

NOT REPORTABLE
IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)
CASE NO: C 614/2009

In the matter between:

NATIONAL UNION OF MINEWORKERS First Applicant
SECOND AND FURTHER APPLICANTS

and

TRANSHEX OPERATIONS (PTY) LTD Respondent

JUDGMENT

DE SWARDT, A J:

The second to 47th applicants were formerly in the employ of the respondent ('Transhex') at a diamond mine operated by it in the Northern Cape. At the commencement of the proceedings, S J Fortuin and D A Farmer (the 45th and 46th applicants respectively) were removed from the list of applicants, it being common

cause that they had not been dismissed, but were still in the employ of Transhex.

The individual applicants were all members of the first applicant trade union ('the union'). Pursuant to their retrenchment on 30 April 2009, they instituted these proceedings against Transhex claiming reinstatement, alternatively compensation,

on the basis that their retrenchments had been both procedurally and substantively

unfair. The applicants were represented by Ms T Ralehoko of Cheadle Thompson & Haysom and the respondents were represented by Mr A Steenkamp of Bowman

Gilfillan Inc.

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At the pretrial conference the applicants admitted that '*there was a need to retrench*

some employees, but not all the employees who were retrenched'. In his evidence,

the applicant's main witness, Mr Van Wyk, testified that the union's only objection to

the retrenchment process was that the consultation process had not been exhausted.

Ms Ralehoko, however, submitted that the dismissals were nevertheless substantively

unfair inasmuch as Transhex failed to consider alternatives to dismissal and, in some

instances, applied unfair selection criteria.

Inasmuch as it was common cause between the parties that the individual applicants

had been dismissed from their employment with Transhex, the latter bore the onus of establishing that the dismissal was fair. Transhex accordingly assumed the burden of adducing evidence first. Three witnesses testified on its behalf - its executive director, Mr Mervyn Carstens ('Carstens'); its group HR Officer, Mr Gregory van Heerden ('Van Heerden') and its senior HR Officer at Baken mine, Mr Edward Bowers ('Bowers'). The applicants called as witnesses Mr Daniel van Wyk ('Van Wyk'); Ms Maria Galant ('Galant') who was a shop steward, Mr Albert Roberts ('Roberts') who was the chairperson of the Baken branch of the union and Ms Martha Newman (Newman').

Transhex conducts operations in various locations in the Northern Cape. The operations to the southern side of the Orange River include those at Baken Central Plant which is still running; operations at Paleo Kanaal (which was referred to as the 'PK' plant) at Baken which is the plant that has been closed; and 3 plants in the Richtersveld which are known as the Bloeddrift, Nxoidap and Gariep plants.

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Transhex exports 98% of its product to countries like the United States of America, India and Asia. With the banking collapse in the USA during the latter part of 2008, prices for diamonds dropped by as much as 50% to 60%. Whereas the average price for produce from Baken was US \$1000 per carat before the recession, the first sale after the banking industry crash realised only US \$480 per carat. Indeed, prices for Baken's product fell from a peak of US \$1342 in 2004 to a low of US \$472 in December 2008 with only approximately 7 out of 35 former purchasers tendering for Transhex product. Production cost at the time was around US \$600 to US \$650 per carat, which meant that the mining operations were running at a loss. The evidence by Carstens that the sudden drop in prices had caught Transhex by surprise, inasmuch as prices had been stable for some time, was not disputed. It was also not disputed that the PK plant, where most of the individual applicants had worked, had been running at a loss independent of the recession. In the 2008

financial year, for example, it had shown a loss of R12 million. In the following year, the loss amounted to R45 million. With the advent of the recession, Transhex was plunged into a crisis and management realised that it would not be possible to sustain all of the operations conducted by Transhex if prices remained as low as they were.

Management accordingly decided to be proactive and in December 2008 the union was invited to meet with it at the business school of the University of Stellenbosch at Bellville. At this meeting, the union was briefed on the crisis which Transhex was

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facing, due to the losses which it was sustaining as a consequence of the sudden price drop in respect of its product. After discussion with the union, it was decided

that the mining operations would shut down for a period of 20 days that month in

an effort to save costs. The closure would simultaneously afford management an opportunity to come up with intervention strategies and would enable management

to ascertain how other players in the industry were meeting the situation.

On 27 January 2009 a special meeting of the Central Negotiating Committee ('CNC')

was held at Vredendal. The CNC is a body which was constituted in terms of the recognition agreement between Transhex and the union in order to deal with negotiations in regard to substantive matters. Management's representatives at this

meeting were Carstens, Van Heerden, Schroeder (the Training and Development Manager) who kept the minutes of the meeting, Johan Heinlein (the HR Manager responsible for the Richtersveld, who was based at head office in Cape Town) and

Bowers. The union representatives were Van Wyk (a full time shop steward at Baken

whose salary was paid by Transhex although he worked full time for the union), André Joubert (the regional organiser for the union who was based in Springbok),

Maarman (the regional chairman of the union who was based in Cape Town and whose salary was paid by Transhex although he worked for the union on a full time

basis) and shop stewards from different regions who were in the employ of Transhex.

