



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS90/10

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

MOHALE J and OTHERS

**Second to Further
Applicants**

and

COROBRIK (PTY) LTD

Respondent

Heard: 13 March 2012

Delivered: 30 May 2012

Summary: Retrenchment – applicants claim no operational justification as contemplated in section 189A(19)(b) and (c) as at the date when the retrenchments took place – operational justification when consultation began common cause and not negated by temporary operational difficulties at the date when retrenchments effected a year later - claim dismissed with costs.

JUDGMENT

Introduction

- 1] The applicants seek, in their statement of claim, the following relief in terms of section 189A(8)(b)(ii) read with section 191(11) of the Labour Relations Act, 66 of 1995 (“the LRA”):
 - 1.1 Declaring that the dismissals of the second and further applicants by the respondent were substantively unfair;
 - 1.2 Ordering the respondent to reinstate the second and further applicants with effect from the date of their dismissal;
 - 1.3 Ordering the respondent to pay the costs of this application;
 - 1.4 Granting further and/or alternative relief.
- 2] At the commencement of the trial, the respondent made a “with prejudice” offer to re-employ 11 of the second to further applicants (“the individual applicants”) who it submits it had been unable to contact previously to communicate its recall offer. The offer was rejected. It was submitted by the applicants’ counsel that they sought compensation and no longer reinstatement.

Facts recorded as common cause in the pre-trial minute

- 3] The individual applicants are members of the first applicant (“the union”), and were employed by the respondent at its Rietvlei factory, a brick-producing factory, until their dismissals on or about 28 August 2009.
- 4] On 5 May 2008, the respondent sent the union a notice in terms of section 189(3) of the LRA inviting it to consult about ‘a project contemplated at its Rietvlei factory and which could affect a number of positions at Rietvlei factory.’ The notice also stated that the project related to the automation of

key functions at the factory, including 'de-hacking and sorting operations which are currently undertaken on a manual basis'.

- 5] The respondent indicated that it would be willing to pursue the proposal of offering the opportunity for employees to volunteer for retrenchment subject to them not constituting essential skilled manpower or experienced staff considered critical to the efficient functioning of the factory.
- 6] The parties met the following day, 6 May 2008 and discussed various issues arising out from the proposal to automate the de-hacking and sorting operations. The first applicant's representative requested a schedule indicating how the automation would affect its members. Discussions took place around the potential implications for staffing needs being reduced at the level one category and the resultant creation of further positions at the more skilled level two and three positions.
- 7] In June 2008, the respondent provided the union with a schedule reflecting the existing staff complement and the proposed changes after the proposed automation. The respondent also informed the union that in terms of the proposal, two sorting belts would remain operational until October 2008 at which time it was expected that one of the belts would be removed in order to accommodate the installation of the automated de-hacking via robotic technology. The automated system was expected to become operational by 1 December 2008.
- 8] The parties met again on 12 September 2008. At this meeting, the respondent indicated, *inter alia*, that the anticipated date for the commencement of recruitment at the factory for the new positions in levels two and three that had arisen as a result of the automation was now October 2008. The respondent also indicated that it would invite employees to apply for voluntary retrenchment.
- 9] In 2009, the union's representation was taken over by Bongzi Zwane, who was briefed by the respondent during meetings in April 2009 on the consultations

and processes that preceded his involvement.

- 10] On 5 May 2009, the respondent provided the union with certain of the information it had requested.
- 11] On 22 May 2009, the parties met again and the respondent provided the union with further information regarding its proposed selection list derived with reference to LIFO, skills levels, handyman duties and back-up employees, with particular reference to skills it wished to retain. The parties discussed proposed severance pay for the employees who would eventually have to be retrenched.
- 12] The parties met again on 25 June 2009. The union requested that the individual applicants should be provided with information on severance and other payments so as to enable them to volunteer where applicable. The union sought to propose a broadly framed retrenchment agreement.
- 13] The parties met again on 20 July 2009. At this meeting, the respondent indicated that it intended to proceed with the retrenchments.
- 14] The parties met again on 22 July 2009 when they reached agreement on the issue of retention of forklift drivers. The respondent also provided the union with a template letter of retrenchment it intended to issue to the individual applicants.
- 15] The parties met again on 29 July when the respondent submitted further proposals on the draft retrenchment agreement.
- 16] A further meeting followed on 1 August 2009 and the parties discussed the outstanding selection issues relating to the use of back-up employees and the handyman issue. The union agreed to compromise on the handyman issue based on the considerations that the respondent had articulated regarding their retention, and the respondent agreed in turn to compromise on the issue involving the retention of the back-up employees and agreed to use LIFO as a

basis for determining eligibility for employee retention where the choice was between back-up employees and other affected staff.

- 17] On 3 August 2009, the respondent issued termination notices to the individual applicants informing them that their services would terminate with effect from 28 August 2009.
- 18] Shortly after their retrenchments, the respondent engaged some of the individual applicants on fixed term contracts.
- 19] On 3 September 2009, the applicants referred a dispute to the CCMA for conciliation. The dispute remained unresolved and was referred to this Court for adjudication on 1 February 2010.

The issue to be determined

- 20] This Court is required to determine whether the dismissal of the individual applicants for operational requirements was substantively unfair, and if so the relief to which they are entitled. Although the individual applicants sought reinstatement in their statement of claim, this was amended during the proceedings to a claim for compensation.

The evidence led

Evidence led for the respondent

Steven Feist

- 21] Feist is Director: Industrial Relations of the respondent. He explained the process of brick making at the Rietvlei factory. This requires the crushing and grinding of clay which is then compressed and pushed through a processor, following which it is cut into bricks, burnt, vitrified and removed into kilns for de-hacking and sorting. The bricks are then picked up by forklift trucks, taken to the sorting yard and packed into bins. The main processes involve crushing, grinding, de-hacking, sorting as well as the yard procedure. The

crushing and grinding process was automated in 2006 but this did not involve retrenchments. It always remained conceivable that there would be changes to production as the respondent's objective was to produce product of a certain quality in volumes that would achieve production benefits. The Rietvlei factory had been shut in the 1990s on account of the economic recession. It had a massive capacity but was underperforming. In 2002, it was decided to operate the factory again on a 2-kiln basis to produce mid-range product. Since the 2006 automation had not resulted in any retrenchments, when he was instructed by the Executive Committee to initiate discussions with the union in regard to a proposed automation of de-hacking and sorting, he likewise did not anticipate that retrenchments would be necessary.

