IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO CA 11/2002

In the matter between

GENERAL FOOD INDUSTRIES LTD **APPELLANT**

and

FOOD AND ALLIED WORKERS UNION **RESPONDENT**

JUDGMENT

NICHOLSON JA

Introduction

[1] The appellant is General Food Industries Ltd ("**the company**" or "**Genfood**"). Some explanation is required at the outset to cover sales and mergers of previous corporate entities involving Genfood. As I understand the position Genfood's holding company, National Cereal

Industries Limited ("**NCI"**), bought the shares in Premier Food Industries Ltd ("**PFI**") during August 1998 and merged Genfood with PFI to create a new Genfood. Although NCI acquired the right to use the name "**Premier**" it did not use it. Genfood's name was later changed to Premier Foods Limited. The appellant will be referred to as such or as Genfood and the old Premier Food Industries Ltd, before the merger with Genfood, as PFI. The respondent is the Food and Allied Workers Union ("**the union**"), a registered trade union acting for and on behalf of 58 of its members who were dismissed by the appellant on 15 February 2000.

[2] This appeal concerns a dispute about the fairness or otherwise of the dismissal by the company of 58 of its employees (all members of the union) at the appellant's Salt River Mill in Cape Town. Dismissals were also effected by the company at its Epping depot, Blue Ribbon Bakeries in Lakeside, and Blue Ribbon Bakeries in Cape Town. The union and the company entered into an agreement in terms of which the Salt River Mill dismissals would be regarded as a test case which would enable the parties in the remaining cases to consider the judgment and decide thereafter whether litigation in the remaining cases was necessary.

[3] The respondent referred the unfair dismissal dispute to the Labour Court and sought the reinstatement of its dismissed members. The appellant defended the claim. The court found that the dismissals

were automatically unfair in terms of section 187(1)(c) of the Labour Relations Act 66 of 1995, as amended ("**the Act**") and also substantively and procedurally unfair. Arendse AJ made an order for reinstatement on 8 August 2002 with retrospective effect from 15 February 2000 after a trial spanning the period 4 to 13 March 2002 with argument on 26 April 2002. Costs were ordered against the appellant with the exclusion of those relating to one amendment. With the leave of the Court a quo, the appellant now appeals to this Court against the whole of that judgement and order. Before I can deal with the appeal, it is necessary to set out the history and background to the matter.

<u>History and background</u>

[4] Genfood has wheat mills in centres throughout South Africa, including one at Salt River, Cape Town as well as maize mills, depots, distribution centres and bakeries throughout the country. Genfood mills wheat at its Salt River mill in Cape Town and operates 24 hours a day, six days a week and is labour intensive. Essentially, a mill buys wheat and processes it. The flour that is produced is sold to bakeries within the group (one third) and the remainder to others. The jobs performed by the dismissed employees still exist, but have been outsourced by the company to a service provider, Staffgro (Pty) Ltd ("**Staffgro**").

[5] Up until the birth of the new South Africa in 1994, the wheat and

milling industry was very profitable and was regulated by the Wheat Board under permit. The Wheat Board was, however, abolished in 1994, and, following deregulation, wheat and maize could be sourced freely in the open market. Farmers could demand international dollar prices for their crops. Tariff and price protections were abolished, prohibitions on the import of wheat and flour fell away and the industry felt the strictures of foreign competition and threats from smaller and medium-sized millers entering the fray.

[6] Ms Esselaar, its director of organisational effectiveness, came from the PFI group, having started there in 1987 and, after the acquisition of PFI, became the human resources manager in the company's milling division. Esselaar testified that the respondent had been recognised by Genfood prior to the acquisition in 1998, but only at plant level. The relationship between the respondent and PFI prior to 1998 was regulated by a national collective agreement and a participative agreement. These agreements provided for various structures at national, divisional and plant levels. At plant level, for example, joint management teams ("**JMTs**") were formed with full union participation.

[7] In 1997 PFI was in a poor financial state and investors in the company were unhappy. As a result it appointed consultants called Competitive Capabilities Africa ("**CCA**") in an attempt to revitalise the organisation and to make it competitive. CCA used the JMTs provided for in the

participative agreement. The process involved the election of task forces on which both union and management were represented. These task forces undertook an analysis and audit of the business to help create an understanding of a world-class business. One such task force, the national outsourcing task force, was established to look at merchandise, canteens, etc on a group basis.

[8] In October 1997 the possibility of the sale of PFI's food assets to Tiger Milling was discussed and at a meeting between PFI and the union on 6 November 1997 the union was told that a joint effort could stop the merger. The proposal that was ventilated involved restructuring PFI as the company's principal shareholders were dissatisfied. Management proposed that a retrenchment of 2000 employees be effected on an urgent basis and other matters were addressed relating to the terms and conditions of those remaining. An agreement was reached which included retrenchments and the union was thanked for the positive spirit with which it had conducted the negotiations. 1211 employees were retrenched and Esselaar testified that consultations in this regard took place at various levels. Her evidence included concessions that the rationale and number of retrenchments were dealt with nationally and the timing and selection of retrenched workers at plant level. The process came to an end when PFI's chief executive officer, Mr Ian Heron, called a halt in mid-1998.

[9] During August 1998 the company bought the milling and baking

businesses of PFI as going concerns and merged the businesses of PFI with those of the company. The evidence of Nelissen reveals that this resulted in a duplication of mills with concomitant inefficiencies which resulted in economic problems and questions about its viability in the food business. Esselaar testified that the reasons for the sale by PFI to Genfood were that the objects of the rescue plan had not been achieved, major shareholders were not satisfied with the returns; and Genfood was attracted to PFI's brand-names and national presence.

[10] After the sale the appellant moved to effect a reconstruction of its operations to counter the depredations of market conditions and what it perceived as over inflated salaries. Reference will be made to various minutes of meetings, which the parties agreed correctly reflected what transpired at the said gatherings. On 18 August 1998 the minutes of an Exco meeting referred to the rationalization of the Group and to redundancy declarations and the application of a uniform policy in regard thereto. A week later a plan to fire PFI staff and then rehire them with Genfood was mooted but then rejected – in favour of a plan to offer new terms to those that came over and to retrench those who did not accept. After the purchase of PFI the total staff of Genfood was 9 889 employees and the board contemplated retrenching 1 000 before the end of the year.

[11] Esselaar was at a meeting on 10 September 1998, shortly after the acquisition in August 1998, when the company announced to the union that downsizing was inevitable, and that retrenchments would take place at the workplace level. She testified that at the "old" PFI businesses, negotiations took place in accordance with the previous (centralised) arrangement; and at the "old" Genfood businesses, negotiations took place at plant level. It was common cause that wages at PFI were higher than at previous Genfood businesses and were higher than any of the appellant's competitors.

