LABOUR COURT

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C928/2009

In the matter between:

JOHN HENRY ADAMS **Applicant**

and

DCD-DORBYL MARINE (PTY) LTD **Respondent**

JUDGMENT

STEENKAMP J:

Introduction

1] The applicant, Mr John Adams, was dismissed for operational requirements. He claims that the dismissal was automatically unfair in terms of s 187(1)(g) of the Labour Relations Act[1]; alternatively, that it was procedurally unfair.

1 Act 66 of 1995 ("the LRA").

Background facts

2] Adams was initially employed by an entity called Globe Engineering Works (Pty) Ltd ("Globe") from 1 February 2007. In March 2009, the Competition Tribunal approved a merger of Globe, Nautilus Marine (Pty) Ltd ("Nautilus") and the Cape Town operations of DCD Dorbyl (Pty) Ltd. The merged entity became the respondent, DCD-Dorbyl Marine (Pty) Ltd ("DCD") with effect from 1 April 2009.

3] Before the merger, on 28 February 2009, Globe had issued a notice of possible dismissals for operational requirements in terms of s 189A of the LRA. On 1 April 2009, commensurate with the merger, DCD withdrew that notice.

4] As a result of the merger, Adams's contract of employment was transferred to DCD in terms of s 197 of the LRA. In terms of the order of the Competition Tribunal and the conditions attached to the approval of the merger, 28 "white collar" employees could be retrenched in the 12 months following the merger, viz:

4.1 24 support staff from administration and finance, human resources, stores and security; and

4.2 four executive managers.

5] Adams was employed as a buyer. He fell within the service departments (administration and finance) described as "white collar" employees.

6] On 28 April 2009 DCD issued a notice to all employees confirming that, in terms of the Competition Commission ruling, "blue collar" workers would not face retrenchment, but that 28 employees from the service departments "could be" retrenched. DCD also brought a reduction in workload to its employees' attention. Some employees – not including Adams – were put on short time. The notice also recorded that "several employees" had enquired about the possibility of voluntary severance

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packages. Adams was not one of them.

7] On 11 May 2009, DCD issued a notice to affected employees – including Adams – in terms of s 189(3) of the LRA. The notice refers to the ruling of the Competition Commission and states that it wishes to consult on the possible dismissal for operational requirements of 28 employees in the "support functions", including administration and finance. It stated that, in the original submissions to the Competition Commission, the employer had stipulated that "rationalization of the support functions (administration, finance, HR, security etc) of the three businesses may result in the reduction of 28 positions". It continued:

> "Consequently the employer proposes that the positions listed above are redundant and that selected incumbents should be operationally dismissed. The employer proposes commencing consultations on these matters on 13 May 2009.
>
> Regarding the alternatives to operational dismissals which the employer has considered, the employer regrets that there are no alternatives consequent to the proposed merged support structure, requiring lower staffing levels. Furthermore the dramatically lower levels of business activity mean that there are no alternative positions available."

8] The proposed selection criteria for dismissals were stipulated as "position and skill". Adams was informed that:

> "You currently hold the position of Buyer. The employer views this position as redundant, due to the restructuring of the Buying Departments, consequent to the merging of the Departments of DCD-Dorbyl Marine, Globe Engineering Works and Nautilus Marine. The company has taken into consideration factors such as skills and experience."

9] The letter went on to set out the terms of a voluntary retrenchment package, that would be more beneficial than the statutory severance pay of one week's remuneration per completed year of service that would be paid to employees who would be dismissed for operational requirements and had elected not to accept voluntary retrenchment.

10] On 13 May 2009 at 07:18 Adams received an email message from

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Pamela de Swardt, the financial manager, who was his immediate supervisor. The email was addressed to him and seven other employees with the subject line: “Meeting @ 9am”. The body of the message read:

“The meeting has been moved to 9am in the board room.

Delmary please tell Lauren.

Annette please tell Nediswa.”

11] There is a dispute whether this meeting was intended to be a consultation meeting as envisaged by s 189 of the LRA, or simply a regular weekly meeting. More of that later.