- 22] Feist despatched the notice in terms of section 189(3) notice to the union and its members, and was involved in the consultations with J Rabothata (the union organiser). The parties first met on 6 May 2008 when Feist explained the operational issues and the rationale for the proposed automation. He also set out the alternatives that had been considered by the respondent, namely job sharing and short-time, but explained that given the fact that the proposal was not driven by economic/financial reasons these alternatives were limited in terms of reducing or obviating the need for the retrenchments. He also indicated that the respondent was willing to consider voluntary retrenchments in order to reduce or eliminate the need to retrench. He proposed that selection criteria such as skills, LIFO and experience should be utilised, and indicated the proposed period in which the introduction of the technology was envisaged and that fixed term contract labour would be used to provide supplementary labour for any additional sorting that would need to be done over the period. It was also proposed that manual sorting would take place on one belt while the installation of the new technology occurred on the other. In the meeting, Rabothata requested additional information, including a schedule reflecting how the union members would be affected, and Feist provided this attached to his correspondence of 2 June 2008. They also discussed the intended manner in which the new technology would be installed, how the operator level positions would be filled, and when volunteers would be invited. Feist also proposed that if retrenchments were still necessary they should be

finalised by 12 December 2008. On 2 June, he also provided the union with a revised breakdown of the existing staff complement and the planned complement after the installation of the technology.

- 23] On 3 June 2008, Feist met with Rabothata again when an in principle agreement was reached on the rationale for the proposal; the proposed process by which the new technology would be introduced; the proposed process by which the operator positions at levels two and three would be filled; the proposed process for calling for volunteers; and the proposed process for selecting candidates for any forced retrenchment and the fact that the selection criteria used would be LIFO, experience and special skills. The parties also agreed to continue to discuss issues in order to minimise job losses as far as possible.
- 24] On 24 July 2008, he updated Rabothata about the delays in installing the new technology. He also sought to propose dates by which the filling of the operator positions would take place and again outlined the volunteer process. He sent correspondence to Rabothata on 4 August 2008 in which he reiterated the proposal that fixed term labour would be used to provide back up to the automated sorting during this period. Under cover of that letter he also provided an updated schedule of all employees, including wage and salaried staff.
- 25] A further meeting was held on 12 September 2008 when again information and updates were provided to the union. Feist testified that he again proposed to Rabothata that any shortfall in manpower complement during the period of conversion from the manual to automated de-hacking would be made up through the use of fixed term contractors and overtime. In his correspondence to the union on 17 September 2008, he again set out the agreed process by which the selection of employees would take place as well as the criteria of LIFO, experience and special skills.
- 26] Feist testified that the installation of the new technology was only finalised in January 2009 but thereafter the parties began wage negotiations which

resulted in a strike that lasted approximately one month from about February to March 2009. At this stage the level two and three operator positions had been filled and the only remaining issues were the placement of the forklift drivers, back-up employees and handymen, as well as the identification of sorters and cleaners who would be affected by the process.

- 27] On 17 April 2009, Feist and Heinrich Von Wielligh, the respondent's Factory Manager, met with Bongi Zwane who had replaced Rabothata as union official. They briefed him on progress made to date as well as the selection criteria agreed with his predecessor. Zwane insisted that LIFO should be the sole selection criteria determining which union members should be retained and insisted on agreement being reached on this basis alone. Feist tried to explain the importance in some instances of utilising special skills in conjunction with LIFO as an objective basis for determining eligible employees for retention. Zwane insisted that if LIFO was not the sole selection criteria he would declare a dispute, and Feist undertook to accommodate his concerns as far as possible. Subsequent to the meeting and under cover of a letter dated 23 April 2009 he provided Zwane with a schedule relating to waged employees at the factory, their job titles, dates of engagement and job levels. He indicated in the schedule the implications of the application of LIFO by level on the one side and on the other the implications of using experience, skills and LIFO in determining the selection of affected employees. In addition to this, on 5 May 2009 an email was sent to Zwane setting out the Rietvlei staff complement (pre and post restructuring), the positions to be filled as well as surplus positions, as well as a breakdown of current salaried posts, incumbents and years of service.
- 28] A further meeting followed on 22 May 2009 where the focus shifted to the specifics of what was outstanding in respect of the restructuring process. At that stage the issues still outstanding were the placement of forklift drivers, handymen and back-up employees. Severance pay was also discussed. The forklift drivers were affected because as a result of the introduction of the new technology the respondent was able to place less reliance on two ton forklifts and proposed the use of eight ton forklifts. A number of employees had

experience in operating eight ton forklifts but the union was opposed to them being placed in these positions and insisted that employees with longer service (and no experience) should be preferred. The respondent undertook to consider this demand that LIFO should be the sole criterion determining eligibility for the forklift driver positions. In relation to handymen the respondent provided the union with details of how LIFO would impact on the group if it were the sole selection criteria to be applied. In relation to back-up employees, Feist provided Zwane with details of four employees who provided back-up services (i.e. they occupied key positions during periods of absence and lunch breaks) and who had over time acquired skills and knowledge in various activities where they provided relief. Feist attempted to explain to Zwane that it was operationally necessary to retain the services of these employees.

- 29] Zwane had also raised the issue of one week's severance pay and Feist indicated that at this meeting he conceded to the demand that two weeks' severance pay for every year of service should be paid.
- 30] A further meeting was held with Zwane on 25 June 2009 where the focus was on the outstanding issues relating to forklift drivers, handymen, back-up employees, volunteers, temporary services and salaried employees. Zwane still insisted on only LIFO being applied to forklift drivers; rejected the proposal that handymen should be retained for their skills and experience which were essential to the functioning of the factory and could not be replaced over a short period of time; and rejected the retention of the four back-up employees on account of the skills and experience they had accumulated over the years. The respondent agreed to consider the union proposal that LIFO should be the sole criterion for determining who would be retained from this list and ultimately revised the list. It was agreed in relation to volunteers that this would occur in due course. Feist indicated that there was also discussion about temporary services through a labour broker that had been rendered to the respondent for the purposes of providing cleaning services in the ablution blocks and change rooms. The respondent did not consider these activities as key and wished to continue to retain the services on an outsourced basis, but

undertook to refer affected employees who wished to be employed by the contractor. It was further agreed that salaried positions would be advertised to enable affected employees who had the necessary skills and capabilities to apply for those positions even though these were supervisory positions which the individual applicants who were mainly sorters and cleaners at level one did not have. Feist confirmed that he provided Zwane with the full details relating to the experience levels of the handymen on 7 July 2009. On 20 July 2009 at a further meeting Zwane agreed that he would view the work the handymen were doing in order to form a better understanding of the situation. He failed to do so and at a further meeting on 31 July 2009 it became clear there was a deadlock between the parties on the issue of the handymen with the respondent contending that these jobs involved special skills. In relation to the back-up employees, it was agreed that the list would be revised in accordance with the schedule provided by the respondent on 7 July and at the 31 July meeting the union was informed that only one of the back-up employees had applied for a salaried position and would shortly be interviewed for that position.

