Reportable

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO.: C964/2008

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Applicant
McGREGOR NTYINALA & 57 OTHERS	Second and Further Applicants

and

REVAN CIVILS ENGINEERING CONTRACTORS	First Respondent
REVAN PLANT HIRE (PTY) LTD	Second Respondent
REQUAD CONSTRUCTION CC	Third Respondent

JUDGMENT

Rabkin-Naicker A.J.

[1] The second to further applicants were dismissed on the 11th July 2008, allegedly on the basis of the operational requirements of the respondents. The retrenchments were purportedly effected in terms of section 189 of the LRA. On the first day of trial, by means of an unopposed application, applicants' statement of claim was amended. They alleged, as an alternative claim, that their retrenchments should have been governed by section 189A of the LRA. The primary relief they now sought was a declaration that the notices of termination they received were unlawful and invalid.

[2] By the stage that legal argument was presented at the trial, the respondents, on their part, had made a number of significant concessions, that:

2.1 section 189A of the Labour Relations Act applied to the entire retrenchment process of the employees of the three companies and the

individual respondents should have been regarded as divisions of one entity for the purpose of the retrenchments;

2.2 applicants listed as numbers 28 to 33 and number 45 were not casual, but permanent workers;

2.3 where LIFO was applied by the respondents as a selection criterion in respect of first and third respondents, it should have been applied across the two companies, and all employees who lost their jobs as a result of such application of LIFO are entitled to a finding that their dismissal was substantively unfair; and

2.4 as a result, of 2.3 above, 9 employees of first respondent (the 3rd to 12th applicants) should not have been dismissed because they should have been assessed together with their counterparts employed by third respondent, for purposes of LIFO.

[3] The concession that section 189A applied, came with a rider: that as a result this court does not have jurisdiction to consider the procedural fairness of the dismissals. We shall return to this proposition.

Background

[4] On 30 April 2008, the first applicant (the union) received three invitations to consult in terms of section 189 of the LRA. These were dispatched by the South African United Commercial and Allied Employers Organisation (the employers' organisation) on behalf of the respondents.

[5] At the core of the explanation for contemplated retrenchments was the situation of third respondent (Requad). According to the 189 notice, the civil engineering industry in Cape Town had over the past 12 months experienced a 'drastic reduction' in the amount of tenders available from government and the private sector. The company was no longer strategically positioned to

compete for and take on tenders with an average turnover of R6 million per month, and it would be better to scale down its activities.

[6] The notice anticipated that approximately 15 positions would be affected including 4 pipe layers, 9 general workers and 2 survey assistants and stated that: 'The selection was made due to certain activities being reduced and to keep certain skills and experience.'

[7] In clear reference to section 189A, each notice contained a clause headed "Statistics". In respect of Requad, this read: 'In terms of law we are also required to advise you that our member currently employs 47 employees and that no other employee's services have terminated due to operational requirements in the preceding 12 months.'

[8] In as far as second respondent (Revan Plant) was concerned; the union was told that due to the fact that it hires plant to Requad on a monthly basis and due to the operational requirements of Requad, it would be necessary to reduce the current staffing structure accordingly. The notice anticipated that 'approximately 9 positions' would be affected. These included 2 dumper operators, 1 flatbed operator, 1 water truck driver, 2 excavator operators and 3 digger loader operators. The decision was made, according to the notice, 'on the basis of plant which will be standing shortly with no work and no work foreseen in the immediate future'.

[9] The 'Statistics' clause read: 'In terms of law we are also required to advise you that our member currently employs 71 employees and that no other employee's services have been terminated due to operational requirements in the preceding 12 months. The number of 9 contemplated retrenchments was fortuitous, in that it was 1 less than the number required to trigger the provisions of section 189A.

[10] In respect of the invitation to consult with the first respondent (Revan Civils), the notice referred to the fact that its activities were closely related to that of Requad, in that the Revan Civils provides labour and administrative services

to Requad. It anticipated that approximately 7 positions would be affected including 3 pipe layers, 3 general workers and 1tacky-siter.

[11] The notice proposed that the selection criteria 'primarily be based on the principle of last in first out, but that certain exceptions may need to be made in order to ensure retention of certain skills and experience.' The 'statistics' provided in this notice were that the company employs 18 employees, and that no other employee's services have been terminated due to operational requirements in the preceding 12 months.

