

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case No. JA52/03

In the matter between

FORECOURT EXPRESS (Pty)Ltd

Appellant

And

SOUTH AFRICAN TRANSPORT and

ALLIED WORKERS UNION

First respondent

ABRAM MONYELO AND 54 OTHERS

**Second and Further
Respondents**

JUDGMENT

ZONDO JP

Introduction

- [1] I have had the benefit of reading in draft the judgment prepared by my friend and Colleague, Mlambo AJA, in this matter. I agree with him that the finding of the Court a quo that the dismissal of the second and further respondents by the appellant was procedurally unfair cannot be sustained and that the dismissal was procedurally fair. However, I am unable to share my Colleague's finding that the dismissal was substantively unfair as was also found by the Labour Court. In my judgement the Labour Court erred in concluding that

the dismissal was substantively unfair. I explain my approach and reasoning here below.

[2] Mlambo AJA has already set out the sequence of events and the facts of this matter. Accordingly, it is not necessary for me to do the same. I shall only focus on the question whether there was a fair reason for the dismissal and deal with the issues and evidence relating to that question. I may have something to say about procedural fairness in addition to what Mlambo AJA says about procedural fairness in his judgment.

[3] Section 188 of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”) requires that there be a fair reason to dismiss and that a fair procedure be followed before a dismissal can be said to be fair. If there is no fair reason for a dismissal exists and/or no fair procedure was followed before the dismissal, the dismissal is unfair.

Evidence relating to the reason for the dismissal of the second and further respondents

[4] In order to determine whether there was a fair reason for the dismissal of the second and further respondents, it is necessary to first determine what the reason for the dismissal was and thereafter the question whether that reason was fair can be decided. To determine what the reason was, it seems to me necessary to have regard to correspondence between the parties, the pleadings and the

oral evidence. Accordingly, I now propose to consider such matters.

- [5] In its letter of the 27th August 1999 the appellant informed the union in the first paragraph of that letter why it had sought the Daimler Chrysler contract. The first paragraph of the letter read thus:

“Forecourt has acquired the operation as certain synergistic opportunities exist between this operation and other contracts (i.e. the Volkswagen SA contract) operated by Forecourt. Utilising these opportunities will not only make the Fauna Operation a viable prospect but it would also enhance the viability of Forecourt’s other vehicle ferrying operations.”

It also stated upfront that significant changes had to be made to the Fauna operation if it was to remain viable.

- [6] It will be seen from the extract from the letter of 27 August that the appellant’s objective in seeking to acquire the Fauna operation was to exploit certain opportunities and enhance the viability of the appellant’s other vehicle ferrying operations. In that paragraph the appellant also said: **“It is our view that this operation cannot continue to be operated on a viable basis without making a significant change to the operation. The financial performance of Fauna has been less than satisfactory during the recent past.”**

[7] In paragraph 2 of the letter the appellant set out the operational changes that it thought were necessary in order to make the Fauna operation viable and to also exploit the opportunities that it thought the acquisition of the Fauna operation would present. In paragraph 2 the appellant wrote:

“A fleet of 13 carriers vehicles are currently operated by this operation on a double crew basis. It is our proposal to change the fleet as follows:-

- i) Five (5) of the current vehicles are old and in our opinion no longer viable. Mr Fourie has offered to purchase these vehicles.**
- ii) Six (6) of the remaining vehicles will be sold to a company called Accurate Auto Ferriers with whom Forecourt will subcontract for ferrying vehicles in terms of its contract. Forecourt’s overhead and operating costs will be reduced as it will not be required to operate these vehicles on a permanent basis. Vehicles will be contracted in on a demand basis whenever required.**
- iii) The remaining two (2) vehicles are available to be sold to owner drivers with whom Forecourt will contract to ferry vehicles.**
- iv) The eight (8) vehicles referred to in (ii) and**

(iii) above will be utilised for local ferrying of vehicles and not for Forecourts long distance needs.

- v) For the purpose of long distance ferrying Forecourt proposes to subcontract with Highway Carriers – a sister company. Highway currently operates multi-purpose carrier vehicles. These vehicles could carry motor vehicles in one direction and a general freight load on the return leg, obviously bring significant efficiencies and cost savings to the operation.**
- vi) Further efficiencies can be achieved by utilising vehicles used on Forecourts Volkswagen contract more effectively by using these vehicles for the Fauna operation where possible.”**

[8] It is clear from the letter of the 27th August that the appellant thought that the manner in which the Fauna operation had been conducted was not viable and it wanted to run it differently. Running it differently meant running it the way the appellant had been running the Volkswagen contract. That the appellant should prefer to run the Fauna operation in the way it had been running the Volkswagen contract is understandable because that was the only way of operating a vehicle ferrying operation in which it had

experience. The union did not respond to that letter to dispute anything contained therein.

- [9] In the meeting of the 7th September 1999 between the appellant and the union the appellant's representatives informed the union that the appellant's position in seeking to make the changes that it was seeking to make in the Fauna operation was justified **“given the financial situation of the company in the recent past as well as to achieve synergy with other operations.”** This appears in par 4 of the agreed minutes of that meeting. The minutes of that meeting also reflect that the appellant's representatives informed the union that, although the Fauna operation was **“taken over as a going concern,”** the appellant wanted to effect certain changes to make it profitable. In this regard the minutes reflect that the appellant's representatives also explained that the **“(c)hanges are also necessary to make other operations of Forecourt more profitable.”** They also informed the union that **“with the efficiencies which could be obtained by utilising vehicles from other contracts as well as the multi- purpose vehicles from Highway Carriers the need for convoy drivers will be reduced. The company will negotiate with labour brokers to utilise existing drivers of the company when the need for convoys arise (sic).”**

- [10] In par 3.1 of their statement of claim filed in the Labour Court the respondents alleged that the second and further respondents were

dismissed without any fair reason. In paragraphs 26.1 – 26.2 of its amended response the appellant put up the following defence:

“26.1 The [appellant] is a third party logistic company involved in the business of ferrying motor vehicles. The [appellant] does not own carriers, employ carriers or convoy drivers or operate a mechanical workshop. It concludes contracts to ferry commercial and passenger vehicles, supervises the logistics of ferrying those vehicles and outsources ferrying i.e. collection and delivery, to ferrying operators.

2.6.2 Fauna was bought to obtain the contract to ferry motor vehicles for Daimler Chrysler South Africa (Pty)Ltd held by Fauna.”

In their evidence both Du Plessis and Gibb were able to prove these statements. Indeed, the respondents’ only witness did not contradict their evidence. In paragraphs 26.3 of the appellant’s amended response the appellant gave reasons why it did not seek to operate Fauna as a going concern. The appellant said that this was because of the reasons given in paragraphs 26.1 and 26.2 as quoted above, that Fauna was not profitable or sustainable, and that the appellant could not afford financially to sustain Fauna’s continued operation. In par 26.4 of the appellant’s amended response the appellant alleged that the Fauna operation was not profitable and its erstwhile owner had been unable to recapitalise the business. In Court it became common cause that Mr Kruger, the previous owner of the Fauna operation, had failed to recapitalise the Fauna operation. As to the profitability of the operation, Counsel for the respondents never put it to the appellant’s witnesses that the Fauna operation was profitable. He also did not call Kruger to testify to that effect even though he had a statement by Kruger and indicated

that he could call him as a witness.

- [11] Du Plessis explained how the appellant got into the vehicle ferry market or industry. He said in his evidence in chief:

“... why we got into the market, it’s because, just to give you a bit of background, it was a closed shop market the whole motor ferry industry. You had four companies, and **they’ve had three companies and ... it’s been a monopoly within South Africa. The reason how we got in, what gave us the edge is the carriers that we subcontract out to, being Imperial, Cargo and actually the owner drivers. The trailers are multi-purpose, as I’ve mentioned earlier, and the only way we could have done at viable rates is to have product going down, so we running full down and we’re running full up where the opposition only moves cars, so they move cars up and they move cars down because they’ve got numerous contracts. So the reason why we could not also look at these carriers or the trailers especially is they were not designed to fit into the whole logistics set up that Forecourt had at that point in time.**”

Although much of Du Plessis’ evidence was challenged, this part of his evidence was not challenged. The appellant sold the whole fleet that it acquired from Fauna. Mr Kruger apparently kept four or five of the vehicles.