- 31] As far as the labour brokers were concerned, Feist's evidence was that he had addressed the union's concerns that the respondent wanted to retrench its members in order to bring in staff contracted through labour brokers. Feist indicated to Zwane that the respondent had agreed to extend the 12-month recall period following the retrenchments and that this should allay any concerns of the union that it intended to replace retrenched employees with staff contracted through a labour broker. He had also explained to Zwane that the respondent had terminated its outsourcing contract with the labour broker providing cleaning services, which would create a further four positions for the affected employees. Furthermore, another vacancy had arisen which would create an additional position and thus reduce the number of retrenches to 35.
- 32] On 1 August 2009, a Saturday, an urgent meeting was held to resolve the impasse that had arisen on 31 July around the issue of the handymen. Zwane and a number of union shop stewards met with Feist, Von Wielligh and David Matlou, Managing Director of the respondent. Zwane produced a generic

retrenchment agreement to replace the contemporaneous one drafted by the parties, and the respondent's representatives indicated that this was not practical and suggested amending the generic agreement but Zwane indicated that he did not have the stamina to do so. The respondent's representatives indicated their willingness to meet on the Sunday for this purpose but Zwane said he was not available.

- 33] After exhaustive discussions, the identity of the employees to be retrenched was agreed with Zwane. It was also agreed that the notice of termination, a template of which had already been given to the union, would be issued on Monday 3 August 2009 after Von Wielligh and the shop stewards committee had verified the names. Feist testified that this agreement had only been reached once the union had relented on the handymen issue and agreed to their retention on the basis of special skills. The respondent had in turn conceded on the issue of back-up employees and agreed that LIFO would apply to their selection. On the Monday the shop stewards informed Von Wielligh that there were volunteers for retrenchment, which reduced the proposed number of retrenchments to 33. Von Wielligh and the shop stewards signed off on the final list and the termination notices were accordingly issued to the 33 individual applicants.
- 34] Feist received a telephone call from Zwane on 14 August 2009 when he was travelling and Zwane suggested a further meeting. Feist asked him if there was anything specific he wished to discuss and he said no. They agreed to meet on 25 August 2009 when Zwane raised a number of new issues.
- 35] In keeping with its recall undertaking Feist confirmed that 17 of the individual applicants were subsequently re-employed into permanent positions. An additional three applicants were later recalled, of which two were dismissed and the third (Koka), who had been appointed on a fixed term contract did not have her contract renewed on account of her refusal to work overtime. A further two applicants were deceased. He confirmed that the respondent had made attempts to contact the remaining 11 applicants via the shop stewards committee, but had been unsuccessful.

36] In relation to the allegation that the respondent relied unnecessarily on overtime and fixed term contracts at the time of the retrenchments, Feist testified that this reliance was short-lived and was driven by unusual operational circumstances that the respondent had to deal with shortly before the retrenchments became effective and for a short period thereafter. This was prompted by an order in May 2009 for a specific brand of bricks by customers for two projects, one at Port Shepstone and the other at Kempton Park. Difficulties had arisen with the colour matching of these bricks and they had to be sorted manually in accordance with the agreement reached with the union in 2008 that it could use fixed term contract labour and overtime to meet customer demands. Unfortunately for the respondent at the same time there was an economic recession which affected the brick making business and in order to keep its operations going and ensure that it could be given an opportunity to reduce its conventional product stockpiles it resorted to making plaster and classic satin bricks. This resulted in the unanticipated problem of clinkering (sticking together) which required manual labour to separate the bricks. The respondent utilised fixed term contract labour from its Springs factory as the employees at Rietvlei were refusing to work overtime, and subsequent to the retrenchments it recalled some of the individual applicants. This was demonstrated by the graphs produced by the respondent and which formed part of the evidentiary bundle. This was a short term problem and when it resolved itself the respondent progressed towards the elimination of overtime and use of fixed term contract labour.

37] In cross-examination, Feist denied that the respondent had continued to use employees contracted by labour brokers. He confirmed that the only discussions that had taken place in this regard with Zwane related to cleaning services being provided by a labour broker (AML), but that the respondent had agreed to in-source this function effectively resulting in four positions being created for affected employees. He stated that Zwane had referred in the 31 July 2009 meeting to an ulterior motive on the part of the respondent to get rid of permanent employees and bring in employees contracted through a labour broker. In order to allay these fears, the respondent confirmed that it would extend the recall period beyond 12 months. He confirmed that shortly

after the retrenchments, unanticipated problems arose with bricks clinkering which required manual sorting. Once this was completed there was no further need for fixed term contract labour or overtime, which had been necessitated by the same considerations.

Evidence of David Matlou

- 38] Matlou is the Managing Director of the respondent. He confirmed that the equipment used on the lines was outdated and there were problems with obtaining replacement parts, as well as implications for employee safety. This resulted in significant loss of production. After various alternatives had been considered, the respondent ultimately proposed the introduction of robotic technology. The executive committee received feedback on the union consultation process from Feist and in June 2008 they were informed that a principle agreement had been reached on the operational rationale for the proposal, the means and manner of implementation and the process of placement and retrenchment. The installation of the new technology was finalised in January 2009 and the commissioning of the technology took place over a four month period up to April 2009. He confirmed that he attended the meeting with Zwane on 31 July 2009 and that Zwane threatened to declare a dispute as a result of the eight handymen positions, and insisted that LIFO should be the sole selection criterion determining which employees should be retained. Given the outstanding issues he suggested the parties meet on the Saturday (1 August) to seek consensus. Zwane arrived late that afternoon but had issued instructions to the shop stewards to proceed in his absence. On his arrival the parties reached agreement on the handymen and back-up employees. Zwane had conceded on the handymen issue and the respondent conceded to the demand that only LIFO should apply in appointing the back-up employees. He confirmed that there was discussion on the labour broker issue with the respondent agreeing to extend the recall period in order to allay the union's concerns about its alleged continued reliance on labour brokers. He confirmed that Zwane had produced a new retrenchment agreement and Feist indicated that they should continue the discussions on the basis of the original agreement the parties had developed. Zwane's attitude was that he

had no appetite to discuss the agreement. It was then agreed which employees would be retrenched and Zwane agreed that Von Wielligh would meet with shop stewards on Monday 3 August to confirm the names.