[12] While in PFI less profitable units would have been subsidized by more profitable ones, Genfood adopted a decentralized structure and Nelissen

testified that each business unit was required to be viable in its own right. Before Genfood had acquired shares in PFI, the latter had already closed mills at Butterworth, Port Elizabeth and East London and was outsourcing its non-core functions – examples of this being Pretoria and the Durban mill. Limited outsourcing occurred at Thaba Nchu and Kroonstad.

[13] The union wanted centralized wage negotiations and was of the opinion that PFI wages should prevail throughout the company. The union was told that if they continued pushing up wages, then the company would have to look at outsourcing and further job cuts.

[14] Esselaar maintained that outsourcing was widely used in the industry and the union was aware of this as it represented its members who worked in the industry for the appellant's competitors. Before the acquisition in August 1998, retrenchments and outsourcing had taken place at PFI plants as well as at Genfood operations. To further illustrate that PFI workplaces were not targeted – because the workers there earned comparatively higher wages, where there was duplication of depots after the acquisition, the Genfood depots were closed, and the PFI ones kept open. Esselaar confirmed that 58% of the union's members lost their jobs at the Salt River Mill due to outsourcing. Retrenchments which took place at PFI plant level after November 1997 took place following an agreement that was reached between PFI and the union.

[15] After Genfood acquired the shares in PFI it commenced rationalizing operations and retrenchment exercises took place at Vereeniging and Isando. After August 1998 problems emerged between the company and the union as the collective bargaining arrangement between PFI and the union was highly centralised, whereas the appellant operated in terms of a decentralised system of collective bargaining. The need to outsource and retrench was also imperative because the cost of raw materials escalated by some 300%.

[16] At the meeting of the 4th May 1999 the chairman of the board of the Exco meeting took note of the forthcoming dates for wage increases and spoke of rectifying the gap between old PFI and Genfood salary scales. The minutes of a meeting held on the 12th June reflect under the heading 'rationalisation' that staff had been placed on the [lower] Genfood pay scales at Pietersburg with negative consequences and that the matter had been referred to the CCMA. It was also noted that since the commencement of the rationalization policy the complement of staff had been reduced by 1000. Mr Hansen, the appellant's Human Resources Director, told Exco on 10 July that a 6% increase had been budgeted for in respect of the bakery division but that the appellant could face a strike which - the meeting concluded - should be prevented at all costs.

[17] Centralised wage negotiations commenced on 22 July 1999 between

the appellant and the union and were conducted in terms of the recognition agreement entered into between the union and PFI, although the appellant had given notice in February 1999 of its intention to cancel it. At the first round of national wage negotiations Mr Sibongile Pohlongo was present representing the Western Cape. He was the chairman of the shop steward committee at the Salt River mill. The appellant explained to the union that it faced tremendous problems, which its competitors were tackling by way of rationalisation (which included outsourcing). The appellant explained that it was paying more than its competitors and suggested a wage freeze in the wheat division, 4% in the urban depots and a 20% reduction in the rural depots. The respondent started with a demand of a 14% wage increase but stated that it would not accept below 11%. It said that it certainly would not accept any change in the wage structure downwards as it had no guarantee that retrenchments and outsourcing would come to an end. The appellant was unwilling to give any undertakings on job security in return for reduced wage demands but modified its position to a 2% increase for the urban wheat sector and urban depots and minus 10% for rural depots.

[18] The appellant explained its parlous state and the reasons for its losing market share because "**our labour cost is the second highest cost of the product; we are paying at least 10 % higher wages than our major competitors; the small millers are paying about 25% of our wages only, this being a matter that should be addressed by the**

union…" So clearly the appellant was asking the union to moderate its demands for increases.

[19] It is clear that outsourcing and retrenchments were discussed as the minutes record this "**motivating the demand of 14% the union said that it had no guarantee that retrenchments and outsourcing would come to an end; it would not be easy to motivate to the employees a 0% increase in light of the aforesaid; at the end of the day the members will still be retrenched."** Clearly the union knew that retrenchments would take place and wanted a sweetener for the rest of the workers who were not laid off. Later in the minutes it is recorded that "**the union also wanted to record that it is not happy with rationalizations that are only taking place in the old Premier operations; it will voice its objection that Maizecor and the other operations are not being affected by retrenchments…"**

[20] Finally the union made mention of the fact that, as "**70% costs have been saved through outsourcing and retrenchments**", and other factors, including that it was "**against the idea of being paid the same rate as companies that use cheap labour**", it was reducing its demand to 11%. This was the clear position at the meeting and no evidence was tendered on the side of the respondent to gainsay it. The inevitable conclusion to be drawn from this is that at national level the union was being asked to persuade its members to lower their wages or face the

retrenchments that had taken place at other mills.

[21] That position did not change at the next national wage negotiations on 10 August at which Pohlongo was also present, where the respondent made its position clear that "**anything relating to a wage freeze or minus will not be discussed.**" Appellant again emphasized the high level of wages in comparison to other companies and "**management reminded [the union] that during the Premier days the union was strong. High wages were demanded. The long-term impact caused the Company to be uncompetitive. The wage increase were (sic) always above inflation rates. All this caused the business to close and jobs were lost. Management said that people must be mature about this and allow other companies to catch up on wages. Continuation of un-competitiveness will lead to further job losses.**" Again the importance of reducing or moderating the wage increases and the possibility of retrenchment were clear. The dispute was then referred to the CCMA where an across the board settlement of 6% increase in the relevant bargaining units was agreed on 14 October 1999.

[22] The Salt River Mill was making a profit in 1999 but, nevertheless, the company was looking at flexibility, including outsourcing as utilized by its competitors, given that flour can be stockpiled. Nelissen stated in his evidence that the mill had limited warehousing space and had capacity for only three days storage. There were peaks and troughs with extra

demands at weekends and lag periods where the fixed costs of labour and other items persisted. Tiger Foods and Pioneer Foods had utilized outsourcing to achieve flexibility in this regard. Although the mill was profitable, account had to be taken of a loan to purchase PFI and the proportionate level of interest repayment to the mill. The profit margin was 5.9% and at least 10% was required to remain viable.

[23] Nelissen testified that he attempted on 19 August 1999 to approach the shop stewards at the Salt River Mill to discuss these issues, in particular about the need for operational requirements to change. Reference was made to a document, which evidenced the view of the Department of Trade and Industries that the South African milling industry was inefficient and had a few years to improve. The shop stewards were told that alternatives were being explored including outsourcing. He explained that the wages paid at Cape Town were much higher (by between 8 to 47%) than other mills, including those of the opposition companies. He reminded them that the Vereeniging mill had been through the outsourcing exercise and the union had been involved. After consultations between the parties an agreement was reached there between the company and the union. There were alarming cost differentials between Salt River and other mills belonging to the appellant, the average cost per ton was R76,19 at Salt River compared to R46.83, as the average for all the other mills combined.