- [12] In his evidence Du Plessis said that the convoy drivers based at

Eikenhof became “**casualties**” because Daimler Chrysler required that its vehicles be transported off-wheels. Du Plessis said that Daimler Chrysler gave the appellant a time frame within which to ensure that all its vehicles were transported “**off-wheels**” and the appellant passed the information about the time frame to its subcontractors. Du Plessis also gave evidence to the effect that the appellant’s initial idea was that it would retrench almost all the Fauna employees. When he was asked why, his answer was that the appellant did not employ drivers, did not keep carriers and did not operate a mechanical workshop. He continued thus: “**When [the appellant] started up from day one in September 1998, not one driver has been employed by them, and this is not only unique to the facility up here, it’s down in (inaudible) office, where our head office is with VW. We do not employ any drivers whatsoever.**”

- [13] With regard to the union’s suggestion made at the time of the consultation process that the retrenchment be postponed by three to six months, Du Plessis said: “**We could not take on these Fauna drivers and set up a separate division now to run the carriers.**” He also said the appellant could not accept the union’s proposal because “**as I’ve said, we had the depot Cargo and owner drivers, their carriers were multi-purpose. The rate we had for Mercedes Benz was (sic) in such a way that if we had to run carriers empty, we had to run carriers down empty and bring back cars, we would never, ..., after the first month, we would**

have gone down, it was just totally impossible to do it that way, and we did not employ drivers. We had not one driver on Forecourt's books. We would now have to go and employ these ... 15 or whatever convoy drivers and Forecourt did not, as I've said, have our own drivers, we did not employ any drivers whatsoever." Van der Walt testified that he saw no purpose in postponing the implementation of the retrenchment or the consultation process. When Counsel for the respondents asked Van der Walt what harm the appellant would have suffered if the consultation process was delayed for a few weeks, his answer was:

"The [appellant] would now have operated the Fauna operation on a non-profitable basis, included losses, and [it] would have forfeited the opportunities and the benefits [it] would have got in [its] other businesses by integrating this into those businesses."

- [14] Du Plessis said that, while he could not testify about the financial position of Fauna, he could testify about the condition of Fauna's vehicles. He said that the conditions of some of those vehicles was shocking. Du Plessis must have described those vehicles like this during his evidence at least about four times. An attempt was made to challenge his evidence in this regard under cross-examination, but, in my judgement, his evidence about some of the vehicles is probably true. In this regard I point out that, in so far as Monyela's evidence is inconsistent with that of Du Plessis in this regard, Du Plessis' evidence must be preferred. He had a reason to look at the

vehicles closely.

[15] Counsel for the respondents put it to Du Plessis that, after the 17th September 1999 (that is the date when the second and further respondents were informed that their services were being terminated with effect from the 30th September 1999) the appellant continued to do the work which the second and further respondents had been doing but now used employees employed by labour brokers to do work. Du Plessis conceded that this was true but went on to say that this was done at hugely reduced costs to the appellant. Du Plessis explained: **“what was happening now, we were paying the labour brokers per vehicle moved. So if there was no demand, there were no costs incurred. If there were vehicles to be moved, we would then pay that driver per vehicle or the labour broker, per vehicle moved. Because of the nature of the business at Eikenhof and the inconsistent volumes, we could not have 20 drivers sitting and wait[ing] for vehicles to be moved from the storage yard or vehicles to be ordered. We couldn’t employ 20 people to sit and wait for vehicles to go out.”**

[16] At this stage of Du Plessis’ cross-examination Counsel for the respondents asked him where the documentation was to support what he had just said. In response Du Plessis said: **“I can get you a copy of the rates agreed to with the subcontractors, it’s not (inaudible) labour brokers, it is per, and if need be I can, I**

know a lot of the rates off the top of my head, I can give those to the court if need be, and it's not per hour, we pay all drivers and all subcontractors, even the subcontract carriers that work out at Kaalfontein are paid per vehicle moved and not per hour your Lordship." At this stage Counsel for the respondents asked Du Plessis why he was offering such documentation when he was almost finished with cross-examining him and why he had not offered it earlier. To this Du Plessis responded: **"Mr Van der Riet, you haven't requested it earlier. You have got the onus here Mr Van der Riet, unfortunately."**

- [17] Mr Gibb was asked whether the appellant had been interested in acquiring Fauna's carriers and trailers. He answered that they were not but had to buy them because the Fauna operation was being sold to them as a going concern. He put it thus: **"We weren't interested in acquiring the carriers for our own purposes because our modus operandi is completely different..."**. He was then asked what the appellant's modus operandi was. Gibb explained the appellant's modus operandi in these terms:

"Forecourt Express was awarded a R 450 million contract by Volkswagen South Africa on the basis of a unique activity and the activity rests upon the fact that Forecourt Express move cars in the conventional manner, with trailers that are specially designed to move cars. But these trailers collapse and are designed to

convey freight from the point of destination back to the motor plant, so the value proposition for the motor manufacturer is a significant reduction in the cost levels. So you need very very sophisticated, extremely expensive equipment to be able to do this, but it is the only way in our view that our business model could be sustainable.”

Gibb was then asked whether Kruger had had the kind of equipment that he was saying was critical for the sustainability of the appellant’s business model and he replied in the negative.

- [18] Gibb was asked how the Daimler Chrysler contract was going to be integrated into the appellant’s modus operandi. He answered: **“Well Forecourt Express has a very very sophisticated information technology platform, designed by Dia Data, in terms of which all of the motor vehicles are tracked, traced and dealers can access the inventory through the internet. Now clearly it’s a very very expensive platform and in Daimler Chrysler’s case our platform was expanded to include Daimler Chrysler. So the opportunities for us in terms of service enhancement and reduction in cost are obvious because the volumes that we would generate through Daimler Chrysler’s volumes, as well as other contracts we had obtained, lowered the effect of cost of this information IT platform.”**

- [19] Gibb was asked about Fauna’s financial position. He said that **“it was common cause that the company was incurring losses, and**

clearly was in need of a major capital injection to actually enable it to compete in what had become a changed market environment.” Asked why he was saying that the market environment had changed, Gibb explained:

“Forecourt **Express** is owned ... **70% by Cargo Africa and 30% by a private Port Elizabeth company. Cargo Africa itself is owned 60% by Imperial Holdings. Imperial Holdings is one of South Africa’s largest industrial conglomerates, and Forecourt Express, by coming into this market with its changed modus operandi, with its new emphasis on service and low costs, has changed the landscape of this particular sector on the other companies, because without the innovation of being able to return with freight on your carriers the other carriers or the other players are at a competitive disadvantage to our own business from a pricing point of view.**”

- [20] Gibb testified that he had seen Fauna’s financial statements and had formed a view that Fauna’s operation was not viable. He said that the Fauna operation needed a major capital injection. When Counsel for the respondents asked him why in principle Mr Kruger would not have had access to a financial loan capital, Gibb said that the loan capital that would have been required by the Fauna operation would have been about R 25 to R30 million and he doubted that any financial institution would have advanced such a large sum of money **“against Kruger’s business model and his**

income statement and, on that basis you know there was a fundamental difference between our business model and his. Our business model was one of a completely viable and dynamic approach to dealing with the industry, going into 2000, 2001, 2002. His was a model that had not been re-engineered or looked at and had been overtaken by events and it was no longer sustainable.”

Counsel for the respondents did not challenge this evidence by Gibb. The respondents’ only witness, Monyela, also did not contradict this evidence by Gibb.

- [21] Counsel for the respondents attempted to suggest to Gibb that, although the latter might have seen Fauna’s financial statement, he had not been given the information that he would have required to make a proper assessment of the Fauna operation. Gibb’s response was emphatic and telling. He said:

“...without wishing to sound immodest, I’m regarded as one of the logistics industries leading entrepreneurs. I intimately understand whether the transport business or logistics business is profitable or not, pretty much the same kind of expertise that Raymond Ackermann would be able to give with regard to the review of a retail organisation, and I have absolutely no doubt that that business was absolutely, and by any criteria, under severe financial pressure. By no stretch of the imagination was it sustainable.”

