IN LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: CA5/2007

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU) — **1st APPELLANT**

AA EWERTS & 16 OTHERS — **2nd to 18th APPELLANTS**

and

KANNALAND MUNICIPALITY — **RESPONDENT**

Judgment

Tlaletsi AJA

Introduction

[1] This is an appeal from a judgment of Nel AJ sitting in the Labour Court in a trial relating to a dismissal dispute between the appellants and the respondent. The first appellants contended that the second to eighteenth appellants ("the individual employees") who were all members of the first appellant, a representative trade union *("SAMWU")*, were unfairly dismissed by the respondent on 30 November 2004. The respondent on the other hand, contended that the dismissal of the individual employees was based on its operational requirements and was fair.

[2] The dispute concerning the fairness of their dismissal was referred to the *South African Local Bargaining Council-Western Cape* ("the Bargaining Council"). The dispute remained unresolved as at 27 November 2004 and a certificate to that effect was issued by the

Bargaining Council on 5 December 2004. The matter was referred to the Labour Court for adjudication.

[3] It is perhaps apposite to state that the matter was heard by the Labour Court from 11 to 15 September 2006. Only the respondent tendered oral evidence.

[4] The Labour Court gave its judgment on 23 January 2007. The Labour Court found that the dismissal of the individual employees was substantively fair but procedurally unfair. Although the Labour Court found the dismissal to be procedurally unfair, it made no order for compensation and costs.

[5] Aggrieved by that part of the order of the Labour Court relating to the substantive fairness of the dismissal and failure to make an order for compensation and costs, the appellants applied for leave to appeal against "the whole of the judgment" of the Labour Court. Leave was granted on 28 May 2007.

Factual background

[6] The following facts are either common cause or not in dispute. The respondent is a municipality established in terms of the *Local Government: Municipal Structures Act* 117 of 1998 *("the Structures Act")*. The process of establishing the respondent involved the amalgamation of several municipalities, namely *Ladysmith, Calitzdorp, Zoar* and *Van Wyksdorp.*

[7] During 2003, representatives of the *South African Local Government Association ("SALGA")* (of which the respondent is a member), the first appellant as well as its sister trade union, the *Independent Municipal and Allied Trade Union ("IMATU")* entered into a collective agreement

termed the *Organisational Rights Agreement ("the ORA")* under the auspices of the Bargaining Council. The ORA sought to regulate *inter alia*, the organisational rights afforded to the trade unions, the conduct of collective bargaining and the resolution of disputes at national level. The agreement was binding on all municipalities affiliated to *SALGA*.

[8] Clause 7 of the *ORA* made provision for the establishment of *Local Labour Forums* at each workplace. The workplaces in this instance were the member municipalities. Such *fora* were compulsory dispute resolution bodies at the workplaces. Disputes could be referred by either the trade unions or municipalities to these *fora*. It is important to note that the *Local Labour Forums* were not empowered to deal with matters that are bargained at national and provincial forums. Their powers and scope were only limited to matters relating to the work places and which were not the subject of bargaining at either national and or provincial level.

[9] During December 2002 SALGA, SAMWU and IMATU entered into a collective agreement which was commonly known as the *Placement Agreement*. Clause 3 of the *Placement Agreement* required each new municipality to prepare final organograms of all departments and to submit it to the *Local Labour Forum*s for consultation prior to their finalisation by the Councils of the municipalities. Should such consultation at the *Local Labour Forums* fail to reach consensus, the concerned municipality had the right to unilaterally adopt and implement the aforesaid new organogram.

[10]Following its amalgamation, the respondent produced an organogram containing the proposed structure for the municipality as envisaged by the *Placement Agreement*. This organogram was consulted on in the *Local Labour Forum* and agreement was reached. Placements in terms of the organogram were subsequently effected. The date when the

agreement on the organogram and when it was subsequently implemented are not provided. However, nothing turns on the said dates safe to note that the respondent had complied with the *Placement Agreement* by submitting the final organograms to the *Local Labour Forum* for consultation and an agreement was reached.

[11] During March 2004 an organisation known as *Zader Municipal Services* was tasked with investigating the parlous financial state of the respondent. Out of this exercise a report dated 23 March 2004 known as the *"Zader Report"* was produced. The report made certain proposals that included a new organogram for the municipality. The report stated *inter alia* that the new organogram had been drawn up in conjunction with the Municipal Manager and Heads of Departments of the respondent; that there had not been consultation at the *Local Labour Forum* and that the consultation process be completed once the *Local Labour Forum* had been reconstituted and its powers defined. It is important to note that the new organogram had the effect of rendering at least 28 employees redundant as they would not be catered for in the budget of the respondent.