[24] The shop stewards' response, however, was that these sorts of

discussions should take place at national level in terms of the recognition agreement. The discussions were therefore unsuccessful. Hansen told Exco on 24 August 1999 that, while the union was not in favour of the appellant's policy of outsourcing, the company was going to continue with the process because the appellant's competitors were already implementing it.

[25] The minutes of the Exco meeting of the 29th September reflect that 16 workplaces were to be the subject of outsourcing and restructuring. As I have already mentioned, on 14 October a wage agreement had been concluded with a 6% increase across the board, valid for a year from 1 July 1999.

[26] The 6% across-the-board increase agreed on 14 October 1999 was a surprise to Nelissen. Esselaar denied that the company had agreed on a 6% wage increase because it had already decided to outsource. She confirmed that no decision had been taken to outsource and that the company had agreed to a 6% increase because of the overriding consideration to strike sensitivity.

[27] The minutes of the Exco meeting of the 28th October 1989 dealt with questions relating to human resources and the meeting noted the progress of restructuring at various divisions. Hansen emphasized that outsourcing was becoming increasingly important and that Genfood should continue to keep control of the venues, where outsourcing was

taking place. Esselaar prepared an outsourcing update in November 2000, which summarized the broad picture during the period in question. It reflected that 36 workplaces had been the subject of outsourcing. As outsourcing had occurred at 76% of the work venues she and Nelissen were hard pressed to resist the suggestion that it had not occurred spontaneously but was the result of a deliberate policy of the appellant.

[28] By November 1999 no improvement had taken place at Salt River and the issue of outsourcing there was deadlocked as the local shop stewards took note of these issues, but they maintained that it should be discussed at national level. Nelissen told the court a quo that the only way he saw of moving forward was to force the workers to confront the issue, which he had tabled at the previous meetings.

[29] On 16 November 1999 Nelissen issued a retrenchment notice - designed to force the hand of the shop stewards. At the first consultation meeting on 24 November 1999, the company proposed the retrenchment of 74 employees out of a total staff complement of 98 in the packing, warehouse maintenance and mill production departments. These jobs would be outsourced. The company's wage bill would be reduced by R123 000 per month. Further consultations took place on 24 November, 8 December 1999 and on 25 January 2000. On the last-mentioned date alternative employment was discussed, in particular the issue of outsourcing.

[30] Nelissen told the meeting that he had already (in August 1999) identified some service providers and he could arrange meetings with them. He testified that he had consulted with certain labour brokers and they had supplied quotes for supplying the manpower for the work. The union had been informed of this fact. He also consulted service contractors who provided a specialized service and also managed the work in question. Nelissen explained that the use of a labour broker or service provider also resulted in reduced costs as far as other non-labour items were concerned including administrative costs, staff loans, cleaning costs and damage caused.

[31] No formal response was elicited from the shop stewards and the union organiser contended that the meetings were unlawful. The management expressed disappointment that an opportunity of alternative employment of the workers had been missed. Nelissen also said "**what we proposed is that when there's a retrenchment programme that we deal with it so that the retrenched employees could find alternative employment elsewhere in the company, and that might mean a relocation to either a different town or a different site…**" Names were required of persons who were willing to take up employment within the company even though no vacancies existed at that time. The respondent and the shop stewards committee wanted nothing to do with that suggestion.

[32] On 28 January 2000, Nelissen addressed a letter to all union members, giving them notice of the termination of their contracts of employment with effect from 15 February 2000. The last consultation was held on 2 February 2000, where the union's alternative proposals of a wage freeze, a reduction in paternity and compassionate leave, etc were discussed, but rejected by the company. The union's proposals only related to a saving of R20 160,00. The company informed the union and the shop stewards that, if it remained at the same level of wages, it would go out of business. The union stated that it would not accept any reduction in wages and salaries.

[33] The company's proposal on outsourcing was described as unlawful and unprocedural and was rejected by the union. The advantages of outsourcing were explained in evidence by Nelissen, who testified that the labour broker or service provider would attend to the flexibility issue and provide workers at the peak periods required and not have to pay for them at the times of troughs when no work was required.

[34] Nelissen made specific mention of finding jobs with the outsourcers. He said that he would arrange meetings with them. The shop stewards wanted to have nothing to do with outsourcers. Nelissen denied that the company's decision to retrench was purely to increase profits as it needed to reduce operational costs in order that it could be more competitive. The market was depressed, there was an over-capacity, prices were low, and the price of flour had come down.

[35] One alternative that had been considered was to close the mill, and to import flour directly from overseas. He furthermore denied demanding that the union's members reduce their wages, or they would face dismissal. Nelissen explained that lowering wages was not an adequate solution as there was a need for flexibility. The last mentioned consideration convinced the company to contract with Staffgro which would provide its services from 16 February 2000.

[36] Nelissen found the process of consultation frustrating given the union's refusal to properly consider the problems facing the company, and evaluate the solution of the company's competitors i.e. outsourcing. He agreed that the only way jobs could be saved would be to change the conditions of employment of the affected employees to suit the company's competitive needs. He denied that he was trying to get rid of the union and testified that outsourcing was employed by the company throughout the group, only where this would reduce the operational costs.

[37] The company advised the union in the course of the consultations that outsourcing would reduce its wage bill by approximately 48% or R120 000 per month. The evidence of Nelissen was, furthermore, that the union was not invited to discuss the issue of outsourcing at a national level, as the company wanted to deal with these issues at plant level and this was one of the factors, which compelled the company to retrench

employees at the Salt River Mill.

[38] Staffgro was willing to employ the affected employees at Staffgro rates but, as will be discussed later in this judgment, the proposal was not attractive to the union or the affected employees. Nelissen conceded that he had decided on the Staffgro proposal at the meeting with the shop stewards on 25 January 2000. As the letter of 28 January 2000 had effectively terminated their employment, it was suggested to Nelissen that the last consultation meeting of 2 February 2000 was merely going through the motions, but he said he was obliged to respond to the union at this meeting. The company paid to the union's members a severance package of two weeks for each completed year of service.

[39] Mr Van Dyk, the company secretary, testified that decisions on principle and policy such as mergers, takeovers and such like would be made at board and executive level, and that operational decisions relating to employment and restructuring would be dealt with at plant and regional level. The last mentioned matters would be referred by company executive directors to the divisional director who, in consultation with the company's human resources director, would make the plant-level decisions. The human resources director reported to the national management meetings. Decisions as to methods of implementation during retrenchment exercises were taken at plant and regional level. He testified that the plant management decided on restructuring, and in particular whether or not to outsource any of the

plant's functions.