[22] Counsel for the respondents sought to pursue this line of inquiry. Counsel asked Gibbs whether Mr Kruger had actually **“given you facts and figures, and whether his financial statements that he produced to you, gave you facts and figures to have a precise picture of exactly what, at that point in time, what his current situation was.”** Gibb’s answer was in the affirmative. Counsel then asked Gibb **“whether in other words in August he actually made a further loss, whether in July he made a further loss, or whether he perhaps just broke even or perhaps, obviously in the long term your view is that there was no chance that he can go on, but did you have the actual information from Mr Kruger to assess what the situation on a specific day to day basis was at the time that you took over the contract?”** Gibb’s answer was firm and unequivocal. He said: **“Yes I did.”** As if in disbelief, Counsel for the respondents then asked Gibb this question. **“You did get the figures?”** Gibb answered: **“Yes”**. Counsel for the respondents then asked Gibb where those facts and figures were. Gibb answered: **“The facts and figures were discussed. [Mr Kruger] had a business adviser whose name I forget, but we went through the monthly income statements for two or three months, so I had a precise understanding of what the prevailing trading conditions were at the time.”**

[24] Later on Counsel for the respondents asked Gibb whether there wasn’t a document that would have been given to Du Plessis to

show how the Fauna business looked like. Gibb's answer was:

"I wasn't even remotely interested in how Mr Kruger ran his business because with our expertise we were going to always run the business properly and professionally, and we would not take anything from that business, with respect to Mr Kruger, there is nothing that Mr Kruger could actually **impact on us with regard [to] how to operate that business, nothing whatsoever.**"

Thereafter Gibb said: **"I looked at the income statements and saw how they were structured and realised what financial predicament he was in. But that was not of interest to us because we weren't going to operate the business with his methodology, so it was [of] a passing interest."**

- [24] When told that Kruger had told Counsel for the respondents that he himself had realised that he had to recapitalise his business but that there was no way he could not have continued the business for another few months without making losses, Gibb's answer was: **"I can't comment on his opinion."** Gibb also said:

"If we applied the kind of accounting standards that we apply as part of the listed group I have no doubt that **[Kruger] would have actually been incurring massive losses.**"

Kruger was not called to give his evidence and contradict Gibb's evidence to the effect inter alia that continuing the Fauna operation in the way that he had been running it was unsustainable and that that operation was under huge financial constraints.

- [25] In re-examination Gibb was asked why the appellant got rid of

Kruger's carriers at a time when the carriers that were to be suitable for the mode of operation of the appellant were not yet available. Gibb's answer is worth quoting in full. He said:

“Because part of the sustainability of the business going forward is that Mr Kruger's carriers or the way in which he operated the business is that vehicles would come from East London with motor vehicles, and those vehicles, once they had arrived on the Reef, would discharge the motor vehicles and then go back empty to East London. Now East London is about 950 kilometres from Johannesburg. You can imagine at today's cost of diesel, etc what the cost of running these vehicles back to East London empty was. Now if you compare that with our business model, our business model see the carrier that can convey 11 motor cars from East London as opposed to Mr Kruger's carriers that could only convey 7 motor vehicles. So our new technology carriers carried 11 cars versus Mr Kruger's 7. Our carriers operate from East London with 11, **10 or 11 cars to the yard here, the very position here, and they return with cargo. Now it's self-evident and common sense that we have a massive cost advantage, and the basis of our business was that without technology there is no way that the business could sustain itself. So that's the rationale.**”

- [26] Gibb said that the fact that their business model entailed that carriers would leave East London with cars and to be driven to the Reef and return with cargo was the reason why Volkswagen actually awarded the appellant a long term contract. He said that this model had been implemented from 1998 when the appellant got the VW contract.

[27] The question whether there was a fair reason for the dismissal of the second and further respondents must be determined with reference to two questions. The first one is: what was the reason for the dismissal? The second one is: was the reason for the dismissal a fair reason? I turn to deal with the first question.

What was the reason for the dismissal?

[28] It was never suggested to any of the appellant's witnesses during their cross-examination that on taking the Fauna operation over the appellant was not entitled to run it in the way it thought viable or in the way in which it had experience in running such a business. That no such suggestion was ever made is not, in my judgement, surprising because there can be no doubt that as a general rule an employer has a right to choose the way in which he will run his business provided that, in so far as workers are concerned, he respect their contracts of employment and obtains their consent if he wishes to amend such contracts or consults with them or their representatives as contemplated by sec 189 of the Act if he contemplates dismissing them for operational requirements arising out of such choice. Indeed, he can even resort to the measure of a lock-out to try and compel them to agree to such changes as he might wish to make to their contracts of employment. Of course, as this Court said in **Chemical Workers Industrial Union & others v Algorex (Pty)Ltd (2003) 24 ILJ 1917 (LAC)**, it is unfair for an employer, in selecting a solution to deal with problems in his business, to choose a solution that entails job losses if there is another solution which can satisfactorily address his problems without any job losses.

[29] It was never the respondents' case that the appellant acted wrongly or unfairly or unlawfully in insisting on running the Fauna operation in accordance with its preferred way of running a car ferrying business. This means, in my judgment, that the submission by Counsel for the respondents that the appellant should have proceeded to run the Fauna business for six months or so to understand it is unsustainable. Why would the appellant have to study how Kruger had been running the Fauna business when it was never going to run it in any way other than in its preferred way? To say that the appellant should have agreed to the union's proposal to postpone the retrenchment consultations for about six months was to suggest that during that period the appellant should have run the Fauna operation the way that Kruger had run it. There is no basis in law for such a suggestion. In fact, given Gibb's uncontradicted evidence that the way in which the Fauna business was run under Kruger was such that the business was not viable, to suggest that the appellant should have run the Fauna operation for another six months or so is to suggest that the appellant should have run the operation on the same basis on which Kruger had run it which was not viable.

[30] It is also clear from Gibb's evidence that he is very knowledgeable on the transport sector or the car ferrying business and Counsel for the respondents was not able to challenge much of his evidence. I do not think that the Court is qualified to say that the appellant should have opted for the Kruger way of running the Fauna business for six months as opposed to immediately integrating it with its other operations and running it in the way it did. If the Court is qualified to say anything, I am very clear in my own mind that the appellant was right in steering as much away from the Kruger way of running the Fauna business as possible and in integrating the Fauna business with its other operations. The advantages and benefits for the latter route were very good as explained by Gibb and Du Plessis in their respective evidence.

[31] If the appellant were to have continued operating the Fauna operation on the basis of continuing to employ the second and further respondents, that could only be if the appellant continued to run the Fauna operation in the way that Kruger had done. The appellant could not have continued to run the Fauna operation for six months and employ the second and further respondents during that time if it run the Fauna operation in accordance with its preferred way of running that business because its preferred way excluded the employment of drivers, the keeping of carriers but it envisaged the use of labour brokers and subcontractors. Furthermore, it is to suggest that it should have run it contrary to the requirement of its client, Daimler Chrysler, that its vehicles be transported off-wheels. Such a suggestion is, in my judgement, unjustifiable, particularly when regard is had to the fact that not once did Counsel for the respondents or the respondents' only witness suggest that that was a better way of running the Fauna business than the appellant's way.

[32] There was also the question of peaks and valleys that was the subject of much debate in the Court a quo and in this Court. The appellant said that the operation at Eikenhof was subject to peaks and valleys. The respondents disputed this. Du Plessis was adamant that the Fauna operation was subject to peaks and valleys. Monyela was adamant that it was not.

[33] The issue of peaks and valleys had been raised during the consultation process. The appellant's initial stance was that the work of the convoy drivers based in East London was also subject to peaks and valleys and sought to retrench them as well. However, later, after some consultation meeting with the union and further investigation, the appellant came to the conclusion that the work of the convoy drivers in East London was not subject to peaks and valleys and decided to retain

them. With regard to the work at Eikenhof, the appellant maintained that there were peaks and valleys and did not change its mind.

