REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 844/15

In the matter between:

NUMSA	First applicant
L E BOTOMANE & 27 OTHERS	Second and further applicants
and	
HIGH GOAL INVESTMENTS CC	Respondent
t/a CHUMA SECURITY SERVICES	

Heard: 12-15 and 22 September 2016

Delivered: 18 October 2016

Summary: Automatically unfair dismissal. Discrimination based on gender. Female security guards dismissed for operational requirements. LRA s 187(1)(f).

JUDGMENT

STEENKAMP J

Introduction

[1] The 28 individual applicants are female security guards. They are represented by their trade union, the National Union of Metalworkers of South Africa (NUMSA, the first applicant). They were employed by the respondent, Chuma Security Services. Chuma dismissed them, ostensibly for operational requirements. The reason was that Chuma's client, Metrorail, requested it to employ fewer women and more men as security guards. The applicants say their dismissal was automatically unfair as contemplated in s 187(1)(f) of the Labour Relations Act[1] because the reason for the dismissal was that Chuma unfairly discriminated against them on the basis of gender. In the alternative, they plead that the dismissals were in any event unfair as it was not for a fair reason and Chuma did not follow a fair procedure as contemplated in s189 of the LRA.

The evidence

[2] Much of the factual background to the dispute is common cause. Those facts were further elucidated upon in evidence by three witnesses for Chuma and one for the applicants.

Common cause facts

[3] The parties agreed in their pre-trial minute that the following facts are common cause:

3.1 NUMSA forwarded proof of membership forms to Chuma during June 2014 and requested organisational rights which included access rights and stop order deductions for union membership subscriptions.

[1] Act 66 of 1995 (the LRA).

3.2 Chuma responded in a letter dated 9 July 2014. It refused to grant the union organisational rights. NUMSA referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA).

3.3 At the conciliation on 11 July 2014, the parties came to an agreement requiring the union to provide verification of its membership in a meeting scheduled for 23 July 2014. This meeting was convened.

3.4 Further verification meetings were required; however; these meetings did not take place due to Chuma's failure to convene the meetings.

3.5 NUMSA referred a fresh organisational rights dispute to the CCMA on 20 October 2014. That dispute was conciliated on 23 October 2014. At the conciliation meeting, the parties agreed to convene a meeting to once again verify the stop order forms.

3.6 The verification meeting was convened on 27 November 2014 at Chuma's premises. Commissioner Landu of the CCMA was present. The parties signed a written agreement which provided the union with organisational rights in terms of sections 12-16 of the LRA and for the parties to conclude a recognition agreement.

3.7 NUMSA applied to the CCMA for the settlement agreement to be made an arbitration award in terms of section 142A of the LRA. It also filed a fresh dispute on matters of mutual interest and organisational rights on 15 July 2015. At the conciliation of this dispute on 4 August 2015, Chuma agreed to implement the stop order deductions for union fees.

3.8 The deductions for union subscriptions were finally implemented on 7 September 2015.

3.9 Nineteen of the applicants were issued with termination letters dated 17 May 2015 on 20 May 2015 and nine were issued with termination letters dated 17 April 2015 on 20 April 2015.

3.10 The reasons provided for the dismissal in the termination letters was that Chuma's client, Metrorail, had requested Chuma to use more male security guards at their sites.

3.11 NUMSA wrote an email to Metrorail on 17 April 2015 with regards to the reasons for the termination, as alleged by Chuma in its termination letters. Metrorail responded with an email dated 21 April 2015 denying that they had issued an instruction to Chuma to dismiss female employees. Metrorail had however requested that females should not be deployed or placed at a few dangerous hotspots.

3.12 Chuma did not pay the dismissed employees any severance pay.

3.13 NUMSA referred an unfair dismissal dispute to the CCMA on 17 June 2015. The dispute was conciliated on 7 July 2015 and remained unresolved.

[4] At the commencement of the proceedings in this Court, Ms *Ralehoko* handed the Court an agreed schedule (Schedule A) reflecting the date that each applicant (except applicant 29 whose membership form could not be located and applicant 23 whose membership form is undated) joined the union as well as the severance pay due to each employee.

Oral evidence

(a) Mr Ngcwangu

[5] Chuma's first witness was Mr Sithethi Joseph Ngcwangu (Ngcwangu). He testified that Chuma had a contract with PRASA, trading as Metrorail, concluded in 2005, to provide security services to what is referred to as the Northern Line Area (the railway line from Old Mutual all the way up to Wellington and Strand) in the Western Cape. Chuma deployed security guards to protect track boxes and cables. In terms of that contract, Chuma had to make 200 security officers available, but because of a "new law" (apparently a sectoral determination) that required employees to work a 17 hour shift, Chuma increased its staff complement to more than 350 employees. Chuma employs anyone who is qualified to do the job and has the required certificate. The contract with PRASA / Metrorail did not specify the gender of the employees to be deployed. Staff is deployed as per the deployment plan drawn up by Chuma. Chuma had about 60% female security officers and 40% male security officers. The initial fixed term contract was changed to a "month to month" contract in 2011.

[6] Sometime in October 2014 Metrorail raised the issue of increased crime on sites serviced by Chuma and surmised that this was due to the deployment of mostly female security officers, who, according to Metrorail, could not arrest crime. Metrorail suggested that Chuma reduce the number of female security officers that it deploys. He testified that there were incidents in which female security officers were involved. He referred to a female security officer who was raped while doing cable patrol, in the company of a male security officer; and vandalism on the line. He also referred to an incident involving Ms K., a female security officer who was attacked whilst in a guardroom on Metrorail's premises. K. was robbed and sexually assaulted. This occurred after the dismissal of the applicants.

