IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

CASE NO: D1419/01

In the matter between**:**

DHANAM MOODLEY **Applicant**

and

FIDELITY CLEANING SERVICES (PTY) LTD

t/a FIDELITY SUPERCARE CLEANINIG **Respondent**

JUDGMENT

MURPHY AJ[1]

1.The applicant has referred a dispute concerning her retrenchment to this court in terms of section 191(5)(b)(ii) of the Labour Relations Act ("the LRA') alleging that her dismissal was both substantively and procedurally unfair.

2. The applicant was initially employed by Prichard Cleaning Services as an on-site supervisor on 28 August 1995. Prichard Cleaning Services later merged with the respondent and the applicant's contract of employment was transferred to the

respondent in terms of section 197 of the LRA.

3. During 1996 the applicant was promoted to the position of on-site manager and then again in August 1997 was promoted to the position of area manager, which position she held until she was retrenched for the first time on 9 April 1999. The applicant challenged this retrenchment, and the dispute was eventually settled on 24 April 2002. The terms of the settlement are not clear, but it is common cause that the applicant was re-employed as an area manager on 27 September 2000 (some 18 months before the dispute was settled). The applicant remained in this position until her services were again terminated on the 31 July 2001 (before her first dispute was settled), following the acquisition of the Supercare group of companies by the Fidelity Services group. It is this latter dismissal, which forms the basis of the present dispute. The matter came to trial on 25 October 2004. No explanation has been offered for why it took almost three and a half years to do so.

4. The respondent called two witnesses to justify the applicant's dismissal: Mr. B Stewart, who was previously employed by the respondent as its operations and regional manager, and Mr. WR Berger, currently employed as the respondent's Director: Labour Outsourcing, Coastal. At the time of the applicant's dismissal Mr. Berger held the position of Director: Hospitality with some responsibility for human resources. The applicant testified on her own behalf and also called Mr. J Reddy to give evidence on the relationship between the respondent and another

company, Hlanganani.

5.The testimony of both Berger and Stewart was supported by little in the way of documentary evidence. It is common cause that the respondent failed to comply with section 189(3) of the LRA. Section 189(3) obliges employers to issue a written notice inviting consultation on proposed retrenchments and to disclose in writing all relevant information pertaining to the retrenchments. The purpose of the section is to set the agenda for a joint consensus-seeking process and to ensure that there is sufficient disclosure of information *prior* to any decision to dismiss on operational requirement grounds. The failure of employers to fulfill this obligation meaningfully, invariably leads to disputes, misconceptions, a break down in trust and the de-legitimizing of the joint consensus-seeking process mandated by the statute. The absence of contemporaneous written information containing the agenda for the consultation process and the employer's initial proposal can, if not sufficiently explained, give rise to the inference that the employer has not initiated and engaged in the process with an open mind and the requisite seriousness. Employers that have fallen short on this obligation often present arguments, tending to diminish the value of section 189(3), with much reliance being placed on the *dicta* of Froneman DJP (as he then was) in *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at 96-97 where he remarked in relation to section 189:

> "The important implication of this is that a mechanical "checklist" kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved….If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving that purpose must be sought".

There can be no quarrel with the logic and rationality of a pragmatic approach of this kind. However, the *dicta* do not amount to a license to employers to negate what is after all a statutory right to information and due process in the form of meaningful consultation. The prescriptions of section 189 are clear, notorious, well understood, wisely crafted and tailored to oiling the wheels of a meaningful joint consensus-seeking process. It is the wise employer who follows them to the letter. Those employers that choose not to, do so at the peril of a finding not only of procedural but also substantive unfairness.