[12] During the course of the year 2004 the Member of the Executive Council ("MEC") responsible for Local Government and Housing in the Western Cape Province, acting in terms of Section 106 of the *Local Government: Municipal Systems Act No*: 32 of 2000, ("the Systems Act") appointed L A Dekker ("Dekker") and Oppelt to conduct an investigation into the affairs of the respondent. There were at that time serious allegations of maladministration at the respondent. Dekker testified that he is an attorney specialising in Labour Law and Municipal Law. He had been in the municipal field for about thirty years and also ten years doing Labour matters. The investigating team produced a report on its activities dated 16 April 2004. This report became known as the *"Dekker Report"*. All relevant stakeholders

including the trade unions, councillors, officials and members of the public participated in the process. Dr Kaap whose entity produced the *Zader Report* also made a presentation to the investigating team.

[13] Dekker and Oppelt's brief were to investigate alleged maladministration and allegations concerning corrupt activities that were taking place at the respondent. The investigators were to gather evidence, make findings and recommendations to the MEC. The following are some of the findings of the investigation relevant to this appeal:

13.1 It was found that the recommendation that was made by a certain municipal finance official who was appointed to assist the respondent during 2002 about ways to deal with the respondent's financial deficit were not as yet implemented by 2004;

13.2 *Zader Report* had established that the income of the respondent was below than what was budgeted for, and that there had been personnel appointed without being budgeted for. The team then prepared a financial recovery plan that was adopted by the respondent and approved by the MEC. This plan had also not been implemented;

13.3 Loans and overdrafts were not being repaid;

13.4 Politicians at the respondent were involved in appointing staff. Through this unauthorised process they improperly appointed their family members and relatives;

13.5 Staff appointments were made outside the policy framework of the respondent. The municipal manager was contrary to policy framework not involved in the appointment process. The staff policy framework was only one page and proved inadequate;

13.6 Post levels were not allocated and job descriptions were incomplete. A glaring example is that of a general labourer at

the cemetery at post level 14, who was rewarded by being elevated eleven notches up to the position of *internal auditor* by the Mayor after he testified in the mayor's defence at a rape trial. Unsurprisingly, the appointee did not have the necessary qualifications and experience of internal auditor position;

13.7 There were irregular and *ad hoc* upgrading of post levels without changing the content of the post or providing reasons for such steps;

13.8 Appointments, promotions and upgrading of posts were done by the *Local Labour Forum* and submitted to the Executive Mayoral Committee only for information and without taking the financial implications into account. The City Treasurer was not even part of the *Local Labour Forum*. This conduct together with others rendered the staff establishment of the respondent to be unaffordable.

[14] The *Dekker Report* made a number of recommendations aimed at improving the situation at the respondent. Those relevant for this matter included:

- that the respondent should create an affordable staff establishment;
- the *Local Labour Forum* should be reconstituted and its powers be limited to what was agreed previously at SALGBC;
- that a policy framework of the respondent provided for in section 55 and 66 of the Systems Act be revised, improved and approved by the Council of the respondent;
- that any possible dismissal of employees based on operational requirements that might be considered in terms of Section 189 of the Act be done with the help and advice of the *Western Cape Local Government Association ("WECLOGO").*

The report was handed to the MEC on 16 April 2004.

[15] On 21 June 2004 the MEC for Local Government published a set of directives emanating from the *Dekker Report*. In addition the MEC wrote a letter to the Mayor and the Speaker of the respondent's Council. In the letters the MEC outlined the findings of the investigating team and listed directives with time frames that were to be implemented by the respondent. Some of the directives were that:

- the respondent was to revise and improve its policy framework in terms of section 55 and 66 of the *Systems Act* so as to enable the municipality to perform its statutory functions (by 31 August 2004);
- the respondent was to restructure the organogram to make its staff structure "*leaner and more streamlined*" cost effective;
- the *Local Labour Forum* was to be revived;
- the revised organogram was to be implemented once the Council had approved it and any possible retrenchments were to be carried out with the assistance of WECLOGO;
- the timeframe set for completion of the process was within three months.

[16] It is common cause that during April 2004, the first appellant was advised by the respondent that approximately 28 employees of the municipality were not catered for in the municipal budget and that, as a result, the municipality was in financial difficulty.

[17] On 28 April 2004 a *Special Council Meeting* was convened. Adv. Etienne Vermaak from SALGA had been appointed to conduct the consultations for the envisaged retrenchments on behalf of the respondent. His appointment coincided with the recommendations of the Dekker Report and the subsequent directive by the MEC that any possible retrenchments were to be carried out with the assistance of *WECLOGO*. Vermaak as well as Mr Besselsen

representing *ZADER* attended the meeting. A letter from SAMWU requesting some clarification on the 28 employees not catered for in the budget was presented to the Council. The Council resolved to note the letter. Both Vermaak and Besselsen addressed the council on the process relating to the negotiations about the restructuring that had taken place up to that stage. They also reported to the Council what else was still to be done. Council resolved to approve their report and that the unions be provided with a copy of the report.

[18] It is common cause that on 7 June 2004 Vermaak held a consultation meeting with the unions. The meeting was postponed at the instance of the unions to enable them to study the Zader report.