[34] Counsel for the respondents put it to Du Plessis during the latter's cross-examination that, where there are no **"peaks and valleys"** and work is consistent, it would be more costly to use labour brokers than to use permanent employees. Du Plessis conceded that this was true. It is important to note that Du Plessis' concession was made in regard to a situation where there were no peaks and valleys. A little earlier before this, Du Plessis had testified that, due to peaks and valleys, it made more sense to use labour brokers because the appellant paid only for cars actually moved whereas, if the appellant used permanently employed employees, it would be paying them per hour and not per car moved. In my judgement, even if it can be said that the appellant did not prove **"peaks"** and **"valleys"**, it was entitled to prefer the use of labour brokers and subcontractors to the use of permanently employed workers because the former arrangement gave it certain benefits which the latter arrangement did not offer. Accordingly, whether the peaks and valley were proved is neither here nor there. The appellant was entitled to choose a way of doing business that was less risky. The way of using labour brokers and subcontractors was less risky than the one of using permanent workers.

[35] A question that arises is: why would the appellant say that there were peaks and valleys in Eikenhof and proceed to retrench the workers there when in fact there were no peaks and valleys, particularly when, with regard to East London, it had changed its

earlier position and retained the convoy drivers on the basis that the union was right in regard to the East London convoy drivers? I accept that the union's case was that it never said this but the fact of the matter is that, on its own version, it said that there were no peaks and valleys anywhere. Once it had said this the appellant went and investigated the issue further and found that at least in regard to the East London drivers what the union said was true. At any rate, whether there were peaks and valleys in the work of convoy drivers at Eikenhof, the fact of the matter is that Daimler Chrysler wanted its vehicles to be transported off-wheels and the appellant wanted to run the Fauna operation so as to have a competitive edge and for reasons of efficiency and costs.

- [36] It is in the light of all of the above that the question as to what the reason for the dismissal of the second and further respondents was has to be determined. The second and further respondents were not dismissed because Fauna had been making a loss before it sold its business to the appellant. They were also not dismissed because the appellant had made a financial loss in the nine months before its purchase of the Fauna operation. The second and further respondents were dismissed because the appellant had decided to run the Fauna business in a certain way that was different from the way that the Fauna operation had been run before. That way of running the business was one in terms of which the appellant did not employ drivers, did not own its own carriers, did not operate a workshop, had transport Daimler Chrysler's vehicles transported **“off wheels”** as required by Daimler Chrysler and used labour

brokers and subcontractors to run the business. As the vehicles were to be transported off-wheels, convoy drivers were to have no future in the Fauna operation as convoy drivers.

[37] The appellant preferred to run the Fauna operation on the basis of integrating it into its other operations because that would give it certain benefits and a competitive edge over its competitors. It would also reduce costs for the appellant because, for example, as the evidence revealed, the appellant would be able to pay the labour brokers for a vehicle that had been actually moved and not per hour and also because the specially designed carriers that would be used were able, after delivering vehicles to their destinations, to return with cargo on their return trip whereas in terms of the way of running the business that was used at Fauna by the Krugers, the carriers ran empty on their return trips after delivering vehicles.

[38] In the light of all of the above it seems to me that the reason for the dismissal of the second and further respondents was that, in the light of the way in which the appellant was going to run its business – it not employing drivers, not keeping carriers, not operating a workshop and using sub-contractors and labour brokers - there was no work for which the appellant could continue to employ them.

Was the reason for dismissal a fair reason?

[39] I have in effect said above that the appellant was entitled to choose the manner in which it would run its business provided that it did not change the terms and conditions of employment of the employees without their consent, and provided that, if it contemplated the dismissal of the employees, it complied with its obligations provided for in sec 189 of the Act. If it is accepted that the appellant was entitled to decide to run the Fauna operation in a way that was different from the manner in which the Krugers had run it and was entitled to insist on running it in the way it proposed to run it, then there can be no doubt that a necessary consequence of such decision or choice was that it had no work for the second and further respondents. In this case the reason why the appellant had no work for the second and further respondents was that its preferred way of running a car ferrying business necessarily entailed that it would not employ drivers, would not own or keep carriers and would not run a workshop. Its way of running that business entailed the use of labour brokers, subcontractors and certain specially designed carriers which were able, after delivering cars to their destinations e.g. dealers, to collapse and carry freight on their return trip. This way of running the appellant's business left the second and further respondents with no work. Incontestably the fact that an employer has no work itself to give to workers to perform is a fair reason to dismiss.

[40] In any event both in its letter of the 27th August 1999 and in the subsequent consultations with the union the appellant invited those employees of the Fauna operation who were interested in getting employment with the labour broker and the subcontractor (who

were going to be involved in doing the work previously done by the Fauna employees) to submit their names so that it could facilitate their employment by the labour broker and the subcontractor but the second and further respondents spurned that offer. As a result the labour broker and the subcontractor did not employ them. This is common cause.

- [41] There was an attempt to say that an offer of employment with a labour broker was not such an attractive idea because the employment would have entailed that the employees work only on the days when the labour broker had work for them. It was suggested by Monyela that employment by a labour broker would have meant that employees would on some days have spent money to travel from the townships to work and found that they were turned away on the basis that there was no work on those days. This may well have been so but the fact of the matter is that, if the appellant was in law entitled to use a labour broker - and it was not the respondents' case that the use of a labour broker in this case was unfair, there is nothing that could be done about such an

eventuality. It is interesting that Monyela testified as he did in regard to the second and further respondents' attitude to employment by the labour brokers and subcontractors and yet in their letter of the 17th September 1999 addressed to the appellant the second and further respondents' attorneys actually wrote, among other things, that the second and further respondents were entitled to be transferred to the employment of the labour brokers

and, I assume, subcontractors. 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.

[42] In the light of the above there can, in my judgement, be no doubt that the reason for the dismissal of the second and further respondents was a fair reason.

The Court a quo's finding on substantive fairness

[43] The Court a quo found that the dismissal of the second and further respondents was substantively and procedurally unfair. The Court a quo dealt with the substantive fairness of the dismissal in paragraphs 13 – 21 of its judgment. In par 17 of its judgement the Court a quo stated that the appellant had failed in its letter of the 27th August 1999 to mention, or, to give motivation for, the dismissal of **“all 14 yard workers.”** It then stated that the appellant had failed to justify their dismissal. It further stated that the appellant had, as an after thought, sought to justify their dismissal on grounds of **“efficiency and the financial situation as the main reasons.”** I am unable to agree with the Court a quo that the appellant did not justify the dismissal of the yard workers. The fact of the matter is that the appellant decided to use only a certain way of running its business. That way of running its business meant that it needed only about three yard workers. It retained those three yard workers. The respondents did not lead any evidence to show

that, after the appellant had begun to rely only on three yard workers, the three yard workers had more work than they could handle and it had become necessary to employ more workers.

- [44] In par 18 of its judgment the Court a quo stated that the appellant had not placed any evidence before it in support of its contention that the financial situation of Fauna was hopeless and had been so for a considerable period. In my judgement the Court a quo overlooked the evidence given by Gibb on the financial position of Fauna. That evidence was not challenged under cross-examination. That evidence was not contradicted by Monyela, the respondents' only witness. Gibb testified in very clear and unequivocal terms that, having seen Fauna's financial statements, he had no doubt that Fauna was under considerable financial pressure. He also said that he had no doubt that, if he were to have applied the accounting principles that were applied by the appellant's group, Fauna would have been making huge losses. The respondents' Counsel informed the Court a quo during his cross-examination of the appellant's witnesses that he had a witness statement from Mr Kruger and that he could be calling Mr Kruger as a witness but he did not call him and no explanation was tendered as to why Kruger was not called to contradict Gibb's evidence that Fauna was under considerable financial pressure. It is also noteworthy that Counsel for the respondents did not at any stage put it to the appellant's witnesses that Kruger would testify that Fauna was making a profit. He also did not put it to them that Kruger's reason for selling the business had nothing to do with the financial pressure under which Gibb

said Fauna was operating.

[45] At any rate Fauna's financial position was not an important factor. Gibb made this very clear in his evidence when he said that Fauna's financial position was only of a passing interest to him. He explained the relevance of Fauna's financial statements to him as relating to getting to understand why Kruger was selling the Fauna operation and not because Kruger was going to have any impact on how the appellant operated the Fauna operation. Gibb made it clear that the appellant was never going to run the Fauna operation in the same way that Kruger had operated it. He said that the appellant was always going to run the Fauna business in accordance with the appellant's way of operating a car ferrying business. It seems to me from paragraph 18 of the Court a quo's judgment that that Court regarded the financial position of Fauna as having been a significant factor in the determination of the question whether there was a fair reason for the dismissal. It was not significant at all.

