IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

DATE: 12/11/2010

CASE NO: J2298/10

In the matter between

SASBO **Applicant**

and

STANDARD BANK OF SOUTH AFRICA **Respondent**

_____

J U D G M E N T

LAGRANGE J:

Background

[1] On 12 November I handed down an *ex tempore* judgment in this matter and provided brief reasons for my judgment, noting that I may supplement them. The reasons for my judgment and order are set out more fully below.

[2] On 8 November 2010, the applicant, SASBO, a union with members employed by the respondent, Standard Bank, brought an urgent application under section 189A(13) of the Labour Relations Act 66 of 1995 ('the LRA') seeking, *inter alia*, the following relief:

"*(a) Compelling the respondent to comply with Section 189A of the Labour Relations Act 66 of 1995 ('the LRA') and the Code of Good Practice on Dismissal based on Operational Requirements prior to retrenching any of the applicant's members.*
(b) Interdicting and restraining the respondent from following the expedited or 'urgent' process of consultation under exceptional circumstances."

[3] The applicant also sought an order compelling the bank to disclose all relevant information relating to details of all alternative measures to avoid retrenchment, with reference to expected savings on specific items of expenditure, and measures to mitigate the adverse effects of retrenchment. Lastly, it sought an order compelling the bank to engage in a meaningful joint consensus seeking process as required by the Code.

[4] Prior to the hearing of the matter on 11 November 2010, the parties were encouraged to try and find common ground on a way forward by devising an agenda and timetable to complete the consultation process insofar as there were unresolved issues between them. This process appears to have been partially successful as the parties were able to achieve a degree of consensus which was taken from a proposal made by the bank during the course of the morning. The portion of that proposal to which SASBO agreed reads follows:

"*The bank proposes the following timetable for further consultation.*

4.1 Your client be given until 12:00 on Friday 19 November 2010 to seek further clarity or information arising out of the information given to your client on Tuesday.

4.2 Secondly, the bank will respond to any further request by close of business on Monday 22 November 2010.

4.3 Your client is invited to a consultation meeting on Tuesday 23 November 2010 to consult on the issues raised by, or in the information given, request and response, and on the outstanding

matters referred to in the founding and replying Affidavits, including the number and profile of affected staff, the estimation of the cost saving from alternative measures, and the projection of the estimated cost savings brought about by the retrenchment, bonuses of the financial year 2010/2011, nonexecutive directors' fees, the use of labour brokers in the IT department."

(emphasis added)

[5] What the parties were unable to agree upon was:

a) Whether or not the bank could continue to complete the individual consultation process with the remaining 11 employees, who were the only remaining potentially affected employees who had not been consulted individually.

b) Whether or not the further steps agreed upon did not affect the processes completed to date and did not affect the 60 day redeployment period due to be completed by the end of December or the proposed date of termination of 31 January 2011.

[6] The union wanted the individual consultation process involving the remaining 11 employees who had not yet been engaged it, to be halted pending the completion of the other agreed steps. It also did not want the timetable for retrenchments to be set in stone, but argued that the final termination date should remain flexible.

[7] The timetable adopted by the bank was not unilaterally decided but comes from a collective agreement concluded between the parties in 2006 entitled 'Agreement on the handling of dismissals based on Operational Requirements (DSORs)'. In terms of that agreement consultations for more than 14 SASBO members were to take place at NCF meetings starting with a placement of restructuring item on the agenda of such a meeting, which the parties deemed would constitute compliance with section 189(3) of the LRA.

[8] Further, the DSOR agreement ('DSORA') provides the following consultation timetable:

"Consultation that takes place in the contemplated manner must,

unless otherwise agreed, be concluded within 10 working days from the date on which the union receives the invitation to consult. If the union should require more information or further clarity, then the request for such information/clarity should reach the bank within 5 working days of the date on which the union receives the invitation to consult. Once the bank responds to the union's request for further information or clarity, the union must conclude the consultation with the bank within 3 working days from the date on which the bank furnishes the union with further details. These timelines may be extended by agreement, where exceptional circumstances justify the process."

[9] Although the preamble talks about consultations with the union taking place within a reasonable time (see below), it is clear that the union committed itself to the above timetable when it signed the agreement and specifically agreed that it would only be extended by agreement.