[7] According to Ngcwangu, he initially ignored the request from Metrorail to reduce female security officers because he believes that females are good workers. They do not miss work and they do not attend work with a hangover. For six months after Metrorail made the request, he did not comply with the request because females are good employees. However, in early March 2015, Mr Blom from Metrorail -- who is in charge of the Western Cape region -- insisted that female security officers should be reduced and replaced by male security officers. Ngcwangu testified that at that point he relented, to avoid losing the contract. It was agreed that 50 female security officers would be retrenched and Chuma started the process of retrenching female security officers.

[8] Ngcwangu also stated that at that time Chuma and Metrorail were on a month to month contract and if Chuma had not complied with the request to further reduce female security officers, PRASA / Metrorail would simply have refused to renew the contract the following month. He could not refuse to comply with a request made by a client. Metrorail wanted fewer female security officers and Chuma had to do as demanded by the client. As far as he is concerned, he was to be applauded because he had succeeded in getting Metrorail to back down on the big number of female security officers that they wanted replaced by male security officers.

[9] In cross-examination Ngcwangu conceded that there were no consequences for Chuma after it ignored Metrorail's initial request made in October 2015 to get rid of female security officers. Metrorail did not

terminate the contract. He had tried to dissuade Metrorail from insisting on the request because he knew it was against the laws of the country to ask that women be dismissed. When requested to produce written proof of his communications with Metrorail in that regard, Ngcwangu said that he did not have a written document to that effect.

[10] Chuma did not investigate the specific incidents that Metrorail relied upon in support of its demand for female security officers to be replaced by male security officers. Ncgwangu simply accepted what Metrorail alleged. He did not investigate the incident about the break-in into the Huguenot train station ticket office. He is aware of the Goodwood incident and had in fact attended at the scene because his offices are not too far from that station. Their investigation established that the 15 year old girl involved had in fact consented to the sexual acts and knew the alleged perpetrators. He could not dispute the applicants' version of events as regards the incidents that Metrorail referred to. He was however aware that female security officers lock themselves up in the guard rooms. He is also aware that guards sleep on duty but they deny it.

[11] Ncgwangu alleged that he had sight of the e-mails between Metrorail and Chuma (in which Metrorail demanded the replacement of female security officers) and the pre-trial minute for the first time in court. The e-mails between Chuma and Metrorail were annexed to the respondent's statement of efence in the matter.

[12] As regards severance pay, Ncgwangu heard that the employees had been paid and he did not receive any reports that they had not been paid. He thought that the employees had received their severance pay and he would check. If the employees did not receive severance pay, he would ensure that it is sorted out.

[13] Ncgwangu testified that he spoke to the Operations Manager, Andile Khambi, to go along with the retrenchment process. Chumba did not issue a notice in terms of s 189(3) of the LRA but simply invited SATAWU to a meeting. The only two unions at Chuma were SATAWU and DUSWO. SATAWU was the majority union with 95% membership and the rest were DUSWO members. There was no other union. Khambi informed him that they had invited SATAWU to a meeting and the shop stewards indicated

that they would obtain a mandate from the employees, which feedback they later brought in the form of a letter. In the letter, SATAWU agreed to the retrenchment process and for LIFO (last in first out) as the selection criterion to be applied. His niece as well as his fellow Anglican church members had been affected by the retrenchments. The affected employees could not be accommodated elsewhere as Chuma did not have other sites other than Metrorail sites. They had however agreed with SATAWU that if Chuma were to be awarded another contract, the affected employees would be given first priority. In his view, females are good employees and he did not want to let them go.

[14] When he was challenged on why NUMSA was not invited to the consultations, Ncgwangu stated that it was because the employees were all SATAWU members and that subscriptions were going off the salaries of these employees in favour of SATAWU. He also stated that there were no resignation forms or proof of delivery of these resignation forms to Chuma by NUMSA.

[15] He denied that there was anything wrong with the manner in which the employees had been issued with termination letters. If this was an issue, the shop stewards ought to have raised it but did not.

(b) Ms Madikase

[16] Ms Ntombentle Madikase was the respondent's second witness. She had nine years' service with Chuma, employed as a security officer. At the time of the retrenchments, she was a SATAWU shop steward and she resigned from SATAWU at the beginning of December 2015 to join DITAWU. During the time that she was a SATAWU shop steward, almost all employees of Chuma were SATAWU members, because they all paid subscriptions to SATAWU. A few male security officers were DUSWO employees.

[17] She was aware that the employment of 50 female security officers was terminated because there were incidents that occurred involving female security officers and Metrorail raised the issue of the deployment of female security officers. Metrorail had raised the issue in October 2014 and again in 2015. As a shop steward, she received Metrorail's communication from Mr Blom in which Metrorail stated that 'ladies' should be gone within 7 days.

[18] Her concern was to find out if Chuma was following the LRA. As shop stewards, they spoke to Mr Willemse of SATAWU and a general meeting of all members paying subscriptions was convened. They explained to the members that Chuma was following the LRA and the members agreed to the retrenchments on condition that the amounts owed to them – like severance pay -- were paid. They then held a meeting with Chuma on 17 March 2015 when Willemse took the decision that Chuma should undertake to re-employ the affected employees if it was contracted to work on another site other than a Metrorail site.