- 39] Matlou testified that since March 2009 there had been problems with two contracts and that complaints had been received from the architects on the projects which resulted in manual sorting being necessary. He confirmed that Feist had consulted with Rabothata in 2008 about the possibility that using fixed term contract employees and overtime might be necessary to deal with operational problems that may arise. After the termination notices were issued, the respondent had been forced to make plaster and classic satin bricks, and had to use fixed term contract employees from the Springs factory to deal with clinkering. The retrenched employees were recalled to assist with the temporary operational problems, but once these problems were resolved the respondent no longer required the use of additional labour.
- 40] Matlou confirmed that the running of two kilns required approximately 100 employees. He testified that after the retrenchments, in 2010, there was an economic recession which resulted in the respondent having to use one kiln only and as a result further retrenchments were necessary to reduce staff to below 100. When conditions improved again in 2011 the respondent recalled 20 of the individual applicants and attempted to contact the remaining 11 applicants but to no avail. It then employed other employees who had been retrenched subsequent to the individual applicants, on fixed term contracts.
- 41] He also confirmed that the cost of production had reduced significantly as a result of the new technology and that the factory was currently operating at its pre-2009 costs which enabled the respondent to be competitive and to operate in markets it had been unable to access previously.
- 42] In cross-examination Matlou maintained that the possibility of fixed term and overtime work to deal with operational issues had been canvassed with and agreed to by Rabothata at the inception of the consultation process. He confirmed that the use of this additional labour was short lived and the

respondent reverted to its normal employee complement thereafter. He denied that the use of supplementary labour was something more than a temporary situation necessitated by the clinkering or that it had any relevance to the retrenchments of the individual applicants. He confirmed with reference to the graphs produced by the respondent that at the stage at which the problems with clinkering became apparent (i.e. 21 August 2009) the notices of termination had already been issued to the individual applicants.

Evidence of Heinrich Von Wielligh

- 43] Von Wielligh was the Factory Manager at Rietvlei at the relevant time and had participated in the consultation meetings together with Feist. He confirmed the operational rationale for the installation of automation technology. He confirmed that an in principle agreement had been reached with Rabothata in June 2008 in respect of any proposed retrenchments and the selection criteria that would apply. He confirmed that at further meetings with Rabothata in August and September 2008, the latter was given feedback on the implementation of the new technology. By January 2009 the technology had been installed and operators at levels two and three had been migrated from their old positions into new positions. Zwane became involved on 17 April 2009 when the respondent had already commissioned the installed equipment and which process was intended to take approximately four months. Zwane then raised the issue that LIFO should be the sole selection criteria. Discussions ensued about the handymen and back-up employees as well as certain salaried employees, D Smit and K Kruger, who were shift supervisors, and whom the union contended (at a rather belated stage just prior to the trial) should have been retrenched instead of some of the individual applicants. He explained that Smit and Kruger had previously worked for a contractor until they were directly employed by the respondent and had been trained in 2006 by the Australian contractors who had installed the initial robotic technology, in addition to which they had artisan skills which were necessary to provide maintenance and diagnostic services on the production line. Two other employees, whom the union had also recently contended should have been retrenched, Happy Sepogoana and J Mailola had been trained by French

contractors in 2006 on the new technology for a period of three months, were experienced and held their positions over a long period of time. The union also raised an issue concerning Prince Sekushule who was an experienced Extruder Operator who had been in the position for a significant length of time. Von Wielligh explained that there were serious risks involved if an unskilled employee performed these services. Von Wielligh testified that the individual applicants were mainly sorters and cleaners employed at level one (specifically those referred to by the union in Exhibit B, page 88, namely Matlala, Nkosi, Selepe, Lekgothoane and Koka). As such they had no specialised skills nor could they acquire these within a short period of time. He had indicated the skills levels as above to Zwane but at no stage during the meetings were any issues raised in relation to the above individuals and whom the union now suggests should have been retained in preference to certain of the retrenched employees.

- 44] He also testified that following the meeting of 30 July, he met with shop stewards on Monday 1 August 2009 to compare the lists of employees and the final list was agreed and signed by him and the shop stewards. Subsequent to the list being agreed the shop stewards informed him that two employees were volunteering for retrenchment and the list was amended.
- 45] He confirmed the problems concerning country meadow bricks for which the colour matching had to be done urgently based on client needs. Contract workers from the Springs factory had been used since at this stage the applicants were still employed by the respondent. On or about 21 August 2009 a completely unanticipated problem arose with clinkering in two types of bricks, i.e. plaster and classic satin. The problem, he explained, only becomes apparent about a week after the mix has been put through the machines when already a million bricks had passed through the system. The machines could not deal with clinkering and sticking of bricks and this had to be done manually with the use of fixed term contract labour. This had occurred over a short period as was manifested by the peaks in the graphs produced by the respondent. When the applicants became available their services had been used instead of the Springs fixed term employees as was apparent from the

graphs. He confirmed that these problems were unanticipated and had to be dealt with as a matter of urgency. He confirmed that the respondent had not used labour brokers to provide staff other than cleaning staff and two employees who were used as *ad hoc* support when specialised technical assistance was required on the lines or the equipment.

- 46] In cross-examination, it was put to him that the retrenchment should have been delayed and he indicated that this would have served no purpose as the requirements for fixed term labour were fluctuating and could not be predicted or planned with any degree of certainty. In addition, once the unanticipated problems had been resolved there was no longer any reliance upon such supplementary labour.

Evidence of Robbie Carswell

- 47] Carswell replaced Von Wielligh as factory manager at the end of November 2009. He testified that when he started there had been a problem with sticking and clinkering that was associated with the manufacture of plaster bricks and classic satin. There had also been a further phase (after May 2009) on the Kempton Park and Port Shepstone projects where country meadows bricks had been used and this had resulted in a further need for manual sorting for a short period of time. He confirmed that the individual applicants had been engaged on a fixed term basis to help with these unplanned difficulties and that the difficulties had more or less resolved themselves by 16 April 2010. At the stage the new technology was implemented the employee complement was anticipated to be around 100 on the basis of two kilns operating, but that there had been a significant economic recession in 2010 that resulted in only one kiln operating. However retrenchments had been held off until October 2010 and when these took place the staff complement of the respondent was reduced by almost half. When economic circumstances improved the second

kiln was made operational and approximately 20 of the individual applicants were recalled. Three of those were subsequently dismissed. Attempts were made to contact the remaining 11 and two of the individual applicants were deceased. He also confirmed that costs of production had come down to pre-2009 levels and the respondent was accordingly able to compete in markets it had not been able to access before as a result of the introduction of the new technology.