The consultation process

[10] In this instance, there was no other agreement reached between the parties about an alternative timetable. The bank claims to have acted in terms of the timetable set out in DSORA. Indeed, the first consultation meeting was held on 11 October and the second, ten days later on 21 October 2010.

[11] At the first meeting the bank provided a Powerpoint presentation which met most of the requirements of section 189(3) , though failing in one important respect, namely to provide the number and profile of staff who might be affected. This was only provided at the second meeting where it turned out that number of potential retrenchments was considerable and unlike the scale of any previous retrenchment. The last time the union had been involved in a retrenchment exercise it involved retrenchments roughly one tenth of what was proposed on 21 October 2010. SASBO argued that DSORA was never intended to address large scale

retrenchents, but the preamble to the agreement does not qualify in any way the size of the potential retrenchments which it applies to, nor is such a limitation to be found anywhere else in the agreement. It merely states that:

> "*The bank and the union agree to the following regarding Dismissals based on Operational Requirements.*
> *This agreement supercedes all previous arrangements between the union and the bank regarding DSORs. The parties agree that where the DSORs are conducted in the manner contemplated in this agreement, the requirements of section 189 and 189A will have been sufficiently met.*
> *The parties acknowledge that any DBORs which are effected will be a last resort and the bank will attempt as far as possible and practicable to avoid such dismissals*
>
> *The parties acknowledge that section 189A of the LRA contemplates a period of 60 calendar days within which no DBORs may be effected and a further period of notice which must preceded the DBORs. The parties acknowledge that in terms of the bank's policy, the standard notice period of one (1) month will be applicable in all DBORs. Accordingly, the bank will first conclude consultations with the union and affected employees (provided consultations with the union are concluded within a reasonable time) and then implement redeployment efforts for a 60-day period.*
> *Should redeployment efforts fail, then one (1) month's notice will be given to affected employees. Redeployment efforts will continue to apply during the one-month notice period. "*

[12] SASBO also complained in its founding papers that the bank did not provide it with the target saving to be achieved in the process and an estimation of the cost saving from alternative measures that could be adopted to avoid or minimize retrenchment. This is an issue I will return to later.

[13] Between the two consultation meetings on 11 and 21 October 2010, SASBO sent a list of pertinent questions to the bank which were answered the day before the second meeting.

SASBO had sent these questions to the bank on 15 October, within the timetable envisaged in DSORA. It should be mentioned that although the questions raised included a request for information on all alternative measures the bank had implemented it did not specifically ask for the targeted savings the bank expected to achieve.

[14] On 16 October SASBO raised a further concern about what might happen if the consultations were not concluded at the next meeting on 21 October, particularly in the light of the banks' stated intention to notify affected staff on the 22 October. This was an e-mail prefaced by a reference to an earlier e-mail saying that the unioin had additional concerns they wanted to raise. The pertinent portion of the email reads:

> "*What does the bank believe will be the position if consultations are not concluded on Thursday, taking into account that staff have already been told that those affected will be advised on Friday 22 October, one day after our consultation session. We are extremely concerned about the style of communication to staff as it seems SASBO will simply be presented with a fait accompli, to which SASBO will agree, and then the bank can happily proceed. What is the bank's intention once consultations have been concluded and finalised with the staff who are affected*."

The e-mail goes on to say:

> "*Surely their services cannot be terminated before the end of the redeployment period.*"

[15] It is clear the union had a genuine and not unfounded concern that an impression might have been created in the eyes of its members that it would simply accede to whatever the bank proposed. The bank apologized for a manager who had improperly mentioned the dates for the retrenchment phases had been shared with SASBO at the first meeting. Importantly, in answer to SASBO's question about the timetable, the bank reiterated its intentions regarding the envisaged stages of the retrenchment. It also indicated its view that if it responded to SASBO's concerns and allowed time for consultation to address further concerns it would have consulted 'sufficiently' with the union. After receiving management's response on 19 October 2010, the union ought not to have been in any doubt that management was not proposing to extend the consultation process and was intending to embark on the individual consultation phase on 22 October 2010. The union did not respond to this by way of stating what its attitude would be if management proceeded to follow its timetable, if it was not satisfied that there had been sufficient consultation after the meeting on 21 October 2010.