[19] In cross-examination, Madikase persisted with her view that all employees were SATAWU members because subscriptions in favour of SATAWU were being deducted from their salaries. It turned out that she was oblivious of the agreement between Chuma and NUMSA concluded in November 2014. She insisted that only SATAWU and DUSWO were organising at Chuma.

[20] She also claimed that she was furnished with a letter in terms of which Metrorail demanded the removal of 'ladies' within 7 days and when it was put to her that Metrorail had not issued a letter to that effect, she persisted that the letter existed but she had not brought it to the hearing because she had been prepared a few days before the trial. She was unable to say whether any of the applicants knew about the general meeting and whether any of them had attended. Shop stewards sent text messages to those employees whose telephone numbers they had to inform them about the meeting. She did not know whether any of the shop stewards had the telephone numbers of any of the applicants.

[21] When asked why SATAWU adopted the view that Chuma was following the LRA, she stated that Chuma followed the section 189 process. She also claimed that a section 189 notice was issued. When she was challenged to produce the notice, she stated that she had not brought it to the trial but insisted that it had been issued.

(c) *Mr Khambi*

[22] Mr Andile Goodman Khambi testified that he was the Operations Manager since 2012 but started working for Chuma in 2005. He is the second in charge to Ncgwangu. The unions that were active at Chuma between 2010

and 2015 were SATAWU and DUSWO but Chuma engaged with NUMSA sometime in 2014. Initially he stated that NUMSA commenced recruiting in late 2014 but in cross-examination conceded that NUMSA commenced recruiting in May 2014. He conceded the settlement agreement concluded with NUMSA in November 2014 after the verification process but stated that thereafter he took the list of NUMSA'S members to Mazandi Mgwigwi in the payroll department who informed him that the employees on NUMSA's list people were paying subscriptions to SATAWU. When he sought to engage NUMSA on the issue, they were not co-operative. He did not want to deduct two subscription fees from the employees' salaries. He had been provided with membership forms but not cancellation forms. Deductions in favour of SATAWU continued until May 2015 when Chuma received cancellation forms from NUMSA. When it was put to him that the issue of whether the employees on the list were in fact NUMSA members was resolved during the verification exercise, he insisted that there were no cancellation forms. NUMSA made inquiries after the retrenchments and he did not pay much attention to it because most employees were still paying subscriptions to SATAWU.

[23] Khambi testified that Chuma had embarked on the retrenchment process because of complaints about increased crime from Metrorail. A "deficiency meeting" was held (areas where Chuma was lacking were set out and it would be penalised in respect of those) and Metrorail said it was because of the deployment of mostly female security officers. Metrorail wanted Chuma to deploy 100 female security officers and 100 male security officers. If Chuma had other contracts, it would have taken the affected security officers to these other sites. After discussing the matter with Ngcwangu, they begged Blom who agreed to reduce the number of affected female employees to 50. They could not defy Metrorail because the e-mail from Blom had been copied to senior people within PRASA, who had the powers to terminate the contract. For that reason he treated the matter with urgency and responded promptly, so that Chuma could not lose the contract. He informed PRASA that 50 employees would be retrenched. He had delayed implementing Metrorail's demand in 2014 but in 2015 he could not.

[24] As he was not sure how to proceed, he sought guidance from SATAWU. SATAWU agreed to the retrenchments. He did not involve NUMSA because they were still knocking on Chuma's doors. Notwithstanding the November 2014 agreement, there was no agreement yet and subscriptions deductions were still being made in favour of SATAWU and none in favour of NUMSA.

[25] Khambi conceded that the employees issued with termination letters in April were not given a month's notice but this was rectified subsequently.

[26] He became aware a week before trial that the retrenched employees were not paid severance pay but is not aware of the reason. He had specifically instructed one Amina in accounts to ensure that the employees are paid all the amounts due to them. There were no consultations over what severance pay was to be paid.

[27] Khambi agreed that the applicants did nothing wrong and that, but for the fact that they are female, they would not have lost their jobs.

(d) *Ms Gcanga*

[28] Andisiwe Gcanga was the only witness called in support of the applicants' case. She started working for Chuma in May 2013. She was never a SATAWU member and joined NUMSA in August 2014. She worked at Huguenot station. At that station, sometimes there would be three female security officers on duty and sometimes two female security officers and one male officer. The break-in into the Huguenot ticket office occurred when a Metrorail LPO, Camagu, arrived on site to conduct an inspection. Whilst Camagu was discussing the contents of the occurrence book (OB) with the security officers, they heard an alarm. Camagu and the three security officers on duty (two female and one male) chased after the children who had broken into the station but could not catch up with them. The children gained access into the ticket office through a window which did not close. She denied Metrorail's allegations that the guards on duty were asleep or sitting in the guard room when the incident occurred. She also denied that they did not assist Camagu or that it was Camagu who heard the alarm go off. This was the first incident at Huguenot station since she started working there in 2013.

[29] As a female security officer, Gcanga had never been approached by anyone from either Chuma or Metrorail with allegations that women were too scared to intervene if they witnessed a crime.

[30] Ever since she joined NUMSA in 2014, no union subscription deductions were made from her salary until she was dismissed. She heard NUMSA kept going back to Chuma for verification.