The evidence led by the union

Evidence of Bongi Zwane

48] Bongi Zwane was the union organiser at the time and received a section 189 (3) prior to the process commencing and on 17 April 2009 held the first meeting with the respondent. The 2008 process had been abandoned and a new consultation process had commenced but the union did not want to get into whether restructuring was necessary. Their concern was just how many people are affected. He admitted that the rationale was technological and economic and that by the time he first met with Feist, the technology had already been installed. His approach was not to focus on the reason why the technology or economics were in issue – but how the numbers can be reduced

49] The union asked for information and was promised information regarding both the current and intended staff complement and incumbents. The union was not necessarily concerned with the rationale for the retrenchments because management would have already decided on the need to retrench. They were provided with list of staff at the time and the positions that were anticipated as a result of the restructuring but this did not reflect salaried staff and they then requested this to get a holistic view of the employees. The respondent insisted on confining them to information about the bargaining unit and wage earners only. This led to the argument that to engage in a fair process the union should be permitted to look at all opportunities to limit casualties and salaried staff should not be protected. Management later provided information

(by email on 5 May) but this was limited to level one and two employees.

50] At the next meeting on 22 May 2009, he engaged with the respondent as follows :

1. They compared staff affected and those not affected. The respondent wanted to use LIFO, skills and experience to select which employees would remain in employment on the restructured line. He pointed out that the universal principles applicable are LIFO and skills, and that experience was part of LIFO. The respondent said there were certain people with certain skills they did not want to lose and the union requested proof but were not provided with this immediately although they eventually received it. This was the information relating to salaried employees allegedly trained by the foreign consultants (i.e. Smit, Kruger, Sepogoana, Mailola and Sekushule) but he was of the view that there was favouritism and these employees did not bring higher skills. LIFO meant the respondent needed to look at date of employment and nothing else and these salaried employees had commenced after some of the individual applicants. The union continued to be concerned about the unjustified differentiation between LIFO and skills and between waged and salaried staff.
2. The union also wanted a moratorium on the use of labour brokers. The respondent initially denied it was using labour brokers but the shop stewards knew this and referred to AML as one of the labour brokers being used. The respondent agreed that at the time of the retrenchments it would no longer use labour brokers. There was no discussion of fixed term contractors being used or of a need for overtime. There were vacant positions for which union members were told to apply but the union was opposed to this because then management prerogative would determine appointments. In his view the distinction between salaried and waged staff was a myth.

51] At the final meeting of 1 Aug 2009, the union realised that there was no

intention to discontinue the use of the labour brokers and the question of overtime was discussed. There were still four employees employed by labour brokers doing cleaning and the union said they should be replaced before the end of the process. The respondent finally conceded that they would discontinue this practice. His concern about labour brokers was that it was unfair to replace permanent staff with employees contracted through labour brokers.

52] He finally admitted in cross-examination that he knew the respondent was using labour brokers including AML and temporary workers and that they were sorting and doing general work mostly during the night. He denied being aware of any operational emergencies and suggested that the union should have been consulted had this been the case. When he received information that the respondent was continuing to rely on overtime and fixed term contractors he contacted Feist on 13 August 2009. They met on 25 August when he raised his concerns. His view was that the use of labour brokers on or after the retrenchments was never discontinued. The respondent was simply going through the motions of consulting and continued its usage of labour brokers through offering these employees fixed term contracts on or before 1 September 2009. He denied that this was as a result of operational problems but manifested a pre-determined and clear intention to retrench union members.

53] Zwane admitted that there had been agreement as at 1 August 2009 on the list of employees to be retrenched but this was on the understanding that the labour brokers would be gone by the time the retrenchments took place. He indicated that he believed that the respondent had gotten rid of its permanent employees in order to be able to employ staff through labour brokers and fixed term contractors. It was only at the meeting of 25 August that he realised that the respondent had no intention of discontinuing its use of employees contracted through labour brokers.

54] Zwane denied that the respondent had briefed him on its consultations with Rabothata and that he had seen any of the previous correspondence between

the respondent and the union. He testified that he had received a new s 189 (3) notice from the respondent in April 2009, but was unable to point it out from the bundle of documentary evidence. He disputed that the notice sent to the union in 2008 had been brought to his attention at any stage. He identified annexures to letters sent to Rabothata as documents that had been handed to him as part of the consultation process, and denied (when it was put to him in cross-examination) that they were in fact annexures to letters written to Rabothata in 2008 (and represented period specific employee complements from May and June 2008) and that it was improbable that they would have been given to him without copies of the covering letters which were sent to Rabothata. He was insistent that these were the only documents given to him by the respondent during the consultations in 2009.

- 55] It was further put to him in cross-examination that contrary to his suggestion that he had not been provided with the information requested on salaried employees, information on both waged and salaried employees as well as positions that needed to be filled were given to him and this was apparent from the annexures to the letter dated 23 April 2009 and the email sent to him on 5 May 2009 by the respondent. He also indicated that he had requested information in writing about the skills of salaried employees, including Smit and others, but this had not been forthcoming. It was put to him that there was no evidence that this had been requested nor had it been put to the respondent's witnesses. He refused to explain why he had insisted on LIFO being the sole selection criterion and had threatened to declare a dispute if this was not applied. He was unable to explain why he felt the handymen skills were not discrete. He admitted that he had been given information about the handymen skills after the second meeting on 22 May 2009 and he had then accepted the distinction between them and other affected employees on the basis of their special skills. Insofar as he testified that the respondent had been withholding information about the handymen it was put to him that this was improbable if one took into account the fact that the respondent had provided him with details of the handymen skills as well as the past experience of these employees, and furthermore that he had not addressed any correspondence to the respondent complaining about the alleged non

disclosure of information and demanding that it should be provided.

- 56] He denied that the discussions with Feist about labour brokers was limited to concerns about the outsourced cleaning contract, and insisted that they also discussed labour brokers providing sorting services. He was unable to indicate why, if he continued to object to this vehemently and the respondent had not complied, he had not sought fit to place his objections in writing.
- 57] He insisted that the consultation process initiated with Rabothata had been abandoned by the respondent and that he was party to a new process commencing in April 2009. This is despite it being common cause in the pre-trial minute that the process commenced in May 2008. He was unable to explain why both Feist and Von Wielligh would testify that they had briefed him on the past consultations or why he would not have known anything about the past process in which the union had been involved.
- 58] In his view, the retrenchment of the individual applicants was unfair because the respondent did not disclose to him that it was using fixed term contractors, and because it had never intended to stop contracting labour brokers. The retrenchments were not necessary, according to his evidence, because the respondent intended to get rid of permanent staff and "casualise" its workforce.