At the meeting in Vredendal, Carstens briefed the union in regard to the situation facing Transhex. He provided figures relating to the drop in prices, production costs,

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the loss which Transhex had incurred during the previous year and the anticipated

loss for that year. Carstens explained that management had considered its options

and had come to the conclusion that it had no choice but to close the PK plant in order for Transhex to survive. Baken central plant was the biggest of the operations

conducted by Transhex in the lower Orange River Region and had to remain in production in order for the company to survive, but management could not guarantee that it would be kept open indefinitely. The plant at Bloeddrift was engaged in exploration and was not generating money. One of the options management was considering in regard to Bloeddrift, was to change over from exploration into production. Management tabled other cost saving measures such as, for example, the reduction of transport costs, cash preservation, a moratorium

on the encashment of leave, a moratorium on housing loans, reduction of telephone

costs and the management of overtime. Management also requested the union representatives to table suggestions they might have to save costs and the union undertook to provide these in writing. Van Wyk acknowledged that management sought suggestions in regard to cost saving initiatives from the union, but that the

union failed to respond.

At the conclusion of the meeting on 27 January 2009, management proposed that

discussions continue during the first week of February 2009, in view of the urgency

of the matter. Van Heerden denied Van Wyk's evidence that the union requested Transhex to provide it with financial statements and no documentation evidencing

such a request was placed before the Court.

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Van Heerden sent a formal notice in terms of section 189 of the Labour Relations Act,

No 66 of 1995 ('the Act') to the union by facsimile on 30 January 2009. The letter

was sent by e-mail to Maarman, André Joubert, Van Wyk and Albert Roberts. The

letter was also sent to the union's regional offices in Cape Town and Springbok by

telefax. The letter containing the notice, sent out by Van Heerden, *inter alia*, set out

the reasons for the proposed retrenchments and was accompanied by a list of approximately 150 employees whom Transhex thought might potentially be retrenched pursuant to the closure of the plants at PK and Bloeddrift. The reasons

advanced for the retrenchment related to the global economic crisis and the impact

which this had had on the profitability of Transhex. The union subsequently requested further information in this regard, but at no stage challenged the rationale

underlying the proposed retrenchment.

Van Wyk testified that he only received the section 189 notice, which had been sent

by Van Heerden on Friday 30 January 2009, on the following Monday, because the

day shift has the last Friday of each month off, it being pay day. He conceded,

however, that Maarman and Joubert were not off on the Friday. Van Wyk

complained that he was unable to identify the particular employees who were at risk

of retrenchment from the list which accompanied the notice, because the list did not

contain any names, only affected positions. He conceded, however, that the section

189 notice complied with the provisions of the Act, inasmuch as it provided the number of employees who were likely to be affected and the job categories in which

they were employed.

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Transhex proposed that consultations with the union around the proposed retrenchment be held on 4 and 5 February 2009. Van Wyk responded to the letter

sent by Van Heerden on 2 February 2009, indicating that the union would respond

after it had held a mass meeting. The union held a mass meeting on the same day.

In the event, however, consultations only commenced on 24 February 2009, because

the union was not available prior to that date. In a letter to Van Heerden on 3 February 2009 Van Wyk indicated that the union's internal processes around the retrenchment would only conclude on 11 February 2009 and that the union would

thereafter *'be in a position to finalized (sic) the retrenchment consultations'*. Van Wyk confirmed in evidence that the internal processes were indeed concluded on

that day.

On 12 February 2009 Van Heerden sent an e-mail to the union requesting dates for

the next meeting and placed its concerns regarding the delay on record.

Eventually,

Van Heerden telephoned Joubert who was the lead negotiator for the union at the

time. The parties then agreed to meet at the Business School of the University of Stellenbosh on 24 and 25 February 2009. Transhex sent a revised or updated list of

potentially affected employees at Baken to the union on 20 February 2009, so that

the latter could consider it in advance of the meeting. Van Wyk testified that the list

was not discussed with union members in advance of the meeting on 24

February,

because it was the week-end and union members were not available. He could not

explain why no attempt was made to speak to members of the union who were working over the week-end.

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Van Wyk testified that the union needed a period of 3 weeks to complete its internal

processes before it could meet with management to consult in regard to the proposed retrenchments. The procedure involved in obtaining a mandate from all of its members was time consuming, due to the shift system, the fact that off-duty

employees lived in other towns, some of the operations which Transhex conducted

were 500 Km from Baken and, in addition, the union had to liaise with the community, the municipality and the governing body of the Richtersveld Land Claim

organisation. He had to visit Baken, Bloeddrift, Nxoidap, Reuning (the town at the

Nxoidap mine) and De Punt (at Vredendal). The members of the executive committee of the union also had to meet in order to prepare for the retrenchment

process, more particularly to identify the information which the union required from

Transhex. He denied that the union delayed the consultation process. According to his recollection, it was only around 11 February 2009 that all of the union's members had been reached and consulted. He could not recall what happened between 11 and 19 February 2009, but a shop stewards' council meeting was due

to take place on 21 and 22 February 2009 and the union could not meet with Transhex before such meeting had been concluded.

Bowers explained that Transhex employed 3 shift systems at Baken mine. Employees like Bowers, who formed part of the administrative staff, worked normal

office hours from Mondays to Fridays. The remainder of the work force were divided

into four different 12 hour shifts. Shifts A and B would work day and night shift respectively for a period of 7 continuous days, while shifts C and D were off.