[31] Her colleague, Lolwethu, informed her about the general meeting held where the employees were informed that 50 female security officers would be retrenched. Lolwethu heard about the meeting on the train.

[32] The termination letter was handed to her whilst she was on duty. Thereafter she contacted a NUMSA shop steward for assistance and the controller to inquire whether she must still report for duty. She was informed that she should work the 17 day shift until June. She was hurt by the news of the termination of her employment. She secured alternative employment in January 2016 but before that, she was unemployed.

Evaluation

The applicable legal principles

[33] Section 187 of the LRA provides as follows:

> 187. **Automatically unfair dismissals**
>
> (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is -
>
> …
>
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to..., gender, ...

[34] Section 188 deals with dismissals other than automatically unfair dismissals. It provides as follows:

> 188. **Other unfair dismissals**
>
> (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -

(a) that the reason for dismissal is a fair reason -

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

[35] The dismissals of the applicants were effected at the behest of a third party, Metrorail. The issue of dismissals at the behest of a third party is not new in our law.

[36] In *East Rand Proprietary Mines Ltd v United People's Union of SA*[2] the employer dismissed Zulu speaking employees who were the target of ethnic hostility from the other employees and whose safety the employer could not guarantee. The employer argued that the dismissal was for operational reasons and as such, the decision to dismiss lay within the managerial prerogative. The Labour Appeal Court commented as follows:[3]

> "The argument regarding the scope of managerial responsibility to direct and reshape an enterprise in response to operational necessities cannot be faulted. That 'the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management', where operational reasons for dismissal in fact exist, has been authoritatively established. See *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* 1995 (3) SA 22 (A) at 28I; (1994) 15 ILJ 1247 (A) at 1253H-I.
>
> These dismissals were not, however, as in *Atlantis Diesel Engines*, the product of operational reasons arising from serious financial difficulties in consequence of a declining market-share. Nor were they retrenchments arising from 'outsourcing' of a portion of the enterprise's business. Nor, again, were they the product of reorganization or technological developments or electronic supercession of previous employee functions. There was in fact work for these workers to do. It was urgent that they should return to it. The company could, at least in the foreseeable short term, pay them to do it. They were not dismissed because their jobs

[2] (1996) 17 *ILJ* 1134 (LAC).

[3] at 1149 H [per Cameron J].

disappeared. They were dismissed because the company was unable to guarantee their safety at its premises because of ethnic hostility in the workplace.

The Industrial Court judgment proceeds on the assumption that the applicable principle was that management was entitled to decide regarding an operational reasons termination, but that it did so prematurely. The argument of both parties proceeded upon the same premise. But, in my view, the case sits uneasily within the operational reasons framework. It is necessary to be very clear on what occurred here. At the causal root of the dismissal of these workers was ethnic hostility to them. As their representatives said in the meeting of Tuesday 12 April, before the 'home stay' period was agreed on, 'because we are minority, we must go'. On that same day, the Zulus addressed a letter to the general manager of ERPM. It was signed by 'concerned Zulu employees'. It asked of management an answer to the following question: 'Are the employees have right to dismiss other employees just because they don't want them?' No amount of verbal elaboration or supposed legal sophistication can express more powerfully the question this appeal raises.

The question, therefore, is not whether the court should defer to the reasonable ambit of management's prerogative to dismiss for operational reasons. The question is in what circumstances the court should countenance a dismissal which has its origins in ethnic victimization of the dismissed employees."

[37] The court continued:[4]

"But the court, in examining what is fair in the circumstances, must draw a distinction between management's motives (which were not impure) and the actuating causes which formed the background to its action. The court must distinguish between the forces of the market and the advances of electronics or technology (which may render a decision to dismiss within the competence and responsibility of management), and operational reasons which have their roots in opprobrious social conflict. There can be no doubt that, for management itself to dismiss a worker merely because he is Zulu, or because she is Jewish, or because he or she has HIV, would be reprehensible. For management to dismiss not directly for that reason, but because the rest of its workforce hold that reason, places management

[4] At 1150H.

> only at one remove from the opprobrious consideration. That remove is of course not without significance. It means that management will ultimately, when it truly has no alternative, be permitted to dismiss when it cannot guarantee the safety of employees whom the rest of its workforce, for reprehensible reasons of ethnic hostility, threaten with injury or death. But it also means, in my view, that management truly must have no alternative, and that no discretionary 'band of reasonableness' can be granted it.
>
> Where a dismissal is actuated by operational reasons which arise from ethnic or racial hostility, the court will in my view countenance the dismissal only where it is satisfied that management not only acted reasonably, but that it had no alternative to the dismissal."

[38] It is apparent from this judgment that an employer may dismiss at the behest of a third party, but it truly must have no alternative to the dismissal. In the context of that dispute about ethnic hostility, the court also stated as follows:[5]

> "In a country that consists of linguistic, ethnic and other minorities, public policy in my view requires that a test of necessity, and not reasonableness, should be applied in scrutinising management's action in dismissing workers in such circumstances. In my view, management does not in the present case pass that test."

[39] The court acknowledged that at some point management would have been entitled to draw the line that mediation was taking too long to resolve the matter but that management terminated the process prematurely. For that reason the court concluded that management was not entitled to dismiss the Zulu speaking employees.

