THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PS 22 / 17

In the matter between:

BELINDA VAN VUUREN & 5 OTHERS **Applicants**

and

MODELEZ SOUTH AFRICA (PTY) LTD **Respondent**

Heard: **10 and 11 September 2018**

Delivered: **7 November 2018**

Summary: Operational requirements – alternative positions – alternative positions came about as a result of employees' own conduct – not appropriate to offer employees such alternatives

Operational requirements – compliance with section 189(2)(iii) and (iv) – employer complied with these provisions

Operational requirements – agreed termination dates – employer anticipating termination dates because employees refused to do handover – employer's conduct justified

Operational requirements – case of substantive fairness must be properly defined in pleadings – employees then bound by such case

Dismissal – operational requirements – dismissal substantively fair – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This case epitomises the unfortunate reality of being part of the global market place, where it comes to local security of employment. This reality simply is that global decision making in the interest of enhancing profits and efficiencies of a global conglomerate leaves in its wake local unemployment, and there is not much than can be done about it. This was recognized by the Labour Appeal Court as early as 1999 in the judgment of *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*[1] where the Court recorded the following where it came to the consequences of this kind of global decision making:

> '... Word was sent from USA headquarters to subsidiaries around the world: restore profitability of the product range by the end of 1997 or face closure of those business divisions connected to manufacture of the range. The appellant was one of those who had to pay heed to this call. Something had to be done. Costs needed to be reduced. A time-honoured way of cutting costs is to dismiss staff. So it came about that a number of females working for the appellant at the East London factory (the employees) were retrenched at the end of 1996. All of this, it is said by some, is for the ultimate benefit of mankind. Consumers will benefit. It is even possible that Proctor & Gamble might, as a result of its success, employ more workers. But not in East London. It does not have a factory there. Wondrous and mysterious though the ways of global capitalism may be for some, for others they bring only cold comfort.'

[2] And so it also is in the matter now before me. A decision was taken by the respondent's overseas parent to outsource all its accounts receivable functions, on a global basis, to a service provider in India called Accenture.

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[1] (1999) 20 ILJ 89 (LAC) at para 2.

This decision meant that these functions were simply no longer needed where it came to the respondent's accounting operations in Port Elizabeth. All this culminated in the ultimate retrenchment of the applicants in this matter.

[3] The applicants, as a result of their retrenchment, brought a case of unfair dismissal based on operational requirements to this Court in terms of section 191(5)(b) of the Labour Relations Act ('LRA').[2] The applicants brought this case by way of statement of claim filed on 3 May 2017.

[4] Because section 189A applied the retrenchment process in this case, section 189A(18) applies, which reads:

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

Therefore, it was not competent to challenge procedural unfairness in these proceedings.[3] Procedural fairness is accordingly not an issue to be decided in this case, and all I must consider and decide in this case is whether the retrenchment of the applicants by the respondent was substantively fair.

[5] The matter came before me on trial on 10 and 11 September 2018, and I reserved judgment which I now provide. I will commence with this judgment by first setting out the relevant facts.

The relevant background

[6] The pertinent facts in this matter were mostly common cause. The matter was also well documented, with most of the interaction between the parties being confirmed in correspondence and in the pre-trial minute. The consultation proceedings were also facilitated under the auspices of the CCMA, and these consultations were minuted, the contents of which minutes were not in dispute.

[2] Act 66 of 1995 (as amended).

[3] See *Edcon v Steenkamp and Others* (2015) 36 ILJ 1469 (LAC) at para 19 (an appeal to the Constitutional Court was dismissed in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC)); *National Union of Metalworkers of SA and Others v SA Five Engineering and Others* (2004) 25 ILJ 2358 (LC) at 2361I-2362B; *Perumal and Another v Tiger Brands* (2007) 28 ILJ 2302 (LC) at para 19; *National Union of Mineworkers v Anglo American Platinum Ltd and Others* (2014) 35 ILJ 1024 (LC) at paras 20 – 22.