[19] A second meeting was held on 21 June 2004 between Vermaak and the unions. The meeting was also postponed so that the union could be provided with the Section 106 report commissioned by the MEC. It is also on this day that the MEC made the Dekker report public.

[20] On 29 June 2004 a council meeting was held. At this meeting a new organogram was tabled. Council noted the organogram.

[21] On 19 July 2004 a meeting was held between Vermaak and SAMWU. It would appear that SAMWU was handed a Section 106 report. According to Johan De Wet, who was the *Manager: Administration* at the respondent, the purpose of the meeting was to consult on the organogram. De Wet testified that he does not know whether the minutes of this meeting were available. He however recalled that SAMWU's representatives at this meeting requested certain documents relating pensions as well as the *Integrated Development Plan ("IDP")* of the respondent. De Wet

testified further that the agendas, minutes and other documents of the respondent were confiscated by the South African Police Services during an investigation conducted by *Dekker* during the year 2000 to 2004. De Wet confirmed that the process for the preparation for the IDP was undertaken by the respondent with the participation of all stakeholders, including the unions. The IDP document was ultimately adopted by the respondent on 24 April 2002 after it lay for inspection and comments for a period of 21 days. He mentioned that it was the responsibility of the Municipal Manager that the *IDP* was prepared and that it was ultimately implemented. The Municipal Manager was also responsible for the preparation of a budget and organogram of the respondent in terms of the *IDP* and to appoint staff that would deliver services in terms of the *IDP*. De Wet testified further that the meeting of 19 July 2004 was postponed in order to allow the *SAMWU* and also *IMATU* who was not represented at this meeting time to study the Section 106 report. This arrangement was confirmed by a letter from Vermaak to *SAMWU* on 21 July 2004.

[22] On 27 July 2004 Vermaak addressed a letter in terms of Section 189(3) of the Act to the unions in which he, *inter alia*, advised that:

22.1. the respondent's Council had approved the new organogram in principle and would take a final decision on receiving a report from WECLOGO on 30 July 2004;

22.2 the approval of the organogram by Council would lead to dismissals of some employees;

23.3 a final request for consultation in terms of Section 189 was being made.

[23] On 30 July 2004 *SAMWU* replied to Vermaak's letter. In their reply they mentioned inter *alia* that:

23.1 there had up to that stage not been any real consultation;

23.2 the organogram had not served before the *Local Labour Forum* and that a date should be set for that purpose to finalise the organogram;

23.3 the section 189 (3) notice was issued prematurely as the organogram had not been subject to consultation before the *Local Labour Forum*.

[24] It is common cause that there was no response to the aforesaid letter from *SAMWU* wrote another letter to Vermaak in which they stated the following:

24.1 the issuing of the notice in terms of Section 189 was premature as there had not been a consultation on the new organogram and also that the organogram had not been approved by Council;

24.2 the consultation before the *Local Labour Forum* had been required by the *Zader Report* and was also compulsory;

24.3 a meeting before the *Local Labour Forum* be convened; that the forum be revised as suggested by the MEC and the *Zader Report*; that the organogram then be finalised and the affected employees be placed.

The letter made further submissions regarding the effect of the new organogram on service delivery and SAMWU's proposals on the organogram as well as their "expenditure limiting strategy."

[25] In the meantime Mr B G Seitisho had in the beginning of August 2004 been appointed Acting Municipal Manager of the respondent. He was appointed to assist in resolving the administrative as well as the financial problems at the respondent. According to Seitisho there were serious problems relating to lack of service delivery, "*logistical arrangements*" and the administration was in a chaotic state. The MEC responsible for local government had provided him with a two paged letter containing things that he had to perform.

Seitisho was at the same time involved at Kokstad and Plattenberg Bay municipalities in the same capacity. These Municipalities faced some challenges as well.

[26] It is not disputed that some of the serious problems discovered by Seitisho were that the respondent was unable to fund its loans from the *Southern African Development Bank* and *ABSA* bank. Funds from national and provincial governments intended for projects were wrongly utilized to fund operational expenses; there were no funds to run the sewer networks, water purification works and road maintenance; UIF, PAYE, Pension and Medical Aid deductions were made from employee's salaries but were not paid over to their intended beneficiaries. This meant that book entries on these items were made without the necessary transfer of fund's being made.

[27] Seitisho testified that upon his arrival at the respondent he was briefed by Vermaak on what had transpired in the process that far. He also met the union leaders who were at that point not satisfied with the consultation process that was supposed to have taken place. Some of the union's complaints were that the organogram had not been consulted on at the *Local Labour Forum*. On the other hand, Vermaak advised him that there had been proper and adequate consultation. However, Vermaak was unable to produce minutes of consultation meetings he held with the unions to support his claim. As part of his mandate was to deal with retrenchments, Seitisho felt duty bound to report to Council of the respondent that there might not have been enough consultation process and that to be on the safe side, he needed more time to sort out the consultation process.