[40] Commenting on the *East Rand Proprietary Mines* decision, in *Lebowa Platinum Mines Ltd v Hill* [6] the LAC stated that in *East Rand Proprietary Mines* the court favoured the strict test of necessity where a demand by a third party leads to the dismissal of an employee in circumstances where the dismissal amounts to discrimination. The court went further and stated that such an approach would have to be examined to ascertain whether it is

[5] at 1151F.

[6] (1998) 19 *ILJ* 1112 (LAC).

in harmony with the equality and discrimination jurisprudence of the Constitutional Court.

[41] In *Lebowa Platinum Mines* the employees demanded the dismissal of a white employee who occupied a senior position and had used abusive language towards a black co-worker. The chairperson of a disciplinary inquiry imposed the sanction of a verbal warning on the employee. The employees were dissatisfied with the sanction imposed which they regarded as lenient and demanded a second disciplinary inquiry. In the face of pressure from the employees and because the employee refused a transfer, the employer dismissed the employee. In deciding what an employer must do when faced with a demand for the dismissal of an employee, the court set out the applicable principles as follows:[7]

> "The question whether, in the result, the employer's ultimate decision to dismiss an employee in response to a demand therefor from a third party may be said to be a fair or unfair one, would have to depend on the facts of each case. In general, however, the principles set out below will be applicable. The principles have largely been extracted from cases cited later.
>
> (1) The mere fact that a third party demands the dismissal of an employee would not render such dismissal fair. Such an approach would indeed open a veritable Pandora's box of injustices.
>
> (2) The demand for the employee's dismissal must usually enjoy a good and sufficient foundation. Where it impinges upon the fundamental rights of the employee in terms of the Constitution special considerations need to be taken into account in determining whether it enjoys such a foundation.
>
> (3) It need hardly be stated that the threat by the third party to impose a sanction must be a real one. The employer should, therefore, initially, assess the reality of the threat. If the prospects of the threat being implemented are not real, the employer should ignore the demand, subject thereto that circumstances may change as matters develop.
>
> (4) The employer, should, secondly, assess the probable effect of the sanction threatened by the third party. Thus, that effect may be of such relatively minor proportions that there is no call for the employer to consider

[7] at para [22].

taking any steps in respect of the employee's position, whether in the form of a dismissal or, indeed, in the form of an alternative thereto. In what follows in subparas (6) *et seq* it will be assumed that the sanction threatened by the third party is sufficiently cognizable to lead the employer to take such steps.

(5) It must be borne in mind, however, that the mere fact that dismissal of the employee would ensure continued smooth commercial operation is not sufficient to justify termination of employment. Something more is required. In short, that something is the objectively sound conclusion that dismissal is the only option that is fair to both the employer and the employee.

(6) The employer should make reasonable endeavours to dissuade the party making the demand for the dismissal of the employee from persisting therein.

(7) The employer should properly investigate and consider all alternatives to the dismissal with a view to determining whether one or more of them constitutes a reasonable alternative to dismissal.

(8) In the process of reaching a determination whether or not there is a reasonable alternative to the dismissal the employer must consult fully and properly with the employee, afford him a proper opportunity to make an input thereanent and properly take his representations into account before arriving at a decision.

(9) It is incumbent on the employer to ensure that the employee is aware that non-acceptance by him of an identified reasonable alternative or alternatives would, or could, result in his dismissal.

(10) In all its deliberations the employer must properly consider the extent of the injustice to the employee that would be occasioned by a dismissal.

(11) Relevant to the consideration of injustice to the employee would be the question whether any objectively blameworthy conduct on his part gave rise to the demand for his dismissal."

[42] The court in *Lebowa Platinum Mines* further stated that because the employee was at fault, the issue had changed from one of misconduct to whether the employee's further employment was compatible with the employer's commercial operations, an issue of incapacity. The court stated that the test was that of fairness and that fairness demands that recourse to

the dismissal be had where there is no other alternative thereto. The court then conducted on evaluation of whether the employees' threat to embark on industrial action if the employee was not dismissed was real, whether the employer did what could reasonably have been expected of it to persuade the employees to drop its demand for the employee's dismissal, whether the employer investigated all the alternatives to the dismissal of the employee, and the potential injustice to the employee consequent upon his dismissal.

[43] The significance of the requirement to dissuade a third party from persisting with a demand as well as the threat of harm were also dealt with in *Govender v Mondi Kraft Richards Bay*[8] where the employees demanded the dismissal of an Indian employee who had assaulted a black employee.

[44] In *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distribution* [9], an employee of Imperial Distribution was stationed at a client's site. The client demanded that the employee be removed from its site because he had instituted a defamation claim against the client, following his exoneration on charges of theft. As there were no other alternative positions, the employee was retrenched. As in *Lebowa Platinum Mines*, the court found that this was not a classical retrenchment and applied the principles set out in *Lebowa Platinum Mines*. In dealing with the question whether the dismissal was substantively fair, the court found that the client's stance in demanding the removal of the employee was unjustified, the demand did not enjoy a sufficient foundation and in fact impinged upon the employee's fundamental rights in terms of the Constitution; that there was no threat issued by client on what it would do if the employee was not removed; no evidence was led about what would have happened had the employer refused to accede to the client's demand; the threat must be real; and the employer ought to have assessed the reality of the threat. The court continued as follows:[10]

> "It must be borne in mind, however, that the mere fact that dismissal of the employee would ensure continued smooth commercial operation is not sufficient to justify termination of employment. Something more is required.

[8] (1999) 20 *ILJ* 2881 (LC).