These

shifts changed on Mondays, with shifts C and D taking over on Monday morning and

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Monday afternoon respectively for a period of 7 days, so that shifts A and B could

have a week off. By virtue of this arrangement, Bowers testified that the union was

usually able to get to all of the employees employed at Baken and Bloeddrift within

a period of 7 to 8 days. De Punt was further away and would involve a day's travel

there and a day's travel back.

At the meeting on 24 February 2009, Van Heerden was the main spokesman for Transhex. He gave an overview of the company's situation with regard to cash flow,

sales and the overall financial situation and explained how the impact thereof. He also informed the union that instead of closing the plant at Bloeddrift, Transhex had

decided to switch it over from exploration to production, so that it was at least breaking even and could remain open. This meant that the posts of approximately

50 employees at Bloeddrift could be saved and about 8 at Baken. Transhex, at all material times, aimed to save Baken mine, because it provided funding for the whole

Transhex group. Consequently, if it came under threat, the whole group would be

threatened. The plant at PK had been placed on '*care and maintenance*' and affected

employees had been absorbed into other positions while the consultations required

by section 189 of the Act were taking place. Cash preservation was of particular concern and management discussed transport costs and a freeze on salary increases.

An updated list of potentially affected employees was also provided.

Van Heerden testified that the union made no formal response to management's input and proposals at that stage. Van Wyk's recollection was that the union tabled

certain cost saving measures, one being that the contract with Clean Oil ought to be

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cancelled and the other being that children who went to school in Alexander Bay should be put into schools at Baken so as to save transport costs.

Van Heerden explained that in identifying employees who might be retrenched, Transhex came up with a schedule that was based on the criteria referred to in the

retrenchment agreement which management and the union had concluded. It was

predominantly based on the principle of LIFO, but it also comprised other elements,

such as retaining of skills. Clause 3.3 of the agreement in fact provided that consistent and fair criteria had to be applied and that the *'principles of skills, relevant*

experience, affirmative action and "LIFO" in sequence of priority shall be applied'.

Transhex regarded LIFO and skills as being interlinked, because longer service in many instances equated to skills. In compiling the list of affected employees, it became apparent that management had to weigh persons with longer service and

more skills, against those with shorter service. On lower levels of employment, Transhex was of the view that LIFO was the most suitable criterion for selection. Employees at the various mines or plants could be 'pooled' and selection could then

be made from the pool. Team leaders were in a different position, because management would run the risk of losing specialised skills. Management went through each of the positions on the list of affected employees with the union and

explained in each case what selection criteria had been applied. Management also

informed the union that restructuring at head office had previously taken place and

that further consultations were being conducted with three employees in D-band positions who fell outside of the bargaining unit. The union did not challenge any of

the selections so made.

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Van Heerden acknowledged that Joubert had requested the company's rescue plan

and that the latter seemed to have a formal document in mind. Van Heerden, however, explained that the process was part of the plan and that management

never undertook to provide a formal document. It was common cause that the union had requested certain geological statistics and that these were not provided.

Van Wyk testified that the union wanted this information in respect of Bloeddrift, because Transhex was switching that plant from exploration into production and the

union wanted input from its head office in this regard.

The list of affected employees forwarded to the union on 20 February 2009 for the

first time contained the names of the employees and not only the job titles. Van Heerden acknowledged that the union delegation complained about having received

this information at the last minute. Van Heerden explained that the meeting on 24

February was merely the start of the consultation process. Transhex had started the

information sharing process by providing the list of employees prior to the meeting

and he did not see it as having been provided at a particularly late stage.

Van Wyk testified that the union delegation discussed the retrenchment of certain

individual employees. So, for example, the union's stance was that Newman, one of

the HR officers, had longer service than Annette van den Heever, but management

held the opposite view.

Van Wyk and Van Heerden were agreed that the union also complained that the list

of 20 February contained additional names/positions that had not previously been

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identified, such as the posts in Adult Basic Education and Training ('ABET'). Van Heerden stated that management's stance was that not a single employee had attended the classes offered by ABET during the preceding period of 3 months and

that abolition of these positions would accordingly save costs. According to Van Wyk, the union said that team leaders do not allow time off for employees to attend

such classes, because production was a higher priority.

Two days had been reserved for the consultations. Van Heerden concluded his presentation on the morning of the first day. The union then informed management

that the environment was not conducive to consultations and that they wanted a CCMA mediator to become involved. This request came out of the blue.

Management requested the union to explain why this stance was adopted, but according to Van Heerden the reasons were vague and convoluted. The words 'mediator', 'facilitator' and 'arbitrator' were used almost interchangeably. Management attempted to persuade the union representatives to carry on, but they remained adamant that they were not prepared to continue their participation in the consultation process without the intervention of the CCMA and the meeting had to be adjourned.