[28] There was once again no response from the respondent to *SAMWU*'s letter dated 15 August 2004 referred to above. However,

on 16 August 2004 a Special Council Meeting of the respondent was held. The following was recorded on the minutes:

28.1 the Acting Mayor notes that the two letters from SAMWU had been replied;

28.2 Mr Seitisho noted that the respondent had possibly not consulted sufficiently enough with the union;

28.3 Mr Seitisho requested a week to finalise the consultation with the unions;

28.4 the matter would be finalised during a Special Council Meeting to be held the following week.

[29] On 30 August 2004 another Special Council Meeting was held. The minutes reflected that:

29.1 "it was noted that the "relevant policy" was in place;

29.2 the Council would not take a decision;

29.3 *'Seitisho opined that the decision rested with him'*;

29.4 The Council again would not take a decision."

[30] On 31 August 2004 the individual employees were handed letters of termination of employment for operational requirements dated 30 August 2004, with the termination date set as 30 September 2004.

[31] It is not disputed that a series of correspondence passed between the appellant's attorneys and Vermaak regarding the unlawfulness or otherwise of the intended dismissals of the employees. The appellants demanded that the dismissals be withdrawn and in turn the respondent's officials were not prepared to do so.

[32] On 29 September 2004 the appellants launched an urgent application seeking to have the dismissals set aside. The application was set down for hearing on 30 September 2004.

[33] On 29 September 2004 the respondents held a meeting with the unions in the evening. A settlement agreement was entered into. The terms thereof were that:

33.1 *SAMWU* withdrew its urgent application;

33.2 The respondent unconditionally withdrew the notices of termination of employment;

33.3 The parties undertook to engage in further consultations outside of the Local Labour Forum;

33.4 The parties undertook to finalise the consultation by 29 October 2004 and attempt to reach consensus;

33.5 If no consensus is reached the respondent would be entitled to "initiate the provisions of Section 189 of the LRA;"

33.6 The parties agreed to finalise voluntary retrenchments at their first consultation which would then form the basis for further consultations.

In consequence, the retrenchment notices were withdrawn on 30 September 2004. The Agreement of settlement was made an order of court on 30 September 2004.

[34] It is not in dispute that on 30 September 2004 Vermaak sent a letter to *SAMWU* requesting it to urgently inform him of five possible dates on which they would be available for consultations. *SAMWU* did not reply to this letter.

[35] On 5 October 2004 Vermaak sent a further letter to *SAMWU* noting their failure to reply to his aforesaid letter and again requesting them to urgently inform him of five possible dates on which they would be available for consultations. Once again SAMWU failed to reply to this letter.

[36] On 6 October 2004 IMATU which was also requested to supply dates for consultations, replied and provided possible dates on which it would be available for consultations.

[37] On 11 October 2004 Vermaak sent a letter to Seitisho expressing his concerns about the fact that *SAMWU* had failed to make itself available for consultations and that he was going to seek an opinion from an advocate. The said opinion was subsequently obtained on 12 October 2004. A copy of the letter dated 14 October 2004 from *SAMWU* is not provided.

[38] On 11 October 2004 *IMATU* sent a letter to Vermaak expressing their concerns that no consultations had taken place and further requesting an urgent meeting to be held on 15 October 2004.

[39] On 15 October 2004 Vermaak sent a letter to *SAMWU* in which he referred to the letter from *SAMWU* dated 14 October 2004. He further expressed his surprise that SAMWU failed to attend a meeting in Ladysmith and furthermore, confirming *SAMWU*'s undertakes to attend the meeting to be held on 18 October 2004.

[40] On 18 October 2004 a consultation meeting took place between *SAMWU*, *IMATU*, Vermaak, G J Louw and De Wet. Louw, who was a financial consultant and also part of the ZADER team, attended the meeting at the invitation of Vermaak. Louw testified that he addressed the meeting on the problematic cash flow situation at the respondent, outstanding debt and unpaid short term creditors. He further informed the meeting that the respondent was in dire financial problems and was unable to obtain credit and financial assistance because of its uncredit worthy position. He was only called into the meeting at the end in order to make a presentation

on the respondent's financial position. At this meeting his input on the financial situation of the respondent was not disputed.

[41] It is common cause that a consultation meeting with the trade unions was scheduled for 29 October 2004 at SALGA offices. Amongst those who attended were Seitisho, Vermaak and representatives of *IMATU*. According to Seitisho the meeting started by confirming the agenda and thereafter they waited for the arrival of the representatives of *SAMWU*. They waited for about two and half hours. They were telephoned several times and they did not answer their phone. They later managed to speak to one of them. He mentioned that they were lost. The representatives of *IMATU* became impatient and indicated that they were leaving as they had waited for a long time and that they had no interest in the proposed meeting. *IMATU* representatives indicated further that they were not going to participate in the meeting.