[40] Van Dyk also testified that after the acquisition of PFI, the company engaged in a process of rationalization aimed at avoiding duplication of operations, and in some instances this resulted in closures. Before the acquisition, the company had used outsourcing to cut down on operational costs - after the acquisition outsourcing continued under the control of the managing director of the plant. Van Dyk confirmed that wage negotiations had been delegated to plant and divisional level despite this being contrary to the national agreement. He testified that the contract entered into between the Salt River Mill and Staffgro involved the latter rendering services to the value of R261 000 during March 2000. The dismissal of the employees took effect on the 15th February 2000.

Proceedings in the Labour Court

[41] A dispute arose between the parties on the fairness of that dismissal. The dispute was referred to the CCMA for conciliation but, when attempts at conciliation failed, it was referred to the Labour Court for adjudication. At the trial the appellant adduced the evidence of three witnesses, Mr Dominique Nelissen, the managing director of the company for the Cape region (also responsible for the Salt River Mill), Mr Jan Stephanus van Dyk, the company secretary, and Ms Surita Esselaar, its director of organisational effectiveness. The union

did not call any witness. The respondent contended in that court that the dismissal was automatically unfair in that the appellant's reason for dismissing the employees was to compel them to agree to a demand relating to a matter of interest. Alternatively, the respondent contended, the dismissal was unfair for lack of a fair reason to dismiss and because the appellant had the employees. The appellant disputed the correctness of these contentions and submitted that the dismissal was for operational requirements, was based on a fair reason to dismiss and had been preceded by a fair procedure before the dismissal of the employees. The finding of the Court a quo and the order it made have been referred to above already and need not be repeated.

<u>The judgment of the Court a quo</u>

[42] Arendse AJ, who heard the matter in the Court a quo, considered the argument of the present appellant in the court a quo that the employees were dismissed after the company had decided that outsourcing was the solution to its operational requirements, that outsourcing met its economic and structural needs and that no suitable alternatives to outsourcing could be found. Accordingly, so the argument ran, that placed the dismissals firmly within the ambit of section 189 of the Act.

[43] The Court a quo was satisfied that, on a balance of probabilities, these contentions were not supported by the evidence. The company, so

Arendse AJ held, was picking itself up by its own bootstraps by creating the conditions that validate its decision to outsource at a time when those very conditions already existed before the wage deal was struck on 14 October 1999. He asked why the company concluded a wage deal on 14 October 1999, and then undermined the effect thereof by serving notice of its intention to retrench those very workers on 16 November 1999.

[44] The Court a quo accepted that a company may outsource work to a third party that might otherwise be performed by its employees and that this promoted the efficient operation of the business. Arendse AJ held that in this matter, however, outsourcing constituted a threat to trade unions because it strikes at the core of job security and the survival of jobs. He held that "**the company used outsourcing as a device for undermining the status of the wage agreement concluded on 14 October 1999, and, as a device, for undermining the status of the union as the exclusive recognised collective bargaining agent of its members, the dismissed employees**." Consequently, held the Court a quo, the company failed to demonstrate the existence of any compelling logic or economics of operation to justify the use of section 189 of the Act, other than the wage bill, when it decided to outsource certain of its operations.

The appeal

[45] Before us there was argument directed at the legal implications of the union's failure to testify at all; the failure to put a version to the company's witnesses (**Small v Smith 1954 (3) SA 434 (SWA) at 438E–G; President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)** at paragraphs [58]–[65]); the selective use by the union of certain documentary evidence without agreement or formal admission; and the union's reliance on inference, in the absence of fact (**Lazarus v Gorfinkel 1988 (4) SA 123 (C) at 135A–B).**

[46] Mr Wallis, very fairly in my view, submitted that the appellant's witnesses were not sufficiently unreliable or mendacious that their testimony could be dismissed out of hand. In the circumstances, in the absence of evidence from the respondent, he conceded that he was stuck with such evidence, oral and documentary – and, given that it was peculiarly within the knowledge of the appellant – there was little that could have been done about it. In my view, if the respondent wanted to challenge the appellant's version of what transpired at certain meetings and union officials or shopstewards were present at such meetings, it should have adduced their evidence. However, it was up to the respondent to make the decision to call or not to call a witness in this regard. In the absence of such evidence, if there were two versions the court would accept the evidence of the appellant's witnesses in so far as such evidence emerged unscathed from the rigours of cross examination.

[47] Mr Wallis indicated that, as a result of the recent judgment of this Court in **National Union of Metalworkers of SA v Fry's Metals [2003] 2 BLLR 140 (LAC**), he was unable to defend the finding of the Court a quo that the dismissals were automatically unfair. In that case this Court held that the argument that an employer cannot dismiss employees for operational requirements in order to increase profits, but can only do so to ensure its survival, is not supported by the provisions of the Act.

The issues as pleaded

[48] The two questions that remained for decision in this appeal were whether the individual respondents' dismissals were for a fair reason based on the employer's operational requirements and implemented after following a fair procedure as contemplated in section 188(1) of the Act. In terms of section 189 (as it read at the relevant time) when an employer contemplated dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult any registered trade union whose members are likely to be affected by the proposed dismissals and try to reach consensus in terms of sub-section (2) on

> **"(a) appropriate measures**

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees."

In terms of section 189(3) – (7) **"the employer must disclose in writing to the other consulting party all relevant information, including, but not limited to**

a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;

c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

d) the time when, or the period during which, the dismissals are likely to take effect;

e) the severance pay proposed;

f) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

g) the possibility of the future re-employment of the employees who are dismissed."

Subsections 4 to 7 read thus:

"(4) The provisions of section 16 apply, read with the changes required by the context to the disclosure of information in terms of subsection (3).

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.

(6) The employer must consider and respond to the representations made by the other consulting party and, if

the employer does not agree with them, the employer must state the reasons for disagreeing.

(7) The employer must select the employees to be dismissed according to selection criteria

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective."

[49] A central enquiry into the question of substantive fairness is whether there was a fair reason to dismiss the employees concerned. The court a quo found that the ostensible commercial rationale proffered by the company did not provide a reasonable basis for the dismissal of the 58 employees. Substantive fairness with regard to retrenchment means that a fair reason must exist for the termination of the employment of an employee on account of operational reasons. The grounds why the respondent submitted that there was no fair reason for dismissing the individual respondents were set out in paragraphs 28 – 30 of its statement of case. These read as follows (the present appellant was the respondent and the present respondent the applicant):

"**28. The wage levels which existed in 1999 were the product of a collective bargaining process. In other words, they were**

at their current levels because respondent had agreed to pay these wages. Respondent, having made no previous attempt via the collective bargaining process to reduce wages, commenced a retrenchment process claiming that the wage bargain which it itself had struck with the applicant would provide the justification of possible dismissals there being, according to respondent, no other viable alternatives of which the respondent was aware.