6. Because Mr. Berger was directly involved in the merger and restructuring process leading to the applicant's retrenchment, it is best to consider his evidence first, although Mr. Stewart testified before him. Berger testified that in late 2000 the respondent entered into negotiations with the Supercare group of companies resulting in a deal in which Fidelity bought Supercare some time in the first quarter of 2001. As a result of the deal "Fidelity Cleaning" and "Supercare Cleaning" were merged. This necessitated an analysis of the

infrastructure of the two companies as well as their overhead structures, branch offices, staffing, vehicles and the various operations throughout Kwa-Zulu Natal ("KZN"). Since no documentation about the deal was discovered or introduced into evidence, it is not clear who was tasked with this responsibility, when it was carried out or how it was implemented. The instruction given to Berger, and presumably his colleagues who shared responsibility with him, was "to optimize the efficiencies of the two companies and to put the two sets of infrastructure and overheads together to form one cost-effective structure that would be able to service all of the contracts and all of the business that the two companies would have had collectively". It is difficult to determine from Berger's testimony who gave the instruction, when it was given, whether it was in terms of a written strategic plan and hence whether at that time retrenchments were contemplated by senior management in the two companies. Moreover, as no evidence was led explaining the respondent's corporate and regional structure, it is difficult to determine accurately whether the restructuring process was directed and managed from national head office or done at provincial, regional or local level. Berger focused his testimony on what was relevant to KZN.

7. Berger described the implementation of the instruction as follows:

> "we started putting together organograms -we started geographically, we started by looking at Durban Central and then some of the outlying areas, we also looked at the

> major overhead costs such as branch offices, etcetera, etcetera. Decisions were then made as to where we going to house the regional head office and once that decision had been made we then looked at various outlying offices, branch offices etcetera, etcetera, and in some cases the Fidelity structure was absorbed into the Supercare structure".

It is not immediately clear as to who constituted the "we" to whom Berger referred, though later he indicated that he chaired a team of managers drawn from both companies set up for the purpose of selecting employees for retrenchment. Neither the mentioned organogram, nor any other evidence, oral or documentary, was introduced detailing the national, regional and local structure of either Fidelity or Supercare. Thus it is difficult to sketch a precise picture of the restructuring process and the context in which the retrenchments occurred or where duplication of human resources presented as a problem.

8. Be that as it may, senior management of both Fidelity and Supercare evidently got together some time in 2001 and decided on "the umbrella structure" and considered where there would be staff duplication. The methodology applied to do this remains unclear, but one can safely assume that it was done departmentally across the company at a regional level using the organograms of both companies. Unfortunately there seem to be no minutes of the meetings of the management team. Furthermore, as I have said, Berger failed to delineate comprehensively or precisely the five regions into which KZN was divided, nor

the areas falling into each region, or the administrative and operational departments making up the company in KZN. There is also no documentary evidence on record to elucidate this. Such evidence, to my mind, would have assisted in determining whether the applicant's position as an area manager was indeed redundant and whether alternatives existed or were properly considered in order to avoid her retrenchment. I will return to this critical issue later.

9. Once it completed a regional, local, and departmental review of the company, the exact nature and content of which remains a mystery, the management team spoke to the various departmental and operational heads and in Berger's words "asked them to have a look at the operation and come up with proposals in terms of how they felt they could best optimize the resources at hand". It was understood that inevitably as a result of the merger there would be a duplication of resources and surplus employees. However, at that stage there was no clarity about the number of retrenchments likely to follow "until such time as we properly analyzed the resources and properly gone through the structures of working out what we needed to be able to run the company properly".

10. No evidence was led about when precisely retrenchments were first contemplated or the exact number, but it would seem that some time in June 2001 the management team established exactly which people they had under each job category and then set about a process "where every single person that

was to be affected by this process was given an opportunity to attend an interview, prepare for the interview, and they had an opportunity put forward anything that might have been of relevance for a panel of representatives both from the Fidelity company, the Supercare company….” From the evidence presented it is not possible to deduce how many employees were proposed for retrenchment and ultimately dismissed, or the categories, levels, regions or areas into which they fell. The selection interviews took place between 26 and 28 June 2001. Other than an “Interview Timetable”, no written notice explaining the purpose of the interviews was given to the employees interviewed. With the benefit of hindsight, it is clear enough that the interviews were for the purpose of selecting employees for retrenchment. Whether the employees subjected to them understood as much is another matter.

