IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 440/14

In the matter between:

GENERAL INDUSTRIES WORKERS UNION OF SOUTH AFRICA ('GIWUSA') **First Applicant**

THE PERSONS LISTED IN ANNEXURE "A" **Second to Further Applicants**

and

AFRICAN EXPLOSIVES LIMITED **Respondent**

Heard: **25 March 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be 7 November 2021 at 10:00**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] GIWUSA seeks an order declaring the dismissal of the individual applicants (the second to further applicants) from the respondent's employ on account of its operational requirements to be procedurally and substantively unfair.

[2] This matter initially came before the Court by way of a statement of claim, and was enrolled for trial on 3 August 2020. In the light of the prevailing National State of Disaster, the parties had following a directive by the Court, filed a Joint Practice Note, in which it was agreed that the matter should be disposed of on

affidavits as an opposed motion. All three sets of affidavits were filed and exchanged. Only the respondent had filed its heads of arguments when the matter was heard on 25 March 2021. At the conclusion of the hearing, the applicant was granted further leave to file its written heads of argument. The respondent in turn also filed and served its replying heads of argument.

Background:

[3] The background to this dispute to the extent that it is not seriously disputed is as follows;

3.1 The individual applicants were employed by the respondent in various positions within its Modderfontein operations. The respondent as its name suggests, is in the business of manufacturing blasting explosives and detonators, and primarily services the gold and diamond mining industry in the Republic..

3.2 The respondent has a long history in the business, and over the years, there has been a decline in the local mining industry, and moreover, a decrease in the South African explosives market. A combination of these factors together with an increased competitiveness in that market compelled the respondent to seek business opportunities elsewhere in the world, and to adapt to the changing market conditions.

3.3 Adapting to market conditions involved having to modernise the respondent's operations. In 2006, the respondent commenced a project to construct an Initiating Systems Automated Plant ("ISAP") at its Modderfontein plant. With this project, the respondent sought to modernise its operations, and put in place a high volume and quality manufacturing plant, particularly in the production of its shock-tube assembly. This had to be done in the light of the need to move away from old manufacturing methods, which had over time become inefficient and dangerous. Furthermore, the intention was to make the respondent more competitive both in respect of costs and the quality of the output.

3.4 According to the respondent, it was contemplated that the introduction and implementation of the ISAP Project would not only culminate in the creation of more employment opportunities, but also the cessation of the manufacturing of certain products such as capped fuse detonators, electronic detonators, and lead azide (a substance used to effect detonators). These plans meant that certain positions responsible for the old method of production would become redundant, and it was contemplated that some of the affected employees would be accommodated in the new ISAP plant.

3.5 In 2012, the Initiating Systems (IS) business (which was mainly the detonator part of the business) was located in two areas in Modderfontein, *viz.* the old DETS Campus and the newer Fuse Campus. The ISAP was constructed on the newer Fuse Campus. Approximately 770 employees were employed at DETS Campus, whilst 779 were employed at the newer Fuse Campus.

3.6 The respondent contends that following its analysis of the conditions, it had concluded that it was no longer viable for it to continue with the manufacturing process at the old DETS plant, as a result of costs having escalated, whilst there was a reduction in the margins. Two main steps were taken by the respondent. The first was to restructure ISAP to make it more efficient. The second was to close the DETS Campus which was historically responsible for the manufacturing of the detonators for a period of approximately 90 years.

3.7 As part of the ISAP, all the shock-tube, electronic assembly and associated activities were to be transferred to the newer Fuse plant. Furthermore, the manufacturing of products such as Lead Azide, Fuse-heads, Carricks and IEDs, Starters and Capped Fuse accessories was to come to an end. The employees from that campus were to be moved to the newer Fuse campus and others transferred to a new assembly plant (The SF2). From these steps, it was envisaged that as a result of redundancy, 630 employees from the old DETS campus were to be affected.

3.8 On 22 February 2013, the respondent issued a Notice in terms of section 189(3) of the Labour Relations Act[1] (LRA). The Notice *inter alia* recorded the reasons for the contemplated restructuring as being linked to the design performance increase in the ISAP, and the lack of profitability of a number of older products. It set out the alternatives that were considered and the steps taken in that regard which involved the redeployment in existing vacancies or those created from the restructuring process. An approximate number of 600 employees were envisaged to be affected. The proposed selection criteria was set out and it was indicated that 193 employees were retrenched in the preceding 12 months.