The meeting of 21 October 2010

[16] At the scheduled meeting on 21 October, which would have been the end of the ten day consultation period provided for by agreement in DSORA, the bank made its intentions about the prospective number of retrenches clear. The upper limit of possible retrenchments was estimated to be in the region of 1700 management staff. In the course of a further presentation by the bank a number of issues were addressed which were set out in the banks answering affidavit. In summary, these were:

(a) information requested by SASBO on 11 October was provided;
(b) aternatives proposed by SASBO were dealt with
(c) analternative of providing an additional month for re-deployment was declined and reasons given;
(d) a alternative of providing a 13th cheque instead of an additional month's redeployment was agreed to;
(e) labour brokers were dealt with;
(f) the bank's business case was restated in more detail;

(g) measures to reduce costs without retrenching were dealt with;
(h) positions and numbers of staff whom the exercise might impact on were provided;
(i) each division of the bank's rationale for reducing costs was to be provided and the case for a number of divisions was set out, and
(j) the rationale for the need to retrench and alternatives already taken was set out.

[17] The bank also presented again the phases of consultation as it envisaged them. SASBO disputes none of this on the papers. Tellingly, it makes no claims in its founding affidavit that it made any demand for the extension of the timetable for consultation or proposals to defer the individual consultations with the potentially affected employees until further consultations had taken place. Ebersohn, SASBO's Assistant General Secretary, who deposed to the union's affidavits only states somewhat baldly in his replying affidavit:

> *"I asked the question: 'What would happened if this urgent process is not completed by 21 October 2010?" The Respondent refused any extension."*

[18] It is reasonable to suppose that had the union pertinently objected to the retrenchment process proceeding on the bank's timetable, this would have featured prominently in the founding affidavit. The union's reticence in engaging the bank is also suggested by another statement in the founding affidavit. After noting that SASBO '*…detected a change in approach to dismissals based on operational requirements and striving for profit*', during the meeting of 21 October 2010 and making comments about the shareholding of a major Chinese bank in Standard Bank, Ebersohn states without elaboration:

> *"The applicant detected that the respondent was acting hastily and in a high handed manner in this retrenchment.*"

[19] However, there is nothing to indicate that the union expressed this view to the bank. The very language used in the affidavit creates an impression that SASBO was observing the

bank's behavior in the consultation process without engaging directly and unequivocally with the bank over areas of disagreement. Asking questions without reacting to the answers or without indicating that a response will be forthcoming can create a false impression that one is not dissatisfied with the answers given.

[20] The bank also averred that only two issues remained outstanding at the end of the discussions which ensued, namely an issue concerning conversion of pensions and a request to extend the date for finalizing re-deployment until February 2011. The union denies there were only two issues outstanding and in particular avers it insisted on meaningful joint consultations with a view to seeking consensus. Again, this a claim made only in reply and ought to have featured prominently in the founding affidavit if SASBO had indeed been rebuffed when it made such claims. It also claims it requested various information relating directors' remuneration, bonuses and the use of labour brokers in the IT department. In its papers before court the union contended the bank had failed to provide critical information that the alternatives were properly considered and that retrenchment was a last resort. This only first surfaced in SASBO's letter over a week later, once the individual consultations were already well underway.

[21] The union also does not dispute that when it was asked at the end of the meeting if there were 'any further questions' its answer was 'no'. How the meeting ended is important to examine. The union was aware that the bank was planning to send out letters to all potentially affected employees with a view to commencing individual consultations with them. This is the first step in a 60 day 're-deployment' phase in terms of the agreement. It is clear that this phase ought only to be embarked upon after the conclusion of the consultation phase with the union which would traverse the matters set out in section 189(2) of the LRA, yet the union did not make an attempt to decisively intervene at this point.

[22] At the meeting on 21 October 2010, SASBO was given a copy of a draft letter that the bank intended to issue to the affected employees the following day. The letter sets out again the banks reasons and proposals and announces its intention to consult with the

individual employee, particularly on the impact it might have on them. There are two important paragraphs on the first page of the letter which must be specifically mentioned, namely:

> *"The bank has already consulted SASBO regarding the dismissals based on operational requirements, and the possible affect thereof on positions. SASBO is in principle opposed to any form of dismissal based on operational requirements. Please note that the Labour Relations Act requires consultation, and not agreement with SASBO regarding dismissals based on operational requirements."*

and

> *"Despite the fact that the consultation requirements of the Labour Relations Act have been met through the union consultation, I nevertheless wish to meet with you to inform you of the process followed so far, and what is being envisaged.*"

(emphasis added)

[23] The union claims in its reply that it was impossible at 17h00 on 21 October to 'haggle' over the wording of the letter, taking into account that the letters when out the next day. It also said there was no consensus on the issue. Once again this explanation for not objecting to the letter is only offered in reply. The union fails to explain why it did not specifically tackle the bank on the two paragraphs above which would strongly suggest to the reader that the first phase of consultation was complete. SASBO makes no allegation that it asked the bank not to send out the letters because that would be premature, nor that

it requested the letters to be amended so as not to create the impression that consultations between itself and the company had concluded.