12] On 14 May 2009 Adams was provided with an “exit pack” containing his unemployment insurance form (UI-19); his pension release form; and a letter dated 15 May 2009 “confirming” that he would be “released of [his] duties with immediate effect”. In an affidavit opposing an earlier application for condonation, DCD’s human resources manager, Ms Jino Swart, said this was given to him “... on the assumption that he would be retrenched at the end of the s189 process.” On the UIF form form, his termination date was recorded as 30 June 2009 and the reason for termination was given as “retrenched/staff reduction”.

13] It is disputed whether Adams remained at work for the rest of that day, Thursday 14 May 2009.

14] It is common cause that Adams was ill and not at work on Friday 15 and Monday 18 May 2009. On 19 May, Swart invited him to a meeting. This took place on 22 May 2009. At the meeting, she gave him a copy of a staff communiqué dated 21 May 2009. The communiqué deals largely with applications for a voluntary severance package, reminding employees that it would be open for applications until 25 May 2009. It states that: “Employees who haven’t applied by this date will only receive the normal package, as stipulated above”. It continues to refer to organograms for particular departments and explaining a “spill and fill” process for filling

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remaining positions:

> "Where there are more employees in a particular job category than positions on the organogram, all of those employees will be entitled to compete for the positions on the organogram. The competitive process will entail an interview with a panel and the panel will determine the employees for the positions."

15] Adams received an undated letter from DCD's general manager, Andries Joubert, headed "TERMINATION OF EMPLOYMENT IN ACCORDANCE WITH SECTION 189" and informing him that his employment would be terminated with effect from 29 May 2009.

Automatically unfair dismissal?

16] Adams claims, firstly and primarily, that his dismissal was automatically unfair in terms of s 187(1)(g) of the LRA, which states that:

> "A dismissal is automatically unfair if the reason for the dismissal is ... a transfer, or a reason related to a transfer, contemplated in section 197 or 197A."

17] It is common cause that Adams was dismissed shortly after his contract of employment had been transferred from Global to DCD in terms of section 197. But was the reason for the dismissal that transfer, or a reason related to the transfer?

18] At first blush, it would appear so. In the letter that DCD issued in terms of s 189(3) on 11 May 2009, it reminds affected employees that:

> "In the original submissions to the Competition Commission the employer stipulated that rationalization of the support functions ... of the three businesses may result in the reduction of 28 positions."

19] The notice also states that there are no alternatives available, "consequent to the proposed merged support structure, requiring lower staffing levels". From these excerpts, it seems clear that the merger led to rationalization and hence redundancy consequent to the merger, ie as a result of the merger. And in her affidavit in the condonation application, Swart says the

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following:

> "From an original headcount of 108 employees, the merger had the effect of increasing DCD's staff compliment [*sic*] by almost 4 times to 397 full time workers. This increase, together with the economic situation as aforesaid, necessitated that the Respondent follow a restructuring exercise, which unfortunately also resulted in the retrenchment of a number of employees".

She also states further on:

> "Adams was part of a group of buyers of Globe whose positions were earmarked for restructuring as these positions had all become redundant consequent to the merger."

20] On the other hand, Ms Pamela de Swardt (DCD's financial manager) testified that, even before the merger, Globe had been struggling financially – hence it issued a notice of contemplated dismissals in terms of s 189A on 26 February 2009. That notice was withdrawn after the merger.

21] What, then, was the real reason for Adams's dismissal? This needs to be determined in order to ascertain whether it was the transfer, or "a reason related to" the transfer from Globe to DCD.

22] The guidelines to determine whether a dismissal falls within the ambit of s 187(1)(g) were neatly summarised in *Van der Velde v Business Design Software (Pty) Ltd*[2] and in Du Toit *et al, Labour Law Through the Cases*[3]. I can do no better:

22.1 The applicant must prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of s 197;

22.2 The applicant must adduce some credible evidence showing that the dismissal is causally connected to the transfer in an objective sense;

2 [2006] 10 BLLR 1004 (LC) at 1014 E – 1015 C.
3 LRA 8-28 (13) – LRA 8-28(14).

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22.3 If the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for the dismissal, being a reason that is not automatically unfair;

22.4 If the employer relies on a potentially fair reason as the true reason for dismissal, the court must apply a two-stage test of factual and legal causation to determine the true reason for dismissal:

22.5 The factual causation test is: 'But for the transfer, would the dismissal have taken place?'. If the answer is in the affirmative, the legal causation test must be applied.