Van Wyk alleged that the union delegation had put forward proposals and that these were consistently rejected by management and that this was the reason why the union wanted to involve a third party in the consultation process. Van Heerden denied that this was the case. Van Heerden conceded that the union delegation complained that the retrenchment was not being conducted in accordance with the

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retrenchment agreement and that they relied on this complaint to substantiate their request for a mediator. At the start of consultation proceedings he expected differences of opinion to be voiced, but the union delegation refused to participate any further without a mediator and he failed to understand how one could jump from an opening session to a withdrawal from the consultation process. In the event, management requested the union to submit a formal written notification to Transhex indicating the basis for the request and Joubert undertook to do so. It was, however, common cause that no such written notification was forthcoming and that the union abandoned the demand for a mediator/facilitator. Van Heerden conceded that the union forwarded a copy of a circular which had been sent to its members to him and that such circular contained the union's motivation for requesting a mediator. He stated, however, that he did not regard this document as constituting a formal request to the company and that management accordingly did not formally respond to the copy of the circular. Transhex and the union, however, continued to communicate with each other about the resumption of the consultation process and management sent out its own circular to employees.

The union held mass meetings with the employees on 2 and 4 March 2009 in order to inform its members of the matters discussed at the meeting on 24 February 2009.

On 3 March Transhex wrote to the union to enquire whether it still wanted to participate in the consultation process. Van Wyk responded that the union would revert after its strategic planning session which had been scheduled to take place on

5 March 2009 and the union subsequently proposed that a further meeting of the CNC be held in Springbok on 11, 12 and 13 March 2009. Van Wyk testified that the

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union delegation decided not to persist with the demand for a mediator if management declined this request, so as not to delay the process.

Van Heerden testified that it was clear on the morning of 11 March 2009 that something was afoot. The union representatives arrived dressed in ANC clothing. More particularly, some members of the union delegation wore T-shirts on which the

words '*ANC Marshall*' had been printed. Van Wyk and Galant disputed that members

of the union delegation wore T-shirts depicting them as ANC Marshals. Van Wyk alleged that two members of the delegation - Galant and one Nieke Links - wore red

T-shirts bearing the NUM and ANC emblems with the word '*volunteer*' printed on the

front and the words '*NUM votes ANC*' on the back of the shirt. This version had not

been put to any of the witnesses who testified for Transhex. Moreover, in cross-examination

it was put to Van Heerden and Bowers that ANC T-shirts were handed out in the streets of Springbok when the union delegation arrived there for the meeting on 10 March 2009 and that members of the union delegation received such

T-shirts from people on the streets. None of the union's witnesses testified to this

effect. Van Wyk testified that ANC T-shirts were handed out at the rally on 12 March. Galant alleged that the union representatives normally wore the NUM T-shirts

which she had described when they met with management and stated that she had

received the shirt she had worn at a previous meeting of the union in Gordons Bay.

At the commencement of the meeting on 11 March, the union's chief negotiator, Joubert, informed management that the union representatives would begin

consultations, but that they would only be available until 12h00 the following day,

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because they were going to an ANC rally in Springbok. Van Heerden was upset and

the management delegation felt that they had been brought to Springbok under false

pretences, that the union was not acting in good faith and that the union was jeopardising the process. Management tried to persuade the union delegates to carry on and they stubbornly refused. At some stage the union delegation suggested

that they might come back at night after the rally, but the consultation process broke

down. Van Heerden, however, denied that he stormed out of the meeting. He stated that the parties spent the entire afternoon of the 11th March arguing about attendance at the rally the next day. *Bowers corroborated the evidence of Van Heerden in regard to the events at the meeting in Springbok and testified that he liaised with Van Wyk during the remainder of the afternoon in order to get the consultation process back on track, without success.

During the evening of 11 March 2009 a number of telephone conversations were held with senior union officials in Johannesburg as well as with Van Heerden's superior in Cape Town. It was eventually agreed that Carstens would drive from Baken to Springbok and that he would try to break the deadlock. Carstens also had

a discussion with one Peter Bailey at the union's head office and it was agreed that

he would request Maarman, the regional chairperson of the union, to become involved in the consultation process.

Carstens arrived in Springbok in time for the meeting which was scheduled to start

by 08h30. Management was accordingly ready to start the meeting on time, but the

union delegation arrived an hour late and then engaged in a caucus, so that the

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meeting eventually started 1½ hours late. Van Wyk acknowledged that the meeting

started late and stated that the delay was occasioned by the fact that Maarman, the

union organiser, had to travel to Springbok from Cape Town.

It was common cause that Carstens addressed the meeting and put management's

disappointment at the turn of events on record. He obtained agreement for the consultation process to continue and the parties met until approximately midday.

Bowers went through the list of employees who had been identified for

retrenchment. The union delegation tabled the names of persons who volunteered for voluntary retrenchment and early retirement. Cost cutting measures were discussed and the union undertook to revert with formal proposals in this regard, once it had had the opportunity of doing some research into the matter. There were no questions around the rationale for the retrenchment, or the retrenchment process.

According to Van Heerden, the meeting was adjourned around lunch time on the 12th

March 2009 on the understanding that the section 189 process was on track and that

the detail in regard to specific employees whom the company had identified for retrenchment, as well as the persons who volunteered for retrenchment, would be

sorted out at project level between Bowers and the members of the union delegation. The business of the meeting was concluded and the union delegation left to attend the ANC rally.