[12] The history of the three companies was gleaned from respondents' witnesses (the applicants did not give evidence at trial). Revan Civils was described as a 'historical relic', although its fortnightly paid employees were among the longest serving across the three companies. Requad had been established in 1991, and became active in 1997 with BEE credentials, thus able to tender for government construction contracts. Plant Hire and Revan Civils were entirely 'white owned'. The court was told that no BEE stakeholder was involved in the retrenchment process.

[13] The notices referred to possible finalisation of the section 189 process as of the end of May 2008.The Respondents offered a severance package at the statutory rate of one week paid for every completed year of service, and undertook to re-employ retrenchees, should suitable vacancies arise within three months of the retrenchment.

The consultation process

[14] The first consultation meeting took place on the 14 May 2008. The parties discussed amongst other things, the issue of potential voluntary retrenchments and short time. Two days later the union faxed a counter proposal on 17 positions occupied by employees who were prepared to accept voluntary retrenchments. Of the 17, 7 were at Revan Civils, 7 at Plant Hire and 3 at Requad. The union was not prepared to disclose the names of the individuals to the respondents.

[15] At a meeting on 20 May 2008, the second consultation meeting, respondents gave the union a list of names of the employees who had been identified for retrenchment. According to the evidence of Mr De Klerk (De Klerk), representative of the employer's organisation, and long-time consultant to Revan Civils, his mandate was to the effect that the companies needed a small component of employees which would have the right blend of skills and experience. Service came into question, primarily LIFO, but there was also an emphasis on retaining skills and experience- the right people were needed for the job. He made this clear to the union at the first meeting.

[16] De Klerk stated that the union had not had an issue with the substantive reasoning of the retrenchments at the outset. In regard to the measuring of the skills of employees, he stated that he felt comfortable in relying on management and the shop-steward's knowledge of the employees. The company had become knowledgeable about those employees performing very well in their jobs, and those able to perform other duties.

[17] Before the second consultation meeting on 26 May 2008, he had sent a list of names of contemplated retrenchees to the union. De Klerk said the union identified the list as an aggressive move by the employers. Despite this, there was engagement on names on the list and debate about swopping certain individuals with others at the 26 May meeting.

[18] On 4 June 2008, he was notified by the respondents that if the retrenchments were not urgently dealt with, there was a chance that remaining jobs in the companies could be severely jeopardized. Accordingly, De Klerk drafted and sent a letter to the union dated 4 June 2008 stating that:

> *"As indicated in our initial correspondence of 30 April 2008 as well as in the consultation meetings, our member has now exceeded the time frame for implementation of the retrenchment which results in additional financial prejudice being incurred on a daily basis. Our member has agreed to the above meeting (i.e. on 6 June 2008) on the basis that it reserves its rights to regard the said meeting as a final*

attempt to reach consensus regarding the consultation process. Should no such consensus be reached our member may have no alternative but to declare the consultation process exhausted.

We have also been instructed to notify you that regardless of the current number of employees affected by the retrenchment exercise it has now been confirmed that our member has been unable to secure any additional work to the production schedules provide (sic) to yourselves and that it would thus, as a second phase of the retrenchment exercise be necessary to consider a further list of names for retrenchment, details of which will be provided to you in due course."

[19] According to De Klerk, following the letter, at the meeting of 6 June 2008 with the union, the company took '*a bit of a beating'*. A further 39 names had been added to the list of potential retrenchees, meaning that the original number had now more than doubled. The chairman of the union, in addition to a union official, attended on 6th June 2010. De Klerk stated in chief that the air was cleared at the meeting and the discussion continued regarding the selection of the additional 39 names.

[20] Under cross-examination, he conceded that the employer and the union were 'not quite' in agreement regarding the selection criteria proposed by the respondents. This had been expressed by the union in the meeting of the 6 June 2008. He agreed that his testimony to this effect was not in line with the statement of defence of respondents, nor with his witness statement prepared for trial. It had been asserted in these pleadings that a binding agreement had been concluded at the meeting of June 6th which the union proceeded to renege on.

[21] In answer to the question as to whether the 39 new retrenchees had been subject to a consultation process at all, De Klerk testified that all the issues regarding the retrenchment i.e. a recall clause, severance and assistance measures had been dealt with at the previous consultations with the union and these issues must have been already debated in a general meeting of the

union members.