Analysis of evidence and submissions

- 59] In his written closing argument, Mr Van Der Riet submitted on behalf of the applicants that the dismissals were substantively unfair in that :
- a) The dismissals were not operationally justifiable on rational grounds within the contemplation of section 189A(19)(b);
 - b) There was no proper consideration of alternatives to retrenchment before proceeding with the retrenchments (as contemplated in section 189 A (19) (c)).

- 60] Mr Van Der Riet submitted that the evidence proved that 24 of the individual applicants were employed on fixed term contracts immediately after their retrenchments. At the time the respondent was already employing more than 25 other employees on fixed-term contracts as well as requiring its employees to work overtime. This situation continued well into 2010 (albeit to a lesser degree after October 2009). Thus, he submitted, on the respondent's own version it is clear that at the time the individual applicants were retrenched (i.e. 28 August 2009), the respondent needed their labour.
- 61] Mr Van Der Riet submitted that it was not in issue, as was the evidence of Zwane, that the respondent never raised the fact that it was using fixed-term contractors and that it planned to recall many of the individual applicants after they had been retrenched. The fact that the respondent's witnesses suggested that the use of contract workers was mentioned in the consultation process does not take the matter any further since this relates to two letters written in 2008 and which had a very specific context. The reference in the correspondence ¹ to the effect that 'for practical reasons the company favours that day shift sorting be conducted by existing sorters and that night shift sorting be done on contract. Consequently, it is planned to effect voluntary retrenchments (where applicable) to take effect early in July 2008, and for the contract to operate fully from that date (after a period of training during June 2008)', related to the situation before the automation on the de-hacking section became operational and had nothing to do with what occurred in August 2009.
- 62] Furthermore, Mr Van Der Riet submitted, the respondent stated in its 2008 correspondence that 'should a small complement of sorters / de-hackers be required for a while as a backup to the automated sorting, employment would be on a fixed-term contract basis during this period. Preference in this regard would be given to those employees who were previously in permanent employment', but the evidence was that when the automated sorting started on 1 April 2009 all the sorters were still in full time employment and no use was made of fixed-term contractors at that stage. Therefore, there was no

¹ See Bundle B page 2.

suggestion whatsoever that in August 2009 the respondent would need contract workers (and overtime) for the purposes it needed labour at that stage.

63] On the law Mr Van Der Riet submitted that it was trite that the LRA² requires the employer, in consultations preceding retrenchments, to not only reach consensus with the union on appropriate measures to avoid dismissals and to minimise dismissals, but also to change the timing of dismissals. He submitted further that, as was held in *SACTWU and Others v Discreto (a division of Trump and Springbok Holdings)*,³ the consultation process has a substantive purpose, namely to 'ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale'. This, he submitted, introduces a substantive component to the consultation process in that if a matter is not raised in the consultation process it would be impossible for the dismissals to be justified as substantively fair. Furthermore, retrenchment must be a measure of last resort in order to be substantively fair: See *CWIU V Algorax (Pty) Ltd*⁴ where the LAC held that a retrenchment was substantively unfair on the grounds that there were reasonable alternatives and retrenchment was therefore not a measure of last resort.

64] Mr Van Der Riet submitted that the union's approach does not amount to challenging procedural fairness, since as was pointed out in the *Discreto* matter,⁵ if a matter is not raised during consultations it is often impossible to justify the ultimate retrenchments. It becomes a question of substantive fairness. The crux of the applicants' case is that the dismissals were substantively unfair because on the evidence led it is clear that the respondent has failed to show that the retrenchment of the individual applicants was rationally justifiable for operational requirements as at the time of their dismissal on 28 August 2009. At that stage, the respondent needed an additional 50 fixed term contractors and the retrenched employees would

2 See section 189(2)(a),(b) and (c).

3 [1998] 12 BLLR 1228 (LAC) at para 8.

4 [2003] 11 BLLR 1081 (LAC) especially at para 70.

5 Supra at paras 6-9 and 15.

have performed the work required. The respondent may have been able to show at a later stage that the retrenchment of some of the individual applicants was justifiable on operational grounds, but on the date in question there were reasonable alternatives to retrenchment. The respondent could have simply used the individual applicants to do the work it used contractors to do or to do the work done by permanent employees as overtime. The applicants conceded the technological rationale for the retrenchments and conceded that it made sense in the long term. However, they submitted that at the time this reason had nothing to do with the retrenchments even though it may have become relevant at a later stage. Mr Van Der Riet submitted that the evidence of Von Wielligh supports the applicants' submission in that he confirmed that after the operational problems had been resolved and the respondent no longer needed replacement labour, the retrenchments would have been operationally justified. However, the respondent retrenched the individual applicants before that point arose and at a point in time when they still needed labour. The retrenchment accordingly cannot be justified as a measure of last resort, and as in *Algorax (supra at para 70)* where the employer had other alternatives available that would make it unnecessary to resort to dismissals, the dismissals are not substantively fair.

- 65] Mr Van Der Riet admitted there was no reference in the statement of claim to the use of Springs factory workers because this fact only became apparent at the trial. The criticism of Zwane's evidence, moreover, he submitted, is not justified since he was called simply to rebut the evidence that the references in the correspondence to contract workers were made in the context of a justification for the retrenchments to be effected on 28 August 2009. Zwane's testimony established that the manual sorting on contract had nothing to do with justifying the use of contract labour in August and September. His evidence proved that all sorters were still in permanent employment until 28 August 2009 and at no stage did management indicate to him that as at 28 August 2009 they will still require contract workers. They could have raised this with him on 25 August 2009 when Zwane expressed the concern to Feist that there were still 'lots of labour brokers,' and the failure of the respondent to raise this or agree to an extension implies that it is not able to justify the

retrenchments. This information was only within the knowledge of the respondent but was never raised with the union. Matlou's explanation provides the only rationale for persisting with the retrenchments at the time i.e. that the termination notices had already been handed out. The respondent could have withheld these given its need for contract labour, and there was therefore no justification for the timing of the retrenchments. Mr Van Der Riet submitted further that the statement of claim should accordingly be deemed to be amended in light of the facts that emerged during the trial regarding the fixed term contract employees.