3.9 On 19 August 2013, the respondent together with GIWUSA, CEPPWAWU, SACWU and Solidarity agreed on the appointment of a facilitator in terms of section 189A(4) of the LRA. The facilitation process was to commence on 20 August 2013.

3.10 Several consultation meetings were held between 20 August 2013 and 25 October 2013. During that period, the respondent had made presentations on the contemplated restructuring; the impact on the employees; and identified the various plants to be affected. The consultation process took the form of question and answer sessions.

3.11 The respondent had also disclosed its financial statements which were shared with the unions' financial experts, and who had in turn prepared a report. Further information requested by GIWUSA was also furnished, and discussions had continued in regards other matters for consultation.

3.12 On 18 October 2013, the respondent communicated a proposed selection criteria to the trade unions. A further consultation was held on the issue on 19 October 2013, where GIWUSA and CEPPWAWU had made joint submissions on a range of alternatives to the retrenchment, including; back-up facilities for the ISAP Plant in a form of three

[1] Act 66 of 1995, as amended. The Notice is attached to the respondent's answering affidavit as Annexure 'MM3'

additional cells incorporated into the new SF2 plant which could save jobs; the ceasing of contractors or alternatively to be phased out; the transfer to other departments and sites; moratorium on external recruitment; training lay-off schemes; and the re-opening of the training centre.

3.13 Further facilitation meetings followed on 20 and 25 October 2013. In the latter meeting, the respondent announced its decision to implement a selection criteria based on LIFO with the retention of skills per plant, since an agreement could not be reached on the criteria.

3.14 Aggrieved, GIWUSA had then on 4 December 2013, approached this Court on an urgent basis in terms of section 189A(13) of the LRA, seeking a declaratory that the retrenchment process was procedurally unfair, and further ordering the respondent to follow a proper process.

3.15 That application was opposed, and was subsequently dismissed by Prinsloo AJ (as she then was) on 5 December 2013. The dismissal of the individual applicants followed on various dates in December 2013. GIWUSA subsequently referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) and when it could not be resolved, it was then referred to this Court.

<u>The primary dispute and the legal framework:</u>

[4] The issue of procedural fairness of the retrenchment was disposed of as a result of the Court order of 5 December 2013, when the section 189A(13) of the LRA application brought by GIWUSA was dismissed. I further did not understand GIWUSA's case to be that the need to restructure the respondent's operations as well as the need to retrench was in dispute. In fact, GIWUSA could not have argued that there was no need to retrench in view of its main arguments as shall be demonstrated in this judgment, which was that other employees rather than the individual applicants ought to have been retrenched. GIWUSA's case ultimately turned on whether the respondent had in the absence of an agreement, applied a fair and objective selection criteria, and furthermore, whether it had applied that criteria in a consistent manner.

[5] The provisions of Section 189(2) of the LRA require an employer and the other consulting parties to engage in a meaningful, joint consensus-seeking process, and attempt to reach consensus on the method for selecting the employees to be dismissed[2]. This further implies that the employer must consider and respond to the submissions made by the other consulting parties. As required by section 189(3) of the LRA, the employer must state reasons if the proposals made by the unions are not acceptable[3]. Where the parties cannot agree on the method of selection, the employer is entitled to implement a criteria, which must however be fair and objective[4].

[6] LIFO is generally accepted as fair and objective criteria. Where appropriate however, a combination of LIFO with retention of skills, qualifications, merit, conduct, performance, experience, and adaptability will equally be deemed to be fair and objective[5]. It is also accepted that 'bumping' forms part of LIFO as a method for selection of employees to be retrenched[6]. The overriding consideration however is that the employer must objectively provide valid measures and relevance of any such differentiation. This is so in that the employer's subjective preferences, or arbitrary, capricious and inconsistent criteria or even other discriminatory or irrelevant factors, would invariably render selection of employees for retrenchment to be unfair[7].

<u>The submissions and evaluation:</u>

[7] As already indicated, the respondent had implemented LIFO with the retention of skills per plant as the preferred criteria. Seven plants were to be closed and it was envisaged that employees from those plants would be retrenched. Three

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[2] See also Item 9 of Code of Good Practice on Dismissal based on Operational Requirements

[3] *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd* (JA31/2002) [2005] ZALAC 14.