[46] I am unable to follow paragraph 19 of the Court a quo's judgment. In paragraphs 20 and 21 the Court a quo said that the appellant had failed to prove that the drivers were "**subject to peaks and valleys.**" I have already dealt above with the issue of peaks and valleys and do not propose to add to what I have already said. The Court a quo also suggested by implication that the appellant should have entertained the proposal by the union that it postpone the retrenchment consultation process for some time so that its management could gain an understanding of the Fauna business.

The Court a quo had no basis to criticise the appellant in this regard because a reading of Gibb's evidence makes it abundantly clear that he had a clear enough understanding of the Fauna business to be able to say that he wanted to have nothing to do with the manner in which Kruger had been running the Fauna operation. Gibb was part of the team that negotiated the purchase of the Fauna operation with its then owners. He had seen the financial statements of the operation. He had had discussions with Mr Kruger. He was clear in his own mind that the Fauna business was not viable. It is also clear from not only Gibb's evidence but also from that of Du Plessis that the appellant had from the start wanted to integrate the Fauna operation with its other operations such as the Volkswagen contract and to run it in accordance with the appellant's way of running a car ferrying business. It, therefore, seems to me that, the reasons upon which the Court a quo relied to support its finding that the second and further respondent's dismissal was substantively unfair are not sustainable and stand to be rejected.

Procedural fairness

- [47] I have already said above that I agree with Mlambo AJA that the dismissal was procedurally fair. I do so for the reasons that he gives in his judgment for that finding. However, I do want to deal with two or so aspects in regard to procedural fairness. In the letter of the 17th September 1999 to the appellant, the respondents' attorney accused the appellant of having made the final decision to retrench prior to embarking on or completing the consultation

process. This accusation is without any merit. As has been said by this Court in **NEHAWU & others v University of Pretoria [2006] 5 BLLR 437 (LAC)** at par 51 “(s)ec 189 of the Act does envisage that the employer may come to the first consultation table with a proposal that can be said to be not only his preferred proposal but, indeed, one that he strongly views as the solution to the problem.” It seems to me that the appellant approached the consultation with a strong view as to how to deal with the employees from the Fauna operation but as open to different proposals if they were viable. That is why, although it initially envisaged the dismissal of almost all the employees, the appellant changed its mind and retained 20 employees after the union had disputed that the convoy drivers were underutilised or were subject to peaks and valleys. The appellant also increased the notice period from one week to two weeks after consultation with the union. It also increased the severance pay. Whereas in terms of its first proposal, an employee would have received no severance pay for part of a year as opposed to a completed year, it changed this and committed itself to paying a week’s pay for any part of a year.

- [48] In my judgement, to the extent that the consultation process failed to produce a consensus, this was not the appellant’s fault. In this regard it is important to remember that Monyela’s evidence was that during the consultation the union’s attitude was that, as there was, as far as the union was concerned, no need to retrench, the union was only interested in discussing two issues, namely, severance pay and notice pay and not any other issues that are

normally discussed at a retrenchment consultation. It was the union which was not co-operating in the consultation process. It ought to have discussed all issues even if this was done under protest if it was not persuaded that there was a need to retrench. As the union was not interested in discussing any matters at the consultation meetings other than the two matters, it seems to me that the Court a quo erred in criticising the appellant's conduct in relation to the consultation process.

[49] The Court a quo stated in par 24 of its judgment that the appellant did not comply with the requirement of sec 189 in its letter of the 27th August 1999 or in the subsequent consultations in that it had not indicated what alternatives it had considered before proposing dismissals and the reasons for rejecting each one of such alternatives. It may be true that the appellant did not do this in the letter of 27 August but the union was free to ask the appellant to disclose this if this was of any interest to it or if it felt that this prejudiced it in the consultation process. The union did not complain about this because it was not interested or did not feel prejudiced by the omission.

[50] The Court a quo also said that the appellant did not propose the method for selecting employees to be retrenched. There is no merit in this criticism because the appellant initially intended all employees to be retrenched. Monyela's evidence was to the effect that this was the union's understanding as well. The Court a quo also said that the yard workers were not disclosed as likely to be

retrenched. Once again Van der Walt's evidence was that his understanding as well as that of the union at the consultation was that all employees, which would include the yard workers, were candidates for retrenchment. Indeed, Counsel for the respondents did not argue this point about yard workers both in his heads of argument and in his oral argument before us. The Court a quo went on to say that the selection criteria adopted by the appellant was arbitrary. Counsel for the respondents did not advance this argument and, in my view, correctly so, on the facts of this case. For these reasons and those given by Mlambo AJA in his judgment in regard to procedural fairness I am of the opinion that the appellant acted procedurally fairly in dismissing the second and further respondents and the Court a quo's finding to the contrary is one I am unable to share.

[51] In conclusion I am of the opinion that the appeal should succeed and the cross-appeal be dismissed. With regard to cost I am of the view that this is a matter where the requirements of law and fairness dictate that there should be no order of costs. It was, in my view, legitimate that the issues raised by this matter be brought to court and be pronounced upon.

[52] In the premises I would make the following order:

1. The appeal is upheld.
2. The cross-appeal is dismissed.

3. There is to be no order as to costs on appeal and cross-appeal.
4. The order of the Court *a quo* is set aside and replaced with the following one:
 - “1. The applicants’ claim is dismissed.**
 - 2. There is to be no order as to costs.”**

Zondo JP

I agree.

Davis AJA

Appearances:

For the appellant	:	Adv TJ Bruinders SC
Instructed by	:	Bowman Gilfillan Inc
For the respondent	:	Adv J G Van der Riet SC
Instructed by	:	Cheadle Thompson & Haysom Inc
Date of judgment	:	16 August 2006

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No: JA 52/03

FORECOURT EXPRESS (PTY) LTD
(Respondent in the Court *a quo*)

Appellant

and

**SOUTH AFRICAN TRANSPORT AND
ALLIED WORKERS' UNION**

First Respondent

ABRAM MONYELO AND 54 OTHERS
Further Respondents
(Applicants in the Court *a quo*)

Second and

[1] This appeal concerns the fairness of the dismissal of the individual respondents, by the appellant, based on operational requirements. The court *a quo* found that the dismissal was substantively and procedurally

unfair and ordered the appellant to pay the individual respondents compensation of 12 months wages each but declined to reinstate them. This appeal, with the leave of the court *a quo*, is directed at the finding that the dismissal was substantively and procedurally unfair as well as the compensation award. Leave was also granted to the respondents to appeal against the order refusing to grant reinstatement. In what follows, I set out the background of the dispute between the parties.

[2] The appellant is a third party logistics company involved in the business of ferrying commercial and passenger motor vehicles. It does not undertake the actual ferrying but concludes contracts

with subcontractors to undertake the freight responsibilities i.e. the collection and delivery of the vehicles. What the appellant does is to supervise the logistics of the freight of the vehicles. In view of **conducting** business in this manner the appellant does not own carriers, nor employ permanent staff such as drivers, and does not operate mechanical workshops.

[3] During 1999 the appellant and Fauna Motorvervoer (Pty) Ltd (Fauna) concluded an agreement for the sale of Fauna's business to the appellant, as a going concern, for R12 million. The effective date of the

sale was 1 September 1999. The individual respondents were all, at that time, employed by Fauna and they were members of the first respondent (the union), which had concluded a recognition agreement with Fauna.

[4] Fauna was a transport company whose sole source of business was a contract with Daimler Chrysler South Africa (Daimler) for the ferrying of passenger and commercial vehicles.

The contract entailed that Fauna ferry those vehicles from Daimler's factory in East London to dealers in Gauteng.

Commercial vehicles were driven by convoy drivers and passenger vehicles were ferried by its fleet of carriers from East London to a holding site at Eikenhof in Gauteng from where they were ferried, driven to or collected by Mercedes and Honda dealerships in Gauteng. Unlike the appellant, Fauna was directly involved in the actual ferrying of the vehicles.