[7] The respondent, at its Port Elizabeth operations, conducts the business of the manufacturing of chocolate confectionary and sweets for the wholesale market, with its local customer base being the large retail chains such as Pick 'n Pay, Shoprite, Spar and the like. The respondent had a dedicated accounting department at its Port Elizabeth operation, consisting of a total of 36 (thirty six) employees, with some 15 (fifteen) of these employees, including the applicants, being in the accounts receivable section.

[8] The applicants were all employed as financial controllers in the accounts receivable section. In such capacity, they were each allocated specific customers to attend to. The duties relating to these customers were the overseeing and processing of payment collections from allocated customers, the preparation of reports on payments from customers and amounts owing by customers, and the managing of credit and credit limits. The amount of customers allocated to each applicant depended on the size and complexity of a particular customer, with some applicants having more customers than others to attend to.

[9] In 2016, the respondent's overseas parent company, and on a worldwide basis, took a global decision to outsource account management functions of all subsidiaries to a service provider in India, called Accenture. This included the respondent locally. The impact of this decision would be that all the respondent's local customers would also be serviced by Accenture in India. This was known as the Mondelez Business Systems project.

[10] This decision meant that the entire accounting department in Port Elizabeth would be affected. In particular, and of relevance to this matter, accounts receivable would be done by Accenture in India, and thus all these positions, numbering the whole total of 15, would be affected. It was common cause between the parties that this came about pursuant to the valid and legitimate operational requirements of the respondent.

[11] On 5 July 2016, the respondent initiated restructuring proceedings in terms of the LRA, by way of a section 189(3) notice issued on that date. It was common cause that, as set out above, section 189A applied in this instance, considering the number of employees affected. As a result, the respondent requested CCMA facilitation in respect of the consultation process to follow,

and commissioner Feizel Fataar was designated to the process as facilitator, by the CCMA.

[12] A number of facilitated consultations took place between the respondent and employees. These consultations were held on 14 and 29 July 2016, 29 August 2016, and finally 6 and 16 September 2016. Pursuant to these consultations, consensus was in fact achieved between the parties on all of the issues as contemplated by section 189(2) of the LRA. In particular, and in the consultation on 16 September 2016, it was agreed that the issues of the reason for retrenchment, ways to avoid job losses, selection criteria and applicable severance pay had been fully consulted upon, and consensus had been achieved on these issues.

[13] In the course of the above consultations, it was finally determined that the respondent would only retain 5 (five) permanent positions in the accounting department in Port Elizabeth. As part of the agreed process of selection, all the employees in the accounts department were given the opportunity to apply for these available positions. The applicants participated in the process, and indeed applied for the positions remaining in the accounts department, along with all the other affected incumbents. They were all interviewed. Unfortunately, none of the applicants were successful in their applications, were not appointed, and were thus earmarked for retrenchment. It must be reiterated that this selection process was not in dispute between the parties, and none of the applicants sought to make out a case that someone else should have been retrenched in their stead and that they should rather have been appointed.

[14] There was only one remaining issue for discussion in the last consultation of 16 September 2016. This was the so-called 'ramp down plan' in terms of which time frames and activities would be discussed relating to the winding down and then handing over of the duties and functions relating to the now outsourced accounts receive positions, to the external service provider. Commissioner Fataar indicated in this consultation that as far as he was concerned, the actual retrenchment process had been concluded, the issue of 'ramp-down' was an internal matter, and he took his leave from the further consultation on this issue on the day.

[15] After discussion on 16 September 2016, a ramp-down plan was agreed to. Part of this included extended and staggered actual termination of employment dates of employees. In the end, a total of 15 (fifteen) employees were to be retrenched, and the following termination dates were agreed to, where it came to the 6 (six) applicants:

15.1	Tania Rankin:	30 November 2016
15.2	Lynn Allies:	30 November 2016
15.3	Verne Campbell:	30 November 2016
15.4	Adele Britz:	31 December 2016
15.5	Belinda Van Vuuren:	31 January 2017
15.6	Shameela Abrahams:	31 January 2017.

[16] Up to this point, there was nothing contentious between the parties. It is what happened after the final consultation on 16 September 2016 and where it came to the actual implementation of the ramp down plan, that led to the issues at stake in this case.