[22] After the June 6 meeting, in a letter dated 9 June 2008, De Klerk stated that: *"we refer to the agreement reached in the above regard",* and enclosed a draft retrenchment agreement for the union. A list of those to be retrenched was annexed to the draft. De Klerk conceded that when a union receives a draft retrenchment agreement it needs to get a mandate before agreeing to it and in fact a 'draft agreement' was one for consideration.

[23] Mr Visser (Visser), a contract manager employed by Revan Civils, and deployed to manage contracts won by Requad, gave evidence on the nature of the skill/ experience selection criteria favoured by the respondents. For example, he testified that where an employee, had had longer years of experience on a particular piece of plant, even if such experience had been with a previous employer, that person was retained in place of another employee with shorter experience on the particular piece of plant, but who had longer service with the respondent companies.

[24] In the pipelayers category, years of experience was not used as a criteria, but rather the range of pipelaying skills of an individual was used to select those employees being retained. Much of Visser's evidence aimed to establish, by means of models of the various plant machinery, that the specific machines used by Plant Hire required particular and different skills. As a result, it was claimed that it was not possible to train an employee on a different machine.

[25] A number of examples of individuals were shown to him for comment during his evidence in chief. These he dealt with by means of reference to a schedule which had been prepared for purposes of consultation with his counsel, to refresh his memory. He explained that the union had been asked to give information on skills but had not been forthcoming. His knowledge of the skills people had, 'he had in him'. Visser conceded that the issue of breadth of skills in pipelaying as a criterion was never put on the table and discussed with the union and members involved. He agreed that from his perspective the process was to end up with the best staff.

[26] In relation to dumper truck drivers who had been retrenched, Visser explained that the reason for the retrenchment was that there was no work for the dumper truck machines anymore. He stated that since 2008 dumper trucks were '*seconded'* to Revan Civils and did not work for Requad anymore.

[27] He testified that the issue of 'skill years', as a selection criterion, was discussed on the basis of the knowledge '*we have as management'* and he had from the site. Although the union had been asked to provide a list of skills of its members, no input was received from them.

[28] It was evident from Visser's evidence and the schedule referred to by him that skills/experience criteria applied by the respondents was not applied across the three companies. The employees in each company were considered separately in respect of the selection criteria even though certain job categories ran across the companies.

The 'invalidity' remedy

[29] Mr Kahanovitz for the applicants, submitted that given the retrenchment process should have taken place in terms of section 189A, and that respondents did not comply with the provisions of that section, the appropriate remedy for this court would be to declare the retrenchment notices that were given to the individual applicants as unlawful and invalid. Section 189A(2)(a) provides that: *"an employer must give notice of termination in accordance with the provisions of this section"*. He argued that should the court issue such a declarator, the respondents would be obliged to pay the individual applicants all of their wages from the date of their terminations until the date of the court order. The authority for such an approach, he submitted, was to be found in the as yet unreported judgment **(JA 65/2009) [2010] ZALAC 26 (20 December 2010)** in the matter between **De Beers Group Services (Pty) Ltd and National Union of Mineworkers (the LAC De Beers case)**.

[30] I turn to consider if such a remedy is apposite.

[31] The provisions of section 189A as a whole were considered in the matter of **National Union of Metal Workers of South Africa & Others v SA Five Engineering & Others (2004) 25 ILJ 2358 (LC)**, Murphy AJ (as he then was) stated in paragraph 7:

> *"Section 189A sets out to accomplish several objectives. First and foremost it bestows on employees in significant operational requirement dismissals a choice between industrial action and adjudication as the means of attempting to resolve the dispute. To minimize avoidable strikes and litigation, the section allows for the possibility of compulsory facilitation by the CCMA, if either the employer or a consulting party representing the majority of employees targeted for dismissal requests it. Otherwise the parties are free to agree to voluntary facilitation (s 189A(3) and (4)). The appointment of a facilitator suspends the employer's right to dismiss for 60 days. After the period has expired the employer may give notice of termination of employment. Once the notice of termination is given, the employees have the choice of either embarking on lawful industrial action or referring a dispute regarding substantive fairness to the Labour Court - s 189A(7). Once there is a referral to the Labour Court the right to strike is no longer available. Equally, if no facilitator is appointed, neither party may refer a dispute to the relevant bargaining council or the CCMA for 30 days from the date of a s 189A(3) notice. Thereafter the employer is free to give notice of termination and the employees are compelled to opt for industrial action or a referral of the dispute about substantive fairness to the Labour Court.*
>
> *What is most notable about this scheme for present purposes, is that referrals to the Labour Court are overtly restricted by ss 189A(7)(b) (ii) and 189A(8)(b) (ii)(b) to disputes 'concerning whether there is a fair reason for the dismissal', in other words disputes about substantive fairness. Moreover, both provisions state expressly that the referral is to be made in terms of s 191(11), the provisions of which appear below. Disputes about procedure in cases falling within the ambit of s 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in s 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of s 189A(13), read*

with s 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action."

