

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 3933 / 18

In the matter between:

MORWASEGOSELE JOHANNES RACHOENE

AND 17 OTHERS

Applicants

And

G4S SECURE SOLUTIONS (PTY) LTD

Respondent

Heard: 6 November 2023

Delivered: 18 March 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 18 March 2024

Summary: Operational requirements – redundancy of position – meaning of – employees’ positions redundant

Operational requirements – alternative positions – alternative positions

available – employees failing / refusing to apply for alternative positions – no proper / justified basis for employees failing / refusing to apply for alternative positions – employees’ retrenchment justified and fair

Operational requirements – rationale for retrenchment – employer losing large contract – proper rationale for retrenchment shown

Operational requirements – procedural fairness – s 189A finds application – employees cannot challenge procedural fairness where s 189A applies – Court having no jurisdiction to decide procedural fairness

Dismissal – operational requirements – dismissal substantively fair – claim dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] From the outset, it must be stated that when this matter finally came before Court for adjudication, only two of the individual applicants still remained in the matter. All the other individual applicants were no longer participating in and pursuing these proceedings, and as such, are not before Court. Accordingly, this judgment only relates to and applies to the remaining two individual applicants, being Morwasegosele Johannes Rachoene (Rachoene) and Molahlogo Delmond Sebone (Sebone), referred to in this judgment either by name, or jointly as ‘*the employees*’.

[2] The employees were dismissed by the respondent for operational requirements, and they were part of an unfair dismissal dispute referred to this

Court in terms of section 191(5)(b) of the Labour Relations Act ('LRA')¹, following unsuccessful conciliation at the Commission for Conciliation, Mediation and Arbitration (CCMA). The employees represented themselves throughout these proceedings, and were party to a statement of claim filed on 12 November 2018. The employees contended that their dismissal was both substantively and procedurally unfair. They initially prayed for reinstatement as consequential relief, but when this matter was heard, they had both found alternative employment and no longer sought reinstatement, but only compensation.

- [3] The respondent, on the other hand, and in its answering statement, contended that it had a proper financial rationale to retrench the employees following the loss of a major contract, rendering the positions of the employees redundant. The respondent further contended that there were alternative positions available to the employees which they could have applied for, but they failed to do so. Where it came to procedural fairness, the pertinent question was whether section 189A of the LRA applied, and therefore whether it was competent to challenge procedural fairness in these proceedings.
- [4] The matter came before me on trial on 6 November 2023. At the commencement of the proceedings, the respondent sought to raise a challenge with regard to the jurisdiction of the Court to entertain the matter, on the basis that the employees had signed agreements in full and final settlement of the dispute. I dismissed this jurisdictional objection and determined that the Court did have jurisdiction to entertain this matter. The reasons for this finding will be dealt with later in this judgment.
- [5] The matter then continued with evidence being presented by the respondent in the form of two witnesses testifying on its behalf, whilst the employees testified on their own behalf. At the conclusion of the hearing, I reserved judgment. I will now decide this matter by first setting out the relevant facts.

¹ Act 66 of 1995 (as amended).

The relevant background

- [6] The respondent conducts business as a contract security services provider. It employs security guards in its business. It *inter alia* contracts with customers for on-site contract security services, with the security guards employed by it being deployed on the customer sites to render the security services. The employees were two of these security guards. Rachoene was a grade C security guard, whilst Sebone was a grade A security guard.
- [7] It was common cause that the employees were deployed (placed) at the respondent's Silver Lakes Residential Estate (Silver Lakes) contract. It was a fairly large contract, requiring close on 100 personnel of the respondent. This was a contract in the respondent's Pretoria (Tshwane) region. It was also common cause that Silver Lakes in 2018 put the security contract out for open tender, and the respondent also tendered to retain the contract. However, the respondent was not successful, and on 1 June 2018, the respondent was given written notification by Silver Lakes that the respondent's entire security services contract with it would finally terminate on 31 August 2018.
- [8] Another common cause fact was that all the security guards of the respondent deployed on the Silver Lakes contract were issued with notices of intention to retrench as contemplated by section 189(3) of the LRA, on 7 June 2018. The notice itself was presented as part of the documentary evidence, and was not contested. In terms of the notice, the reason for possible dismissal is indicated to be the loss of the Silver Lakes contract as from 31 August 2018. It was also indicated that the respondent would seek alternatives to mitigate retrenchments. But importantly, the notice records that:
- 'The company has dismissed in the 12 months preceding this notice more than 50 employees due to its operational requirements. As a result, we envisage that the above matter should be conducted in accordance with the provisions of Section 189A of the Labour Relations Act (66 of 1995).'

It was undisputed that the respondent employed more than 50 employees, with the notice itself indicating that the respondent employed a total of 9 441 employees. The section 189(3) notice was also sent to two trade unions who had membership at the respondent, being AMCU and SATAWU. In terms of the notice, it was indicated that four consultations were envisaged with employees, being 29 June, 13 July, 31 July and 10 August 2018.