[42] Seitisho testified further that as they were leaving the premises they met *SAMWU's* representatives at the stairs. He asked one of them, Mr Baartman who was one of his co-employees in Plattenburg Bay where they had been. He reported that they had been lost. He told him that he found it strange that they were all full time shop stewards and also members of *SALGA* but they got lost when they knew where the *SALGA* offices were. Seitisho mentioned further that there was no discussion about further meetings with *SAMWU* representatives. He denied that *SAMWU* representatives requested another meeting. They all left without having discussed about what was to happen thereafter.

[43] On the same day, Seitisho held a meeting with the Mayor and Vermaak at the latter's office. The two reported to the Mayor about the failed meeting and that they were running out of time and

further that the respondent did not have the funds to maintain the staff component as it was. They also expressed the view that the appellants were deliberately delaying the process and that the process had become costly to the respondent. It was then decided that letters terminating services be issued on the same day as the time frame set for consultation as per the agreed court order had come to an end. The selection criteria for the employees to be dismissed were based on the LIFO principle as previously resolved at the Council meeting.

[44] As pointed out already the appellants did not tender any evidence at the court *a quo*. It was contended on behalf of the appellants that the decision to dismiss the employees for operational requirements was taken by Seitisho as the Acting Municipal Manager and was *ultra vires.* The reasons why the decision was said to be *ultra vires* were based on the following argument:

In the first place it was contended that only the respondent's Council had the power to retrench employees; secondly, and in the alternative, Seitisho was only able to exercise the power to retrench once a policy had been promulgated by the respondent's Council under section 55, 66 and 67 of the Systems Act; and thirdly, also in the alternative to the first submission, it was contended that Seitisho and or the respondent was only able to exercise his powers in accordance with the directions made by the MEC in terms of sections 106 of the Systems Act.

[45] The Labour Court held that the Acting Municipal Manager was empowered to appoint employees in terms of the *Systems Act*, and when necessary could dismiss the employees of the Municipality. With regard to the first alternative argument that the Acting Municipal Manager could only dismiss employees once policy had been promulgated by the respondent's Council, the Labour Court

held that there was a policy in existence at the respondent at the time. This conclusion was based on the findings by both the *Zader* and *Dekker* reports that appointments had been made outside the municipal policy and that those appointments were not budgeted for. Withregard to the second alternative argument relating to the directives issued by the MEC, the Labour Court found itself not persuaded by the argument that the directives issued in terms of section 106 of the *Systems Act* constituted statutory framework within which the respondent had to from that point act upon failing which its actions would be *ultra vires*.

[46] Withregard to the procedural fairness of the retrenchment process the Labour Court held that there had not been sufficient consultation as required by section 189 of the Act. The Labour Court found that the respondent had not proved that the appellants' representatives wilfully stayed away from the meeting of 29 October 2004 and that it would have been reasonable for the respondent to reschedule the meeting to conclude the consultation process. By doing so, the Labour Court reasoned, the process would have complied with the procedural fairness requirements. The court *a quo* held further that it was satisfied, in the absence of evidence to the contrary, that the 17 individual appellants had been properly selected by applying the LIFO criteria for retrenchment.

[47] Withregard to order of compensation, the Labour Court considered the role played by the respective parties during the period of consultation and also what caused the last meeting not to take place and decided not to order compensation for procedural unfairness. In doing so, it considered as paramount the following factors: Firstly, that the employees had a benefit of an extra month's income due to the settlement agreement to pursue consultations for a further month; secondly, the fact that the

employees received three weeks salary instead of the "obligatory" one week salary for each year of service; thirdly, the Labour Court held that the individual employees were appointed under the circumstances where they ought not to have been appointed resulting in them receiving a benefit of income. The Labour Court, however, held that there was no evidence to suggest that the individual employees themselves acted improperly for them to be appointed. As regards costs, the Labour Court held that the procedural fairness only related to failure to hold one further meeting which was to a large extend unsuccessful due to the conduct of *SAMWU*. For this reason the Labour Court ordered that each party should pay its own costs.

The appeal

[48] Both in this Court and in the heads of argument filed on behalf of the appellants, they persisted in the same argument that was presented in the Labour Court. As regards substantive fairness, it was argued on behalf of the appellants that the Acting Municipal Manager did not have the power to dismiss the employees and as an employee of the respondent he could only acquire such powers through either legislation or a delegation from the Council. The Labour Court, it was argued, should therefore have found that the Acting Municipal Manager acted unlawfully and as such the reason for the dismissal would fall away. In the alternative, it was submitted that the Acting Municipal Manager could only act in terms of a policy directive in place entitling him to dismiss the employees, and as such policy was not in existence he acted in a vacuum. It was further argued that the Labour Court should have found that the directives issued by the MEC in terms of section 106 of the *Systems Act* created rights for the appellants and as such the respondent was obliged to follow those directives.

[49] Withregard to procedural fairness the attorney for the appellants submitted that although there is no appeal against the finding of the Labour Court, it should have been found that the respondent failed to comply with the directives from the *Dekker Report* and that such a finding would have had the effect of a substantial amount of money as compensation being awarded in favour of the individual employees for procedural unfairness.