[32] The **LAC De Beers** case was concerned with an appeal against a judgement by Bhoola AJ (as she then was), in which the court *a quo* declared that the termination notices of certain employees were tainted by prematurity and were as a result, invalid and of no force and effect. Certain employees were ordered to be reinstated until 'such time as valid termination notices may be issued' and others 'until Respondent has complied with a fair procedure'. As Davis JA put it at paragraph 7 of the **LAC De Beers** case:

"In the view of the learned judge in the court a quo, section 189A (2) (a) had to be interpreted to the effect that compliance with the provisions of section 189A were peremptory, as a result of which a premature issue of a termination notice, without compliance in terms of section 189A (8), rendered the notices void ab initio."

[33] The court a quo was seized with an application brought in terms of section 189A(13) in which the applicants sought, amongst other relief, that the notices of termination in terms of section 189A be declared invalid. The LAC found that the declaratory order was justified in law, and dismissed the appeal.

[34] It is necessary on the facts of this case to consider two pertinent questions. First, what is the effect of an employer's failure to conduct a retrenchment process in terms of section 189A and instead conduct it as though section 189 applied; and secondly, where, as in this case, on respondents' own version it acknowledges that section 189A was applicable, can this court nevertheless make an order in respect of the procedural fairness of the dismissals.

[35] In **National Union of Metal Workers of South Africa & Others v**

Shakespear Shopfitters (Pty) Ltd (2008) 29 ILJ 1960 (LC) Basson, J surveyed a number of decisions that have dealt with section 189A(13) of the LRA and had this to say in paragraph 9 :

> *"The remedy that the court may grant under s 189A(13) for non-compliance with a fair procedure includes an order compelling the employer to comply with a fair procedure, interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure and directing the employer to reinstate an employee until it has complied with a fair procedure. In order to give effect to the purpose of this section, particularly in respect of the order sought in terms of s 189A(13)(a) -(c), it is necessary that employees who seek to rely upon it, act with expedition and some measure of urgency. An unreasonable delay in bringing an application to compel an employer to adhere to a fair retrenchment procedure may render the order academic once the horse has bolted."*

[36] I am of the view that on a proper reading of section 189A as a whole, the remedy of a declaration of invalidity of notices of termination, may only be granted on an interim basis, pending compliance with its provisions. In my view the **LAC De Beers** case is not authority for such remedy to be afforded in a case such as this, where applicants seek it at the stage of trial proceedings, and which order would be final in effect. I note that Mr Kahanovitz did not seek reinstatement in reliance on the **LAC De Beers** case, but rather payment of remuneration from date of dismissal to date of this judgment – in effect a *solatium* greater than the compensation afforded by the LRA.

[37] This brings me to consider the alternative relief sought by the applicants and whether in light of the evidence presented at trial and the concessions made by the respondents, the respondents have proved that the retrenchments were for a fair reason and conducted according to a fair procedure.

Procedural fairness

[38] Mr Rautenbach for the respondents submitted that the 'portal' to the granting of compensation for unfair procedure in a section 189A retrenchment process was only by way of section 189(A) (13) of the LRA. In the result the court did not have jurisdiction to make such an order.

[39] His submission, if correct, would be the prize for the concession made that section 189A indeed applied to the retrenchment process. On this basis compensation for procedural unfairness could not be entertained.

[40] Followed to its logical conclusion, the argument would mean that an employer could avoid its obligation to follow the section 189A procedure, concede that such was applicable at the stage of trial, and then claim that this court has no jurisdiction to hear a claim for procedural unfairness.

[41] In my view the proposition is at odds with the objectives of the LRA as a whole, and the provisions of s189A read with s189 in particular. Section 189A is a finely balanced provision which affords the parties opportunities to exercise their rights to strike and lock-out. It also seeks to encourage an ordered and exhaustive consultation process.