[9] (2002) 23 *ILJ* 492 (LC).

[10] at para [25].

> In short, that something is the objectively sound conclusion that dismissal is the only option that is fair to both the employer and the employee."

[45] Considering whether the employer did what could reasonably have been expected of it to persuade the client to drop its request that the employee be removed from its premises, the court found that a single meeting held with the client was insufficient. The court also emphasized the importance of properly considering the extent of the injustice to the employee that would be occasioned by the dismissal.

[46] The issue of the dismissal of an employee at the instance of a third party who is a labour broker arose in *Nape v INTCS Corporate Solutions (Pty) Ltd* [11]. The employee had sent an e-mail containing offensive material at the client's premises and the client demanded the removal of the employee. It was a term of the contract between the client and the labour broker that the client could demand the removal of an employee for any reason whatsoever. In defending an unfair dismissal claim brought by the employee, the employer relied on *Lebowa Platinum Mines* and argued that there was nothing it could do after the client demanded the removal of the employee. It also argued that in those circumstances it could legitimately invoke the provisions of s189 of the LRA as it had very little bargaining power with the client. The court found that the employer and the client could not structure their contractual relationship in a way that would effectively treat employees as commodities to be passed and traded at the whims and fancies of the client and that the contractual relationship should not be structured in a way that undermines the employee's constitutionally guaranteed rights. On the important question of a client's demand, the court stated as follows:[12]

> "An illegal demand can never found the basis to justify a dismissal based on operational requirements just as it cannot form the basis of a lawful strike. (*TSI Holdings (Pty) Ltd & Others v NUMSA & Others* (2006) 27 *ILJ* 1483 (LAC))…By the same token s189 cannot be used to disguise the true reason for dismissal…

[11] (2010) 31 *ILJ* 2120 (LC).

[12] Para [72].

> It is axiomatic, however, that where the demand of the client is lawful and fair the employer labour broker may properly rely upon the provisions of section 189 of the Act."

[47] According to the court in *Nape*[13], the recourse available to a labour broker when a client demands the unlawful removal of an employee is:

> " … the labour broker is in fact not powerless to resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The labour broker is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed…"

[48] In conclusion, the court stated as follows:[14]

> "The respondent labour broker could have accordingly resisted the client's attempts to invoke clauses in its contract with the client which undermined the applicant's rights. It was unfair of it not to do so before invoking its right to terminate the contract of employment for operational requirements and also because the demand of the client was unlawful and unfair."

[49] The court found that in fact its findings were consistent with the *Lebowa Platinum Mines* decision, where it was stated that the mere fact that a third party demands the dismissal of an employee would not render such a dismissal fair.

Dismissal automatically unfair ?

[50] Chuma conceded that, but for the fact that the applicants were women, their employment would not have been terminated. They were dismissed to make way for male security officers.

[51] It is so that the dismissal was effected at the instance of a third party. That does not make it fair. I agree with Ms *Ralehoko* that dismissing the applicants merely because they are female is akin to the "reprehensible conduct" that the court referred to in *East Rand Proprietary Mines Ltd*.[15]

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[13] Above para [77].

[1414] Para [86].

[15] Above at 1150H.

[52] Section 187(1)(f) of the LRA makes it clear that, if the reason for dismissal is that an employer unfairly discriminated against an employee, directly or indirectly, on the grounds of gender, then such a dismissal is automatically unfair.

[53] Chuma (through Ngcwangu) was alive to the fact that the demand by Metrorail which resulted in the dismissal of the applicants was unlawful and in fact contravenes equality laws. Yet the company made no effort to persuade Metrorail to drop its demand; neither did it conduct its own investigation to establish whether it was a fair demand; nor did it try to secure alternative positions for the applicants.

[54] The dismissal of the applicants was simply and directly on the grounds of gender. There is no reasonable justification for it. The dismissals were automatically unfair.

[55] And even if I am wrong, the dismissals were in any event unfair, both substantively and procedurally.

Substantive fairness

[56] Chuma bears the onus to prove that the dismissals were fair, both substantively and procedurally.

[57] Against the legal principles set out above, the respondent's conduct in this matter falls far short of what it was required to do before dismissing the applicants to make the dismissals fair.

[58] Whether a dismissal at the instance of a third party is effected for operational reasons or incapacity reasons is not an issue that arises in this matter. The principles remain the same.

[59] As Mr *Van Wyk* submitted, the principles dealing with s 189 dismissals were set out by the LAC in *Super Group Supply Chain Partners v Dlamini*[16]:

> "It is trite that an employer is permitted to dismiss an employee for operational requirements. However, for the employer to do so successfully, it is obliged to have a *bona fide* economic rationale for the dismissal and to comply with the provisions of s 189… Section 189 imposes an obligation on

[16] (2013) 34 *ILJ* 108 (LAC) para [24].

> the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimise the effect of the dismissal. The consultation envisaged by the Act is a 'meaningful joint consensus-seeking process' in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and, where not possible, to ameliorate the effects of the dismissal for operational requirements."

[60] The starting point in this case is the fact that Metrorail demanded the reduction of female security officers. That is where the rationale for the dismissals originates. But simply contending that Metrorail made the demand is not a defence to an unfair dismissal claim. The demand for the dismissal of the female security officers must have had a good and sufficient foundation. Chuma was obliged to investigate the allegations by Metrorail that crime was on the increase due to the deployment of mostly female security officers to establish whether there was any truth to them. Had it investigated the claims made by PRASA / Metrorail as it was obliged to do, Chuma would have discovered that there was no truth or substance to those allegations.