11. The interviews were conducted by a small panel chaired by Berger. The panel posed various question to the employees aimed at eliciting information about the interviewee’s experience, education, skills and personal qualities. Berger initially claimed that a job specification and person specification were circulated to the interviewees prior to the interview. Under cross-examination he was forced to concede that he had no documentation formally notifying the employees of the interviews or setting out its purpose. The applicant in her testimony denied ever receiving any documentation concerning the interview, claiming instead that she first heard of having to attend an interview

telephonically on the day of the interview. She confirmed however that she was indeed questioned about her skills, experience, education and personal qualities. In the absence of documentary evidence I consider the applicant's version the more probable and accept that the interviews took place on short notice without any written notice or relevant documentation about the nature, purpose and extent of the interview having been furnished to the applicant beforehand.

12.After interrogating her 'experience, skills, education and personal qualities, the panel, in the case of the applicant, had regard to the number of cleaning contracts she had under her control as an area manager and the recommendation of her immediate superior, Mr. Stewart, about whether she should be retained as an area manager. In order to maintain the chronology, it makes sense to discuss the evidence of Mr. Stewart regarding the redundancy of the applicant's position now.

13. Stewart is currently self-employed, but at the time of the retrenchments had served as the respondent's regional manager and operations manager in KZN and had been employed for about 6 months at the time the restructuring began. He confirmed that the merger resulted in a duplication of area managers within the five regions of KZN. He was responsible for Natal Midlands, North Coast, South Coast and the key contracts in and around Durban. He did not say whether these four areas made up one region. Although he only mentioned four

localities, his region was served by five area managers, including the applicant, who reported to him directly.

14. After the restructuring Stewart decided that he only needed three area managers and could justify employing no more than that. Why this suddenly became the case, he never fully explained. He offered no breakdown of his staffing complement or an organogram describing the effect of the merger with Supercare at this level. He did however identify the five area managers working under him without in each case specifying their areas. It seems no additional area managers employed by Supercare were placed under his control.

15. Stewart went on to explain that the decision to reduce staff was not made at regional level, but was a corporate decision made at head office. Because no proper section 189(3) notice was ever issued by the respondent it is impossible to determine whom at head office made that decision or when it was made. Nevertheless it seems the regional managers were given the authority to determine the number of posts they needed and to make recommendations about who should fill them. In this regard Stewart stated:

> "In terms of the selection staff, it was a bit difficult because you really had to sort of look at and see which were the stronger of your staff members, look at their personal attributes, look at their skills…."

16. All staff were thus required to re-apply for their positions, and thus the interviews conducted by the panel chaired by Berger were set up for that purpose.

17. Prior to the interviews for the area manager positions in his region, Stewart, as I have explained, decided that he needed only three. As stated, he tendered no explanation for why he preferred to reduce the number of area managers or if there indeed was a need to do so because additional Supercare staff would take on the functions. Without himself interviewing the five incumbents, he then made a recommendation to the panel that the three positions be filled by Hazel Jampies, Freddy Moodley and Zane Ismail. In effect, therefore, he recommended to the panel that the services of the applicant and another area manager, Jenny Coetzee, be terminated.

18. Stewart's justification for recommending Freddy Moodley, Ismail and Jampies was vague and unsupported by documentation identifying objective, pre-determined selection criteria and the proposed manner of their application.

19. His justification for selecting Freddy Moodley was as follows: Moodley had been with the company for a long time (how long was never stated), he lived on the South Coast and managed that area, where he had an established client base. And hence it made sense to keep him there, as it would cut down on costs.

When it was put to him in cross-examination that Moodley did not live on the South Coast, but in fact lived in Phoenix or the North Coast, he somewhat arrogantly and dismissively replied that he did not know where Moodley lived, stated that he thought he lived in Umkomaas, butt then conceded that he might have been wrong and claimed that he had recommended him on the basis of his personal attributes and capabilities. His vacillation renders his recommendation unreliable and possibly polluted by an element of subjectivity.