[42] Section 189A(3) offers parties in large scale retrenchments an important election, ie that a facilitator be appointed to assist the consultation process. Although this is an election and not a requirement, failure to go this route closes the door to claiming unfair procedure at a later stage. Section 189A(18) provides that: *"The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)."*

[43] In this case, the applicants were not afforded the election contained in s189A(3), precisely because the respondents chose to conduct the retrenchments as though section 189A did not apply. The applicants cannot then be subject to the provision contained in section 189A(18), and lose their right to claim procedural unfairness of their dismissal. A loss of this sort would

offend the aims and objectives of the LRA.

[44] Given the concession made at trial that section 189A did in fact apply, the obiter dictum in **Continental Tyre SA (Pty) Ltd v National Union of Metalworkers of SA(2008) 29 ILJ 2561 (LAC)** is particularly apposite**.** In that case the LAC stated that if an employer acted in a manner to avoid the scope of s189A, it can be held to be subverting hard-earned rights won by employees.

[45] The concession made by the respondents in this matter, that section 189A did in fact apply, taken together with the evidence given by De Klerk and the content of the notices drawn by him (I refer particularly to the 'statistics' section of the notices), leads to the conclusion that the respondents were indeed attempting to avoid the scope of section 189A at the time of the retrenchment process.

[46] As stated above, an important part of the rights afforded by section 189A are procedural safeguards. In my view the avoidance of the section by the respondents must render the retrenchment process of the applicants procedurally unfair. Even if I am wrong in this view, then on respondents' own evidence, the 11th hour addition of 39 more retrenches on behalf of whom no consultation took place; the claim in pleadings before this court that there was a final agreement by the 6 June 2008 which the union reneged on, when in fact it was conceded there was not; and a consultation process that was clearly not exhausted, would satisfy the court that the respondents have not met the onus of proving the procedural fairness of the dismissals.

Substantive fairness

[47] In so far as the substantive fairness of the dismissals are concerned, Mr Kahanovitz submitted that all the employees who would not have lost their jobs if fair selection criteria had been applied, should be reinstated on the same terms and conditions as applied at the date of their dismissals. They should also be entitled to full back-pay less such amounts, as those

employees who were re-employed by the respondents since their dismissal, may have earned.

[48] Mr Rautenbach, for the respondents, referred the court to section 189A(19) of the LRA which provides as follows:

> *"In any dispute referred to the Labour Court in terms of section 195 (b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if-*
>
> *a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;*
> *b) the dismissal was objectively justifiable on rationale grounds;*
> *c) there was a proper consideration of alternatives; and*
> d) *selection criteria were fair and objective."*

[49] The distinction between this provision and that contained in section 189(7) bears mention. Section 189(7) obliges an employer to select the employees to be dismissed according to selection criteria that have been agreed to by the parties, or if no criteria have been agreed, criteria that are fair and objective**. Screenex Wire Weaving Manufacturaing (Pty) Ltd v Ngema and Others (2010) 31 ILJ 361 (LAC) at paragraph 23.** The cumulative requirements of section 189A(19) appear crafted to heighten the hurdle for employers when proving the substantive fairness of large scale retrenchments.

[50] In this matter, given the concession that no agreement was reach on selection criteria by Visser, it is clear that whether in terms of section 189 or section 189A the applicable test is whether the selection criteria were fair and objective. Mr Rautenbach submitted that it is permissible and fair for an employer to select employees based on their skills as observed by management. He further submitted that such observations or knowledge may include knowledge of previous skills which employees possess. For these propositions he relied on the case of **National Union of Metalworkers of SA and Others v John Thompson Africa (2002) 23 ILJ 1839 (LC) at par 264.**

[51] In the **John Thompson Africa matter**, Pillay J found that *"the retention of skills is a valid selection criteria….However, the method of assessing the skills must be objective, fair and consistently applied".* The method used in that case was an assessment of skills by the production manager, in conjunction with the supervisors. He undertook an exercise of grading workers according to their skills. Realising, however, it was unfair because it was based on the opinion of the supervisors, he abandoned the grading. He continued the process of selection by examining the content of the jobs to determine whether a particular individual would be able to do the job. His opinion of their skills was based on his observations of their actual performance or through discussions with the foremen.