[5] Due to this direct involvement in the freight (of vehicles) business Fauna owned a fleet of thirteen (13) carrier vehicles to undertake the

freight obligation between East London and Eikenhof. Fauna also employed convoy and carrier drivers, workshop employees, yard and administrative staff. The yard and administrative staff were employed predominantly at its Eikenhof site, whilst the convoy and carrier drivers, as well as yard inspectors were employed at the East London site. The majority of the individual respondents who were dismissed were employed at the Eikenhof site.

[6] Subsequent to the conclusion of the sale and before the appellant took over Fauna's business, a meeting was held

between the appellant, Fauna and the Union) on 20 August 1999.

The purpose of that meeting was to inform the Union of the acquisition of Fauna by the appellant as well as the latter's intention to restructure the business. It was agreed at that meeting that the appellant and the union would meet on 26 August 1999 to consult regarding the appellant's proposed changes to the operations.

[7] On 26 August 1999 the envisaged meeting took place but the appellant's proposals were not yet ready. It was agreed that the appellant would send its proposals to the union per letter the next day. Indeed on 27 August 1999 the appellant sent a letter to the union advising it of its contemplation to restructure the business as well as detailing its restructuring proposals. The contents of the letter formed the basis of the discussions in the subsequent consultation meetings. It is important therefore to provide a comprehensive exposition of the restructuring proposals as expressed in this letter.

[8] The letter stated that the business could not continue to be operated on a viable basis without restructuring it significantly and that Fauna's financial performance had been less than satisfactory in the recent past; that the way in which the freight of vehicles was

done by Fauna was costly and inefficient and that significant peaks and valleys were present regarding the demand for the delivery of vehicles.

[9] The letter then set out the following proposals:

[9.1] that five (5) of Fauna's thirteen carrier vehicles were old and no longer viable. Based on this view the Appellant proposed that they be sold to a certain Mr Fourie;

[9.2] that six (6) of the remaining vehicles be sold to a company called Accurate Auto Ferriers with whom the appellant intended to subcontract for the freight of the vehicles in Gauteng. This proposal would, in appellant's view, reduce the appellant's overhead and operating costs as the carrier vehicles would be owned by a different company and would be contracted only on a demand basis.

[9.3] that the remaining two (2) vehicles would be sold to owner/drivers with whom the appellant intended to contract on the same basis as with Accurate Auto Ferriers;

[9.4] for long distance ferrying the letter proposed that a sister company, Highway Carriers, be subcontracted to undertake this responsibility. The letter stated that Highway Carriers was the preferred subcontractor because it would operate multi purpose carrier vehicles which would ferry vehicles in one direction and general freight on the return leg;

[9.5] the appellant proposed not to employ any permanent staff due to its view that the operation as it existed then was inefficient

and costly, with significant peaks and valleys. The letter stated that as and when the appellant needed staff it would source this from a labour brokers.

[9.6] the letter stated further that the implications of the foregoing proposals were that, if implemented, there be would no need to operate a workshop, meaning that the Fauna workshop would shut down;

[9.7] the letter further stated that further cost savings would be achieved by integrating the management of the Fauna operation with the appellant's existing operations;

[9.8] the letter mentioned that the implications of implementing the appellant's proposals, for employees, were that:

(a) the appellant would negotiate with Accurate Auto Ferriers regarding the possible employment of six (6) drivers to operate the carrier vehicles intended to be sold to Accurate Auto Ferriers, subject to negotiating conditions of employment;

b) a further two (2) drivers would be identified to take over the two carrier vehicles proposed to be operated on an owner/driver subcontract basis;

c) that this meant that a total of eighteen (18) drivers would be surplus and should suitable alternatives not be found it regrettably meant that they would be retrenched.

d) that an attempt would be made to reach agreement with the labour brokers who would provide temporary convoy drivers, to

consider employing drivers who had become surplus. These drivers could be utilised on an ad hoc basis in accordance with the demands for the movement of vehicles in convoy;

- e) that should the workshop be closed it would result in a total of eight (8) workshop employees also becoming redundant and that should suitable alternatives not be found that they too would be retrenched;
- f) that the proposed integration of the administration and management functions with that of the appellant would also render a number of employees redundant including the tea lady;

[10] The letter was followed by the second consultation meeting on 7 September 1999 to discuss the appellant's proposals. At this meeting the union contended that the appellant could not retrench employees transferred under s 197¹ of the Labour Relations Act No 66 of 1995 ("the Act"). The union voiced its opposition to the

¹ Section 197: '(2) If a transfer of a business takes place, unless otherwise agreed in terms of ss (6) –

- a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employee and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;
- (c) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an *employee's* continuity of employment, and an *employee's* contract of employment continues with the new employer as if with the old employer.'

proposed retrenchment because it felt that the appellant was simply replacing its members (the individual respondents) with labour brokers.

[11] Though discussions about severance packages were also entered into, no agreement was reached on any aspect. The union's proposal was that a six (6) week severance pay for every year worked and four

week's notice pay be paid to each retrenched employee as opposed to the appellant's proposal of one week severance pay and one week's notice pay. The union's proposal was however reduced after a caucus to four week's severance pay and two week's notice pay. On the other hand the appellant raised its offer to one week's severance pay for every year or part thereof worked and two week's notice pay.

[12] Apart from disputing that convoy drivers were subject to peaks and valleys the union never debated the proposed retrenchment or need to retrench carrier drivers, workshop employees or other employees in the bargaining unit. This was due to its stance that there was no evidence to support the view that Fauna's operation was costly and neither profitable nor viable. Furthermore although the appellant did not give an indication when retrenchments were likely to take effect it intimated that as far as it

was concerned the matter was urgent and that it preferred that the restructuring and retrenchments be finalised as soon as possible.

[13] The third consultation meeting was held three days later on 10 September 1999. At that meeting the union proposed that the appellant hold over retrenchments for six (6) months after which the necessity thereof could be revisited. The union further proposed that a bargaining council sub-committee be set up to look into the employment of sub-contractors. These proposals were not acceptable to the appellant in view of its stated position that it was financially unable to run the Fauna operation without restructuring it nor was it financially able to tolerate the delay that would inevitably follow the involvement of the bargaining council in a lengthy mediation process. The appellant also shifted from its position of retrenching all employees and proposed to retain two yard attendants at the Eikenhof site and one inspector at the East London site. The union did not debate this proposal was never debated by the union nor did it make any counter proposals. However the union stuck to its reduced proposal of four (4) week's severance pay for every year worked and two (2) week's notice

pay. This was however not acceptable to the appellant.

[14] The last consultation meeting was held on the 16th of September 1999. At this meeting the appellant shifted further from its previous position proposing to retain all the seventeen (17) convoy drivers in East London. The appellant repeated its offer to assist retrenches with jobs

as drivers with Accurate Auto Ferriers and as owner/drivers with Cargo Africa as well as pursue employment prospects on their behalf with labour brokers. This was not acceptable to the union.

[15] On 17 September 1999 the appellant wrote a letter to the union giving it notice of the retrenchment of the individual respondents, effective on 30 of September 1999. The employees also received individual notices of retrenchment to the same effect.

[16] The court a quo appears to have favoured a stricter test in assessing whether the appellant had established a commercial rationale for the decision to dismiss based on operational

requirements.² The learned Judge then reasoned that from the evidence adduced it was clear that, in terms of its business model, the appellant did not own carriers nor did it employ drivers; that it would not change this model

despite acquiring Fauna; that this model entailed the outright outsourcing of carriers and the permanent use of labour brokers drivers; and that the appellant was only interested in the Daimler contract when it acquired Fauna.

[17] The court a quo proceeded to find that as early as 23 August 1999, when the Fauna sale was concluded, the appellant had already concluded that it would sell all existing carriers and engage the services of labour brokers. The court a quo also noted that the appellant had omitted to include fourteen 14 yard employees based at Eikenhof, in its retrenchment proposals of 27 August 1999 and concluded that the appellant had failed to justify the retrenchment of these employees.