[9] In terms of the pre-trial minute, it was not disputed that consultations did ultimately take place on 20 July, 31 July, 29 August, and then finally with batches of the affected security guards in the period 3 – 6 September 2018. It was also undisputed that the employees only attended the last consultation on 4 September 2018. According to the employees, the representatives that attended the consultations purportedly on their behalf were not elected by them but were appointed by the respondent. It also turned out that Sebone was an AMCU member and a shop steward, and that AMCU was a party to the consultations.

[10] Turning then to the consultations themselves, the first consultation was held with two representatives of the employees, being Vincent Dlamini (Dlamini) and T Mavula (Mavula), on 20 July 2018. According to Lamprecht, who was the respondent's general manager for Pretoria responsible for the Silver Lakes contract, the issue of alternatives was specifically dealt with in this consultation. It was explained that the respondent would explore if there were alternative positions available on other contracts, even where such contracts were in other regions. Specific possible alternatives were mentioned. This included possible positions at the Bidvest, MTN, and Huawei contracts. It was agreed that all possible available positions would be circulated by way of written notices to the security guards. It was also indicated in the consultation that all of the security guards would be entitled to attend the consultations themselves, if they wished. The employees however did not attend this consultation.

[11] Flowing from the aforesaid consultation, alternatives were actually circulated to all the security guards that were affected on the Silver Lakes contract. In a

written bulletin sent on 20 July 2018 to all security guards, it was indicated that the respondent had a number of vacant positions available, and an opportunity would be provided to such security guards to be transferred (voluntarily) to such positions, subject to the specific proviso that they apply for the positions they were interested in. The positions would be made available on a first come first served basis, and subject to the employees satisfying the appointment requirements. There were a number of grade C positions available, being 50 positions at various MTN sites in Gauteng and Polokwane, 20 positions at Huawei in Woodmead, 11 positions at Tharisa in Rustenburg, and 5 positions at SAB in Garangkuwa and Waltloo. There were also 8 grade B positions available at MTN and Huawei. The deadline for application for any of these positions was 1 August 2018.

- [12] The next consultation was held on 31 July 2018. It was once again attended by Dlamini and Mavula as representatives, but on this occasion some of the individual security guards also attended. The consultation in essence focussed solely on the issue of alternative positions. The employees did not attend.
- [13] Following the consultation of 31 July 2018, and on 1 August 2018, the respondent again circulated a written bulletin to all security guards. The bulletin was in more or less identical terms to the one circulated on 20 July 2018, however some of the available positions changed. There were still the 50 grade C positions at MTN, 20 grade C positions at Huawei, 11 grade C positions at Tharisa, and the 8 grade B positions at MTN and Huawei. What changed was that there were now also 8 grade A positions at MTN and only 2 grade C positions available at SAB Garangkuwa. The deadline for application was 10 August 2018.
- [14] Despite these positions having been made available, the employees never applied for any of these positions. In fact, and according to their testimonies, they believed that they were entitled to be simply transferred into positions at the instance of the respondent. Lambrecht however explained that is not how it works, because an employee had to indicate a willingness to take up a post first, because work circumstances, conditions and even benefits could vary

from site to site. There may also be qualifying requirements, as stipulated by a customer, that need to be met. According to Lambrecht, it was essential that affected security guards had to apply for available posts, and most of them did, resulting in them being successfully placed.

- [15] On 22 August 2018, there was yet another offer of alternative positions circulated to all Silver Lakes security guards. These alternative positions were now in the form of vacancies related to positions available outside the general Pretoria (Tshwane) area, and came with a once off transfer allowance of R1 200.00. These positions were all grade C positions, with 4 positions being available at Goldfields Mine, 3 positions in Nelspruit, 4 positions in Klerksdorp, 1 position at Venetia Mine, 3 positions at MWS, and 1 position in Marble Hall. There were also 6 grade C positions at Out of Bounds in Pretoria East, which was within the region.
- [16] On 27 August 2018, Rachoene indicated that he was interested in a position at Out of Bounds in Pretoria East. However, and unfortunately, this did not turn out to be a viable alternative for him. As Lambrecht explained, when the time came for filling these vacancies, the customer (Out of Bounds) insisted that some of the employees from the former service provider from whom the respondent secured the contract had to be taken over by the respondent, which effectively took most of these vacancies off the table, and Rachoene could not be accommodated at that site.
- [17] Where it came to Sebone, he indicated that he had no interest in any of the positions. As far as Sebone was concerned, he was a grade A security guard, and virtually all the positions that were available were grade C positions. As a grade A security guard, Sebone could competently fulfil a grade C position, however he indicated that he had no interest to do so, as it would involve lesser pay.
- [18] The next consultation was then held on 29 August 2018, attended by the two employee representatives and some of the individual security guards as well. Again, the employees did not attend. In this consultation, it was agreed that LIFO would be applied where employees have applied for available positions

and there were more employees than available positions. It was also explained that severance packages would not be paid if employees were offered alternative positions and did not take those up.