[4] Section 189 (7) of the LRA reads as follows:

> The employer must select the employees to be dismissed according to selection criteria -
> (a) That have been agreed to by the consulting parties;
> (b) If no criteria have been agreed, criteria that are fair and objective.

[5] See *NUM & others v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC); *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River* [2012] 33 ILJ 1729 (LAC); *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd* (JS529/14) [2016] ZALCJHB 344 (30 March 2016) (per Van Niekerk J) at para 10

[6] See *Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 (22 July 2014) at paras 22 -23 and 30

[7] See *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC); *Telkom SA SOC Limited v van Staden and Others* (JA68/2018) [2020] ZALAC 52; (2021) 42 ILJ 869 (LAC) at para 34

other plants were however to be moved to SF2, and LIFO was to be applied subject to the retention of skills, since the total number of employees in those plants to be moved to SF2 was higher than required.

[8] The manner of implementation was that since some plants were to be closed, employees that were to be affected were those who did not have the skills or qualifications to operate in the new plants. In other instances, these employees could not be redeployed, as this would have caused disruptions to the operations in those plants.

[9] In line with the above approach, the respondent therefore took a decision that the positions in the SF2 assembly plant and ISAP required suitably qualified and skilled individuals with a minimum level of education. To this end and with a view of retaining skills, the respondent took a decision that matric or standard 10 was to be the minimum education level, to be considered together with levels of skills and experience. This meant that employees with lower qualifications than matric could not be placed in the new structure (ISAP). This approach was justified by the respondent on the grounds that;

9.1 Where employees had matric and could be redeployed, they were to be selected for available positions using LIFO. This approach was further considered reasonable in order to retain those employees with acquired experience in the ISAP plant rather than ‘bumping’ them;

9.2 Furthermore, each position of the employee to be affected was considered in order to determine whether that employee could be selected for retrenchment, or whether he/she should be retained.

9.3 Given the respondent’s operational requirements, which included the need to close the old, inefficient and obsolete plants in order to modernise its business, there was no justification to apply LIFO across the board on the grounds that the technology and methods of operation were different in various plants and required a different skills set.

9.4 Furthermore, applying LIFO as the sole criteria would have implied loss of skilled and qualified employees, requiring that resources be spent on

training the new employees, who would in any event, not have been capable of retraining due to the minimum requirements and/or qualifications of the positions in those newer and modern plants.

9.5 Thus, employees already placed in the modern plants could not be displaced simply to accommodate those with longer service who came from the old DETS plant, without losing skills and qualified employees. It was based on these considerations that there was a need to ringfence these modern and newer plants to minimise disruptions, and also retain employed in those plants.

[10] GIWUSA disputed the fairness of the selection criteria. Its main grounds were based on the context of the respondent's work system. In this regard, it submitted that over the years, the respondent had developed and implemented a system of multi-skilling which had capacitated employees with a range of skills. It was further argued that in line with that multi-skilling programme, it was ensured that all the employees were more or less capacitated with the same base levels of skills;

[11] According to GIWUSA, the nature of work in the different plants was such that the basic requirements for the job were common across various plants, hence the previous policy by the respondent to move employees between plants. Furthermore, the policy of labour flexibility as formalised since January 2013 between the respondent and the unions, allowed the employees to be utilised across different plants, as their skills and competencies in the plants had become generalised and diffused across employees.

[12] The respondent is correct in its submissions that what GIWUSA's argument in regards to the alleged unfair selection criteria essentially boils down to, is that because all the employees have been raised to the same level of skill and could multi-task across the plants, it was unnecessary to utilise qualifications or skills as criteria.

[13] In considering whether the selection criteria adopted by the respondent was objective and fair, it is useful to reiterate that even though this Court is entitled to scrutinise the fairness and objectivity of the selection criteria, it is however

not for it to impose its preference, or to attach any weight to one selection criterion over another. Thus, the Court must accord some deference to the exercise of the employer's discretion in that regard[8].

[14] As a starting point, it ought to be reiterated that LIFO to the exclusion of other criteria has not been endorsed as the sole objective and fair criteria[9]. To this end, LIFO combined with other criteria as applied in this case, cannot contrary to GIWUSA's contentions, be said to be unfair. The fairness and objectivity of the selection criteria preferred by the respondent ought to be viewed within the context of the entire restructuring process and its objectives.