- 66] No submissions were made on the selection criteria issue and in their final submissions the applicants would appear to have abandoned reliance on this issue. The allegation that certain skilled and salaried employees should have been retrenched instead of some of the individual applicants, raised rather belatedly, was also abandoned, correctly in my view as the evidence refuted entirely the union's proposition in this regard. In any event this issue would have been subsumed by the fact that the parties eventually reached agreement on the identity of the individual applicants.
- 67] Mr Lawrence submitted that the union's sole witness was unable to dispute that there was a fairly extensive consultation process which commenced in 2008 with the issue of the s 189(3) notice and continued into 2009. Zwane conceded that there were many meetings and that the union accepted the technological rationale for the retrenchments but was only concerned about the impact on its members. He was unable to explain his evidence that a new s 189(3) notice was sent to him in 2009. Zwane's main issue was that the respondent did not disclose the use of the fixed-term contractors and labour brokers, which led to a dispute being declared. Mr Lawrence submitted that it was clear from the interactions with Rabothata at the very commencement of the consultation process that the respondent was not coy about the difficulties envisaged in the process and had raised upfront the fact that it had considered job-sharing and short-time but these were not appropriate as this was a retrenchment for technological reasons. In addition, the respondent had raised the possible use of fixed-term contractors and overtime to support the

variable need to the business as it envisaged that there would be problems with the introduction of new technology. The respondent played open cards with the union and the extensive and open discussions culminated in agreement being reached on the selection criteria of LIFO, experience and skills. There was accordingly no need to revisit the entire process when Zwane stepped in to replace Rabothata as the union's representative. Zwane then sought to change the playing field by insisting that LIFO should be the sole selection criterion, although in his evidence he conceded that skills were correctly also applied. Zwane initially denied this, but later conceded that he had been briefed on the background by Feist and it is hardly probable that he would not have been briefed by his own colleagues or indeed that he would not have been informed by the shop stewards that the respondent was using fixed-term contractors.

- 68] Moreover, the graphs confirm that there was no persistent and continuous need for fixed term contractors. Instead there were peaks and troughs and a decline in the use of this additional labour from October 2009 but in April 2010 the variable need for fixed term contractors had disappeared completely. This was not a situation that could have resulted in permanent employment for the individual applicants.
- 69] The explanation for the temporary use of fixed term contractors was moreover clear. The evidence of Feist and Matlou, which was not controverted by Zwane, was clearly and consistently that a particular type of brick had to be produced; that the installation of new technology led to difficulty with matching colours; and that the delivery of the bricks could not be delayed as it was customer driven. The economic recession coincided with the operational difficulties and led to a decision to produce plaster bricks and classic satin in order to stave off closure as other brick factories were closing at the time. The reality was that by 3 August notices of termination with effect from 29 August 2009 had already been issued, and the respondent could not postpone the retrenchments, nor was it even suggested that at the time the applicants sought this. The design of the process led to problems being identified only after a week's production when (as with the clinkering) over a million bricks

would have already been produced. This could not have been anticipated earlier by the respondent.

70] Furthermore, the respondent complied with its undertaking to the union and when problems manifested post the retrenchments it completely ended any reliance on the fixed term contractors from Springs and instead immediately recalled the individual applicants. Zwane conceded in cross examination that that it came to his attention only on 13 August 2009 that fixed term contract labour was being used. He then telephoned Feist but chose not to raise this with him, instead agreeing to a meeting more than a week later on 25 August. However, when the meeting occurred he raised a number of other issues other than the use of fixed term contractors, and more importantly, he threatened an interdict in relation to the use of LIFO. The option of an interdict was in any event available to the applicants in respect of their procedural concerns under s 189A but they elected not to pursue it. It is only the substantive fairness that is now before this Court and it is not available to the applicants to challenge procedural fairness.

71] The undisputed evidence of the respondent was that the factory currently runs at pre-2009 costs. This in itself justifies the technological rationale. The respondent also deferred the retrenchments during the recession. The justification of productivity has been realised and this, as Mr Lawrence submitted, is the true litmus test. In other words, the retrenchments resulted in justification of the rationale of a termination for operational reasons. Mr Lawrence submitted that it is not the case that it was a justification based on financial reasons and could therefore have been deferred. Zwane's evidence was that on 1 August 2009 they had reached agreement on the list of affected employees, selection criteria as well as the effective date. Moreover, there had been consultation with the union on the possible use of fixed term labour. It is thus ironic for the applicant to submit that the recall of individual applicants proves that in retrospect there was no justification for the retrenchments. What is clear from the evidence is that the union accepted the technological rationale; there were no alternatives proposed by the applicants; and the criteria used were fair and objective, and in fact were agreed during

consultation. Mr Lawrence submitted that although Zwane had concerns about experience as a criterion it is clear that experience is an acceptable selection criterion: see *NUMSA obo Members v Timken SA (Pty) Ltd* [2009] 6 BLLR 548 (LC) at para [29]. The approach taken by the respondent has moreover, Mr Lawrence submitted, has been endorsed by the Labour Appeal Court in *CWIU & Others v Latex Surgical Products (Pty Ltd)*.⁶ Mr Van Der Riet submitted that the criticism of Zwane for his refusal to answer the question that he insisted on LIFO is not correct. He did reply that he had already dealt with the issue in his evidence in chief. In any event it was quite apparent (after Feist's letter that Zwane was insisting on LIFO) that the parties thereafter engaged on the skills issue and this was conceded in respect of the handymen.

- 72] Zwane was moreover, as Mr Lawrence submitted, the only witness called by the applicants. He had no knowledge of the operational realities at the respondent and could not controvert any of the operational facts testified put up by the respondent's witnesses; he could not offer any evidence in regard to the operational rationale and had no knowledge of the labour broker contract. He was unable to controvert the testimony of Matlou and Von Wielligh that after the termination notices had been issued plaster bricks and classic satin had presented sticking and clinkering problems which were also unpredicted and needed to be dealt with manually as robotic technology could not deal with this. He was also unable to controvert the position of the respondent's witnesses that this was an unanticipated short-term problem which had nothing to do with the retrenchment process. He was constrained to accept that the services of the individual applicants were used immediately after their retrenchments to deal with these unanticipated operational problems. He was not able to substantiate his view that the respondent's agenda had been to get rid of permanent employees and replace them with labour brokers and fixed term contract employees. None of the shop stewards or individual applicants was called to corroborate his version. The evidence of Carswell was not rebutted and was to the effect that when he took over the reliance on fixed term contractors and overtime work had been resolved and customer

⁶ [2006] 27 ILJ 292 (LAC) at 328B.

orders had been finalised. Zwane was not able to rebut the testimony of Matlou and Von Wielligh that it took in excess of a week and after about a million bricks have been moved through the system to detect problems. On this basis Mr Lawrence submitted there is only one version before this court. Furthermore all the issues raised by the union have been abandoned and the relief sought has now been limited to compensation. The respondent acted in good faith and recalled the retrenched employees and is now faced with the argument that this means there was no original rationale for the retrenchments. Carswell also testified that the normal capacity required running two kilns but this was reduced during the recession to one; new technology was introduced; the respondent picked up the market share of other factories and only in 2011 was it able to run on two kilns again and this led to recalling the individual applicants first.