[24] It also noteworthy that at the end of the meeting on 21 October 2010 the union did not seek to extend the consultation process. It could well have insisted on further consultation over the following days even in terms of DSORA, which specifically envisages three further days for consultation after receipt of further details by the bank. It was only on 28 October 2010, a week later, that the union states more forceful opposition to the process moving forward and demands meaningful consultation. The union could also easily have given the bank an ultimatum not to proceed to issue letters to the individual employees without further consultations taking place to deal with issue on which no consensus had been reached. As mentioned above, I cannot place much reliance on the statement that the bank refused to extend the process when this was only stated in the replying affidavit.

[25] Consultation is a two way street. If the employee party to the consultations does not assert its rights at the appropriate time, the employer cannot be entirely blamed for shortcomings in the process.[1]

---

[1] See ***Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*** **(1999) 20** ***ILJ*** **89 (LAC)** at 96, viz"

"[28] The achievement of a joint consensus seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under s 189(1), (3), (5), (6) and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process (cf NEHAWU v University of Fort Hare [1997] 8 BLLR 1054 (LC); UPUSA & others v Grinaker Duraset [1998] 2 BLLR 190 (LC) at 204D; Fowlds v SA Housing Trust Ltd & another case no J561/98 (LC) at para [11]). It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues discussed. These different possibilities depend on the facts of each particular case.

[29] The important implication of this is that a mechanical, 'checklist' kind of approach to determine whether s 189 has been complied with is inappropriate. The proper approach is to ascertain whether

1999 ILJ p97

FRONEMAN DJP

the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved (cf Maharaj & others v Rampersad 1964 (4) SA 638 (A) at 464; Ceramic Industries Ltd t/a Betta Sanitaryware & another at 701G-702H (BLLR), 676B-677C (ILJ); Ex parte Mohuloe (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H-1138D).

[26] If SASBO believed that the process it engaged in was so wanting, it should have made this point more forcefully at the second consultation meeting rather than waiting a week to put it in writing. It is difficult to understand why the union only started to emphasise the issues raised in its letter of 28 October, nearly a week after the letters to individual employees had already gone out. Similarly, if the union representatives were so shocked by the proposed number of retrenchments, the question arises why it did not seek to extend the consultation process between it and the bank as soon as it became aware of the scale of the proposed retrenchments.

[27] The seemingly acquiescent approach of the union is apparent also in the newsletter it issued to its members the day after receiving the devastating news at the second consultation meeting. The letter notes that it held a second round of consultations with the bank and that it was stressed to the bank that it did not agree with its planned action and that people should not be sacrificed for increased profitability. Having set out SASBO's principled stance the newsletter goes on to say that '*…the bank's plan for this exercise is as follows and is in line with existing agreements between Sasbo and the bank*" (emphasis added). This is not how one would have expected SASBO to have dealt with the question whether the individual consultations were premature if it believed that to be the case. Nowhere in the letter does it mention a request to extend the consulation process: the only requested extension of the process which is mentioned in the letter relates to the re-deployment phase, which is something that was reiterated in court.

Compelling further consulatation

[28] Before looking at the more specific issues pertaining to consultation in this retrenchment exercise, I wish to address the union's request for blanket relief compelling the employer to abide by the provisions of section 189A. The true value of the kind of interdict envisaged by section 189A(13) is that it provides employees with an opportunity to make sure that retrenchment consultations are properly conducted before retrenchments are implemented. Although claims for compensation as a result of an unfair procedure are still possible, where appropriate, the options of approaching the court on an urgent basis

or of threatening strike action are ways of remedying defective consultation processes at the time such interventions can make a difference to the outcome.