[18] The court a quo further found that the appellant had failed to

² The court referred in this regard to the case of BMD Knitting Mills (Pty) Ltd vs SACTWU (2001) 7 BLLR 705 (LAC) and Nehawu and Others vs the Agricultural Research Council and Others (2000) 9 BLLR 1081 (LC)

place any evidence before it in support of its contention that Fauna's financial situation was hopeless. The court a quo also noted that the appellant's 1999 financial statements reflected a loss of just over R2 million but that despite this loss the appellant was still in a position to purchase the Fauna business for over R12 million. This state of affairs led the court a quo to doubt the respondent's contentions that it was in a precarious financial position justifying the retrenchment of the individual respondents. Furthermore the court a quo accepted evidence that even though the Daimler contract required the appellant to ferry its motor vehicles off wheels this, however, was phased in over a period of a year from the time the appellant acquired Fauna. In that regard, so reasoned the court a quo, there was no valid reason to retrench all the Eikenhof drivers at the same time in September 1999. The court a quo also found that the appellant had failed to substantiate its contention that drivers were subject to peaks and valleys. In this regard the court a quo reasoned that the appellant had made this allegation in its proposals of 27 August 1999 - ie a few days before it took control of the Fauna operation and logically gain sufficient knowledge about the Eikenhof business activities. The

court a quo further found that despite this logical shortcoming the appellant was not amenable to entertain proposals for a delay of the restructuring process to allow the parties to (further) assess the Fauna business in order to ascertain if there was in fact a real need to restructure and to retrench.

[19] Based on the foregoing reasoning the court a quo found that the appellant had failed to discharge its onus of establishing the existence of

commercially rational reasons to dismiss based on operational requirements. The court a quo further found that the appellant simply replaced the individual respondents with labour brokers in order to streamline the Fauna operations to fit its business model.

[20] As far as procedural fairness was concerned the court a quo found that the appellant had also not complied with a fair procedure before it dismissed the individual respondents. In this regard the court a quo felt that the appellant's letter of 27 August 1999 and the subsequent consultations disclosed no alternatives

that the appellant had considered before proposing the dismissals and the reasons for rejecting such alternatives; that there was no disclosure of the method employed by the appellant for selecting the employees it intended to dismiss.

[21] The court *a quo* further found that the appellant, in selecting employees to be retrenched had failed to consider the last in first out (Lifo) method, the skills level of the employees, whether there were employees close to retirement, proposing voluntary retrenchment as well as a consideration of general work performance and conduct. The court stated in this regard that the selection criteria adopted by the appellant were arbitrary and that in the final analysis the dismissals were also procedurally unfair.

[22] In this court and in the heads of argument Mr Bruinders, counsel for the appellant, submitted that the factual findings arrived at by the court *a quo* were wrong and were contradicted by the evidence adduced by the appellant during the trial. The findings referred to being that:

the appellant outsources carriers and permanently uses labour brokers as convoy drivers; the appellant purchased Fauna – who

had previously employed the employees – with the intention of replacing them with labour brokers; the appellant did not adduce any evidence of Fauna’s financial situation and statements and that the appellant’s evidence of Fauna’s financial situation was a mere *ipse dixit*; the appellant was not in any financial difficulty having been able to acquire Fauna for R12 million ; the appellant’s June 1999 financials raised doubts about the true efficiency of the appellant’s much vaunted business model; the appellant simply replaced the individual respondents with labour brokers to streamline the Fauna operations to fit it’s business model; the appellant did not substantiate its contention that the delivery of new vehicles to dealers was subject to peaks and valleys; the appellant did not give the Fauna business model some time to see if there was a real need to retrench and that there was no valid reason to retrench all convoy drivers in September 1999 when ferrying vehicles off-wheels was phased in over a period of one (1) year after that.

Mr Bruinders submitted that these findings were not supported by the evidence of the union and the employees.

[23] Mr Bruinders further submitted that this court should follow the reasoning in *Kotze vs Rebel Liquor Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) in assessing whether the appellant has established a commercial rationale for the decision to retrench. In this regard counsel submitted that the appellant had a genuine commercially rational reason for retrenching the individual respondents and that the retrenchment was not a sham or a manoeuvre to rid itself of the individual respondents for a reason other than a genuine and commercial one.

[24] Mr Bruinders also submitted, with regard to procedural fairness, that this court should find that the appellant complied with the ultimate purpose of Section 189 of the Act. In this regard counsel submitted that the appellant truly engaged the respondents in a joint consensus seeking process as borne out by evidence.

[25] The questions to be answered in this appeal therefore are whether the court a quo was correct in finding that the appellant had failed to establish the existence of commercially rational reasons to dismiss, based on operational requirements. Regarding the approach to be adopted in determining this aspect it is worthwhile to refer to the comments of Van Niekerk AJ in *Mababolo and Others vs Manchu Consulting CC* (1999) 20 ILJ 1826 (LC) at 1831 where he stated: “*The first issue that the court is required... is the substantive fairness of the applicant’s dismissal. Section 188 of the Labour Relations Act 66 of 1995 (the LRA) requires an employer that dismisses an employee for reasons relating to operational requirements to establish a fair reason for the dismissal. The approach adopted by this court is to*

require the employer to provide substantive proof of a need to retrench in the form of a commercially rational and sustainable reason, but not to question the commercial imperatives that underlay that decision, unless some ulterior

motive is established. In other words, it is not the function of the court to second-guess the employer's decision to retrench. It is not appropriate to intervene only because the decision taken by the employer was not the one to which the court would have come in the same circumstances".

The other question is similarly whether the court a quo can be faulted for finding that the dismissals were procedurally unfair. It must also be established whether the appellant has disclosed what alternatives it considered which could have avoided the dismissals altogether or minimised them and whether dismissal was the last resort.

[26] It must be pointed out that the case made out by the appellant in the court a quo and in this appeal is that it is a third party logistics company involved in the business of ferrying motor vehicles; that it's involvement in the business is on the logistics side: that it outsources the actual freight of motor vehicles to other operators hence it did not own any carrier vehicles nor employed permanent staff for this purpose; that it did not consider the Fauna business to be a viable proposition without radical restructuring entailing the reduction of a full time payroll; that when the Fauna

operation was acquired it was operating at a loss and could not recapitalise its fleet and further that it had taken over all the debts of the business incurred up to the effective date of the sale and that it was obvious that the business could not continue to operate for any period of time without radical restructuring.

[27] This court has in the in other matters dealt with the approach to be adopted in deciding such matters. One case that comes to mind is Chemical Workers Industrial Union & Others vs Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC). In that case Zondo JP stated at paragraphs 69-70 that:

“Sometimes it is said that a court should not be critical of the solution that an employer had decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a business person may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair. Furthermore, the court should not hesitate to deal with an issue

*which requires **no** special expertise, skills or knowledge that it does not have but simply requires common sense or logic, especially where the employer has had an opportunity of commenting on such an issue and has not said anything that indicates that any special knowledge or expertise is required. This is such a case. The respondent's problem required simple common sense and did not involve any complicated business transaction or decision. Accordingly, where, as in this case, the employer has chosen a solution that results in a dismissal or in dismissals of a number of employees when there is an obvious and clear way in which it could have addressed the problems without any employees losing their jobs or with fewer job losses, and the court is satisfied, after hearing the employer on such a solution, that it can work, the court should not hesitate to deal with the matter on the basis of the employer using that solution which preserves jobs rather than one which causes job losses. This is especially so because resort to dismissal, especially a so-called no-fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort."*

[28] Simply put an obligation is placed on any employer to avoid dismissing employees for operational reasons if there are alternatives which could avoid or minimize the number of dismissals. The employer must consider such other alternatives and must disclose its reasons for rejecting them. In the Algorax matter the following was also stated:

“It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer to only resort to dismissing employees for operational requirements as a measure of last resort. If that is correct, the court is entitled to intervene where it is clear that certain measures could have been taken to address the problems without dismissals for operational reasons or where it is clear that dismissal was not resorted to as a measure of last resort.”

[29] As pointed out above the appellant’s case in the court a quo and in this court is based partly on its business model of outsourcing the freight of motor vehicles and partly on the supposedly non viable and loss making Fauna operation it acquired. Regarding the appellant’s preferred

business model the law is clear as espoused in the Mamabolo and Algorax judgements (*supra*) that it is not for the court to second-guess the employer in how best to manage and restructure its business operations.