[19] Final consultations took place in the period between 4 and 6 September 2018 with groups of all the affected security guards. Rachoene and Sebone was part of the group consulted on 4 September 2018. Following this final consultation, and on 10 September 2018, all the security guards being retrenched were presented with a letter of termination of employment due to retrenchment (the retrenchment letter). On 11 September 2018, the retrenched security guards were presented with a document called a '*retrenchment agreement*' (the retrenchment agreement), and were required to sign it. This included the employees, who signed their agreements on 11 September 2018. The retrenchment agreement was never discussed with them.

[20] The retrenchment letter recorded that the employees did not apply for any of the vacancies presented to them in the course of the consultation process, and therefore it was viewed as a refusal to accept an offer of alternative employment. It was further stated that as a result, the employees would not receive severance pay. The date of termination of the service of the employees was reflected to be 6 September 2018. The retrenchment agreement in essence mirrored what was contained in the retrenchment letter, with the proviso that it was recorded in the retrenchment agreement that all payments to the employees shall be in full and final settlement of any claims arising out of the employment relationship between the parties. In effect, the employees were paid their statutory prescribed notice pay, leave pay, and pro-rata bonus in full and final settlement.

[21] The employees then referred an unfair dismissal dispute to the CCMA. The dispute was unsuccessfully conciliated and then pursued to arbitration. In a jurisdictional ruling dated 29 October 2018, the CCMA directed that this dispute be referred to the Labour Court, leading to the matter now before this Court.

Jurisdiction

- [22] As alluded to above, the respondent raised a jurisdictional objection. In this regard, the respondent relied on the retrenchment agreement concluded with the employees on 11 September 2018. In terms of clause 3 of such agreement, it was agreed that the employment of the employees would terminate based on a '*retrenchment agreement*'. In clause 5, it is then provided that payment made to the employees in terms of the agreement are '*... in full and final settlement of all and any claims the Employee may have against the Employer arising out of the termination of the service contract or service relationship ...*', and that the respondent has '*... discharged all and any legal obligations that exist in respect of the Employee as that he has no other claim against the Employer arising out of the service contract.*'
- [23] Whilst it appears *ex facie* the retrenchment agreement that the unfair dismissal claims of the employees against the respondent have been fully and finally settled, I do not believe that this, in reality, is the case. I am convinced that this retrenchment agreement was nothing else but a sham forced upon the employees at the time of termination of employment to use as some kind of defence should employees decide to pursue the matter further. There is no evidence that the content of the retrenchment agreement was ever negotiated or discussed with the employees, or that they were even given an option to sign it or not. It was not tabled in any retrenchment consultation. It was certainly never, on the evidence, even discussed with the employees at the time when it was presented to them for signature. In my view, it is clear from the evidence that these agreements were simply presented to the employees immediately following the retrenchment letter and they in essence had no option but to sign the same. This cannot be a *bona fide* settlement agreement and the retrenchment agreement would therefore be, in my view, invalid.² As held in *May v Mannesman Demag*³:

² Compare *Corns v Adelskloof Drankwinkel CC t/a Cellars Drankwinkel* (2002) 23 ILJ 2047 (LC) at para 14.

³ (2001) 22 ILJ 2019 (LC) at para 11.

‘In my view it was unfair to present the applicant with a *fait accompli* and such an agreement. It is also questionable, whether an employee who is unrepresented at a meeting, could be required to sign away, so to speak, his or her rights conferred by the Labour Relations Act. ...’

- [24] Ordinarily, voluntary retrenchment agreements are concluded in the course of a retrenchment consultation process as an alternative to forced retrenchment, and would be coupled with some kind of benefit or incentive for the employee concerned to accept the same. In this case, and by the time the retrenchment agreement was first presented to the employees, the ship had sailed, as the retrenchment process was concluded and they had even already been given notice of termination of employment due to retrenchment. The retrenchment letter records that the employees were ‘*given notice of termination in terms of section 189A of the Labour Relations Act [66 of 1995] and in terms of section 37(1) of the Basic Conditions of Employment Act [75 of 1997]*’. Such a notice is entirely inconsistent with an agreed termination of employment as would be contemplated by a retrenchment agreement. The retrenchment agreement *in casu* was presented against the backdrop of a *fait accompli*.
- [25] And finally, there no advantage of any kind accruing to the employees for signing the retrenchment agreement. The payments they received under the retrenchment agreement was nothing else but what they would be statutorily entitled to under the Basic Conditions of Employment Act (BCEA)⁴. They were paid their notice pay, their leave pay, and their pro-rata bonus.⁵ I am of the view that an employee cannot settle for that which the employee is legally entitled to as a statutory minimum.⁶
- [26] For the reasons as set out above, I conclude that the retrenchment agreement concluded with the employees on 11 September 2018 cannot serve to non-suit them where it comes to their unfair dismissal disputes. These agreements are a sham, and I do not consider them to be valid and binding on the

⁴ Act 75 of 1997 (as amended).

⁵ Leave and notice pay is payable under sections 37(1) and 40(a) of the BCEA, respectively. The pro-rata bonus is payable under clause 6 of sectoral determination 6 for the Private Security Sector.