[50] The appellants do not challenge the Labour Court's findings that the respondent was in a financial crisis which necessitated the dismissals of employees. It was also not their case that the individual employees were not employed under the circumstances presented by the respondent through the evidence of its witnesses. It is also not the appellants' contention that the individual employees were incorrectly or unfairly identified for dismissal. In any case no evidence was tendered by the appellants in the Labour Court that could support any challenge to the above findings.

[51] It must therefore be accepted that if the three grounds upon which the appellants are contending the substantive fairness of the dismissal of the individual employees; i.e. the authority of the Acting Municipal Manager and failure to comply with the MEC's directives, are found to be without foundation, then the dismissal of the individual employees would have been *for a* fair reason. Put differently, the appellants' only challenge to the substantive fairness of the dismissal is not based on the financial crisis that the respondent is in and its actions to restructure its operations to free itself from the crisis, but on the authority to dismiss and the procedure followed in dismissing the employees.

[52] The relevant provisions of the Systems Act on which the appellants base their challenge to the Acting Municipal Manager's authority are

sections 55, 56 and 67. The relevant parts thereof are quoted hereunder in full for a better understanding of the responsibilities of Municipal Managers and the framework within which they operate:

"55 Municipal managers

(1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for-

(a) the formation and development of an economical, effective, efficient and accountable administration-

(i) equipped to carry out the task of implementing the municipality's integrated development plan in accordance with Chapter 5;

(ii) operating in accordance with the municipality's performance management system in accordance with Chapter 6; and

(iii) responsive to the needs of the local community to participate in the affairs of the municipality;

(b) the management of the municipality's administration in accordance with this Act and other legislation applicable to the municipality;

(c) the implementation of the municipality's integrated development plan, and the monitoring of progress with implementation of the plan;

(d) the management of the provision of services to the local community in a sustainable and equitable manner;

(e) the appointment of staff other than those referred to in section 56 (a), subject to the Employment Equity Act, 1998 (Act 55 of 1998);

(f) the management, effective utilisation and training of staff;

(g) the maintenance of discipline of staff;

(h) the promotion of sound labour relations and compliance by the municipality with applicable labour legislation;

(i) advising the political structures and political office bearers of the municipality;

(j) managing communications between the municipality's administration and its political structures and political office bearers;

(k) carrying out the decisions of the political structures and political office bearers of the municipality;

(l) the administration and implementation of the municipality's by-laws and other legislation;

(m) the exercise of any powers and the performance of any duties delegated by the municipal council, or sub-delegated by other delegating authorities of the municipality, to the municipal manager in terms of section 59;

(n) facilitating participation by the local community in the affairs of the municipality;

(o) developing and maintaining a system whereby community satisfaction with municipal services is assessed;

(p) the implementation of national and provincial legislation applicable to the municipality; and

(q) the performance of any other function that may be assigned by the municipal council.

(2) As accounting officer of the municipality the municipal manager is responsible and accountable for-

(a) all income and expenditure of the municipality;

(b) all assets and the discharge of all liabilities of the municipality; and

(c) proper and diligent compliance with the Municipal Finance

66 Staff establishments

(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must-

(a) approve a staff establishment for the municipality;

(b) provide a job description for each post on the staff establishment;

(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and

(d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

(2) Subsection (1) (c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57.

67 Human resource development

(1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including-

(a) the recruitment, selection and appointment of persons as staff members,
(b) service conditions of staff;
(c) the supervision and management of staff
(d) the monitoring, measuring and evaluating of performance of staff
(e) the promotion and demotion of staff;
(f) the transfer of staff;
(g) grievance procedures;
(h) disciplinary procedures;
(i) the investigation of allegations of misconduct and complaints against staff
(j) the dismissal and retrenchment of staff, and
(k) any other matter prescribed by regulation in terms of section 72.
[Sub-s. (1) amended by s. 38 of Act 51 of 2002.]
(2) Systems and procedures adopted in terms of subsection (1), to the extent that they deal with matters falling under applicable labour legislation and affecting the rights and interests of staff members, must be consistent with such legislation.
(3) Systems and procedures adopted in terms of subsection (1), apply to a person referred to in section 57 except to the extent that they are inconsistent with that person's employment contract.
(4) The municipal manager must-
(a) ensure that every staff member and every relevant representative trade union has easy access to a copy of these staff systems and procedures, including any amendments;
(b) on written request by a staff member, make a copy of or extract from these staff systems and procedures, including any amendments, available to that staff member; and
(c) ensure that the purpose, contents and consequences of these staff systems and procedures are explained to staff members who cannot read."

[53] Section 106 of the Systems Act in terms whereof the MEC commissioned the Dekker Report reads thus:

*"**106 Non-performance and maladministration***
(1) If an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other

serious malpractice has occurred or is occurring in a municipality in the province, the MEC must-

(a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

(b) if the MEC considers it necessary, designate a person or persons to investigate the matter.