[52] Visser's evidence did not reflect an objective process. The selection he made was based, according to his evidence, on the knowledge '*I had in me'* and on his knowledge of the CVs of employees which he said they had provided when recruited to the companies. He was questioned in some detail under cross examination on the decision to retrench the first applicant, who had 17 years of service with the company. He testified that because dumper truck drivers were no longer needed, first applicant had been offered the lower paid job of a water truck driver, which he had refused. It was put to him that first applicant had been a truck driver in the past and that the union had suggested he be placed as a truck driver which was higher paid. Visser's explanation was that there were truck drivers in the position 'and we didn't want to replace them'. This was even though some of the drivers had only 5 years of service.

[53] In my view, on respondents' own evidence, the selection criteria cannot be characterised as fair and objective. Over and above the fact that the process was dealt with in a manner that kept up the façade of three different companies, even where some job categories were shared across the companies, the selection criteria fell far short of the objective and fair test required. The overall impression created by Visser and De Klerk was that the retrenchment process was being utilised to alter the nature of employment in the companies.

[54] De Klerk confirmed under cross examination that new contracts of employment were drawn up by him to be used for employees who were re-employed or to be employed in the future. These contracts signed by certain of the applicants are for the post of 'general worker' and purport to be only for the duration of a specific project and for a fixed term. The contracts are contained in the documents before court and are entitled *'Limited duration contract'* and *'Agreement to terminate employment by mutual consent'.*

[55] Given the admissions made by the respondents referred to in paragraph [2] of this judgment; the severing of the application of selection criteria between each of the companies; and respondents' own evidence regarding the method of selection, I cannot find that they have met the onus of proving that the selection criteria were objective and fair. In making my order, I also take into account evidence given by the founding member of the companies, Mr Pierre de Preez, who confirmed under cross examination that the companies have successfully tendered for a number of big projects since 2008, and that the order book for tenders was healthy with a six month planning period.

Relief

[56] The parties have provided me with four tables (annexed to this Judgment) containing the names of certain of the applicants in order to assist the court. I deal first with the relief I intend to grant to those applicants whose dismissals I find to have been procedurally and substantively unfair. The 28 applicants whose names appear on Table One are to be reinstated into the positions they held at the time of their dismissals. For purposes of clarity, I emphasise that they are entitled to their remuneration from date of dismissal, less any earnings arising from re-employment with the respondents. Table Four lists the names and remuneration of those applicants who have been re-employed by respondents subsequent to their dismissals.

[57] The 29 applicants whose names appear on Table Two constitute those of the applicants added to the retrenchment process at the eleventh hour, and in respect of whom no consultation process took place at all, are also reinstated

on the same terms as those applicants listed in Table One, due to my finding that their dismissals were substantively and procedurally unfair. I am unable to accept that the only adverse finding I can make in regard to these dismissals is that they were procedurally unfair, as submitted on behalf of the respondents. The oft quoted principle enunciated by the LAC in **National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC)** of the porous divide between substantive and procedural fairness is apposite. As the court in **Keil v Foodgro (A Division of Leisurenet Ltd) [1999] 4 BLLR 345 (LC) at para 10** held:

> *"It is through the constructive engagement implicit in this process that the need to retrench is confirmed as well as the selection of those employees who are to be retrenched."*

[58] The applicants listed in Table Three seek compensation for unfair procedure only. They do so on the basis that had the selection criteria been fair and objective, they would have been retrenched. Taking into account the concession made by the respondents that section 189A should have applied to the process and the degree of departure from a fair procedure which ensued in respect of these applicants, I find that they are entitled to receive an amount of six months compensation, less where applicable, any earnings since their dismissal as a result of re-employment by the respondents.

[59] In as far as costs are concerned, I see no reason why costs should not follow the result. I therefore make the following order:

(a) The dismissals of the applicants whose names are listed in Tables One and Two were procedurally and substantively unfair and these applicants are hereby reinstated into their positions as of date of dismissal;

(b) The dismissals of the applicants whose names are listed in Table Three were procedurally unfair and these applicants are hereby awarded compensation equivalent to six months remuneration;

(c) Any remuneration earned by the applicants referred to in paragraphs

(a) and (b) of this order, due to their re-employment by respondents is to be deducted from their back pay or compensation, as the case may be, in accordance with Table Four;

(d) Costs are to be paid by the respondents jointly and severally.

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Rabkin-Naicker AJ.

Date of Hearing: 7-11 February 2011

Date of Judgment: 1April 2011

Appearances:

For the Applicant:	Adv C Kahanovitz SC
Instructed by:	Cheadle Thompson and Haysom INC
For the Respondent:	Adv F Rautenbach
Instructed by:	Justine Del Monte and Associates