[61] Metrorail raised only three incidents in support of its demand that female security officers should be removed as they were not effective. Gcanga's evidence about the circumstances in which the Huguenot ticket station was broken into was not challenged at all. Contrary to what Metrorail alleged, there was a male security officer on duty when the incident occurred. The allegations that the guards had slept on duty were also not proven. As regards the Goodwood incident, Ngwcangu confirmed that the 15 year old girl involved had consensual sex. And with regard to the rape of a female security officer whilst doing cable patrol, the incident occurred in the presence of a male security officer.

[62] Ms Gcanga controverted Metrorail's claims that crimes were committed at stations manned by female security officers because they were too scared to do anything about it. She testified that crimes occurred regardless of the gender of the officers manning a station. Her evidence was that Huguenot station was always manned by one male and two female security officers and that the break in into the ticket office was the first incident at that station

since she commenced working there. She also denied that she had ever been confronted by anyone about claims that female security officers allowed crimes to occur in their presence.

[63] At the very least Chuma ought to have confronted Metrorail with the facts and persuaded it to drop its demand which had no basis. Without testing the correctness of these allegations, Chuma simply decided to retrench the applicants.

[64] Ngcwangu was aware that Metrorail's demand would cause Chuma to flout the equality laws of the country. Yet he did not demand of Metrorail to drop its demand.

[65] Both Ngcwangu and Khambi testified that they had to comply with Metrorail's demand or else Metrorail would terminate the contract with Chuma. However, at no point did Metrorail threaten to terminate the contract with Chuma if it did not comply with its demand/request. The e-mail of 2 March 2015 from Blom simply stated that "I want an action plan together with the risk assessment on how you will correct the deployment within seven working days".

[66] A similar request was made of Chuma in October 2014 and Ngcwangu ignored it without any consequences. At that time Chuma was on a month to month contract with Metrorail. There was nothing to suggest that in March 2015, when Metrorail renewed its request for the replacement of female security officers, this time around it would react differently if Chuma ignored the request.

[67] The fact that the e-mail from Blom had been copied to senior people within PRASA as testified to by Khambi was of no consequence. Chuma was required to first assess what actions Metrorail was likely to take if its demand was not acceded to. It did not do such assessment. Instead, it decided to retrench the employees in the absence of any threat to terminate the contract.

[68] Ngcwangu's claim that he had succeeded in persuading Metrorail to reduce the number of affected employees to only 50 is to be acknowledged and applauded, as Ms *Ralehoko* readily acknowledged. But his efforts were simply inadequate. He was required to dissuade Metrorail from persisting

with a demand which would have resulted in discrimination against female employees.

[69] Even though Ngcwangu claimed that he did persuade Metrorial that fewer women should be dismissed, there was no evidence placed before court that he had in fact done so. He could have produced his communications to Metrorail to that effect or even the minutes of the meetings held with Metrorail where he had raised these issues. He produced no such document. The more probable version is that he did not raise these issues, fearing risking the contract with Metrorail. Because Ngcwangu did not raise these issues, it is impossible to know whether Metrorail would have dropped its demand and the retrenchment of the employees could have been avoided altogether.

[70] Even though a copy of the contract between PRASA/Metrorail and Chuma was not placed before the court (a legible copy was not discovered), Ngcwangu conceded that the contract with PRASA did not require the deployment of male security officers. Even though such a contractual term would arguably not have been enforceable, that the contract was silent on the issue would have provided Chuma with further ammunition in resisting the unlawful, unjustified and discriminatory demand made by Metrorail.

[71] There can be no debate that termination of the employment of the applicant caused injustice to these employees, who were not at fault. They had done nothing wrong. Chuma ought to have considered this factor. There is no evidence that the factor was considered and if it was, what weight, if any, it had on the decisions ultimately made by the respondent. Against those facts, the test of necessity or fairness has not been passed by the respondent. Chuma did not have a fair reason for dismissing the applicants.

Procedural fairness

[72] The main issue concerning procedural fairness – whether there was any consultation as prescribed by s 189 with the employees' trade union, NUMSA – brings to the fore the fraternal fights for membership between COSATU trade unions that has come to characterise our labour relations landscape of late.

[73] Chuma argues that it followed a section 189 consultation process and consulted with SATAWU because all the affected employees were SATAWU members. The only reason to substantiate its claim that all affected employees were SATAWU members is that it was deducting subscriptions from the salaries of these employees and paying these over to SATAWU. This despite the common cause fact that, in November 2014, Chuma was party to a settlement agreement in terms of which it was agreed that NUMSA had 49.5% membership at its workplace and it undertook to ensure that subscriptions in favour of NUMSA are implemented with effect from January 2015.[17]

[74] Despite the agreement, Chuma did not implement subscription deductions against the salaries of those of its employees who had been found to be NUMSA members at the verification exercise which took place in November 2014. It is common cause that NUMSA took steps to enforce compliance with the settlement agreement and referred disputes to the CCMA pursuant to the signature of the settlement agreement because Chuma refused to comply. On those facts, when Chuma decided to retrench the employees in April and May 2015, it was aware that NUMSA was a representative union at its workplace.