(2) In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), and the regulations made in terms of that Act apply, with the necessary changes as the context may require, to an investigation in terms of subsection (1) (b).

(3) (a) An MEC issuing a notice in terms of subsection (1) (a) or designating a person to conduct an investigation in terms of subsection (1) (b), must within 14 days submit a written statement to the National Council of Provinces motivating the action.

(b) A copy of the statement contemplated in paragraph (a) must simultaneously be forwarded to the Minister and to the Minister of Finance.

[Sub-s. (3) substituted by s. 18 (b) of Act 19 of 2008.]

(4) (a) The Minister may request the MEC to investigate maladministration, fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred or is occurring in a municipality in the province.

(b) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which the Minister requested the investigation and must simultaneously send a copy of such report to the Minister, the Minister of Finance and the National Council of Provinces."

[54] The argument presented on behalf of the appellants is that what is clearly absent from Sections 55, 66 and 67 of the Systems Act is the power of the *Municipal Manager* to initiate a retrenchment exercise or to retrench employees in the absence of a delegation or assignment from the *Municipal Council*. The attorney submitted that it does not appear that the Council at any stage assigned or delegated its power to

implement a retrenchment exercise to the *Acting Municipal Manager*.

[55] Counsel for the respondent has refereed us to Chapter 5 of the *Structures Act* which outlines the functions and powers of municipalities. She correctly pointed out that Section 83[1] of the *Structures Act* refers to the functions and powers assigned to municipalities in terms of sections 156[2] and 229[3] of the

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[1] (1) A municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution.
(2) The functions and powers referred to in subsection (1) must be divided in the case of a district municipality and the local municipalities within the area of the district municipality, as set out in this Chapter.
(3) A district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by-

(a) ensuring integrated development planning for the district as a whole;
(b) promoting bulk infrastructural development and services for the district as a whole;
(c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and
(d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.

[2] (1) A municipality has executive authority in respect of, and has the right to administer-

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
(b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.
(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-

(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

[3] (1) Subject to subsections (2), (3) and (4), a municipality may impose-

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties-

Constitution of the Republic of South Africa Act 1996 (Act 108 of 1996) while section 83(3)(a) to (d) of the structures Act lists the specific functions and powers of municipalities, and that section 4 of the Systems Act outlines the rights and duties of *Municipal Councils*. She submitted that none of the aforesaid provisions empower the *Municipal Council* to exercise the power to initiate a retrenchment exercise. Indeed, the rights and duties of *Municipal Councils* are general in nature and constitute a combination of policy and duties in respect of service delivery to the communities.

[56] In contrast with the general powers and policy functions of the *Municipal Council*, the *Structures Act* and *Systems Act assign* a hands on administrative role to the *Municipal Manager*. It is evident from the above quoted sections that a *Municipal Manager* is empowered to appoint, manage, effectively utilise and train staff[4]; maintain discipline; promote sound labour relations; to account for all income and expenditure of the municipality[5]. The *Municipal Manager* is also empowered to, within a policy framework approved by

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(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:

(a) The need to comply with sound principles of taxation.
(b) The powers and functions performed by each municipality.
(c) The fiscal capacity of each municipality.
(d) The effectiveness and efficiency of raising taxes, levies and duties.
(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

[4] Section 55 (1) (b) – (h)

[5] Section 55 (2)

the *Municipal Council* and subject to any applicable law, approves a staff establishment for the municipality and provide a job description for each post on the staff establishment[6].

[57] It is in my view logical that the power to appoint, discipline, manage, utilise and train staff should include the power to initiate a retrenchment exercise. However, even if this interpretation may be found to be incorrect, the facts of this case have shown that the Council of the respondent was at all times kept abreast of the developments and that at the Special Council Meeting in August 2004 noted that the decision to retrench lied with the *Acting Municipal Manager* and allowed the process to proceed. The Council also gave Seitisho additional time to engage in negotiations with a view to cure whatever defects that may have existed in the consultation process that took place before Seitisho's appointment. The argument therefore that the *Acting Municipal Manager's* actions should be found to be *ultra vires* is without merit.

[58] The next issue raised is that the retrenchments could only take place once there was a policy in place and that in this instance the respondent had no policy in place. It is not disputed, as the *Labour Court* also found, that there was a one page policy that existed at the respondent. According to Dekker, that policy was developed in compliance with the provisions of sections 55 and 56 of the *Systems Act*. The *Acting Municipal Manager* and the respondent's Council acted in terms of that policy. The revised policy that was not as yet approved by Council cannot be taken to have negated the

[6] Section 66(1)

existing policy before its approval. Furthermore, the fact that the policy in existence may have been inadequate in certain respects as Dekker testified does not mean that there was no policy in place. Appellants' contention therefore in this regard is also without merit.