[29] The introduction of the 189A procedure has a short-term preventative aim of pro-actively fostering proper consultation, as opposed to a long term remedial one of compensating employees, following a belated 'post-mortem' examination on what was wrong with the process, long after workers have been retrenched. For this reason, blanket orders which lack specificity about what the parties ought to do are of little value in my opinion and, as far as possible, orders made under section 189A(13) should be crafted to address the defects in the process.[2]

---

[2] I agree also with the analysis of Van Niekerk AJ, as he then was, regarding the flexibility of remedies in section 189A(13) in his judgment in ***Banks & another v Coca Cola SA - A Division of Coca Cola Africa (Pty) Ltd*** **(2007) 28 *ILJ* 2748 (LC),** where he stated at 2755-6:

"[15] It is well established that the aim of the consultation process established by s 189 is to avoid dismissal, or at least to effect a reduction in the number of dismissals and to mitigate the effect of dismissal on affected employees. The nature of the process is equally well established - the parties are required to engage in a problem-solving or joint consensus-seeking exercise (see s 189(2)).

[16] The four remedies established by subsection (13) afford the court a wide discretion. The first two remedies (a compliance order, and an interdict against dismissal) clearly contemplate intervention by the court before a dismissal takes effect, the latter (reinstatement until there is compliance with a fair procedure, monetary compensation) contemplate intervention after an employee has been dismissed. This provision is to be read with the time-limits established by subsection (17). These contemplate intervention by the court at a time that is appropriate given the circumstances of the case, and having regard to the particular remedy that is sought.

[17] The requirement in subsection (17) that an application be brought 'not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed', read with subsection (13), places what might be termed an 'outside limit' of 30 days post-dismissal or notice of dismissal within which the application must be brought. However, the wording of the subsection and the structure of s 189A generally envisage that the court may be asked to intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, for example, when an employer purports to dismiss employees without commencing any consultation with them or their representatives.

[18] In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged, and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)(a), (b) and (c), then compensation as provided by para (d) is the more apposite remedy.

[19] In Insurance & Banking Staff Association & another v Old Mutual Services & Technology Administration & another (2006) 27 ILJ 1026 (LC), Pillay J came to a similar conclusion. In that case, the court noted that although the timing of a s 189A(13) application is not connected to the date when the procedural unfairness occurred, it is a relevant consideration as to whether the application should succeed. More specifically, the court held that if there is an undue delay between the occurrence of the procedural

[30] I accept that the process was brief and not as substantial as it might have been as a genuine joint consensus seeking process on issues such as the extent to which retrenchments might be avoided or minimized. Thus there is some merit in my view in SASBO's complaints set out in its letter of 28 October 2010, that in the absence of a costing of the savings to be achieved by retrenchment and other savings measures that might be implemented it was difficult to meaningfully evaluate alternatives. In order to understand the feasibility or lack thereof of alternative proposals in context it is necessary to evaluate, in the current retrenchment exercise what the expected cost savings aimed at by the bank will be. In turn this enables any alternative proposals to be measured and compared with that financial objective. It is in that context that meaningful discussion of alternatives can take place. It is difficult to see objectively how the parties could have meaningfully engaged with a view to reaching consensus without this material available. The provision of proper information in this regard, is obviously also important to demonstrate why there is a need to retrench as opposed to adopting other cost savings measures. Accordingly, I find that the consultation process to date has only partly met the requirement of joint consensus on ways to avoid and minimize retrenchment, but the proposal by the bank goes a long way to meeting this.

[31] In its proposal made on 12 November 2010, the bank has now effectively offered to provide the information and consult on the issues identified in paragraph 4 of its letter, which SASBO accepts. The bank in fact undertook to do this irrespective of what the court might have ordered. I am satisfied that the proposal set out in paragraph 4 of the banks letter of 11 November 2010 should address the outstanding concerns of the union over matters on which it believes there was insufficient consultation, though I believe provision should be made for two more meetings within a short period to ensure that discussions are exhausted in order to remedy the limited scope of consultation on these issues thus far.

---

flaw and the launching of the application, the remedies established by subsection (13)(a) -(c) would be inappropriate (at 1031G-H). Similarly, these remedies are not appropriate once the retrenchment process is completed (at 1031H-I)."
;

[32] Therefore, with the modifications set out in the order below, I think the contents of paragraph 4 of the bank's proposal should resolve any outstanding concerns the union has, even if consensus might not necessarily be achieved. The modification I have made is provide for a slightly extended period of structured consultation to try and ensure that the parties really try and engage with a common purpose to try and reach consensus on ways to minimize or avoid retrenchments if feasible, rather than merely communicating by means of 'question and answer' session. Whether the opportunity is constructively used will depend on both parties.

