rank (that is, from M6 to M4 level). That could also be the explanation why he appeared to have only a vague idea of what the shift manager's job entailed. The highest academic qualification in respect of the 2nd to 10th applicants was only Standard 10. None of them had any tertiary education or other professional or trade qualifications.

[76] In my view, therefore, the respondent successfully discharged its

onus to prove that the reason to dismiss the 2nd to 10th applicants was a fair reason. Their dismissal was, accordingly, substantively fair.

[77] With respect to the 1st applicant, however, the same facts did not obtain. Over and above his Standard 10 certificate he had at least 6 diplomas and certificates in tertiary education, most of which he obtained from Damelin College, and which, it seems, for purposes of the respondent's industry, were not completely irrelevant. Three of these qualifications were within the knowledge of the respondent and were captured in its computer data. In the workplace he already held a level M4 managerial position. According to van Buuren the post of functional manager was ranked at M4 level.

[78] In my view, therefore, the 1st applicant could easily have been translated to functional manager, without a need for re-application and interview, if the respondent acted fairly in its restructuring of the middle management staff.

[79] None of the applicants sought an order for reinstatement. They are seeking compensation only.

[80] In the result, I make the following order:

80.1 The dismissal of all 10 applicants was procedurally unfair.

80.2 The dismissal was substantively unfair in respect of the 1st applicant but fair in respect of the 2nd to 10th applicants.

80.3 The respondent must pay compensation equivalent to 6 months' salary in respect of the 1st applicant and 3 months' salary in respect of the 2nd to 10th applicants, which shall be calculated in terms of their salary figures reflected in Annexure "B" to the applicants' Statement of Claim. The amounts are as follows:

0

1st Applicant:	6 x R8 272,08 =	R 49 632,48
2nd Applicant:	3 x R6 038,50 =	R 18 115,50
3rd Applicant:	3 x R5 169,25 =	R 15 507,75
4th Applicant:	3 x R5 846,17 =	R 17 538,51
5th Applicant:	3 x R6 038,50 =	R 18 115,50
6th Applicant:	3 x R4 846,17 =	R 14 538,51
7th Applicant:	3 x R4 692,23 =	R 14 076,69
8th Applicant:	3 x R5 907,67 =	R 17 723,01
9th Applicant:	3 x R6 230,75 =	R 18 692,25
10th Applicant:	3 x R4 846,17=	R 14 538,51
TOTAL		R198 478,71

80.4 The compensation aforesaid must be paid on or before 15 May 2003.

80.5 The respondent is to pay the costs of this application.

_____
NDLOVU AJ

Appearances:

For the applicants : Adv J Rossouw
Instructed by : Joubert Attorneys
Auckland Park

For the respondent: Adv A Redding
Instructed by : Perrot van Niekerk, Woodhouse Inc
Sandton

Date of Judgment : 28/2/2003