⁶ Compare *Hodges v Urban Task Force Investments* CC 2014 JDR 0164 (LC) at paras 37 – 39.

employees. The jurisdictional point raised by the respondent must therefore be rejected.

Procedural fairness

[27] In this case, there can be no doubt that section 189A of the LRA found application. It is specifically referred to in the section 189(3) notice and in the retrenchment letter. However, what must remove any doubt in this regard is simply the undisputed number of employees employed by the respondent, being 9 441, and the fact that more than 50 employees had already been retrenched in the preceding 12 months, before the current process even started. In giving evidence, Lambrecht testified that section 189A, considering the number of affected employees, applied in this case, and he was not challenged on this under cross examination.

[28] Where it comes to the application of section 189A, this is determined by numbers. In simple terms, and of relevance *in casu*, section 189A(1) provides that where an employer employs more than 50 employees and the employer contemplates dismissing at least 50 employees (or has dismissed at least 50 employees due to operational requirements in the preceding 12 months) if the employers employs more than 500 employees, the section applies.⁷ Considering the above, and on the numbers, there is no doubt that section 189A applies.

[29] It is not up to the parties in a retrenchment / restructuring process to agree whether section 189A applies or not. It is automatically triggered if the thresholds as specified in the section are met.⁸ The determination as to whether section 189A applies is thus dependent upon answering a number of questions of fact. First, does the employer employ more than 50 employees? Second, and depending on the number of employees employed by the

⁷ Section 189A(1)(a)(i). There is a sliding scale in in section 189A(1)(a)(ii) – (v) as to the number of employees that the employer must contemplate retrenching, where the employer employs more than 500 employees.

⁸ Compare *Lethlake and Another v Metcash Trading Ltd* (2007) 28 ILJ 2006 (LC) at para 11; *National Union of Metalworkers of SA and Others v Greenfields Labour Hire CC and Another* (2004) 25 ILJ 558 (LC) at para 3.

employer, did the employer contemplate retrenching the requisite number of employees as reflected in section 189A(1)(a)(i) to (v)?⁹ If both questions are answered in the affirmative, section 189A, *in toto*, applies.¹⁰ This is certainly the case *in casu*.

[30] Once section 189A applies, this has an important consequence where it comes to the issue of this Court determining the fairness of any dismissals emanating from this section. This consequence is that substantive and procedural fairness are separated. In the case of substantive fairness, this is dealt with in the ordinary course by way of an unfair dismissal dispute referred to this Court in terms of section 191(5)(b) as read with section 191(11)(a) of the LRA.¹¹ Employees of course may also strike about this dismissal.¹²

[31] Where it comes to procedural fairness, and should there be any issue or dispute about whether the restructuring / retrenchment process is being dealt with by the employer in a procedurally fair manner, this must be pro-actively pursued to this Court by way of an application in terms of section 189A(13) of the LRA.¹³ The idea is to have expeditious and pro-active judicial intervention to ensure compliance with a fair process, and so avoid an *ex post facto* autopsy on a point by point basis of the retrenchment exercise, long after the fact, to decide whether it was procedurally fair,¹⁴ and if found to be unfair, awarding some compensation as a result.¹⁵ The point is that the Court in a

⁹ This would include adding employees already retrenched in a 12(twelve) month period prior to the current restructuring as well – see section 189A(1)(b).

¹⁰ Compare *Banking Insurance Finance and Assurance Workers Union on Behalf of Miya and Another v Scorpion Legal Protection (Pty) Ltd* (2024) 45 ILJ 298 (LC) at paras 8 – 10.

¹¹ See sections 189A(7)(b)(ii) and 189A(8)(b)(ii)(bb).

¹² See sections 189A(7)(b)(i) and 189A(8)(b)(ii)(aa).

¹³ The section reads: 'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order- (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate'.

¹⁴ See *Forbes and Others v SA Municipal Workers Union* (2014) 35 ILJ 687 (LC) at para 20; *SA Society of Bank Officials v Standard Bank of SA* (2011) 32 ILJ 1236 (LC) para 29; *Insurance and Banking Staff Association and Another v Old Mutual Services and Technology Administration and Another* (2006) 27 ILJ 1026 (LC) at para 9; *National Union of Metalworkers of SA v General Motors of SA (Pty) Ltd* (2004) 25 ILJ 2358 (LC) at paras 34 and 35.

¹⁵ Ordinarily, only compensation can be awarded for a procedurally unfair dismissal – see section 193(2)(d).

section 189A(13) application, acting pro-actively, can reverse or stop any unfair process to ensure that it is done properly, and even reinstate dismissed employees to ensure that they are consulted properly.

- [32] Because of this separation of processes relating to determining substantive and procedural fairness where it comes to dismissals under section 189A of the LRA, the Labour Court is deprived of jurisdiction to entertain a dispute concerning the procedural fairness of a dismissal, where the unfair dismissal dispute is brought before the Court in terms of section 191(5)(b) as read with section 191(11) of the LRA. The Court can only consider substantive fairness. This is evident from Section 189A (18), which provides:

'The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).'