[15] GIWUSA's primary contentions based on the respondent's work system in the past cannot also be sustainable when regard is had to the overall objectives of the restructuring process. This is so in that;

15.1 Inasmuch as it was not in dispute that over the years the respondent had adopted a policy of multi-skilling, it is my view that irrespective of whether all the employees had moved across the plants at one time or the other during their employment, or whether in fact they had over time become exposed to different aspects of the operations, it does not necessarily follow that all of them would have obtained exactly the same or equivalent level of base skills, competencies, or efficiencies, to fit into the restructured modernised operations.

15.2 On GIWUSA's own version, the multi-skilling policy had been in place over the years since the adoption of the *'Breaking New Ground – Multiskilling Guide'* dated July 2002. It follows that any movements across the plants took place within plants and operations, which we now know have since become obsolete over time, or in some instances, where those plants had to be closed down as their mode of operations was outdated.

15.3 GIWUSA's persistence with its contention that all the employees, who were semi-skilled, were performing operator jobs at Paterson Band B

[8] *Telkom SA SOC Limited v van Staden and Others* at para 37
[9] *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd* at para 10

does not assist its case either. This is so in that it fails to explain how the employees who are semi-skilled, would fit into the new modernised and technologically advanced operating models, which required some level of proficiency, qualifications or competencies. Thus, how the old semi-skilled method of operation would have fitted into the new model without those requirements being met is nonetheless not explained.

15.4 The respondent had at length elaborated on how there were major differences in skills and or qualifications in respect of positions in various plants. It was specifically pointed out that the new positions in SF2 plant were different, more technologically advanced, less reliant on manual labour, carried a higher grade, and further required a different degree of proficiency as well as minimum qualifications. This was even more pertinent since the technology for the manufacture of detonators in particular involved inherently dangerous explosives, which processes had been made more technologically advanced.

15.5 This therefore required employees with minimum qualifications to be placed in the new plant, in order to enable them to perform at the level required within the context of the improved technology and new methods of manufacturing. In my view, these minimum requirements in the light of the restructured and modernised way of operations can hardly be faulted, and should be accepted as being fair, objective and fit for purpose.

15.6 To the extent that candidates for positions may have been considered equal in terms of skills, suitability, proficiency and efficiencies for a limited number of positions, it was equally reasonable, fair and objective for the respondent to then apply LIFO. In the end, LIFO as the primary criteria on its own as correctly submitted on behalf of the respondent, was unsuited for its needs, since this would have resulted in loss of skills or disrupted its modernised business operations.

15.7 It was not in dispute that the newer campus had the objective of modernising the production process together with the utilisation of

modern technology, which clearly required a different level of skill base and educational qualifications. It follows that since GIWUSA had in its replying affidavit, merely denied the respondents' averments regarding the justification for the criteria it preferred, and had instead reiterated its contention that all the employees were on an equal footing in terms of generalised skills without more, the respondent's averments on the *Plascon Evans*[10] rule must then prevail.

15.8 In the end, what GIWUSA in essence seeks from this Court goes beyond mere consideration of whether the criteria adopted by the respondent was objective and fair. It instead seeks that this Court should decide the fairness and objectivity of the criteria in accordance with its own or that of that of the Court's preference. This is impermissible. It ought to be reiterated that in scrutinising the fairness of the criteria, the Court is required to accord deference to the respondent's exercise of its discretion in that regard, and this is what needs to be done in this case, given the intricacies of its modernized operations, which is not for this Court to second-guess what its requirements should be.

15.9 It is apparent that the respondent had preferred a criteria which would have achieved the retention of skills that were best suited to the positions available in the new and modernised structure. Thus, where the legitimacy and justification for restructuring exists was not doubted, and further where there was justification for modernisation of the respondent's operations which required a certain level of skills and qualifications to be fit for purpose, there can be nothing inherently unfair in requiring the employees to meet the minimum requirements set by the respondent, as well as the level of skills required, which might in the end, supersede LIFO on its own. There is therefore no merit in GIWUSA's contentions that the criteria preferred by the respondent was unfair.