[30] It is also clear as stated in Algorax that even if a court is not expected to second-guess an employer's reasons, it remains the court's function to answer the question whether a dismissal is fair and that in answering the question the court should not abdicate this obligation simply because the employer says it acted fairly. An examination of the evidence establishes that the appellant's proposals set out in its letter of 27 August 1999 were all carried out save for the retention of seventeen (17) convoy drivers and one (1) yard inspector based in East London and two (2) yard employees in Eikenhof.

[31] There is no dispute that during the consultations more specifically at the meeting of 10 September 1999 union proposed that the appellant should defer the dismissals for a period of some

six (6) months to assess if indeed the Fauna operation was not viable, as alleged by the appellant, and was making a loss and subject to peaks and valleys. Based on this proposal the union also proposed that a bargaining council committee be drawn in to mediate the employment of labour brokers. This proposal was rejected by the appellant on the basis that it was financially unable to run Fauna as a transport operation for six (6) months nor was it financially able to tolerate the delay that would inevitably follow the involvement of the bargaining council in a lengthy mediation process.

[32] The rejection of the deferral proposal has proven to be the appellant's undoing in this case. This is because the appellant's preferred mode of ferrying motor vehicles was the so-called multi-purpose carrier vehicles, used by Highway Carriers, which could ferry motor vehicles in one direction and general freight on the return leg. Highway Carriers had, at the time of the retrenchment, not yet acquired these multi purpose vehicles. As things turned out it took some twelve (12) months before these multi purpose vehicles were in full use. In the meantime whilst waiting for these

multi purpose vehicles to become operational and having retrenched the individual respondents, the appellant conducted the Fauna operation in the same way as Fauna did but used labour brokers.

[33] This state of affairs demonstrates, in my view, that the appellant acted unfairly in refusing to defer the retrenchments either as proposed by the union or for the simple reason that the multi-purpose vehicles were not available. That means that implementation of that proposal in September 1999 was premature. That this was unfair is also borne out by the fact that the appellant turned a whole business operation on its head within a few days of acquiring it without running it for any period of time to provide a more objective view of the business's viability. This is demonstrative of unnecessary and unwarranted haste particularly when one considers that the appellant started using labour brokers even before it dismissed the individual respondents. The reason for using labour brokers as early as that, according to the appellant, was that it had a high vehicle delivery demand at that time. Such a phenomenon

was not unusual to the Fauna business. Monyela, the union witness, stated that this was not unusual and that when a higher demand for deliveries was experienced yard employees would be expected to assist with the delivery of vehicles.

[34] Section 189 provides that:

“(1) when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult –

(a) any person whom the employer is required to consult in terms of a collective agreement;

2) the employer and the other consulting parties must in the consultation envisaged by subsection (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus 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 of selecting the employees to be dismissed; and*

c) *the severance pay for dismissed employees.*

.....”

[35] In my view deferring the dismissals by twelve (12) months was a viable alternative that would have minimised and mitigated the adverse effects of the dismissals and the failure to change the timing thereof was clearly unfair. The timing of the retrenchments was therefore unfair as the need for the services of the individual respondents remained for some time after they were retrenched. This court stated in *Chemical Workers Industrial Union and Others v Algorax* (supra) that dismissals should be a measure of last resort. *In casu* the dismissals were clearly not a measure of last resort, and that renders them unfair.

[36] It must also be pointed out that it cannot be said that the appellant’s proposals that the retrenched employees could find employment with labour brokers were alternatives to dismissal. This is so because that route still entailed loss of employment, permanent for that matter, with the appellant. Employment by

labour brokers would be ad hoc at most.

[37] The appellant sought to justify the dismissals and their timing on Fauna's alleged financial woes and the supposedly unsustainability of its operation. This, as the court a quo found, was nothing more than an allegation. Despite the valiant attempts of the appellant's witnesses, Gibbs in particular, to paint a dismal picture of Fauna's operation, this foundered dismally. Save for Gibb's unsubstantiated allegations to this effect no shred of evidence of this can be found in the record.

[38] The inability of the appellant to produce evidence of the dismal state of the Fauna operation is not surprising. It can be ascribed to the appellant's adherence to its business model. It is because of this adherence that it turned the Fauna business on its head. Because of this it refused to defer the dismissals until it had satisfied itself and demonstrated to the union that Fauna's financial woes and the supposedly unsustainability of its operation were real. Clearly therefore the court a quo cannot be criticised for finding that the dismissal of the individual respondents were

substantively unfair. The appellant's conduct in this matter is the clearest demonstration that the appellant's interest in Fauna was the Daimler contract and nothing else. This was stated by its own witnesses who also stated that the reason Fauna was acquired as a going concern was due to the insistence of Fauna's erstwhile owners. What this shows is that the appellant was not about to acquire a permanent workforce and the baggage this came with.

[39] As pointed out above the appellant has the managerial prerogative to manage and direct its operations. But the courts retain the power to decree whether anything done by an employer in the name of business alignment or restructuring which leads to loss of jobs was fair. The determination of whether this was fair entails an examination of the reasons relied on to undertake the restructuring. In *General Food Industries Ltd v Food Allied Workers Union* (2004) 25 ILJ 1260 (LAC) this court, relying on the case of *Fry's Metals (Pty) Ltd v National Union of Metal Workers of SA & others* (2003) 24 ILJ 133 (LAC), stated that it is not unfair for an employer to restructure a profitable business to make even more profit and remain competitive, even if this leads to job losses.

[40] The court made that statement in that case because it was satisfied that the employer had established, not by simply alleging, but by demonstrating that restructuring would enhance the business and bring in more profit. In casu all we have is the criticism of the Fauna operation with no demonstration how the restructuring was cost effective.

[[41] I must point out that the respondents expressly disavowed reliance on Section 197 of the Act in this case. I mention this for the simple reason that no mention is made in this judgement of the effect of this section of the fairness or not of the appellant's conduct in dismissing employees of a concern it acquired as a going concern even before taking it over under the guise of restructuring. It may well be that this violates Section 197.

[42] In so far as procedural fairness is concerned I am persuaded that the appellant cannot be criticised. The evidence demonstrates that it engaged the union in an objective manner in a joint consensus seeking exercise. That this was so is

demonstrated by the movement in stance regarding the severance pay as well as the retention of at least twenty (20) employees who had initially been earmarked for dismissal. This change of stance was influenced by the union's input during the consultation meetings. It appears justified therefore to find that the court *a quo* erred when it found that the dismissal was also procedurally unfair. The court *a quo* seems to have overlooked the evidence regarding the consultation meetings as well as the limited proposals emanating from the union.

[43] In so far as the relief aspect is concerned and more particularly the cross-appeal it is correct that the appellant has shut down the departments in which the individual respondents were employed. It would therefore be completely impractical in my view, to order the reinstatement of the employees, for this very reason. In any way I cannot fault the exercise of the discretion of the court *a quo* to award twelve (12) months compensation only. I propose to uphold that order.

[44] A subsidiary issue was raised by Mr Van der Riet, counsel

for the respondents, relating to the refusal of the court a quo to award compensation to a number of dismissed employees who did not file affidavits, like the others, proving their loss after their dismissal. Though Mr Van der Riet raised this issue he did not press it, correctly so in my view as the failure by this group of respondents to file affidavits was fatal to their cause. The court a quo cannot be faulted for excluding them.

[45] Regarding the issue of costs it is my view that the appeal was fractionally successful. This is in relation to the reversal of the finding of procedural unfairness. This reversal however has not influenced the compensation award and for that reason, I hold the view that overall, the appeal was unsuccessful.

[46] Under the circumstances the following the order is granted:

1. The order of the court a quo is set aside and is substituted by the following order:

‘1. The dismissal of the second to further applicants listed in annexure A on 30 September 1999 was substantively unfair.

2. The respondent is ordered to pay compensation of twelve months each to the second to further applicants listed in annexure A.

3. The respondent is ordered to pay the costs of this matter.’

2. The appeal is dismissed with costs.

3. The cross appeal is dismissed with costs.

D Mlambo

Acting Judge of appeal

Date of judgment 13 September 2006