The retrenchment which gave rise to the instant application was the first retrenchment Bowers had dealt with after he was employed by Transhex and he

Page -17- remembered it well. He confirmed that the CNC meeting proceeded on Thursday 12 March. During the course of such meeting, management and the union went through the list of affected employees which management had provided and the union tabled names of persons who were prepared to take voluntary retrenchment.

Some of the union's proposals were accepted by management. When the meeting

ended, it was agreed that consultation at CNC level had been concluded and that he

(Bowers) and three of the union representatives - Van Wyk, Roberts and Galant - would reconvene at Baken to work through the list of affected employees in detail,

as well as to consider the union's proposals in regard to voluntary retrenchments, in

an effort to minimise forced retrenchments. Bowers and the three union representatives were asked to work over the 16, 17th and 18th of March and to finalise the list of persons who would be retrenched. The union delegation decided

that they would use Friday 13 March 2009 to brainstorm and to formulate further cost saving initiatives which they would provide to Transhex in writing. Van Wyk conceded that no written proposals were, however, conveyed to management in this

regard, although he alleged in cross-examination that the union's cost saving

measures were conveyed to management orally.

Van Wyk disputed the evidence by Van Heerden and Bowers to the effect that the consultations at CNC level had been concluded. He testified that the union had agreed to meetings of the working group, but expressly stated that the working group would have no powers other than to make recommendations to the CNC subsequent to the conclusion of its task on 18 March 2009. Although Van Wyk was

satisfied that the union's notes relating to the meeting were comprehensive and
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complete, he could not explain why those notes, like the minutes, contained no reference to an alleged agreement that the working group would report back to the

CNC. He could also not explain why he did not reply to Van Heerden's e-mail of 20

March 2009 in which it was stated that the process at central level had been concluded. Van Heerden recalled that Roberts had telephoned him at some stage after 12 March 2009 to enquire when the next meeting of the CNC would be held.

Van Heerden responded that there was no need for such a meeting, it having been

agreed when the meeting on 12 March was concluded that the consultation process

at central level had been concluded and that the matter was referred to project level

on specific points, such as the particular persons who were to be retrenched. Roberts did not take it any further.

The working group consisting of Bowers and the three aforesaid union representatives met on Monday 16 March and started discussing individual cases. The union representatives came up with certain alternatives and some of these were

accepted. So, for example, a Mr Diergaardt and a Mr Fielding were on the list of affected employees. Both of these gentlemen had recently been promoted, but their

previous positions were still vacant. The union proposed that they be transferred back to their original positions so that their jobs would be saved and these proposals

were accepted. The union also proposed that one Vos, who was not on the list, but

who volunteered for voluntary retrenchment, take the place of one Hunter and that

was also agreed to. Not all of the proposals made by the union were, however, accepted. Bowers did not keep minutes of the meetings of the working group, but

he had his laptop computer with him and updated the list of affected employees so

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as to reflect the matters which were agreed upon. Galant kept notes of the matters

which the working group discussed in relation to individual employees.

The consultations and discussions of the working group around the employees on the

list of retrenchees were concluded on 18 March 2009. On the afternoon of 18 March

the union made a written request for a further meeting of the CNC. Van Heerden responded by e-mail stating that the CNC process had been concluded. Van Wyk disagreed with this view.

Bowers testified that even after 18 March 2009 Transhex still considered alternatives

in order to mitigate retrenchments and efforts were being made to get mandates from management so as to accommodate more of the union's proposals.

Although

the formal process had been completed, he tried to keep the process of consulting

and the sharing of ideas going. Bowers denied that the union representatives asked

him to provide them with a spreadsheet reflecting the agreements reached by the

working group, as well as the items still in dispute, as was alleged by Van Wyk.

His

recollection was that the union indicated in the working group that there was no need to continue discussions. He had to prepare the list of affected employees and

he indeed compiled what he believed was the final list of affected employees and attached a copy to a letter dated 20 March 2009 which he sent to the union by facsimile.

According to Bowers, an amended list of affected employees was subsequently provided to the union after he had persuaded management to make further

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concessions and a meeting was scheduled for Monday 23 March 2009. The union representatives, however, failed to arrive. Van Wyk disputed that a meeting had been arranged for 23 March 2009. Later that day, the union requested Bowers to meet with 3 politicians from the area, inclusive of the MEC for transport, in regard

to roads. He was surprised at the allegation that the union representatives failed to

attend the meeting because they were involved in the regular shop stewards' meeting which is held on Mondays.

The union representatives then proposed a meeting of the working group on 24 March 2009 at 08h00. Bowers could not make 08h00 and suggested 11h00. On the morning of the 24th March Roberts, however, informed the management secretary that they would be unable to meet that day. The reason advanced was that it was National TB Day and that Galant, in her capacity as HIV Wellness Co-ordinator, would be engaged in activities planned for that day. Bowers was frustrated, because even if Galant could not attend the meeting, he could still meet with Roberts and Van Wyk. Roberts was a peer educator, but Bowers did not see that as precluding him from attending the proposed meeting. He telephoned Roberts and tried to persuade the latter to meet on such basis, but Roberts declined, because the regional organiser of the union was coming to the mine for discussions. Late that same afternoon, the union secretary, Andre Jonker, requested that union representatives be given time off the next day to attend a by-election in Sanddrift. Bowers declined the request, because time was running out and, in his view, consultations around the retrenchment had to enjoy preference.