[75] In terms of section 189 of the LRA, Chuma was obliged to consult "any registered trade union whose members are likely to be affected by the proposed retrenchments." Yet Chuma inexplicably avoided NUMSA, which it did not want to recognise and grant organisational rights despite the fact that the verification process had established that NUMSA had 49.5% membership. It is apparent from the schedule prepared by the applicants that the majority of them (16) joined NUMSA before April 2015 when the retrenchments were effected.

[76] Because NUMSA was not afforded an opportunity to put proposals on the table on possible measures to avoid the dismissals, it is not possible to conclude that the dismissals could not be avoided. Where no consultations

[17] The agreement actually reflects "January 2014" but that appears to be a typographical error.

take place over the topics set out in section 189 of the LRA, procedural and substantive fairness become inextricably linked.[18]

[77] The dismissals are also procedurally unfair for the further reason that the decision to retrench was a *fait accompli*. Metrorail sent Chuma an email on 2 March 2015 demanding the reduction of female security officers. The next day, on 3 March 2015 -- and even before SATAWU could be consulted – Chuma informed Metrorail that it would retrench 50 female employees. The engagement with SATAWU was therefore done as a formality. A decision had already been taken to retrench the employees.

[78] Chuma did not even issue a notice as required by section 189 (3). And Khambi conceded that there were no consultations on the severance pay to be paid to the employees (which was not even paid).

[79] The affected employees were unaware of the decisions being taken. Because they were not SATAWU members, they did not hear about the general meeting where the news of the impending retrenchments was communicated to the employees and therefore they did not attend the meeting. Matikase could not say whether she had informed the applicants about the meeting. The affected employees discovered that their employment had been terminated only when they were issued with termination letters. The nine employees issued with terminated letters in April 2015 were given a day or two days' notice of termination of employment. Prior to that, no one from Chuma spoke to them about what was about to happen. Whilst at home, they then received telephone calls from Chuma to return and serve a month's notice. The group issued with termination letters in May were informed that they would serve a month's notice.

[80] Chuma did not pay even the statutory minimum severance pay[19], much less consult about the amount of severance. That severance pay was not paid was conceded when the pre-trial minute was filed in March 2016 and yet no steps were taken to rectify it before the trial. During the trial, Ngcwangu undertook to ensure the issue is rectified but by the end of the trial – and up

[18] Cf Thompson & Benjamin *South African Labour Law* (Juta, service no 66, 2016) AA1-504.

[19] Basic Conditions of Employment Act s 41.

to the date of judgment -- there has been no tender from Chuma to pay it. It is liable to pay interest on the severance pay, calculated from May 2015 and June 2015 respectively, depending on when an employee ought to have been paid the severance pay.

Conclusion

[81] The dismissals were automatically unfair; and in any event also substantively and procedurally unfair.

Relief

[82] The applicants are no longer seeking re-instatement but only compensation.

[83] The principles which apply regarding compensation were set out in *Kemp t/a Centralmed v Rawlins*[20] :

> "There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:
>
> (a) The nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case.
>
> (b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case it is only substantively unfair, or, even lesser, if it is only procedurally unfair.
>
> (c) Insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less the employer's deviation from what was procedurally required, the greater the chances are

[20] (2009) 30 *ILJ* 2677 (LAC) para [20].

> that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.
>
> (d) ....
>
> (e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.
>
> (f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.
>
> (g) ....
>
> (h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution disputes."

[84] In considering the amount of compensation, take into account that the respondent discriminated against female employees; and its deplorable conduct of not paying the dismissed employees severance pay due to them.

[85] Section 194(3) provides as follows:

> "The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

[86] The applicants seek the maximum compensation permissible of 24 months' remuneration. In *CEPPWAWU v Glass and Aluminium 2000 CC*[21] the court laid down the principle that compensation for automatically unfair dismissals should not be less than the amount that an employee would have received if re-instatement had been sought and should penalise the employer for dismissing an employee for a prohibited reason.

[21] [2002] 5 BLLR 399 (LAC).

Conclusion

[87] The dismissal was automatically unfair. But for their gender, the employees would not have been dismissed. And the employer has not shown any justification for the direct discrimination against them.

[88] In any event, the employer has also not shown that the dismissal was for a fair reason related to its operational requirements; nor did it follow a fair procedure as contemplated in s 189 of the LRA.

[89] Mr *Van Wyk* has conceded that Chuma is liable for severance pay, and that that payment should attract interest from the date of payment to the date of judgment.

[90] As Ms *Ralehoko* argued, Chuma's attitude has been deplorable. It conceded early on that it did not pay the employees any severance pay; yet it still has not done so to date. That is but one of the reasons that costs should follow the result. It is also one of the reasons why I agree with Ms *Ralehoko* that the Court should award the applicants the maximum compensation contemplated by s 194(3).

Order

[91] I therefore make the following order:

91.1 The dismissal of the second and further applicants by the respondent was automatically unfair as contemplated by s 187(1)(f) of the Labour Relations Act.

91.2 The respondent is ordered to pay each of the applicants compensation equivalent to 24 months' remuneration, calculated at R3 200, 00 per month as set out in Schedule A.

91.3 The respondent is ordered to pay each of the applicants severance pay as set out in Schedule A, together with interest calculated at 9% per year from their respective dates of dismissal until the date of payment.

91.4 The respondent is ordered to pay the applicants' costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Tapiwa Ralehoko of Cheadle Thompson & Haysom Inc.
RESPONDENT:	Pedro van Wyk Instructed by Swartz Hess attorneys.