[59] The last alternative argument relate to failure to comply with the directive of the MEC by the respondent. I find no fault in the *Labour Court's* finding that the appellant's argument in this regard is not persuasive. There is no provision in Section 106 of the *Systems Act* as it was then or elsewhere that gave the MEC's letter containing directives statutory powers. What the MEC was authorised to do was to submit a written statement to the *National Council of Provinces ("NCOP")***.** It remained up to the respondent whether the recommendations from the MEC were followed or not. Although some of the directives from the MEC required that the existing policy be revised, improved and approved, there is no evidence to suggest that the retrenchment exercise was conditional upon the MEC's directives. The retrenchment exercise had been initiated by the respondent and was never challenged. It is also important to note that the MEC had not taken any steps against the respondent for its failure to comply with his directives.

[60] This matter must be understood in the context that until the stage that an application was launched to challenge the retrenchment process, the parties entered into a settlement agreement in terms whereof they agreed that the dismissal letters be withdrawn, the parties to engage in further consultations outside the *Local Labour Forum*, the consultations be finalised by 29 October 2004, and that an attempt be made

to reach consensus and that if no consensus is reached the respondent would be entitled to initiate the provisions of section 189 of the LRA. It is apparent from the terms of the settlement agreement that *SAMWU* agreed to a retrenchment process, and agreed to a month's time frame to finalise the process. All that was to follow from here on was the consultation meetings to be held. The matters relating to the policy framework, and the authority of the Acting Municipal Manager to initiate a retrenchment were never an issue. In fact *SAMWU* agreed that the process should take place outside the *Local Labour Forum*. They cannot now be heard to complain that the *Local Labour Forum* was not revised, improved and approved as directed by the MEC, and use that as a bar to the retrenchment process. *SAMWU* made an election to continue with a process and their election was made an order of court.

[61] The submission that the respondent was obliged by the Placement Agreement to negotiate the new organograms at the Local Labour Forum is thus without merit. In my view the Placement Agreement only applied at the initial stage of the establishment of the Respondent when various municipalities were amalgamated. The process had long been finalised after the then new organogram served before the Local Labour Forum, agreement reached and placement made as agreed.

[62] It is clear from the evidence tendered that the respondent took the necessary steps to comply with the agreed court order. Requests were made to *SAMWU* to provide dates for consultation meetings. *SAMWU* did not respond to the requests. A meeting was held on 18 October 2004 at which the financial position of the respondent was presented and the voluntary retrenchment applications were discussed as agreed. Furthermore, another

meeting was held on 29 October 2004. This is the meeting that *SAMWU* representatives failed to attend. In my view, the conclusion by Seitisho that *SAMWU* delegation intentionally stayed away from the meeting in order to drag the process is not unreasonable. Seitisho's evidence that they knew very well where the venue of the meeting was and they could not have got lost was not controverted by any evidence. No explanation was placed on record about circumstances that could have caused them not to find the venue of the meeting and where they had been.

[63] The attorney for the appellants contended that it was not open to the respondent to simply terminate the contracts of the individual employees when the period set aside for consultations came to an end. He argued that the settlement agreement stipulated that the respondent had to *"formally initiate a retrenchment process in terms of section 189"*. By this submission he meant that after the consultation for retrenchments had been finalised by 29 October 2004 and there being no consensus, then the respondent was obliged to issue a formal notice in terns if section 189 of the Act and invite the parties to participate in the process. Surely, this interpretation cannot be what was intended. If that was the case, what would have been the point of having a consultation in the first place. It would make no sense and also be a waste of time to undergo the same process twice with the same result. Such interpretation would also defeat the purpose of the clause in the agreed court order relating to the voluntary retrenchments and the entire spirit and purpose of the agreed court order.

[64] In relation to the relief for procedural unfairness, the appellants contended that they should have been awarded compensation

equivalent to twelve month's remuneration. In support of this contention, the appellants referred us to the alleged *mala fide* conduct of the respondent before the signing of the settlement agreement and also that they were forced to approach the *Labour Court* on urgent basis to prevent a patently unfair dismissal. Unfortunately no evidence relating to the conduct of the respondent and the circumstances that led to the bringing of the urgent application was tendered in the *Labour Court*. The *Labour Court* in arriving at a decision to award no compensation was exercising a discretion. Its reasons for the decision are in my view reasonable. Its decision should therefore not be tempered with.

[65] As regards costs, I am of the view that it would be in accordance with the requirements of the Law and fairness that each party should pay its costs as ordered by the Labour Court. The same would apply in this Court.

In the result the following order is made:

(1) The appeal is dismissed.

(2) Each party is to pay its costs.

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Tlaletsi AJA

I agree.

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Waglay ADJP

I agree

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Khampepe JA

Representations:

For the Appellants	**:**	**Mr J White**
Instructed by	**:**	**Cheadle Thompson & Haysom Inc.**
For the Respondents	**:**	**Adv R Nyman**
Instructed by	**:**	**L Scholtz-Muller**
Date of judgment	:	29 January 2010