29. It is submitted that there were clearly alternatives to dismissal but, if from the respondent's perspective the only viable alternatives which presented was one involving a reduced wage bill while maintaining the same size labour force, then the respondent was not entitled, in the first instance, to employ retrenchment procedures to attain this objective. The applicant submits that these retrenchments were effected principally to cancel the impact of a collective wage agreement on the company's profit margins.

30. Dismissals effected for these reasons and by this procedure were not dismissals for a fair reason based on the employer's operational requirements as contemplated by section 188 of the Act."

This ground may be summarized as the "**impropriety**" of retrenchment to reduce the wage bill or increase profits.

[50] Apart from these grounds the question of national consultation was the subject of an amendment of the statement of case, which reads as follows (the present appellant was the respondent and the present respondent the applicant):

> **"32(a) Respondent is a large corporation having under its control mills, bakeries and depots throughout the Republic of South Africa.**
>
> **b) In or about August 1999 the respondent's Executive Committee adopted a policy of outsourcing certain functions at its mills, bakeries and depots.**
>
> **c) In accordance with this policy local management at the various workplaces were inter alia required to investigate the cost benefits, which might be derived from outsourcing. Thereafter, and in the event of the respondent concluding that overheads might be substantially reduced should outsourcing be implemented, respondent in pursuance of this policy would thereupon notify staff at the relevant workplace of an intention to restructure by the outsourcing of certain of its functions.**
>
> **d) Between August 1999 and 27 January 2000 several**

thousands of respondent's employees lost their jobs due either to outsourcing or plant closures.

e) **Respondent's Executive Committee was at all material times aware that introducing outsourcing as a national policy would, alternatively might, lead to retrenchments.**

f) **According to the respondent the problem which it faced subsequent to the purchase of PFI and which required a solution was a national problem, namely that in respondent's view the wage rates at the ex-PFI workplaces, including its mills, were not competitive. Respondent sought, on a national scale, to address this problem via the implementation of an outsourcing policy.**

g) **It is submitted that were a meaningful solution to the problem to be found which might avoid retrenchments such solution would have to be addressed at all the ex-PFI workplaces including its mills.**

h) **Applicant submits that the problems, which arose constituted a dispute of interest to be resolved through power play. Should the court however find that on these facts the use of retrenchment procedures was permissible then the applicant submits as follows.**

i) **Addressing the problem in a manner which might avoid retrenchments required, so it is submitted, retrenchment consultations with the union at a national level in terms of which respondent would have been obliged to notify the union that unless its labour costs were substantially reduced, the problem would have to be addressed by restructuring, including outsourcing with possible retrenchments in consequence thereof.**

j) **In failing to consult at this stage, and insisting on consulting on a plant-by-plant basis over several months, respondent placed itself in a position where it failed to consult at the earliest opportunity.**

k) **In further consequence of this, and by the time that consultations commenced at the Salt River Mill, local wages had been fixed and the principal means by which retrenchments might have been avoided, namely the alteration of substantive terms and conditions of employment affecting Salt River employees, could no longer be addressed.”**

This ground can be summarized as the failure to consult on a national level at an early enough stage.

[51] In terms of the Act read with the Code of Good Practice on Dismissal

Based on Operational Requirements the retrenchment must be based on:

(a) economic or financial reasons, that is those reasons relating to the financial management of the enterprise; or

(b) technological reasons, that is those reasons that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace; or

(c) structural reasons, that is those reasons that relate to the redundancy of posts consequent to a restructuring of the employer's enterprise; or

(d) similar needs.

[52] In the Fry's Metal case (supra) at paragraphs [32] – [33] this Court dealt with the argument that the appellant could not dismiss for operational requirements when this was done for the purpose of making more profit as opposed to where it was resorted to in order to ensure the survival of the business or undertaking. Zondo JP considered the article 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' by Thompson which appears in (1999) 20 ILJ 755 which

was the foundation for the submission and held that such argument has no statutory basis in our law. The Act recognizes an employer's right to dismiss for a reason based on its operational requirements without making any distinction in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.

[53] An employer is entitled to take the provisional decision to consider the possible retrenchment of employees on his own, without any input from the employees or the union. But he is not allowed to make a final decision before consulting with the trade unions or employees involved. In practice an employer will first sense the need to retrench at managerial level and a decision in principle will be taken. However, the employer must consult once it contemplates the dismissal of employees for operational requirements.

[54] The prior consultations between the employer and the trade union enable the employer to provide the union with information on the reasons for retrenchment, the effects thereof, to allow it an opportunity to consult and, if possible, to reach agreement. Consultation is a very important process and necessitates that the consulting parties must engage in a joint problem solving exercise in order to try and reach consensus. Bona fides is crucial and shadow boxing, subterfuges and masquerades only impede what is a matter of life and death for the employees.

[55] The employer must afford the other party the opportunity to make representations on any relevant issue. Bona fide consultation necessarily implies that the employer must seriously consider and evaluate the representations. If the employer does not agree with them, he must state his full reasons for rejecting them. After consultations have been exhausted the employer must decide whether to proceed with the retrenchments or not. The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that - even though reasons to retrench employees may exist, they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum.

[56] The second broad issue was that of procedural unfairness. The respondent pleaded in its statement of case that the dismissals were a fait accompli and the appellant knew that, were it to claim that the only viable alternatives to dismissal was agreement from the workers to a 40% decrease in their wages, then the result would be that the process which would follow would amount to merely going through the motions without any real problem solving being possible. It was further pleaded by the respondent that "**plans were probably made in advance to ensure that the new service provider would be ready to commence their activities by the preplanned effective date of terminations".** The respondent alleged that, given appellant's attitude,

no meaningful consultation could occur on appropriate measures to avoid the dismissals.

[57] The respondent also pleaded that, given that the appellant intended to outsource, it was at the very least obliged to engage in meaningful consultations regarding the possibility of securing alternative employment for its ex-employees with the new service provider on the best terms and conditions of employment that might be obtainable in the circumstances. The respondent alleged that the appellant's claim that it was not able to influence the new service provider had the consequence that no meaningful or good faith consultations could take place on appropriate measures to mitigate the adverse effects of the dismissals.

[58] The respondent also pleaded in the amendment that there was insufficient disclosure of information, in particular the Staffgro contract, as the appellant had been informed in November 1999 that, in the event of Staffgro being appointed as service provider, it was prepared to agree to the following:

> "**7.2 Should you require us to take over existing employees, after consultation and evaluation of those identified current employees, applicants will be appointed on Staffgro (Pty) Ltd conditions of employment. Should you require Staffgro (Pty) Ltd to take employees over as a going concern as in**

terms of Section 197 of the LRA, negotiations with interesting (sic) parties must first and foremost be concluded prior to entering into such an arrangement."