- 73] It is clear from the evidence that there had been consultation with the union right at the inception of the consultation process about the use of supplementary labour, and in addition that unanticipated operational problems arose which necessitated this at the time of the retrenchments. This was not a permanent situation however and once the individual applicants were retrenched they were recalled to assist until the problems had been resolved within a period of a few months. This did not invalidate the operational justification for the retrenchment on rational grounds, which the applicants conceded when the consultation process commenced. In this regard Mr Lawrence argued that the law envisages consultation to be a two-way street and that the applicant bears some responsibility to raise alternatives to retrenchment : *SATAWU v Old Mutual Life Assurance Company SA Ltd.* ⁷ It failed to suggest any alternatives. Furthermore, he submitted, *SATAWU* dispensed with the notion that retrenchment was required to be a last resort. The court held as follows in this regard :⁸

[84] With the amendments to the legislation in 2002, the legislature has given a clearer indication of the standard to be applied. [Section 189A\(19\)\(b\)](#), applicable to employers retrenching a significant number of employees, imports into the test for adjudging the

⁷ [2005] 4 BLLR 378 (LC).

⁸ Ibid, at page 403 para 85.

fairness of a retrenchment the requirement that the dismissal must be “operationally justifiable on rational grounds”. Grogan argues that the use of the phrase “justifiable on rational grounds” implies that the approach envisaged is akin to that adopted by the Labour Court in reviewing arbitration awards by the CCMA. Still, the question remains whether the employer is obliged to satisfy the court that dismissal was the only option under the circumstances or that retrenchment can only be used as a means of last resort. The balance of authority suggests not.

[85] The test formulated by the legislature in the 2002 amendments harkens back to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Such deference does not amount to an abdication and, as stated in *BMD Knitting Mills (Pty) Ltd* (supra), the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer’s scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer’s margin of appreciation to the employee in the exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in *Discreto* and *BMD Knitting Mills*. The two decisions are not entirely at odds with one another. They are simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context’.

74] In regard to the conduct of the union the court in *SATAWU* (supra at page 404) made the following observations which Mr Lawrence submitted are applicable to the facts *in casu* :

[88] ‘The union’s attack on the underlying rationale for the retrenchments throughout

the process was surprisingly muted and indirect. The dispute letter of 20 October 1999 certainly makes it clear that the union did not see the need for outsourcing. Yet throughout, and despite repeated invitations to do so, it never interrogated the rationale for outsourcing, nor requested details of the anticipated financial savings. Nor did it make any proposals whatsoever for an alternative strategy. By and large its approach suggested that it had accepted the need to outsource and chose instead to secure the best severance package for its members. In the result, there is no evidence that the decision to outsource was not for a legitimate, commercially justifiable objective, or that it was arbitrary or capricious in any way’.

75] The applicants accepted the technological rationale for the retrenchment, and as such it can hardly be contended that the dismissals were not operationally justifiable as at August 2009. The respondent has led sufficient evidence to prove the rational and justifiable basis for the introduction of new technology which led to it being cost effective, and has adequately explained the operational problems which resulted in a temporary reliance on additional or supplementary labour, including that of the individual applicants. The unanticipated operational contingencies do not subvert the original rationale, and in any event would appear to correlate with procedural fairness other than substantive fairness. In terms of section 189A (18) this court is precluded from adjudicating a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191 (5) (b) (ii).

76] In regard to substantive fairness section 189A (19) provides as follows : “[i]n any *dispute* referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the *dismissal* of the number of *employees* specified in subsection (1), the Labour Court must find that the *employee* was dismissed for a fair reason if-

(a) the *dismissal* was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;

(b) the *dismissal* was operationally justifiable on rational grounds;

(c) there was a proper consideration of alternatives; and

(d) selection criteria were fair and objective”.

77] The applicants do not dispute the technological rationale for the retrenchments and the dismissals were accordingly operationally justifiable on rational grounds. Moreover, it is common cause that the selection criteria were fair and objective and in fact were ultimately agreed between the parties and that the identity of the individual applicants was furthermore agreed. No alternatives to retrenchment were moreover proposed by the applicants. The respondent conducted an extensive consultation exercise in regard to the technological innovation it sought to introduce, raising from its inception the anticipated operational difficulties. When these and other unanticipated difficulties arose, it utilised fixed term contractors, as agreed with the union for a temporary period. The union’s concerns that the respondent was motivated by the need to replace its permanent workforce with fixed term contractors and employees of labour brokers was purely speculative and did not materialise. The respondent has also demonstrated that it recalled most of the individual applicants when its capacity increased and it further made a without prejudice offer to re-employ the remaining 11 individual applicants. This in itself demonstrates that it was *bona fide* in undertaking the technological restructuring. Moreover, the evidence that the financial benefits of the restructuring have been realised was not disputed. The applicants have therefore failed to make out a case for relief.

78] On the issue of costs Mr Lawrence submitted that the rejection of the “with prejudice” offer made in open court demonstrates that the applicants’ approach to this litigation was nothing but vexatious. The respondent was entitled to seek costs on an attorney and client scale occasioned by conducting a trial for four days. Mr Van Der Riet denied that the refusal to accept the offer was vexatious and submitted that the union is not responsible for the matter being heard more than two years after the retrenchments as a result primarily of the respondent’s raising of a point *in limine*. The individual applicants have moreover obtained other employment and no longer seek

reinstatement but are entitled to compensation for their unfair dismissals more than two years ago. He urged this court given the principles in *Ergo*⁹ not to make any order as to costs given the ongoing relationship between the parties. In my view there is no reason in law or fairness why costs should not follow the result since the applicants persisted with their claim notwithstanding evidence to the effect that most of the individual applicants are already in employment with the respondent or had already been recalled, that two are deceased, and there was an offer to re-employ the remaining applicants. The applicants made no attempt to amend their relief to compensation prior to the commencement of the trial. However, considerations of fairness would in my view militate against costs on a special scale being imposed and moreover I am of the view that the costs should be paid by the first applicant only.

Order

79] Therefore, I make the following order :

The claim is dismissed. The costs are to be paid by the first applicant.

Bhoola J

Judge of the Labour Court of South Africa

APPLICANTS:

H Van Der Riet SC

⁹ *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* [1992] 4 All SA 78 (AD)

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