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On 24 March Bowers informed the union that management had agreed to two further proposals which the union had made in regard to the list of affected employees and on 25 March he sent a further revised list of affected employees to the union. On 26 March 2009 Bowers spoke to Roberts on the telephone about the importance of proceeding with the process. Roberts indicated that the union did not see the need to consult any further, but that it would respond in writing. The union failed to respond and Transhex started sending out letters of termination. A meeting between management and the union's working group was eventually held on 30 March 2009. The list provided on 25 March was discussed, as well as practical matters such as furniture removal and the period of time during which affected

employees could continue to occupy company housing subsequent to their retrenchment. Bowers testified that it was confirmed at this meeting that the process had been finalised, given the time limits. Shortly after the meeting adjourned Bowers, to his surprise, received a letter declaring a dispute from the union by facsimile and a dispute meeting was subsequently held on 2 April 2009. The union complained that it was not clear what criteria management had applied

in deciding whether or not to accede to requests for voluntary retrenchment.

Bowers

testified that each proposal in regard to voluntary retrenchment was discussed with

the union individually in the context of the balance between the retaining of skills and

the costs of voluntary retrenchment. In the end, it came down to a balance between

LIFO and skills retention and these criteria were consistently applied to each individual case. In doing so, Transhex acceded to requests made by the union in Page -22-

regard to voluntary retrenchments as far as it was able to do so.

The union complained, in particular, about the retrenchment of Ms Martha Newman,

one of the HR officers previously employed by Transhex, who was retrenched.

According to Bowers, Newman was retrenched because she had broken service with

Transhex and the length of her service with the company was calculated from the

date of her re-employment, so that she had less actual service than the other HR officer.

Bowers acknowledged that the union had, during the course of consultations, proposed that agreements with outside contractors be terminated and that union members be placed into the positions which would then become vacant, so as to minimise the number of retrenchments. In the event, however, none of the contracts with independent contractors were terminated for sound business reasons.

In the case of Super Cleaners, for example, termination of the contract would have

increased operating costs.

Van Heerden testified that the final number of retrenchments was around 43 or 45,

whereas the numbers originally contemplated (which included the positions at Bloeddrift) were in excess of 170. The substantial reduction in the number of affected employees occurred because Transhex put a moratorium on all outside jobs,

put the Bloeddrift plant into full production and transferred some of the employees at the PK plant into vacant positions at Baken.

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The retrenchment agreement provided for severance pay at the rate of 3 weeks' pay

per year of service, in addition to notice pay, leave pay and payment of a pro rata

bonus. All of the employees who were eventually retrenched, received such payments. The agreement also provided for counselling and vocational training in

order to enable affected employees to acquire new skills. None of the employees who were retrenched applied for such training.

Van Heerden pointed out that 19 of the applicants had subsequently been recalled

and were again employed by Transhex. Ms Ralehoko indicated that these employees

persisted in claiming relief in terms of the instant application, inasmuch as they had

been re-employed on a temporary, as opposed to a permanent basis. During the course of the trial it was agreed that these employees would be permanently appointed.

The evidence of Galant, for the most part, dealt with the proposals which the union

made in regard to the retrenchment of individual employees and the discussions of

the working group at Baken thereanent. According to her testimony, management

accepted some of the proposals made by the union in this regard, but did not give

reasons for their decision, nor did they notify the union when any of its proposals relative to individual employees were accepted. Galant did, however, also testify as

to the events which occurred at the CNC meeting held at Springbok on 11 and 12

March 2009 and confirmed Van Wyk's evidence to the effect that the union had made

it clear, at that meeting, that the working group did not have decision making powers.

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Roberts, the chairperson of the Baken branch of the union, testified as to the meetings which had been arranged between the union and management after the

working group had concluded its deliberations on 18 March 2009. Roberts testified that he had not agreed to meet Bowers on 23 March, because it was a Monday and the union has leadership meetings every Monday afternoon at 2 pm. He further testified that he was unable to attend a meeting with Bowers or management on 24 March, because he was involved in the TB-day, as was Galant. Roberts also testified as to the discussions of the working group around individual employees who had been selected for retrenchment, the selection criteria which were to be applied and the persons who volunteered to take voluntary severance packages. Although he had sent an e-mail to Bowers on 23 March 2009 apologising for the fact that the union had not attended the meeting of the working group that day, he attempted to explain that no such meeting had been agreed to. In one and the same e-mail he proposed a meeting the following day, but in evidence alleged that neither he nor Galant were available to meet on 24 March because they were involved in the TB-day. Newman was one of two HR officers who had been employed by Transhex. Her evidence related in the main to her own retrenchment. She was of the view that she ought not to have been retrenched, because she had longer service than the other person, one Annette van den Heever. Newman did, however, testify in regard to the meetings which were held in Vredendal on 27 January 2009 and the meeting on 24 February 2009. She stated that she had made notes of the discussion at the meeting

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in Vredendal, because she was the vice-secretary of the union and usually reported back to union members after meetings. She also took notes for Joubert during the caucus which the union had requested. She did not take any notes at the meeting which was held on 24 February 2009. Joubert, who had been the union's lead negotiator at the CNC meetings, was not

called as a witness. Van Wyk testified that he had spoken to Joubert about the trial, but the latter indicated that he would not be testifying. No evidence was tendered as to why Joubert was not subpoenaed to attend the hearing in order to testify.