[59] The respondent then pleaded that the appellant being the respondent, and, the respondent being the applicant;

"**32(m) Respondent was under a duty to disclose to the respondent in writing the alternatives that it had considered before proposing the dismissal of respondent's members and the reasons for rejecting each of these alternatives.**

(n) The respondent in fact considered but rejected Staffgro's offer to take transfer of its employees in terms of section 197 of the LRA, the respondent, however, failed to disclose this in writing or at all to the applicant.

(o) The respondent was furthermore under an obligation to disclose in writing any assistance that it proposed to offer to the employees likely to be dismissed.

(p) The respondent failed to disclose in writing that Staffgro, in hiring staff for the Mill, was prepared to employ alternatively employment; grant preference to the

respondent's former employees.

(q) The respondent in either event, in failing properly to communicate the terms and conditions under which alternative with the new service provider might be secured, failed in its obligation to attempt to reach consensus on the means by which the adverse effects of the dismissals might be avoided.

(r) Respondent in fact exacerbated the adverse effects of the applicant's members' retrenchments by failing to pay to them such notice pay as it was in law obliged to pay.

(s) Respondent in fact failed to disclose in writing any alternative which it has considered, or had considered but rejected, which might altogether avoid retrenchments."

The notice pay issue was resolved between the parties.

[60] The first substantive issue really is whether a company is prevented from effecting economic adjustments in an already profitable region in order to increase its national profits.

[61] The question of outsourcing had been engaging the attention of the company and the union for some years. Retrenchments had occurred at a number of mills prior to that in the Cape. That the shop stewards demanded that it be dealt with at national level admits of no dispute. The suggested measures to decrease costs (in the region of R20 000) were directed at the Salt River Mill itself and came nowhere near satisfying the amount that outsourcing would save.

[62] I am of the judgment that a natural consequence of the Fry's Metals judgment is that, all things being equal, a company is entitled to insist by economic restructuring that a profitable center becomes even more profitable. It is also clear from the evidence that the appellant required flexibility on the part of the employees' terms and conditions of employment in order to be competitive. The respondent did not offer such flexibility. In my view that need of the appellant also provided a fair reason to dismiss the employees when they were not able or prepared to offer such flexibility to the appellant. Accordingly, I am of the view that the dismissal of the employees concerned was substantively fair.

[63] If the appellant was entitled to retrench to increase its profits, the next question is that addressed by the second part of the amended statement of claim. This relates to procedural fairness and alleges that the appellant was obliged to address the problem of reducing its costs in a manner which might avoid retrenchments and required retrenchment

consultations with the union at a national level in terms of which appellant would have been obliged to notify the union that unless its labour costs were substantially reduced, the problem would have to be addressed by restructuring, including outsourcing with possible retrenchments in consequence thereof. The respondent went on to contend that, by failing to consult at this stage, and insisting on consulting on a plant-by-plant basis over several months, the appellant placed itself in a position where it failed to consult at the earliest opportunity. By the time that consultations commenced at the Salt River Mill, local wages had been fixed and the principal means by which retrenchments might have been avoided, namely the alteration of substantive terms and conditions of employment affecting Salt River employees, could no longer be addressed.

[64] In my view, within the context of answering the question whether or not the dismissal of the employees for operational requirements was fair or not, the question whether the consultation should have been held at national or local level misses the point. Such issues are matters for discussion among the consulting parties unless there is an agreement between the parties which makes provision as to the level at which such issues should be discussed or dealt with. That is the position in our law in regard to levels of collective bargaining and, in my view, that is also the position in regard to retrenchment consultations. As to levels of collective bargaining, sec 64(2) of the Act makes it clear that a refusal to bargain is a dispute of interest over which a strike or lock-out can be resorted to and sec 64(2)(d)(ii) of the

Act makes it clear that a dispute about appropriate bargaining levels is a dispute about which power can be resorted to if the parties do not reach agreement.

[65] In my view the correct question is whether, given the level at which the consultation took place, there was a fair consultation process which preceded the dismissals. In other words, did the fact that the consultation process took place at the level at which it did render the consultation process unfair? In this matter the respondent could have ensured that, if its delegation at the consultation process, was unable to handle the issues raised at the consultation, such delegation was appropriately increased to deal with such issues. It did not do so and no reason has been advanced why the respondent could not in addition have included its high ranking officials in such delegations to make sure that it took part in the consultation process in an effective manner. If the respondent had sought to include certain senior officials in its delegation but the appellant had refused to continue with consultations unless the respondent altered the composition of its delegation and it was not shown that there was any agreement between the parties precluding the union from composing its delegation in that fashion or if it was shown that the issues were too complex for the plant level delegation, this could have been different. That, however, was not part of the respondent's case. The respondent's case seems to have been based on effectively saying that it would have been more convenient to hold the consultations at national level than at plant level. In my view that could never be sufficient for purposes of determining whether the dismissal that followed such consultations was fair.

[66] To the extent that the respondent may have sought to argue that through "**bumping**", the appellant may have avoided the retrenchment of the employees in this matter, it is necessary to record that a fair reading of the pleadings and the issues before the Court a quo reveal that bumping was not really canvassed in the evidence. For that reason alone it should not be part of the equation. Some of the evidence and I

am thinking especially of the testimony of Nelissen was to the effect that there were two reasons why bumping could not take place. Firstly he stated that there were no vacancies – not that it would be relevant, given that one employee with more experience and service supplants another with less - and secondly, the workers showed no interest in other positions.

[67] Mr Wallis submitted that the evidence demonstrated that the appellant was engaged in a process of restructuring and harmonizing terms and conditions of employment in an attempt to make its operations more competitive and profitable and that these were national matters affecting members of the union throughout the country, not at the Salt River mill only – or indeed at all, as it was common cause that it was operating profitably at all times. He submitted that no reason existed to retrench at Salt River as there were other alternatives that could have been explored, which would have been supportive of collective bargaining. It was, therefore, so he submitted, unfair to retrench long serving employees as the limited financial advantages of such a move were outweighed as against the loss to the workers, and that the parties could have resolved the appellant's economic issues far more advantageously by a proper process of collective bargaining at national level.

[68] This last point was developed to encapsulate the submission that as the retrenchments were part of a national restructuring process and

that – because wages and other conditions of employment were concluded after national bargaining, the proper forum for consultations about retrenchments was also at national level.

[69] Mr Wallis then summarized the evidence, which has been set out above relating to the policy of the appellant to outsource and submitted that the appellant had done so whenever it was commercially advantageous to do so. To characterize such a national process as a local one was unfair, he submitted.

[70] It seems to me that the second point raised in the amendment was addressed at the national negotiations. Clearly the appellant told the respondent that, unless its labour costs were substantially reduced, the problem would have to be addressed by restructuring, including outsourcing with possible retrenchments in consequence thereof. The respondent was unwilling to discuss a wage freeze or a negative increase nor was the question of retrenchment at all appetizing. The extracts from the various meetings of national wage negotiations, set out above, do show that the topics were raised and dealt with at a national level.