[10] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620

[16] To the extent that GIWUSA had alleged that the criteria adopted was not consistently applied, respondent's contention was that the approach it had followed was that;

16.1 Where a plant activity was retained, the employees were transferred from the old plant to perform that activity in the newer plant, and that where there was a reduction in the number of employees from the newer plant, then LIFO was applied;

16.2 Where the plant was to be closed down, employees in that plant were declared redundant, and were to be selected for employment in the new plant using LIFO, subject to skill retention per plant. In accordance with this approach, only employees who had the required qualification were retained, and those that did not meet that requirement were to be retrenched. Where however the employees had standard ten and could be redeployed, then LIFO was utilised. Furthermore, those employees with superior skills relevant for their deployment in the newer plant were to be retained over those that did not.

[17] GIWUSA however insisted that the application of the selection criteria was not consistent in that;

17.1 Despite the respondent's contention that employees in the affected plants that were to close, were to be retrenched, many were not retrenched, but were rather appointed into positions in other plants, and that this was done in a completely arbitrary manner.

17.2 Despite the respondent's contentions that those in affected roles in ISAP plant (*i.e.* Technician Operators (TOs) and Learner Technician Operators), would not be retrenched, some TOs were nevertheless retrenched and in an arbitrary manner with no fair criteria being followed.

17.3 The respondent failed to make a skills audit at the time of the retrenchment, failed to consider and/or inconsistently considered the employees' length of service, skills levels or qualifications of employees, and acted arbitrarily. Examples cited in that regard included comparisons

in the number of years of service of those individual applicants that were retrenched, as opposed to those with lesser service that were retained in various plants including, the Export Packing, the Fuseheads, the Handidet, Pyrotechnics plant, U133, Priming, ICC, Engineering, Carrick, Logistics, and Tech Ops.

17.4 The respondent did not use the minimum qualifications as a criteria in any event, as those selected had more qualification than the minimum standard ten required, and further that the individuals selected were not afforded an opportunity to submit their qualifications prior to their selection.

[18] The respondent's response in regards to the above allegations was that out of a majority of cases of the individual applicants that GIWUSA contends ought not to have been selected for retrenchment, they either did not meet the minimum requirement of standard ten; or had fewer years of service; or did not have the requisite skills for redeployment to the new positions or department; and/or did not meet any of this criteria at all. In some instances, some of the departments such as electrical had to be closed down, meaning that there was no need for those positions.

[19] In the answering affidavit, the respondent had with specific detail, indicated the basis upon which the individual applicants were retrenched, as compared to those that were retained. It is not necessary to go through the entire list of 82 individual applicants as to be found on Annexure 'J1' to the founding affidavit[11]. Neither is it necessary to go through Annexure 'J13' and 'J14', which is a comparative list of employees who were retained.

[20] What needs to be stated however is that a comparative analysis was made by the respondent with reference to a compiled schedule[12], which identified those employees that were to be retrenched and those to be retained. This schedule was submitted as part of the answering affidavit in response to GIWUSA's

[11] Also, Annexure 'A' or 'X' to the Notice of Motion
[12] Annexure 'MM10' to the Consolidated Index. Section 189 Application.

founding affidavit in which it alleged that the identified individual applicants were unfairly selected for retrenchment.

[21] The schedule is a computerised business record compiled by the respondent, which included all employees' information such as years of service and qualifications. It further outlines those employees to be retrenched per plant, those due for compulsory retrenchment, those to be retained (*i.e.* redeployed or appointed at the new campus), and the reasons why they were not selected for redeployment.

[22] Mr. Bayi for GIWUSA had submitted that the accuracy of information contained in the schedule was disputed in certain respects. Mr Redding was correct in pointing out on behalf of the respondent that it was not sufficient for GIWUSA to simply contest the accuracy of the schedule, when no basis was laid in that regard. To the extent that the accuracy of the schedule was disputed without more, the Court ought to admit and accept it. This acceptance is however qualified, to the extent that the respondent had conceded that there was unfairness in regards to three individual applicants that were identified for selection, when they ought to have been retained. I will deal with this issue shortly.

[23] It had further been pointed out by the respondent that GIWUSA had in its replying affidavit and heads of argument, included nine names of individual employees that were not originally included in the founding affidavit. This included individuals who were not the applicants in this case, or were not even retrenched. Mr Bayi for GIWUSA had acknowledged the error, further attributing it to difficulties in locating the affected individuals during consultations. It follows that reference to those individuals in either the replying affidavit or heads of argument ought to be ignored.