20. The basis of Stewart's recommendation of Ismail is equally flawed and problematic. He too had an established client base. But the primary consideration leading to his recommendation appears to have been his sweet and gentle nature. Stewart described his attributes thus:

> "Zane is a very soft-spoken, very respectful person, he tends to take a lot of abuse from people, and he was the kind of person that I could stick into a contract where he had a particularly argumentative client and he would first, 'Yes Sir", 'No, Sir", "Yes, Ma'am", "No, Ma'am", and he would – because of that ability he would soften the client".

21. In addition to his perceived favorable psychological disposition, Ismail was preferred because "he was one of those guys I could send out to DTMB bus depot in Kwa-Mashu at 4 o'clock in the morning, he would be happy to go….."

22. Unlike Ismail, Hazel Jampies was selected because of her rather fierce

personal attributes. She too apparently had been with the company for a long time (how long never being stated). She, quite the opposite of Ismail, was described as: “absolutely regimental, she takes no bull from anybody”. In addition to being ‘confrontational’ she had sound administrative and organizational skills, was meticulous and handled staff better than any other manager.

23. Having thus justified his recommendations, and his implicit exclusion of the applicant, (upon whose attributes, skills and experience, he never elaborated), he summarized his choice as being “the three best suited characters to cover my client base”. His interchange with his attorney on the selection is revealing. It went as follows:

> Snyman: Okay, so if I might summarize, it is not a question of the applicant and the other person not having the ability, you just took the best of what you had.
>
> Stewart: I took what I felt was the three strongest characters -well, not- the three best-suited characters to cover my client base.
>
> Snyman: Yes. So simply put they were just better than the others.
>
> Stewart: As far as I am concerned, yes.
>
> Snyman: Okay. Now, what then - now obviously now you have filled the three area managers, we will call another witness about the processes and all that, now you have filled the three area manager positions
>
> Stewart: Mm.
>
> Snyman: Now, what happens to the other two?
>
> Stewart: The other two, obviously the company had approached them in terms of

possible retrenchment.

24. Thus having proposed the applicant for retrenchment, and once the panel confirmed his recommendation, Stewart, in co-operation with the applicant, and in response to her initiatives, set about looking at finding her an alternative lesser position within an associated company, which, as discussed below, ultimately came to naught.

25. A charitable interpretation of Stewart's methodology is that he applied the criteria of personal attributes, skills, interpersonal relationships, performance, length of service and experience. The fact that these criteria were never discussed, agreed or communicated, together with their generality, vagueness and non-methodical application leads easily to the conclusion that he selected his area managers on the basis of his subjective preferences. Such a conclusion is bolstered by my observation of an occasional flash of hostility and distaste towards the applicant during his testimony in the witness box. In particular, he tended to dismiss the applicant's legitimate concerns and grievance about the prospect of losing her employment describing her application for another job in the following terms: "I know nothing about the thing, there was no application in place, that was her application, jump up and down and shout".

26. Under cross-examination Stewart was unable to give a clear commercial

rationalization for why the number of area managers in his region needed to be reduced from five to three. He conceded that he had not taken any of the Supercare area managers over as part of his staff complement. As mentioned, he initially justified his decision on the basis of his subjective view that he did not need more than three, which he fleetingly defended later on the grounds that some of the contracts he had in Durban Central had been handed over to the other regional managers. How many exactly were handed over and to whom, he did not say, making it difficult to establish whether or not there was indeed a need to reduce the number of area managers in his region from five to three. Considering that he acquired no additional area managers as a consequence of the merger and in the absence of any information about a reduction in workload, one is compelled to question whether the merger itself justified any need at all for retrenchment in Stewart's region. Rather it seems Stewart elected to use the opportunity presented by the merger to reduce his staff complement on the basis of his own subjective assessment of what he needed. The merger had little to do with his decision. He simply decided that he preferred to have three area managers rather than the existing five and made a recommendation to that effect with his rationale for doing so remaining largely a mystery.