[71] It is true, as alleged in the amendment, that by the time that consultations commenced at the Salt River Mill, local wages had been fixed (by the 6% increase). Nonetheless, I am of the view that it was still open to the shop stewards and others at the local levels to discuss

means by which retrenchments might have been avoided, namely, the alteration of substantive terms and conditions of employment affecting Salt River employees. At the first Salt River Mill meeting to discuss the retrenchments, Pohlongo was present as was Mr Lookington Ndongeni, a union official. At that meeting the union asked the appellant when it realized it had a problem that required addressing by way of retrenchments. The appellant responded by saying that at every national wage negotiation the issue had been raised in the context of the wages paid by its competitors. The appellant supplied the figures showing the reduction in costs that would be secured if service contractors or labour brokers were contracted.

[72] That the remaining employees secured a 6% increase is not necessarily contradictory as the appellant feared a strike, which the appellant thought would have had disastrous consequences for it. The employees in the profitable areas deserved an increase and the evidence revealed that such barely kept pace with inflation. The respondent was conscious that it, as a trade union, also benefited from achieving an increase for its members that remained in employment. It also recognized, and I have cited some passages in the minutes of the meetings, if, in order to achieve flexibility, the appellant resorted to outsourcing, a retrenchment would have to follow.

[73] I am of the judgment that possible retrenchments were discussed at a

national level to the extent that the respondent permitted it and that the question of moderating the wage demand was also raised by the appellant, without apparent success.

[74] The present respondent alleged that by failing to consult at this stage, and insisting on consulting on a plant-by-plant basis over several months, the appellant placed itself in a position where it failed to consult at the earliest opportunity. The respondent maintained that the only negative consequences of a failure to have national consultations pleaded by the respondent were that by the time that consultations commenced at the Salt River Mill, local wages had been fixed and that the alteration of substantive terms and conditions of employment affecting Salt River employees could no longer be addressed. In my view it was always possible for the union and its members to agree to a change of their terms and conditions of employment in order to avoid the retrenchment even if that meant foregoing the 6% increase after it had been agreed to. I accept that this would not be easy but that is different from saying that it could not be done. However, at any rate the evidence reveals that the wage rates were not the only problem but the inflexibility of the employees with regard to their terms and conditions of employment was another.

[75] Nelissen testified that the respondent as a national union was involved in all the outsourcing and retrenchment exercises around the country and did not challenge them in principle. Nor did it raise a collective

bargaining issue on the matter. The outsourcing topic had been around for some considerable time and reference was made to it from a long time previously.

[76] I do not believe that the appellant was not entitled to engage in the retrenchment exercise when it did. That it was entitled to increase its profits at an already profitable center is clear – but I do not believe it was impermissible to retrench after the 6% wage increase. From the commencement of the national wage bargaining meetings it was clear that the wages had to be reduced or else substantial retrenchments would follow. The respondent wanted neither and blocked discussions on both topics, which were raised at the various meetings I have mentioned. The increase was agreed to by the appellant at a time it faced a national strike.

[77] Part of the national strategy to outsource had been implemented prior to the 6% wage settlement and it was mentioned during the wage negotiations. The wage settlement did not waive any rights of the appellant to continue retrenchments as part of the outsourcing nor did it provide a contradiction of that policy. The respondent opposed discussions on outsourcing and no increase or minimal wage increases, well knowing that in order to be competitive the appellant had to continue on that path. It cannot lie in the mouth of the respondent to complain that retrenchments and outsourcing were not discussed at a national level when it blocked such a discussion.

[78] I am therefore of the judgment that the dismissals were for a fair reason.

[79] Another issue arising out of the procedural unfairness relates to whether the decision was a fait accompli. This was, indeed, the original ground pleaded by the respondent. Arendse AJ questioned whether the company was sufficiently flexible to consult with the union with an open mind about alternatives to outsourcing when the consultations commenced. He found that the evidence of the company was clear that, unless the employees could show the company how approximately R120 000 per month could be saved on the wage bill at the Salt River Mill, other than by outsourcing, they were going to be retrenched. The only alternative left to the employees, he held, was to change the substantive terms and conditions of their employment. The company, the Court a quo held, was, however, aware of the fact that this could not be done at plant level.

[80] The Court a quo also held that the company also knew that a staff reduction was not the solution because there was no over-capacity. The Court a quo said that this raised the issue of a bargaining-levels dispute. Objectively, therefore, it held, the company was aware that a solution to their retrenchments was objectively unattainable. The company preferred the outsourcing method and therefore by inference,

the Court a quo held, that the company had closed its mind to any other method in dealing with high wages, flexibility etc.

[81] There was much debate in evidence and in argument as to whether outsourcing was a policy of the appellant or was merely a method used where appellant saw advantage in it. In my view it does not matter a great deal even if outsourcing was the appellant's policy. If it was the appellant's policy, that does not on its own assist the respondent. The real question is whether if outsourcing was the appellant's policy, the appellant was nevertheless prepared to properly and genuinely consider other possible solutions including those that the respondent could propose or that it did propose and to change its mind about implementing outsourcing if another option with more merit than outsourcing emerged from the consultation process. In any event, the effects of outsourcing i.e. the savings, were put to the respondent during consultation and it was asked whether it had other suggestions that would result in a similar reduction in costs and the suggestions by the shop stewards resulted in a saving of approximately R20 000 which came nowhere near the target.

[82] There was a long history of outsourcing and the respondent was abundantly aware of it. It is necessary to decide if it was a fait accompli. The fact that it was the only answer staring everyone in the face and had been implemented by competitors and other branches of the appellant did not make it a fait accompli. It was inevitably very

difficult for the respondent or the shop stewards to match the saving that outsourcing could produce. I am of the view that it was not a fait accompli.

[83] The Court a quo was satisfied that the appellant had failed to enter the consultation process with an open mind. Indeed, Arendse AJ held that Nelissen adopted an a priori approach that excluded any or all alternatives other than outsourcing. While I accept that the appellant approached the consultation process with a very strong view that outsourcing was the way to go, I do not accept that the appellant was not open to a consideration of other possible solutions to the problem if they were suggested and appeared to be viable. In my view the appellant was open to other viable options that could be suggested. At any rate it would have been helpful if some suggestions had been made by the respondent either at the meetings or even subsequently at the trial which, if implemented, would have effected the same savings. The matters suggested at the meetings by the union have been mentioned but they were not a serious contender, given the limited savings they involved. I would add that the respondent also proposed that assets be sold but I understand from the evidence that such had already taken place. The mill had sold its ageing fleet of vehicles and had not replaced them.

[84] The respondent also suggested in the alternative that the assets be sold and then rented back by the appellant. Such a procedure was not

feasible on the evidence. The plant was worth R65 million but would only fetch some R10 million in the event of a sale. It was obvious to all that a drastic reduction in salaries and flexibility were required if the retrenchment option was to be countered by the existing workforce. Such a solution was unpalatable to the union and the affected workers and was not proffered.