22.6 The legal causation test is, 'Was the transfer the main, dominant, proximate or most likely cause of the dismissal in an objective sense?'.

22.7 If the reason for the dismissal was not the transfer itself, it may nevertheless be a reason related to the transfer.

22.8 To determine whether the reason was related to the transfer, the court must determine whether the dismissal was used by the employer to avoid its obligations under section 197.

22.9 If it was, the dismissal was related to the transfer and hence automatically unfair.

23] From the excerpts from DCD's s 189 notice and Swart's affidavit, quoted above, it is clear that the underlying transaction – ie the Globe-DCD merger – is one that falls within the ambit of s 197 and is causally connected to the transfer. Can the employer establish that the true reason for the dismissal is not the transfer?

24] DCD says that, but for the transfer, Adams would still have been dismissed by Globe. De Swardt testified that Globe would have continued with its restructuring, had the merger not proceeded. After the merger,

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there was still a shortage of new projects – there is no indication that Globe would have survived financially, had it not merged.

25] On the evidence before me, I cannot find that the transfer was the main, dominant, proximate or most likely cause of dismissal. The merger did lead to duplication and rationalization, and may well have been the cause of some dismissals. However, the evidence that the position of buyer at Globe (that Adams occupied before the merger) was in any event in jeopardy, could not be seriously disputed. In fact, the merger was seen as a lifeline in circumstances where Globe was in dire straits financially and was about to embark on a large-scale retrenchment in terms of s 189A of the LRA. As part of the conditions imposed on the merger by the Competition Commission, blue collar workers were insulated against retrenchment for a period of 12 months, but not the 28 white collar workers, including buyers.

26] In short, it seems that Globe would most probably have dismissed Adams for operational requirements, had it not been for the merger. The merger was not the main, dominant or most likely cause for his dismissal. Neither is there any evidence that DCD used the dismissal to avoid its obligations under section 197 – that had already been addressed by the Competition Commission, and the employer fulfilled the obligations imposed by the Commission.

27] I cannot find that the dismissal was automatically unfair in terms of s 187(1)(g) of the LRA. But was it nevertheless unfair? In order to decide this, the sequence of events needs to be considered against the requirements of s 189 of the LRA.

Procedural fairness

28] Adams's complaint is that the Respondent failed to meet the procedural requirements set out in section 189 of the LRA.

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29] Section 189 provides as follows:

"*189 Dismissals based on operational requirements*

1) *When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult:*

   a) *any person whom the employer is required to consult in terms of a collective agreement;*

   b) *if there is no collective agreement that requires consultation-*

      i) *a workplace forum , if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and*

      ii) *any registration trade union whose members are likely to be affected by the proposed dismissals;*

   c) *if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed ,any registered trade union whose members are likely to be affected by the proposed dismissals; or*

   d) *if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.*

2) *The employer and the other consulting parties must in the consultation envisage by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-*

   a) *Appropriate measures-*

      i) *To avoid the dismissals;*

      ii) *To minimise the number of dismissals;*

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iii) To change the timing of the dismissals; and

iv) To mitigate the adverse effects of the dismissals; and

b) the method for selecting the employees to be dismissed ; and

c) the severance pay for dismissed employees.

3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

a) the reasons for the proposed dismissals;

b) the alternatives that the employer considered before proposing the dismissals , and the reasons for rejecting each of those alternatives;

c) the number of employees likely to be affected and the job categories in which they are employed;

d) the proposed method for selecting which employees to dismiss;

e) the time when, or the period during which, the dismissals are likely to take effect ;

f) the severance pay proposed;

g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

h) the possibility of the future re-employment of the employees who are dismissed;

i) the number of employees employed by the employer; and preceding 12 months;

4) (a) The provisions of section 16 apply, read with the changes required by

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the context , to the disclosure of information in terms of subsection (3).

(b) In any dispute in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that is has refused to disclose is not relevant for the purposes for which it is sought.

5) *The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsection (2), (3) and (4) as well as any other matter relating to the proposed dismissals.*

6) *(a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.*

(b) If any representation is made in writing the employer must respond in writing.