27. Like Berger, Stewart drew a distinction between his recommendation to the panel and the final selection decision. He saw himself as being entitled to decide whom he needed and felt comfortable to make his decision on the basis of his

subjective knowledge without the benefit of pre-determined criteria or any interview. In keeping with his tone throughout, he maintained:

> "For me to sit in an interview to interview staff which are currently under my employ that I have been working with for six months, I don't need to interview my staff to know what my staff's capabilities are. So, there was in effect no need for me to sit in on the interviews".

He therefore made a verbal recommendation that the applicant be retrenched without the benefit of any pre-determined objective selection criteria, any interview or supporting documentation. He did so without the applicant's knowledge and without affording her any opportunity to address him on her qualities, attributes, skills, experience, sweet nature, regimental approach etc. As he saw it, he knew his staff and was sufficiently sensitive and aware of their strengths to make a recommendation, which, as it turned out, was accepted by Berger's panel. He made his recommendation fully aware that at the time the applicant was engaged in litigation with the respondent regarding her previous unfair dismissal that was resolved some time after her second dismissal in April 2002. Additionally, he had regard to her gender, which he felt disqualified her from work in certain dangerous areas. He never explained why such a consideration did not operate to exclude Hazel Jampies.

28. The applicant's explanation of events prior to the interview withstood cross-

examination. She admitted being aware of the merger process prior to the interviews, as there had been general discussion among staff about it. Nevertheless, she stood her ground about the fact that prior to 2 July 2001 she never received any written notification about the merger process, or any notice to attend the interview or any written information about its purpose to select employees for retrenchment in accordance with objective criteria. Her testimony was that she received a message from other area managers to attend the interview on the day of the interview, and that she understood the purpose of the interview to be an assessment of her present job within the context of the merger process. She confirmed that at no point at all, either before or after the interviews, was she ever informed of any selection criteria applied to choose her for retrenchment. She affirmed that during the half-hour interview questions were posed to her regarding her skill, attributes, and experience and that she was assessed on the basis of those questions.

29. Berger confirmed that the panel placed reliance on Stewart's recommendations. His claim to have taken it as "a guideline", what ever that might mean, is an unconvincing attempt to minimize its importance. Even as a guideline its evident distortion by Stewart's subjectivity made it unreliable and positively prejudicial. Its negative influence on the final decision cannot be ruled out, especially in the absence of any minutes of the interview. The only documentation offered in support of the interview consisted of a cryptic rating

schedule and a person specification containing four general questions aimed at eliciting details of the interviewee's experience. Berger testified that the applicant scored lower than the other area managers. However, he failed to hand in the score sheets and specifications of the other candidates. Thus it is not possible to objectively verify his conclusions. Without complete documentation, it is not unreasonable to infer that Stewart's prejudicial and subjective recommendation played an important role in the applicant's selection, especially in light of the recommendation ultimately being effected.

30. Shortly after the interview, on 2 July 2001, the applicant received a letter dated 29 June 2001 addressed to her by G Weissbach, the respondent's regional manager for Natal. It read as follows:

> "Due to a restructuring process as a result of the merger of the Fidelity Cleaning Services and Supercare Cleaning operations, your position has became redundant and it is possible that you will unfortunately be retrenched effective end of July 2001.
>
> Mr. R Manthe will be available to meet with you at a date and time, which will be confirmed, to discuss the relevant issues, which will include amongst others:
>
> 1. The criteria used in selecting affected employees;
> 2. The obvious search for alternative to your retrenchment (sic);
> 3. Discussions concerning any retrenchment payment;
> 4. Any assistance that may be afforded by the company to you.

> In the interim it is requested that you maintain the employee-employer relationship and the company trusts that it can rely on your continued support during what is undoubtedly a very trying and difficult period".