[85] Arendse AJ also held that the company's inflexible attitude was evidenced by the unilaterally shortened time periods it imposed on the union in the retrenchment notice in contravention of the recognition agreement, and were also unreasonable. The notice of retrenchment was sent on 16 November 1999 and proposed implementation on 1 January 2000. Because of annual leave of the union representatives and the failure to appoint alternate representatives, the implementation date was extended to 15 February, giving a period of three months. The evidence revealed that the recognition agreement had been validly cancelled - as the CCMA arbitrator eventually found - and I am of the view that, in all the circumstances, including the lengthy and tortuous road outsourcing had taken in the past, a period of three months was reasonable. I do not think that the notice period that the appellant gave was indicative of any inflexible attitude.

[86] Arendse AJ held that a further indication of the company's closed attitude was the fact that Nelissen appears to have reached an agreement with Staffgro even before the consultations with the union began. He held that Nelissen failed to disclose this to the union. That

he (Nelissen) was of the view that such disclosure was to be "**fruitless**", so held the learned Acting Judge, was no excuse for non-disclosure in the light of section 189(3)(b) of the Act.

[87] Arendse AJ held that a further pointer is that Nelissen had indicated already at the 8 December 1999 consultation meeting that all retrenchments had to be finalised by 15 February 2000. The Court a quo took the view that the only conclusion to be drawn from the facts was that Nelissen had already contracted with Staffgro (before 8 December 1999) to start on 15 February 2000.

[88] Nelissen testified that he telephoned Mr Marais of Staffgro on 8 February or thereabout and told him he had the contract. Counsel for the respondent Mr Kahanovitz asked him:

"**So is it still your version that you wrote him a letter to tell him he got the contract?"** He answered: **" --- I phoned him after the last consultation which was on 2nd February and we decided we needed to carry on. It was only after that meeting that I phoned him and said that he could carry on."** This evidence by Nellissen was not contradicted. It is true that Nellissen had had discussions with Staffgro before the conclusion of the consultation process which may have reached a stage where they all knew what the terms of their outsourcing arrangement were likely to be or would be eventually if the appellant proceeded on the outsourcing route but there is no evidence on the basis of which it can be said that, if a viable alternative was put forward, he would have proceeded to sign an outsourcing agreement with Staffgro.

[89] The court a quo held that there was procedural unfairness because there was an insufficient disclosure of the information, more especially concerning the Staffgro contract. This was important because of two reasons, the first being that Staffgro was willing to consider transfers in terms of section 197 of the Act, alternatively to offer employment on its terms, and, secondly, the union could possibly have engaged Staffgro as a source of alternative employment. Arendse AJ held that in relation to Staffgro, the evidence of Nelissen was not satisfactory, and, indeed, was quite unconvincing and illogical at times.

[90] I do not share Arendse AJ's misgivings. As I understood the evidence a transfer in terms of section 197 was never a possibility as it would have resulted in an even higher wage and other costs structure, given that Staffgro had to also build in its own administration costs. The workers repeatedly refused the offer to work for Staffgro for the reason that the wages and other conditions of employment were far too disadvantageous in comparison with those they enjoyed with appellant.

[91] Did they have enough information to deal with the consultations

sufficiently comprehensively? As I understand it they were promised all the information that they required. The evidence did reveal that some of it had to be inspected at the mill because of the confidential nature of it. The respondent was told that the information was confidential because as a union FAWU represented its members in competing companies as well. Nelissen asked that the information be requested in writing so that if a dispute arose about the adequacy of the answers there would be tangible proof. It seems from the record that FAWU did not do what it was asked to do if it wanted information. Accordingly, the appellant is not to blame if FAWU did not have certain information.

[92] Arendse AJ held further that the failure to give proper notice of termination was a further indication of a closed mind. Since the issue of unlawful notice was, of course, settled before the hearing in this matter commenced, it is difficult to see how it can be a factor to be taken into account in considering the fairness of the dismissals. The evidence revealed that Nelissen was perfectly prepared to pay what the law required and regretted the miscalculation. In my view it does not show a closed mind on the question of consultation. It was a regrettable lapse, which has subsequently been remedied.

[93] The Court a quo found that the fact that Staffgro was willing to offer employment or even to guarantee alternative employment to the retrenched workers, was not disclosed to the union by Nelissen. I am

not convinced that this finding was justified by the evidence. Nelissen testified as follows:

"**It was my suggestion that I would approach these companies that had brought in quotes, so that they could engage with them in terms of what were their working conditions, terms of employment etc, as at that stage I didn't even know that, but I was willing to put them face to face together if they so wished, so that they could explore that alternative, but it was completely denied and it never went further."** This evidence was repeated in a number of passages in the evidence. The minutes of the meeting of 25 January 2000 reflected as much. They read thus: "**Mr Nelissen wanted to offer the individual employees an opportunity of exploring the possibility of alternative employment with the outsourcer who would ultimately be appointed**."

[94] There was nothing wrong with the appellant exploring possibilities of service contractors and obtaining quotes from them. It would, of course, have been the ultimate folly to have concluded contracts with them and alerted the union to that fact during what purported to be open consultations. Staffgro were even going to put up notices to alert the retrenched workers to the opportunities that presented themselves with it. The letter of 8 February records as much:

"I further propose that we place the Staffgro Vacancy memo on your internal notice boards, to allow affected employees to apply

for various positions."

[95] Nelissen also testified to seeing Pohlongo at his work position in the mill laboratory and asking him why the workers were not taking up the positions with the service provider. Pohlongo told him that he had spoken to the union official, Lookington Ndongeni, who had stated that the procedures were unlawful and they were not going to take up the job offers.

[96] The Court a quo held that what made the company's conduct even more unreasonable in the circumstances was the fact that more than half the adversely affected employees at the Salt River Mill had more than 20 years' service, and five of them in fact had more than 30 years' service. It is always tragic when any employee loses employment and that is always exacerbated with longer serving workers. I do not believe that in itself it is a decisive factor in determining that there was procedural unfairness.

I would therefore conclude that no procedural unfairness was proved.

[97] In the result I would make the following order:

a) The appeal is upheld with costs including those consequent upon the employment of two counsel.

b) The order of the court a quo is set aside and replaced by the following order:

"**The claim is dismissed with costs, including those consequent upon the employment of two counsel**."

Nicholson AJA

I agree.

ZONDO JP

I agree.

JAFTA AJA

Appearances:

For appellant: Adv J Gauntlett SC and Adv RGL Stelzner,
instructed by: Deneys Reitz

For respondent: Adv MJD Wallis SC and Adv C Kahanovitz,

instructed by : Cheadle Thompson & Haysom

Date of judgment: 11 May 2004