- [33] The Constitutional Court in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*¹⁶ said the following where it comes to section 189A(18):

'...only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred to it in terms of s 191(5)(b)(ii). ... Subsection (18) may seem very drastic and harsh on employees who may be having a dispute with their employer concerning the procedural fairness of their dismissal. However, it will be seen that, when read with subsection (13), it is not harsh at all. Subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure.'

¹⁶ (2016) 37 ILJ 564 (CC) at para 158.

[34] Following the judgment of the Constitutional Court in *Edcon*, the same matter, but this time under the auspices of section 189A(13), came before the Labour Appeal Court again in the subsequent judgment in *Edcon Ltd v Steenkamp and Others*¹⁷ (*Edcon (2)*). After referring to section 189A(18), the Court in *Edcon (2)* held:¹⁸

‘There could be no clearer indication that after a dismissal had taken place under the stipulated circumstances of operational requirements of an employer, the Labour Court is bereft of jurisdiction, save in respect of substantive fairness. That express exclusion of jurisdiction to evaluate procedural unfairness ex post facto is in stark contrast to the jurisdictional competence of the Labour Court in other kinds of dismissal disputes.

This policy choice in the LRA goes hand in hand with what can be described as a partial claw-back of jurisdiction. This claw-back is the burden of s 189A(13) ...’

[35] *In casu*, the current dispute before this Court was indeed brought under section 191(5)(b) as read with section 191(11) of the LRA. As a result, the employees simply cannot challenge procedural fairness in the current proceedings, and this Court has been deprived of jurisdiction to consider the same. The only manner in which the employees could have challenged procedural fairness is by way of an application in terms of section 189A(13) of the LRA, which they never brought. The Labour Court has been consistently following this approach since the introduction of section 189A into the LRA in

¹⁷ (2018) 39 ILJ 531 (LAC).

¹⁸ *Id* at paras 19 – 20. See also *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2018) 39 ILJ 222 (LAC) at para 13. I am aware that the Constitutional Court in *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* (2019) 40 ILJ 87 (CC) overturned the judgment of the Labour Appeal Court, but it did so on the issue of substantive fairness, and did not overturn the finding of the Labour Appeal Court that the Court cannot enquire into procedural unfairness in a dispute referred to the Court in terms of section 191(5)(b).

2002.¹⁹ And as recently said in *Banking Insurance Finance and Assurance Workers Union on Behalf of Miya and Another v Scorpion Legal Protection (Pty) Ltd*²⁰:

‘The Constitutional Court made it clear that, although a clear policy decision has been made to remove claims of procedural unfairness from the ex post facto jurisdictional competence of the Labour Court, employees are not left without a remedy as they may approach the Labour Court in terms of s 189A(13) of the LRA for an order compelling the employer to comply with a fair procedure. Where employees have already been dismissed, the Labour Court has the additional power in terms of s 189A(13)(c) of the LRA to reinstate such an employee to allow for the consultation process to run its course. Only where these orders are not appropriate, may the Labour Court, where it is appropriate to do so, order compensation in terms of para (d).

The applicant employees' retrenchment falls within the ambit of s 189A of the LRA and, if they wanted to challenge the procedural fairness of the retrenchment process, the remedy at their disposal was to follow the process provided for in s 189A(13) of the LRA. ...’

[36] Accordingly, I am unable to consider any case by the employees that their dismissal was procedurally unfair. I will thus make no finding on procedural fairness, as such issue in dispute is simply not competently before me. As said in *SA Commercial Catering and Allied Workers Union and Others v Southern Sun Hotel Interests (Pty) Ltd*²¹:

‘... I set out as succinctly as possible what I understand s 189A (18) of the LRA to mean as a matter of plain English and in the context of the

¹⁹ See *National Union of Metalworkers of SA and Others v SA Five Engineering and Others* (2004) 25 ILJ 2358 (LC); *Perumal and Another v Tiger Brands* (2007) 28 ILJ 2302 (LC); *Thomas v Fidelity Corporate Services (Pty) Ltd* (2007) 28 ILJ 424 (LC); *Banks and Another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC); *National Union of Mineworkers v Anglo American Platinum Ltd and Others* (2014) 35 ILJ 1024 (LC).

²⁰ (2024) 45 ILJ 298 (LC) at paras 26 – 27.

²¹ (2017) 38 ILJ 463 (LC) at para 18.

structure of the statute. This is that, in retrenchments that fall within the ambit of s 189A, enquiries into the procedural and substantive fairness of a dismissal are to be dealt with separately. Trial procedures, which are to be used to determine the substantive fairness of s 189A dismissal, are not to be burdened with claims about the procedural fairness of the same dismissal.'

Substantive fairness

[37] The issue of whether a dismissal for operational requirements is substantively fair is decided by way of answering what is called a general question and a specific question. As said in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*²²:

'Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place.'