7) *The employer must select the employees to be dismissed according to selection criteria-*

   a) *that have been agreed to by the consulting parties; or*

   b) *if no criteria have been agreed, criteria that are fair and objective."*

30] The test for compliance with section 189 is objective, not subjective. A mechanical checklist approach to determine whether the provision has been complied with is inappropriate. The proper approach is to determine whether the purpose of the section, namely a joint consensus-seeking process, has been achieved.[4]

31] Substantive and procedural fairness are often interlinked in retrenchment cases. There is no bright dividing line. Although it is not required that the procedural guidelines in s 189 be followed to the letter, it is nonetheless

4 *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC).

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expected of the employer to engage in the process meaningfully and with an open mind. The important question that the court will ask is whether or not the employee who is retrenched had a proper and fair opportunity to consult over all issues that are relevant to his or her retrenchment and which may have an effect on his or her continued employment.[5]

32] In this case, DCD did issue a notice on 11 May 2009 that is in substantial compliance with subsection 189(3). The dispute is whether it complied with its obligations in subsections (5) to (7). Adams was not a member of a trade union or a workplace forum. Was there sufficient consultation with him to make his dismissal procedurally fair?

Did Adams have sufficient knowledge?

33] Adams's case is that he only received the section 189(3) notice on 11 May 2009. This notice did not invite him to a consultation meeting; it proposed commencing consultations on 13 May 2009, but did not specify a time or place for such a consultation meeting to be held.

34] Pamela de Swardt testified that, by 11 May 2009, Adams knew that he might be retrenched because she had discussed this with those who might be affected in her department, including Adams. She held informal meetings with groups as well as with individuals in her department. This was confirmed by Shihaam Crowie, another buyer; and Lauren Roberts, a costing clerk. Crowie testified that she attended one such meeting where Adams was present. She referred to as an informal "stand-up" meeting where De Swardt mentioned the possibility of retrenchment to them. Under cross-examination, she said that this meeting took place before the merger, while she, Adams and De Swardt were employed by Globe. De Swardt said that the merger could lead to retrenchments. Roberts's evidence was that Pamela de Swardt prepared 'us' for the meeting of 13 May 2009, referring to employees in her department which included

5 *Maritz v Calibre Clinical Consultants (Pty) Ltd & another* (2010) 31 *ILJ* 1436 (LC) 1441 B-F, citing with approval *Shuttleworth v Afgri Producer Services (a division of Afgri Operations Ltd)* (unreported, JS 799/05) para [3].

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Adams. Roberts also stated that she had heard from other people, before 13 May 2009 that there would be retrenchments. This was "through the grapevine" and the talk was mostly about voluntary severance packages.

35] Adams testified that he first became aware of the fact that he faced possible dismissal when he received the notice in terms of s 189(3) on 11 May 2009. As he did not belong to a trade union or workplace forum, no-one was mandated to represent him. Due to his long experience at Globe, he did not anticipate that he would be affected by retrenchment. He had been working at Globe since February 2007. He denied that he had attended a prior meeting with Pamela de Swardt, as he had not been invited to such meetings.

36] Crowie's evidence that De Swardt did address a meeting where possible retrenchment was discussed, and where Adams was present, was vague and unsatisfactory. She could not remember when it took place, testifying in her evidence in chief that it was in April 2009, and under cross-examination that it was before the merger. The merger was approved with effect from 1 April 2009. On the probabilities, Adams must have known "through the grapevine" that there was talk of retrenchment and of voluntary severance packages in the air; however, I accept his evidence that he was not specifically informed that he faced possible dismissal before he received the s 189(3) notice on 11 May 2009.

37] The Section 189(3) notice states that: "The employer proposes commencing consultations on these matters on 13 May 2009". George Manjo, who was an accountant at Globe and opted for voluntary retrenchment in May 2009, testified that he interpreted this to mean that there was a meeting to be held on 13 May 2009 unless there was a contrary indication. Adams suggested that this was not the meaning of the letter. It did not suggest any specific time or place.