Postponing individual consultations

[33] The union has requested that the process of individual consultations in respect of the remaining 11 employees who have not been engaged should be halted pending further consultation between the union and the bank. In view of the fact that these are only a handful of the affected employees it does not seem to make sense to me to prevent those interviews going ahead. If any broad measures are agreed upon by the bank and the union to avoid or minimize retrenchments, there is no reason why these 11 employees would be any less eligible to benefit from such measures than the employees who have already been consulted by the bank.

[34] Had the union made a more serious request that the bank should not proceed with these individual consultations before consultations with it could be concluded, and if only a small number of individual consultations taken place, the relief sought might have been more appropriate.

Extending the re-deployment period

[35] The union also requests the court to order an extension of the whole timetable so that any retrenchments will only take place at the end of February. This is a matter which the parties have been unable to reach consensus on, but on which the bank has offered

additional financial compensation in an attempt to provide some financial amelioration in lieu of an extended retrenchment date. In the context of a s 189A(13) application unless such an extension is necessary for the completion of consultations it does not seem appropriate for the court to simply order an extension of the proposed retrenchment date. In the current circumstances, any further consultation which does occur, does not require an extension of a termination date some months hence.

When is a union confronted with a *'fait accompli'* in the context of retrenchments?

[36] A final comment must be made about the question of employees being presented with a *fait accompli* in the context of retrenchment exercises. It is trite law that when employees are confronted with a *fait accompli* any subsequent consultations may be fatally flawed.[3] A *fait accompli* in the context of retrenchments s manifests itself typically when an employer takes unilateral action which forecloses the prospect of meaningful consultation on one or more of the issues in respect of which it ought to consult. Under such conditions a union party that is asked to consult where the employer has taken such action may rightly cry 'foul'. However, if management has only proposed to take certain action and the union party does not pertinently raise its voice in protest against such plans, then if management does proceed and the union does nothing to intervene at that juncture, the union is less able to justify a belated complaint about the step taken. In this case, one gets a sense that the union took the proposed management time line, including the planned date for sending out letters to be a *fait accompli*, which it could simply make a note of to itself and keep 'in reserve' as a point to be used against the bank on a later day, rather than tackling the issue at the time and giving the employer an ultimatum to withdraw the offensive step. Under such circumstances, if an employer still proceeds, it

[3] See, for example, ***SA Clothing & Textile Workers Union & Others v Discreto – A Division of Trump and Springbok Holdings*** **(1998) 19 *ILJ* 1451 (LAC);** ***General Food Industries Ltd v Food & Allied Workers Union*** **(2004) 25 ILJ 1260 (LAC)**; ***National Union of Mineworkers v De Beers Group Services (Pty) Ltd & another*** **(2009) 30 *ILJ* 1880 (LC);** ***Robinson & others v Price Waterhouse Coopers*** **(2006) 27 *ILJ* 836 (LC),** and ***National Union of Metalworkers of SA & others v Dorbyl Ltd & Another*** **(2004) 25 ILJ 1300 (LC)**

runs the risk that it might rightly be accused of thwarting a meaningful consultation process by its unilateral action, unless it can show that it could not reasonably have been expected to consult further on that issue at that stage.

[37] In closing, it must be mentioned that although a number of issues regarding the need for retrenchment and alternatives were mentioned in court and in the papers, the question of whether the proposed retrenchments will be substantively fair if they are implemented is not a matter for the court to consider under section 189A(13) proceedings.

Order

[38] In the light of the reasoning above, an order is made as follows:

a) The undertakings in the banks letter to SASBO of 11 November 2010 are placed on record.
b) In the event that the process envisaged in paragraph 4 of the letter does not result in consensus on the question of ways of avoiding or minimizing retrenchments, the parties are directed to hold two further meetings at least one working day apart before 1 December 2010 in order to allow more time for consulting and attempting to reach consensus.
c) In such meetings the parties must keep a record of proposals made and responses thereto, and of information requested and provided.
d) There is no order as to costs

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of Hearing : 11 November 2010

Date of Judgment: 12 November 2010

Attendances

For the applicant: C Roodt instructed by Smit Sewgoolam Inc

For the respondent: T Bruinders, SC instructed by Bowman Gillfillan Attorneys