[38] The general question in *Latex supra* must, in my view, be undoubtedly answered in favour of the respondent. I say this because, firstly, it simply cannot be contradicted that the respondent lost a contract with a customer, Silver Lakes, on which contract the employees were placed. The loss of such a contract would constitute a proper financial rationale for an employer to

²² (2006) 27 ILJ 292 (LAC) at para 55.

seek to reduce costs.²³ This in turn would directly impact on the positions of all the security guards on the contract (site), rendering all those positions redundant.²⁴ It follows that the respondent had a valid and fair rationale to retrench the employees. Despite disputing the rationale for retrenchment in their pleadings and the pre-trial minute, the employees, when giving evidence, did not really dispute the same, and in the end conceded this as a proper rationale for retrenchment.

[39] This matter in reality turned on answering the specific question in *Latex supra*. As touched on above, the crux of the case of the employees was that they should simply be automatically transferred to another site at the instance of the respondent, and not be subjected to a retrenchment process. In the pre-trial minute, it is recorded that the employees disputed the reason for retrenchment because '*there were new sites available for the Applicants to be placed at*'. The statement of case of the employees reflected that: '*Employer informed us verbally all affected employees that there are sides in various province, and normally employer used to transfer employees to the available sides but in this issue employees were instructed to apply ...*' (sic). In fact, both employees in evidence suggested that if the respondent decided to transfer a security guard and he or she refused, that guard should be disciplined.

[40] However, and as Lamprecht explained, the respondent could never do this, as it would in effect amount to arbitrarily selecting employees for placement in vacancies in circumstances when other employees could then lose their jobs, and that will never be fair. Also, there may not be enough vacancies available for the number of redundancies resulting from the loss of the contract. Therefore, and according to Lamprecht, in cases such as these where a whole contract is lost, the respondent would always follow an operational

²³ See *Super Group Supply Chain Partners v Dlamini and Another* (2013) 34 ILJ 108 (LAC) at para 28; *Association of Mineworkers and Construction Union and Others v Tanker Services (Pty) Ltd* (2018) 39 ILJ 2265 (LC) at para 26; *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) at para 46.

²⁴ See *Plaaslike Oorgangsraad van Bronkhorstspuit v Senekal* (2001) 22 ILJ 602 (SCA) at para 27; *Broll Property Group (Pty) Ltd v Du Pont and Others* (2006) 27 ILJ 269 (LAC) at paras 24 and 26; *Viljoen v Johannesburg Stock Exchange Ltd* (2017) 38 ILJ 671 (LC) at para 67.

requirements process. The disciplinary process would not apply in such an instance. He also explained that the only occasion an employee may be directly transferred to a vacancy is where individual vacancies may arise at a particular site because, for example, an employee has been dismissed at that site. But this would never apply where it came to the loss of an entire customer contract together with all the redundancies that come about as a result. Lamprecht specifically said that in the 14 years he had spent being responsible for the region, the process always was that where a contract was lost, a retrenchment process would be initiated, and then, pursuant to that process, the respondent would make all vacancies available to affected employees, which employees would then indicate their interest in the available vacancies by applying for the same. I do not see anything wrong with this process adopted by the respondent as set out above. In *SA Breweries (Pty) Ltd v Louw*²⁵ the Court held:

‘An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses ss 189(2)(b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Being required to compete for such a post is not a *method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee ...’

- [41] The above process adopted by the respondent would of course seek to avoid retrenchment in the form of providing alternatives. Selection would only really come into the equation if all the affected employees cannot be accommodated in alternative positions, and a selection exercise must be carried out between them. In this case, this was not an issue as the employees would be placed. Because of this, the issue of fair selection criteria was not in issue. Lamprecht explained that on most occasions, the respondent is quite successful in accommodating employees in other vacancies at other sites. It appears that it was agreed in the consultation process that the respondent would disclose all

²⁵ (2018) 39 ILJ 189 (LAC) at para 22.

the vacancies in writing and invite the security guards on the Silver Lakes contract to apply for the same. This was done on several occasions, being 20 July, 1 August and 22 August 2018. There was on each occasions a deadline stipulated by when an application for a position had to be made. In simple terms, the very objective was to avoid the dismissal of security guards whose positions had become redundant due to a loss of a service agreement with a customer, and that retrenchment would only be considered once this avenue was exhausted. In *Louw supra*²⁶ the Court has the following to say:

‘... Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed ...’

- [42] The employees were well aware of the above process. Even though both the employees, when they testified, indicated that they were not aware of the notices offering the alternative positions, this proposition was never put to Lamprecht under cross examination, despite Lamprecht stating that all the security guards on the Silver Lakes contract were given these notices.²⁷ Jordaan in her testimony also confirmed that all the security guards at Silver Lakes were offered all these positions, and added that she was personally present every week at Silver Lakes, during this time, to offer positions to affected security guards. In answer to the proposition put to the employees under cross examination that AMCU had in fact agreed to the process of alternatives being circulated by memorandum, the employees suggested that AMCU was on the side of the respondent, which is clearly not a credible suggestion. I must also mention that in a supporting affidavit filed by Sebone as attached to the statement of case, he contended that the first he heard of any retrenchment was on 3 September 2018 when he was told that 6 September 2018 was his last working day, which version, considering the

²⁶ Id at para 19.