38] There is nothing in the notice of 11 May 2009 to suggest that the affected employees – including Adams – were made aware of a definite

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consultation meeting to be held on 13 May 2009. It refers merely to a proposal by management. In the absence of any counter-proposal or agreement to a venue and time, I cannot accept that Adams had been invited to a consultation meeting on 13 May 2009.

39] Adams further testified that he was not aware of the subject of the email from Pamela de Swardt to his departmental colleagues at 07:18 on 13 May 2009, headed 'Meeting @ 9am', and stating in the body of the email message: "The meeting has been moved to 9am in the board room…". De Swardt's evidence was that she sent the email to Adams and others on 13 May 2009 to change the time of "the meeting" to 09:00. It is common cause that departmental meetings were usually held at 07:00 or 07:30. There is nothing in the email to suggest that this was to be an extraordinary consultation meeting over pending dismissals for operational requirements; nor is there any prior correspondence inviting the employees in that department – or indeed, all of the 28 potentially affected employees – to a consultation meeting at an earlier time that had to be moved to 09:00. On the probabilities, I accept Adams's evidence that he was not aware that the meeting scheduled for 09:00 on 13 May 2009 was meant to be a consultation meeting over possible retrenchments.

The meeting of 13 May 2009

40] Adams did attend the meeting on 13 May 2009. Jino Swart, DCD's HR manager, addressed the meeting. She testified that the purpose of the meeting was to inform employees of the contents of the section 189(3) notice, and to discuss the retrenchment process. The meeting was not only attended by buyers. She went through the section 189(3) notice and discussed its contents with those present.

41] Adams's legal representative put it to Pamela de Swardt that only severance packages were discussed in the meeting, and not substantive issues around ways to avoid or minimise dismissals, to change the timing of dismissals, to mitigate the adverse effects, or selection criteria. She

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responded that she "could not think that it would be", that questions would have been pertinent, but that she could not clearly recall what was discussed.

42] Jino Swart denied that she only discussed voluntary severance packages at the meeting. She went through the contents of the letter of 11 May 2009 and also explained the process for claims from the Unemployment Insurance Fund. She then opened the meeting to the floor for questions, and also explained that employees would have to compete for positions. The meeting lasted about 50 minutes.

43] George Manjo's evidence was that six employees that he was aware of – including himself -- had raised with DCD Dorbyl that they wished to accept voluntary packages, for various reasons, such as their age (he was over 55). His evidence was that at the meeting of 13 May 2009 they voiced this request, and the rest of those present did not wish to take voluntary packages because they were young and in debt. It appears from his evidence that the main discussion topic at the meeting was that of voluntary severance packages.

44] Manjo testified that Adams became upset and vocal about what was said. While he was upset, he was aggressive and interrupted the meeting a few times, and even jumped up at some stage. The other employees asked him to sit down. According to Manjo, some of Adams's questions were not answered to his satisfaction and he was becoming frustrated. Questions about selection criteria were not answered properly.

45] Lauren Roberts also attended the meeting on 13 May. The main thing she could remember about the meeting, was that Jino Swart explained the voluntary severance packages to them. Adams was upset because he did not get the answers that he wanted to hear, and was asked by the others to keep quiet because they wanted to hear what Jino had say.

46] It is clear from the evidence of the applicant, as well as the respondent's

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witnesses, that Adams did become emotional during the meeting of 13 May. Swart did not answer his questions to his satisfaction. It is also clear, taking into account the evidence of all the witnesses, that the main focus of the meeting was the issue of voluntary severance packages. The meeting lasted less than an hour. It can hardly be described as a joint consensus-seeking exercise as envisaged by s 189 of the LRA.

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The events after the meeting of 13 May 2009

47] After the meeting of 13 May 2009, Pamela de Swardt said that she saw Adams storming out of the building. She assumed that he had gone to cool off for the day in his anger. She said she "would have" instructed Delmarie Barry and Shihaam Crowie to fill in for Adams to fulfil his tasks in his absence. Shihaam Crowie corroborated this in her evidence, stating that she was asked by Pamela de Swardt to fill in for Adams because, according to De Swardt, Adams had left the office.

48] Crowie saw Adams packing his personal belongings and leaving his office, which was next door to hers, although she did not see him leaving the building. Delmarie Barry told her he was leaving, and Pamela de Swardt told her that Adams had left.