31. This letter, most notably, was the first written notice and disclosure of information given to the applicant in relation to her retrenchment. The letter is somewhat ambiguous in its terms in that in one breath it declares the applicant's position to be redundant and then points to a consultation process of limited purpose. The ambiguity could be interpreted to mean that the possibility still existed for the applicant to avoid retrenchment. The lie is given to this on a number of fronts. First of all, since the need for retrenchment was questionable, the reason for the redundancy is not correctly stated or enlarged upon. That aside, both Berger and Stewart were clear in their evidence that the applicant had been recommended and selected for retrenchment by the end of the interview process. Under cross-examination Berger affirmed that he was part of the decision of who was to be retrenched. He was then asked when that decision was taken and replied that it was taken shortly after the interview process had been completed. When asked what factors he had relied on in making the decision, he answered revealingly:

> "Well, staff members that were on the panel together with me were people that were experienced in their respective industries and together we asked people that attended the

> interviews various questions, we ascertained what their educational background was, also what their experience was, and we also worked on certain recommendations that we got from their various departmental heads, and we worked on a scoring system….".

He was specifically asked if he recalled the exact date when he made the decision as to who was to be retrenched. After some calculation he confirmed the date to have been 29 June 2002, the same day the letter was written to the applicant. When asked to clarify that the decision was indeed taken on 29 June, he replied:

> "Ja, that's quite correct, the decision in terms of which people we felt were going to be able to fill the vacant positions and also which people as a result of that needed to be retrenched"

32. Added to that, the applicant construed the letter of 29 June 2001 as a clear indication that she had been selected for retrenchment. She pointed to the fact that not all the area managers had received such letters and accordingly correctly predicted straightaway that she was one of those that was going to be retrenched. She further testified that her retrenchment was confirmed verbally by Carmen Meyer of the HR department on 10 July 2001. No consultation process involving Mr. Manthe, as proposed in the letter, seems to have taken place after 29 June 2001. Or, at least, there is no evidence in that regard. Furthermore, the applicant's testimony that selection criteria were never discussed with her

remains unchallenged. And as for severance pay, Mr. Snyman in argument suggested that consultation was unnecessary because of the existence of a bargaining council agreement laying down a minimum. I cannot accept that. The existence of minima does not preclude a duty to consult and entertain proposals above the statutory minimum.

Some effort was expended on seeking alternatives, though, as I discuss later, this was at the initiative of the applicant and in any event after she had been selected. Berger testified that his panel gave no attention to considering alternatives at the time of the selection, explaining that such was left to the managers at the local level. Accordingly, it is not possible to say whether vacancies existed in other areas and regions, or whether it would have been possible to offer the applicant a position elsewhere in the company.

33. At this point I pause to reflect upon the requirements for a fair retrenchment. In order to determine if a genuine reason exists for an employee's retrenchment, the court must enquire whether the legal requirements for a proper consultation process have been followed and whether the employer has satisfied its onus of proving the dismissal to have been operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. - *SACTWU and Other v Discreto* (1998) 19 *ILJ* 1451 (LAC). The requirements for a proper consultation impose a duty on the employer to engage in a meaningful

joint consensus-seeking process in an attempt to reach consensus on appropriate measures to avoid or minimize the dismissals and to mitigate their adverse effects. Most importantly, the consultation process must be directed at identifying and pre-determining an agreed method of selecting the employees to be dismissed. Once the method is arrived at, the employer is obliged to proceed strictly in accordance with it. If agreement on the selection criteria eludes the consulting parties then the employer is obliged to apply criteria, which are fair and objective (section 189(7)). Employees, at the very least, should be notified of these in advance to ensure that they are able to protect themselves from inappropriate adverse selection.

34. A critical, if not the most central, ingredient of the consultation process, is the requirement of written notice and the disclosure of information. Effective consultation requires employees to have an opportunity to prepare for consultation by being given sufficient advance notice, an agenda and adequate information. Without this, the joint consensus-seeking process mandated by the legislature is hardly likely to be “meaningful”. To guide and assist the parties, section 189(3) spells out what normally should be included in the written notice and disclosure document. These include: a statement explaining the reasons for the dismissal; the alternatives the employer considered *before* proposing the dismissals; the reasons for rejecting the alternatives, the number of employees likely to be affected; the job categories in which the affected employees are

employed; the proposed selection criteria and the severance pay proposed.