²⁷ This failure results in the acceptance of the testimony of Lambrecht - see *ABSA Brokers (Pty) Ltd v Moshwana NO and Others* (2005) 26 ILJ 1652 (LAC) at para 39; *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC) at para 41; *National Union of Metalworkers of SA and Others v SA Truck Bodies (Pty) Ltd* (2008) 29 ILJ 1944 (LC) at para 10.

common cause facts, was clearly false. I have little hesitation in accepting that the employees were properly made aware of all the vacancies that they could apply for, and all they needed to do was to apply for any of these positions.

[43] Significantly, and despite their protestations of being unaware of available vacancies up to their actual retrenchment, Rachoene actually applied for one of the positions that the security guards were notified of in the 22 August 2018 memorandum. This was the Out of Bounds positions in Pretoria East. He was considered for the position, but due to customer requirements, the available positions were reduced to the extent that there was no availability where it came to accommodating Rachoene. The fact that Rachoene was not placed at Out of Bounds but two other employees were, was not the subject matter of challenge, and the fairness thereof was never explored by any of the parties.

[44] In the end, the evidence revealed that the employees had elected not to apply for any of the vacancies, save for the one vacancy that Rachoene applied for as set out above. There were a number of reasons offered by them as to why they decided to do this. One reason for this was that they were of the view that they should be transferred, which issue has been dealt with above and has no substance. Another reason was that they adopted the view that if they applied for such a position and were transferred, they would have to conclude new contracts of employment and would lose their entire length of service. This proposition advanced by the employees cannot have any merit. There was no evidence by the respondent that in accepting any alternative, employees would lose their length of service. No such proposition was explored with Lamprecht under cross examination. And in any event, the BCEA makes such a proposition impossible.²⁸ A final reason applies only to Sebone, in that he was unwilling to consider any position that was not a grade A position, as it would entail a reduction in pay. He however could have remained employed if he applied for and accepted a grade C position.

²⁸ Section 84(1) of the BCEA provides: 'For the purposes of determining the length of an employee's employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year.'

[45] I am convinced that if the employees applied for, at least, several of the vacancies made available by the respondent, they would not have been retrenched. Lamprecht testified that most of the Silver Lakes security guards had applied for the available positions and were placed, especially on the MTN contracts. Rachoene under cross examination conceded that all the other applicants that were initially part of the referral had accepted positions at the respondent and returned to work, hence they abandoned the dispute. In my view, none of the reasons provided by the employees as to why they did not apply for any of these positions, are justifiable and proper. It was entirely in their own hands to have avoided their retrenchment, however they spurned the opportunity. As such, they exposed themselves to retrenchment. The conduct of the employees in this case is comparable to the following *dictum* in *Viljoen v Johannesburg Stock Exchange Ltd*²⁹:

‘I add that I have very little hesitation in accepting that if the applicant applied for the position of marketing manager, she would have been placed in it. This is evident from the fact that the undisputed evidence was that the applicant was considered by the respondent to be overall competent to fill the marketing manager position and certainly qualified for it. If the interview process and accompanying psychometric test highlighted any deficiencies in the applicant’s make up for the position, then she would be trained to skill and equip her. The respondent made this clear to her in the consultation.

In the end, the applicant should have applied for the new positions of marketing manager or brand manager, or even both in an order of preference. At the very least, she should have taken up the position of brand manager in which she was ultimately placed as a basis of B compromise by the respondent. Her failure to do so must be fatal to her case of substantive unfairness. She left the respondent with no choice

²⁹ (2017) 38 ILJ 671 (LC) at paras 83 – 84. See also *Mineworkers Union/Solidarity on behalf of MacGregor v SA National Parks* (2006) 27 ILJ 818 (LC) at para 39.

but to retrench her, despite being in a risk-free position to have avoided her own retrenchment.'

- [46] Because the employees deliberately decided not to apply for the vacancies, the respondent was in my view entitled to adopt the view that the employees effectively refused to accept offers of alternative employment. And once that is so, they only have themselves to blame for finding themselves unemployed. As was said in *Freshmark (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³⁰:

'.... an employee who unreasonably refuses an offer of alternative employment is not without fault. He has himself to blame if he subsequently finds himself without employment and, therefore, does not deserve to be treated on the same basis as the employee who finds himself without employment due to no fault on his part Where the employer offers to continue to employ the employee - whether in the same position but on different terms or on the same terms but in a different position or in the same position and on the same terms but in a different place, that is still alternative employment. It is an offer of an alternative contract of employment.'

- [47] In *Louw supra*, the Court considered a situation where an employee deliberately decided not to apply for a position, and where the evidence indicated that if the employee had applied for the position, he would have been appointed in it. The Labour Court (Court *a quo*) had decided that it was not appropriate to require the employee to apply for the position, and he should have been simply placed in that position. The comparisons to the contentions of the employees *in casu* is apparent. The Labour Appeal Court came to the following conclusions:³¹

³⁰ (2003) 24 ILJ 373 (LAC) at para 24. Also compare *Latex (supra)* at para 69; *Entertainment Catering Commercial and Allied Workers Union of SA and Others v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 ILJ 1347 (LC) at para 28.