49] Pamela de Swardt testified that it was possible that she had told Jino Swart that Adams had left work. Jino Swart said she was given that information by Pamela de Swart. Jino Swart suggested that a letter be issued to Adams to confirm that he "had requested to be released", and to state that the retrenchment process was, however, still continuing. Jino said the letter was only handed to Adams on 15 May 2009, but that is impossible – it is common cause that he was not at work on that day.

50] Adams says he never left work after the meeting. He might have gone to the workshop and he might have taken his belongings with him if it was close to end of business that day.

51] Adams's evidence in this regard was not entirely satisfactory. However, he did acknowledge that he was "infuriated" by what transpired in the meeting; he nevertheless went back to his office and continued with his daily tasks. The possibility that he went to the workshop and stores and may have taken his bag with him, was proffered in his examination in chief, and not only elicited in cross-examination. It is possible that he may have left early on that day, given his state of mind; however, there is nothing to suggest that he had agreed to his dismissal.

The events of 14 May 2009

52] It was put to Jino that Adams was effectively dismissed on 14 May 2009, referring to the documents handed to him on that date. These included his UIF form; his pension fund details; and the letter dated 15 May 2009, signed by Jino Swart, reading:

> "Dear John
>
> This letter serves to confirm that you have requested to be released of your duties with immediate effect.
>
> We would like to bring to your attention that the s 189 process is still in progress.
>
> Thank you.
>
> J Swart
>
> HR Manager."

53] Adams's evidence was that he went to Annette Kruger's office on 14 May 2009 at about 09:30. Kruger and Jihaan Railoen gave him the three documents. He refused to countersign the letter dated 15 May 2009 and signed off by Swart. Instead, he told them that he had not requested to be

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"released of his duties". Later that afternoon, he was given a spreadsheet setting out his notice pay for June 2009 and is severance pay. The spreadsheet was generated at 15h40 on 14 May 2009. He went to greet some colleagues, returned to his office to collect his belongings, and left for home.

54] Adams admitted that he did not query the alleged dismissal on 14 May 2009 with Jino Swart or with Pamela de Swardt, as it was clear that he had already been dismissed. Only after he had discussed the events with his wife over the following weekend, did he contact Swart again.

The events after 14 May 2009

55] It is common cause that Adams was on sick leave from Friday 15 to Monday 18 May 2009.

56] On 19 May 2009, Adams returned to work. He went to Pamela de Swardt to get permission to go to the bank that morning. According to him, De Swardt's response was: "John, I don't know why you are discussing this with me because officially you no longer work here." De Swardt could not recall that conversation under cross-examination – one of a number of things of which she had no clear recollection – but conceded that it was likely that she would have said something to that effect.

57] In cross-examination, Adams also said that he was hoping to speak to Jino Swart about the status of his employment when he went back to work on 19 May 2009. This is not inconsistent with his evidence in chief, although it expanded upon it; and his version of Pamela de Swardt's words to him were not denied by the respondent's counsel in his cross-examination.

58] Shocked by De Swardt's attitude, Adams went home and telephoned Swart. She invited him to a meeting on 22 May 2009.

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59] When Adams saw Swart on 22 May 2009, she gave him a copy of the staff communiqué dated 21 May 2009 and setting out the terms of the voluntary severance package. She reminded him that applications for the enhanced package had to be submitted by Monday 25 May 2009. She also advised him to take part in the competitive process and to apply for the job of buyer on the new structure. His response was that it would be futile as he had already been dismissed.

Individual consultations

60] Jino Swart testified that, after the meeting of 13 May 2009, throughout the rest of May 2009 she had at least four meetings with every person affected by the retrenchment, except for Adams. She was available to talk with anyone who had questions regarding the retrenchment process. George Manjo and Lauren Roberts confirmed that they met with Swart after 13 May. Manjo opted for voluntary retrenchment. Swart claimed that, had Adams not left work, he would have had the benefit of the individual consultative sessions with her. But it is clear from the evidence that Adams had been given his UIF form, indicating that he had been retrenched, and the other documentation comprising the retrenched employees' "exit pack" on 14 May 2009. There was no further attempt by DCD to invite him to a further consultation meeting. No-one contacted him while he was at home; and when he contacted De Swardt, she told him that he no longer worked there. Even when he contacted Swart on 19 May and she invited him to see her on 22 May, he was merely made aware of the terms of the voluntary severance package and the competitive process; there was no attempt at joint problem-solving.