Evaluation of Evidence

Carstens, Van Heerden and Bowers were impressive witnesses. Each of them clearly

made an honest attempt to relate the events in question as objectively and as accurately as possible. The evidence of Carstens was not seriously challenged.

Van

Heerden's evidence in regard to the events surrounding the retrenchment, is borne

out by the documentary evidence inclusive of the minutes of the meetings and the

correspondence, as is the evidence of Bowers. Bowers and Van Heerden were directly involved in the retrenchment consultations and accordingly had first-hand

knowledge of the events in question. Bowers had every reason to remember the detail of discussions with the union, inasmuch as it was the first retrenchment he had

dealt with at Baken. Both Bowers and Van Heerden were fair to the applicants in giving their evidence and made concessions where necessary. Both Van Heerden and Bowers withstood stringent cross-examination. They remained calm, patient

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and unruffled even when they were repeatedly confronted with the same issues. They made good eye contact and testified in a confident manner. Having seen them

in the witness box and having heard their evidence, I have no hesitation at all in accepting the truth as well as the reliability of their evidence.

Van Wyk was a poor and unconvincing witness. He contradicted himself, for example, by giving three different versions in regard to the cost saving initiatives which were proposed at the meeting held on 27 January 2009. In his evidence in chief, he testified that the union had made 2 cost saving proposals relating to the use

of contractors and voluntary severance packages subsequent to the said meeting.

Under cross examination, he testified that Transhex had made 8 out of the 9 cost

saving measures which were reflected in the minutes of the meeting held on 27 January 2009 and shortly after alleged that the union had proposed all of those measures. His evidence in regard to the T-shirts which members of the union delegation wore to the meeting on 11 March 2009 does not tie in with the version

that was put to Van Heerden in cross-examination. In addition, Van Wyk stubbornly refused to make concessions that were clearly required. So, for example, it was obvious that operating costs would be increased if union members had to perform the work which was done by one of the outside contractors, but Van Wyk declined to concede that the position of such contractor fell within the ambit of contracts which would not be economically feasible to terminate. Moreover, although Van Wyk conceded that all of the union's members had been consulted by 11 February 2009 and he was unable to explain why the union only proposed the meeting of 24 February 2009, he refused to concede that the union was dragging its heels or playing for time. Van Wyk's evidence that Joubert expressly stated, at the meeting of 12 September 2009 in Springbok, that the working group would have to report back to the CNC meeting after consulting on individual retrenchees, is not borne out by any of the documentary evidence.

Galant was an equally unimpressive witness. Her testimony in relation to the T-shirt which she wore to the meeting on 11 March 2009 did not correspond with the version which was put to management's witnesses. She was frequently evasive in answering questions put to her in cross-examination and gave long, rambling answers to questions which clearly required a crisp answer. She obviously tried to paint a picture of Transhex acting unfairly vis-à-vis the union, for example, by stating that nothing the union had said was reflected in the minutes of the meetings. When it was pointed out to her that the union's proposals were reflected, she tried to backtrack.

She also alleged that certain proposals which the union had put forward in the working group, for example, that Vos go on voluntary retrenchment instead of Hunter being dismissed, failed to gain management's approval although Transhex had in fact accepted this proposal. When it was pointed out to her that management in fact accepted such proposal, she changed her evidence and stated that the acceptance had not been agreed and had not been communicated to the union.

Roberts was similarly not a good witness and he clearly tried to tailor his evidence to fit the case. So, for example, he testified that the union's constitution did not permit a single union representative to meet with Bowers at working group level. This evidence was given in an attempt to justify the fact that the union failed to meet

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with management on 24 March 2009 when he (Roberts) and Galant were involved

in the TB-day. He was requested to obtain a copy of the constitution over the lunch

adjournment so that it could be scrutinised. After lunch he explained that he had contacted the union office and then realised that he had made a mistake, the constitution contained no such provision. It was the recognition agreement that provided that at least the chairperson, full time shop steward and one person of the

regional leadership had to meet with management. In this regard, he placed reliance

on clause 49 of the recognition agreement. When regard is had to the recognition

agreement, however, all that clause 49 provides is that at the CNC the union will be

represented by the chairperson of the Project Level Committees, the full time shop

steward and at least one Union Official. The clause does not deal with meetings at

working group level. At a later stage, he alleged that the events on TB-day had been

concluded at 3 pm on 24 March, but that the union could not meet with Bowers at

that stage, because the regional organiser, Joubert, was at Baken that day and they

decided to discuss the retrenchment situation with him.