35. I have risked labouring the point because in this case little of what is supposed to happen in fact happened. Nothing approximating a joint consensus-seeking process occurred in this case. Firstly, the employer does not appear to have invited any employee representation in the consultation process as required by section 189(1). Secondly, at no stage prior to the selection of the employees for retrenchment did the respondent give written notice or disclose in writing the reasons for retrenchment, the alternatives considered and rejected, the number affected and the categories, regions, areas or departments in which they were employed. Added to that, no fair objective selection criteria were ever agreed, identified, communicated or applied. And no severance pay was proposed, discussed or disclosed.

36. In the applicant's case, instead of a fair consensus seeking process, there has been an arbitrary, irrational and subjective unilateral decision to terminate her employment. With no fair and objective criteria to guide him, Stewart, himself an employee of only 6 months standing, without discussing the matter with the affected employees, on the basis of his subjective assessment of their attributes, recommended his personal favourites to fill the area manager positions in his region, which absent a clear commercial rationale, he had arbitrarily and without consultation reduced from five to three. His recommendation was accepted

thereafter with little or no interrogation by a panel of persons unacquainted with the operational requirements of the region. As a consequence, the applicant was selected on the basis of that recommendation and a questionable interview, which rated her according to her qualities, personal attributes, skills, knowledge and experience. She was not given any advance written notice of the purpose of the interview, the method on which she was to be assessed and selected, or even at that stage that her job was possibly in jeopardy. Having been selected for retrenchment the applicant was then presented with a letter inviting her to participate in a sham consultation process, from which tellingly the employees not selected for retrenchment were exempted, and which in any event failed to transpire. On no evenhanded count can such a dismissal be described as substantively or procedurally fair. The purpose of section 189 has not been achieved in this case. The reason for not achieving that purpose has been the employer's total disregard of the section's requirements. The respondent has simply not met its onus to show that there was a need for retrenchment, and the procedural irregularities are of such a nature and so far reaching that a finding of substantive unfairness is inescapable. Where the purpose and methodological prescriptions of the process envisioned by the statute are so evidently not understood, the distinction between process and substance becomes blurred to the degree that the dismissal cannot be held to have been for a fair reason as required by section 188(1)(a). In the premises the applicant is entitled to reinstatement in terms of section 193(2) of the LRA.

37. Much effort and time was spent during the trial and in argument on the issue of whether an alternative position was available in a company associated with the respondent. Apparently, after she had been selected for retrenchment, the applicant was informed by the respondent that there was a possibility of a night shift supervisor's position with Hlanganani Cleaning Services, a black empowerment company, 49% owned by the respondent and run out of its Durban offices. The contention was made that such position depended upon the incumbent being promoted. A dispute exists about whether the promotion took place. As the position was with a separate company it is doubtful whether the failure to transfer the applicant to it can found a claim of substantive unfairness. However, in the light of the view I have taken it is unnecessary to make a finding on this issue.

38. The applicant has incurred substantial legal costs on account of the unreasonable approach taken by the respondent. There is accordingly no reason in this instance why costs should not follow the result.

39. For the foregoing reasons I make the following orders:

39.1 The applicant's dismissal is declared to have been substantively and procedurally unfair.

39.2 The respondent is ordered to re-instate the applicant retrospectively to 1 August 2001 on the same terms and conditions as applied to her at that date.

39.3 The respondent is directed to pay the applicant back pay for the period 1 August 2001 until 1 May 2005 at the rate applicable to an area manager or equivalent within 10 days of the date of this order.

39.4 The applicant is directed to report for duty on 2 May 2005.

39.5 The respondent is ordered to pay the applicant's costs.

MURPHY AJ

Date of Hearing: 25 October 2004

Date of Judgment: 20 April 2005

For the Applicant: Mr. Z.E. Buthelezi

Buthelezi Inc.

For the Respondent: Mr. S. Snyman

Snyman Van der Heever Heyns