61] On 14 May 2009 there was a meeting in the logistics department hosted by Bill Fleur, the logistics manager. Lauren Roberts, who attended the meeting and who was later retrenched, did not give any evidence about the purpose or content of the meeting. Adams was at work on this day but did not attend the meeting. He explained that Fleur told him that DCD would not be able to retain him. There was no attempt to engage in joint

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problem-solving with Adams.

Seletion criteria

62] DCD proposed "position and skill" as the selection criteria to be used in its s 189(3) notice.

63] Jino Swart testified that, at the end of the retrenchment "process", there were two buyer positions available in Adams's section. This was contrary to the statement in the s 189 notice that stated:

> "You currently hold the position of Buyer. The employer views this position as redundant, due to the restructuring of the Buying departments, consequent to the merging of the Departments of DCD-Dorbyl Marine, Globe Engineering Works and Nautilus Marine. The company has taken into consideration such factors as skills and experience."

64] Swart testified that the criteria used for selection were locality, skill and experience, then LIFO. She said Shihaam Crowie had more skill and experience than Adams. It is common cause that Adams had longer service than Crowie. Swart could not comment on Adams's claim that he was more a suitable candidate for a buyer's position than Crowie. She simply relied on the spreadsheet that had been based on information provided by Bill Fleur, the logistics manager.

65] Crowie's evidence was that Adams showed her the processes of Globe, but not how to do her work, of which she had 16 years' experience. She was in fact employed to implement new systems in Adams's section.

66] Adams denied this. He was adamant that he was not only more experienced, but also more skilled than Crowie. And in any event, the "Key Performance Areas" used as selection criteria to retain Crowie were never discussed with him.

67] Crowie was taken to task on the KPA's under cross-examination. She conceded that she had no experience on 6 out of the 10 KPA's; that she

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and Adams had experience in 3 of them; and that none of the buyers had experience in the remaining one. She also acknowledged that Adams had more specific product knowledge than she did.

68] The selection criteria were not only unilaterally imposed by DCD, they were not consistently applied; and in any event, there was no consultation with Adams over either the method for selecting employees to be dismissed with Adams. It did not meet the requirements of s 189 of the LRA.

Conclusion

69] The procedure that DCD followed leading to Adams's dismissal falls far short of the requirements of the Act.

70] The attempt at consultation was premised on the notion, conveyed to Adams, that the position of Buyer was redundant – an allegation that later proved to be false. There was no proper attempt to engage with him in an attempt to avoid his dismissal or to seek alternatives, such as accommodating him in the new structure. The selection criteria were neither agreed nor objective, and he had no opportunity to provide his input on the so-called KPA's that were used to prefer Crowie – who had shorter service – over him.

71] The employer chose to accept that Adams had elected to "be released" from his employment before any meaningful consultation had taken place, despite all indications to the contrary. Its misplaced belief is not borne out by the objective facts.

72] I find that the dismissal was procedurally unfair. Adams was 58 years old at the time of his dismissal. There is no evidence that he has been able to find other employment. At this stage of his life, it is unlikely. He does not seek reinstatement. I consider compensation equal to twelve months' remuneration to be fair.

LABOUR COURT

73] Both parties asked for costs to follow the result. No relationship remains between them. In law and fairness, I can see no reason why I should not heed that request.

Order

74] The respondent's dismissal of the applicant was procedurally unfair.

75] The respondent is ordered to pay the applicant compensation equivalent to twelve months' remuneration, calculated on the basis of his remuneration at the time of his dismissal.

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

LABOUR COURT

STEENKAMP J

Date of hearing:	4-8 November 2010; 28 March 2011; 6, 13 April 2011
Date of judgment:	17 May 2011
For the applicant:	Mr N Masizana
	Legal Aid South Africa
For the respondent:	Adv N Mangcu-Lockwood
Instructed by	Webber Wentzel