Roberts was also clearly not an unbiased witness. So, for example, it was put to him

that Transhex had conducted retrenchments in the middle Orange River region of its

operations during 2007 in a manner similar to that followed in the instant case. More

particularly, the consultation process was initially conducted at CNC level and the details with regard to specific persons who were selected for retrenchment were agreed at project level. Roberts initially responded to the statement by alleging that

all retrenchments were finalised at CNC level, then alleged that he could not

remember the 2007 retrenchments well and finally declined to answer when details

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of that retrenchment process were provided. He also made common cause with Galant in alleging that management simply ignored the union's proposals. Newman was similarly an unreliable witness. During her evidence in chief she stated

that she commenced her employment with Transhex in April 1986, resigned in January 1999 and recommenced employment in September 1999. During the course

of cross-examination it transpired that she had left Transhex to go on holiday in December 1999. She failed to return to work. She alleged that she had tendered a written resignation which was addressed to one Gail Harrison, but she was unable

to provide any documentation to substantiate this allegation, because she had allegedly not kept a copy of the letter. In September 1999, after she had written to

Carstens to ask for a job, she rejoined Transhex. In May 2007 she applied for a position as payroll supervisor and when she did not get the job, she resigned telephonically. Two months later, she rejoined Transhex yet again. Newman clearly

had an axe to grind as far as Transhex is concerned and appears to me to be an unreliable witness.

On an overall conspectus of the evidence, I am satisfied that Transhex has proved,

on preponderance of probabilities, that it consulted with the union in a fair manner

around the retrenchment process in question and that it complied with the provisions

of section 189 of the Act. Van Heerden and Bowers went out of their way to ensure

that the process was fairly and thoroughly conducted and consistently sought the input of the union, which was frequently not forthcoming. They sought, at all times,

to minimise the number of retrenchments and their efforts in this regard met with

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substantial success.

The union, on the other hand, failed its members dismally. It is quite clear from the

evidence that the union representatives were much more concerned with political and community events, as well as their own agendas, than they were with their participation in the consultation process. Indeed, the union adopted an obstructive

attitude almost from the beginning, as is evidenced by its insistence on facilitation/mediation at the meeting in January 2009, which was subsequently abandoned without further ado. Time after time the union failed to react to management's requests and proposals expeditiously and it was readily evident that

the union representatives were trying to delay the consultation process in an endeavour to frustrate the proposed retrenchment, in circumstances where they knew that the rationale for such a process was beyond question and were aware that

the matter was urgent. Management was constrained to plead with the union repeatedly to participate in the consultation process and to provide its co-operation

expeditiously. Most of these pleas appeared to fall on deaf ears.

Much time was spent on evidence relating to individual employees who had been selected for retrenchment. The details relating to each of these persons have not been alluded to herein, but suffice it to say that the union failed to substantiate its

allegation that Transhex simply ignored its proposals. Transhex certainly did not accept each and every proposal which had been made, but a number of the union's

proposals were accepted and in instances where the union's proposals did not meet

with approval, management could justify its decision. The selection criteria which Page -31-

Transhex had applied were derived from the retrenchment agreement which had been concluded with the union and I am satisfied on the evidence before me that

these criteria were properly and fairly applied.

The union's allegation that the consultation process had not been properly concluded

is also unconvincing. Van Heerden and Bowers testified that the consultations at CNC level were concluded on 12 March 2009 at Springbok and that the parties had

agreed to the final details relating to affected employees being agreed by the working group. If the union delegation did not intend to agree to such a course of

conduct, it has only itself to blame. If they had paid more attention to the matter at

hand than the ANC rally at Springbok, they would no doubt have been in a position

to deal at CNC level with individual employees who had been selected for retrenchment.

The union's allegation that its negotiator - Joubert - expressly stated that there would

have to be a further meeting of the CNC is also not borne out by the documentary evidence. Neither the minutes of the meeting, which were prepared by Transhex, nor the notes which the union kept, refer to any such statement having been made.

There is no doubt that such a statement would have been noted, at the very least in the union's notes, if it had in fact been made. The union's correspondence also fails to support its case in this regard.

It is clear from the evidence as a whole that Transhex attempted to reach consensus with the union in regard to the retrenchments as a whole, as well as in regard to each of the individual employees who were retrenched. The law does not require the employer to obtain the agreement of the union, whether to the retrenchment process or to the retrenchment of individual employees. The law requires that an employer make an honest attempt to reach consensus. If the union decides not to participate, or to engage fully in the process, the union has only itself to blame if its members are retrenched without any meaningful input by it. The employer has to make the final decision whether or not to proceed with retrenchment, and whom to retrench.

In the instant case, there is no evidence proving that the efforts at consultation by Transhex was a sham or that its ultimate decisions regarding the retrenchment were irrational, *mala fide*, or made for a reason other than sound business practice. Given the obstructive and intransigent attitude as well as the delaying tactics adopted by the union, Transhex was entitled to proceed in order to ensure its survival and the continued employment of the majority of its employees. I am also satisfied that the individual employees/applicants who were retrenched were in fact retrenched for sound reasons and in accordance with a fair procedure. The provisions of the retrenchment agreement which Transhex and the union had concluded, were clearly complied with.

Given the conclusions reached, it is not necessary for me to deal with the amendment which the applicants sought to make to their Statement of Case at the conclusion of the proceedings.

The following order is accordingly made:

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1. The applicants' application is dismissed.
2. The applicants are ordered to pay the respondent's costs as between party and party, jointly and severally, the one paying the other to be absolved.

A M DE SWARDT, A J

28 July 2010

For Applicant: Ms T Ralehoko of Cheadle Thompson & Haysom

For Respondent: Mr A Steenkamp of Bowman Gilfillan Inc.