³¹ *Id* at para 26.

‘... To move to the impact of this issue on the substantive fairness contention, the so-called unfair selection criteria issue could have had no bearing at all on the failure to be appointed to the Aliwal North area manager post. Louw never applied for that post, despite an invitation to do so. The premise of the judgment a quo is that he should have been given it without competing. That finding is without foundation on the facts or on the law. If Louw applied for the George area manager post, he had no good reason not to apply for the Aliwal North post if he wanted the post. The evidence discloses that he declined the prospect of taking up the Aliwal North post by failing to apply for it. Moreover, as already addressed, a competitive process to seek to avoid retrenchment is not unfair.’

- [48] Also, and considering the motivation put forward by the employees that they decided not to apply for the positions because those positions would be less attractive to them, the following *dictum* in *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union and Another*³² is equally apposite, where the Court said the following, in circumstances where it was argued that the alternative positions at a third party were less attractive to the employees concerned in that case:

‘... In my view the second and further respondents’ loss of income arose out of their refusal of the offer of employment by the subcontractor and labour broker and not from their dismissal. It seems to me that the second and further respondents are, in this regard, the authors of their own misfortune.’

- [49] Another apt example is found in the judgment of *Mineworkers Union/Solidarity on behalf of MacGregor v SA National Parks*³³ where the Court held as follows in finding the retrenchment of the employee to be fair:

³² (2006) 27 ILJ 2537 (LAC) at para 41.

³³ (2006) 27 ILJ 818 (LC) at para 39. See also *Pratten v Afrizun KZN (Pty) Ltd* (2020) 41 ILJ 2899 (LC) at para 36; *Telkom SA Soc Limited v Van Staden* 2020 JDR 2579 (LAC) at para 44.

'If the applicant had followed the instructions of Mr Mogome, he would have just continued in the employ of the respondent, but in the position of manager: environmental management services. His intransigent stance in refusing to change direction caused the respondent to advertise that position internally and to treat all the applicants the same. The applicant was nonetheless encouraged to apply, even belatedly, as the respondent believed he was the best person for the position. However, after the long consultation process, which included meetings and correspondence, the respondent was entitled to decide not to accept an 'under duress' application for the position. The applicant was interviewed though. It was clear that he was not interested in the position. If he was, he would have withdrawn the 'under duress' reservation. ...'

- [50] When giving his testimony, Rachoene suggested that the respondent simply took its '*favourites*' to other sites. He also suggested that he was retrenched because the respondent owed him a lot of money as he had shares. None of this was put to Lamprecht or Jordaan to respond to, under cross examination. There was no indication of who these supposed '*favourites*' were and where they were placed. Rachoene simply made a bald and unsubstantiated statement in this regard. Sebone, in his testimony, also repeated the allegations relating to the '*favourites*' point and him being too expensive to the respondent, but added that they (the two employees) were selected for retrenchment out of 64 security guards because they stood up for themselves. Again, such versions by Sebone were never put to Lamprecht or Jordaan under cross examination. Also, and considering their own version that they were never part of any consultations and were simply presented with a letter of retrenchment, it is difficult to understand what exactly they did to stand up for themselves that may have convinced the respondent to retrench them. I am convinced that these contentions were only afterthoughts the employees came up with when giving evidence, and I have little hesitation in rejecting these versions on the basis of a lack of credibility.

[51] For all the reasons as set out above, I am satisfied that the dismissal of the employees by the respondent was based upon legitimate and valid operational requirements, and that there was a fair and proper reason to retrench them. I am also satisfied that there were viable alternative posts made available to the employees, and they elected not to avail themselves of this opportunity. Because of the fact that they could have avoided their retrenchment, it has to follow that the dismissal of the employees by the respondent is thus substantively fair.

Conclusion

[52] Therefore, the employees' dismissal by the respondent for operational requirements must be held to be substantively fair. As to procedural fairness, this is not competently before this Court to decide, and cannot be considered. The employees' unfair dismissal claim thus falls to be dismissed.

Costs

[53] As to costs, the employees were unrepresented. I accept that in terms of section 162(1) of the LRA I have a wide discretion in this regard. I must say that I have a measure of understanding of the employees' unhappiness for having lost their jobs, however it must also be considered that they only have themselves to blame for having been left unemployed. It at least appeared from the testimony of the employees that they have found alternative employment. I do not believe the employees were malicious or *mala fide* in pursuing this matter. The reality is that they lost their jobs due to circumstances beyond their control in an environment where jobs are already scarce. It is my view that a costs order against the employees, all considered, would not be appropriate. I consider it fair and justified that no order as to costs be made.

[54] For all of the reasons as set out above, I make the following order:

1. The applicants' dismissal by the respondent is substantively fair.

2. The applicants' claim is consequently dismissed.
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Both in person

For the Respondent: Ms L Foot of Crafford Attorneys