[24] To the extent that the accuracy of the schedule is accepted by this Court, and further to the extent that it has been concluded in this judgment that the criteria of LIFO with the retention of skills per plant was accepted as being fair and objective, there can be no substance to the contention that the criteria was not

consistently applied, in the light of the comparative analysis made by GIWUSA and as countered by that made by the respondent.

[25] In the same token, there is no substance to the persistence by GIWUSA that there was inconsistent application of the criteria simply because employees affected were placed in a pool, whilst comparisons were made according to plants and not sections. Elsewhere in this judgment, the reasoning behind the respondent's approach in applying the criteria per plant was dealt with, and conclusions have since been made as to why there was nothing unfair about that approach.

[26] In the end, LIFO across the board on its own as contended for by GIWUSA was non-suited for the respondent's objectives of restructuring and the newer more modern and technologically advanced method of operations. In any event, and other than the three isolated individual applicants' cases that were identified, the respondent had through the schedule, demonstrated why there was differentiation, and had in that regard, objectively provided valid measures and relevance as to the criteria for differentiation amongst employees.

[27] The Court further accepts that in cases of where a selection based on comparisons and differentiations has to be made based on a variety of factors, such as levels of skill, competency and adaptability, this will invariably result in a measure of apparent or potential subjectivity attached to at least some of the criteria applied. This was evident in this case where when making comparisons, the respondent had acknowledged that there were slight differences between employees' number of years of service. This on its own however in the light of the overall factors considered in this case, cannot lead to a conclusion that there was arbitrariness or unfairness in the application of the preferred criteria.

[28] In the end, I am satisfied that the selection criteria adopted by the respondent met the threshold of objectivity and fairness and was consistently applied. The criteria was rationally connected with the operational reasons for the retrenchment, and the ultimate objectives of the exercise.

[29] In the answering affidavit, the respondent had admitted its failings in regards to instances where there was unfairness. This related to three identified

individuals resulting from the exercise of compiling the schedule, who were erroneously selected for retrenchment or retained as a result of failure to apply the selection criteria accurately.

[30] The individuals are the 36th Applicant, (Mr Vongani Maynard Risimate) who was employed in the U133 department; the 11th Applicant, Mr Madumetsa Peter Mabapa who was employed in the Fusehead Department; and the 72nd Applicant, Ms Bonisile B Sithebe from the Carrick Department. The respondent had conceded that in the light of the unfairness to the extent that these individuals ought not to have been selected for retrenchment, the appropriate form of relief would be maximum compensation. Mr Bayi had equally agreed that the relief in question would be appropriate, and it is therefore not necessary for this Court determine why any other form of relief would have been appropriate.

[31] Notwithstanding the above concession and the contention that all three individual applicants were entitled to compensation, the respondent had nonetheless submitted in its replying heads of argument that only Risimati was entitled to compensation. It is not clear on what basis there was this change in approach, other than the fact that it was conceded in the answering affidavit that Sithebe was retrenched in circumstances where she ought not have been due to a *bona fide* error. In the schedule referred to elsewhere in this judgment was compiled by the respondent, it was suddenly pointed out that even though she was identified for retrenchment, she was nonetheless retained. Similar arguments appeared to have been in respect of Mabapa. At what stage this took place was not clarified, and the Court is prepared to accept the averments made in the answering affidavit that they were indeed retrenched in circumstances where they ought to have been retained. To that end, I am satisfied that they ought to be entitled to maximum compensation.

[32] Insofar as an order of costs is concerned, it is deemed unwarranted for any such award to be made, particularly since GIWUSA was to some extent successful, and further taking into account the on-going relationship between the parties.

[33] Accordingly, the following order is made;

Order:

1. The dismissal of the Second to Further Applicants, other than Messrs Vongani Maynard Risimate and Madumetsa Peter Mabapa, and Ms Bonisile B Sithebe was fair.

2. The Respondent is ordered to pay to Messrs Vongani Maynard Risimate and Madumetsa Peter Mabapa, and Ms Bonisile B Sithebe, compensation equal to twelve (12) months' salary calculated at the rate of their pay as at the date of their dismissal.

3. There is no order as to costs

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	M. Bayi of Bayi Attorneys
For the Respondent:	A. Redding SC, instructed by Mervyn Taback Incorporated