[17] According to Karol Jowzicki ('Jowzicki'), the manager responsible for finance who testified for the respondent, the very reason for the staggered termination dates of the applicants was because of the specific customers they serviced and what would individually be required from each of them in conducting a handover of their duties to Accenture. Jowzicki explained that what was envisaged was firstly a 'knowledge capture' (KC) process, in which the applicants would not be required to specifically participate in. But what was required in terms of the KC process is that each of the applicants would continue to fulfil their normal day to day duties and activities, and would be 'shadowed', for the want of a better description, by the Accenture personnel that would ultimately take over these functions.

[18] Although the applicants did not have to participate in the KC process, they were required to participate in the handover part of the ramp down plan. This entailed that in exchange for the extended notice periods as set out above, the applicants had to fulfil certain handover functions such as summarizing in writing the day to day aspects of their jobs on particulars clients and what these clients practically required from them. Jozwicki explained that this was

critically important, because some of the large clients would even refuse to pay a whole invoice for millions of Rand if there is a lack of process followed or even a small discrepancy, which is highly prejudicial to the respondent.

[19] According to Jozwicki, the applicants did not comply with their side of the bargain where it came to the handover part of the agreed ramp down plan. A dispute then arose as what exactly the applicants were required to do as part of this handover requirement in the ramp down plan. As touched on above, and as described by Jozwicki, what the applicants needed to do was to properly document all their day to day dealings with customers, so that there was a usable record of all unique internal customer requirements. Jozwicki testified that the applicants refused to do this, and as a result, and in a letter dated 22 October 2016, it was conveyed to the applicants (through their representatives)[4] what was required of them, and should they continue to refuse to do this, there may well not be justification for their continued employment beyond the end of November 2016.

[20] Pursuant to the letter of 22 October 2016, there was then a discussion with the applicants' representatives on 26 October 2016. The contents of this discussion were then confirmed in a letter on the same date, to the applicants' representatives. It was explained to the applicants why there was a need for a proper handover. It was reiterated that the need for a handover was not an unreasonable request or expectation. It was further explained that the extended termination dates agreed to was in order to give effect to this. The respondent even went so far as to provide the applicants with a basic template of what needed to be done. The letter concluded with the following statements:

> 'Should it be that the impacted team (referring to the applicants) feels they cannot interact with the retained team or assist with the latter phases of MBS i.e. Go-live, Hypercare and Stabilization, the purpose and value of the ramp down plan will be defeated.
>
> Given the conversation on the 25th of October 2016, we ask that the team to reflect on the above and let us know by Monday, the 31st October 2016, whether or not they wish to continue with the ramp down plan and the

[4] The applicants were inter alia throughout the retrenchment process by one Alistair Pringle, to whom the correspondence was addressed.

requirement and expectations thereof or exit the business at an earlier date.' (sic)

[21] The answer emanating from the applicants' representatives came on 28 October 2016, and was a relatively simple one. In this response, it stated that the applicants have done what was expected of them, and there was no need for a meeting on Monday as proposed by the respondent. It suggested that an independent mediator be called in to listen to both points of view and resolve the impasse.

[22] This being the position adopted by the applicants, the respondent brought matters to a head by way of a letter on 1 November 2016 given to the applicants. In this letter, it was pointed that for all intents and purposes, the consultations had concluded on 16 September 2016, and at that point in time the respondent was entitled to terminate the employment of the applicants forthwith. This being the case, it is then important to highlight some aspects of this letter, which records the following:

> 'I would like to stress that the business was not obliged to compromise on exit dates and would have effected terminations at that juncture. Our willingness to agree to a ramp down plan was a gesture of goodwill and on the provision that impacted employees work collaboratively with both Accenture and the retained Mondelez team at the point of Go-live and beyond.
>
> From our dialogue and your resultant e-mail it is apparent that impacted colleagues do not agree to our expectations. For this reason, we believe that the ramp down plan is nullified on the basis of it no longer being mutually beneficial.
>
> I therefore confirm that we will be effecting exists on the 30th November 2016 as we believe the employer-employee relationship and associated trust is irretrievably broken.'

[23] No response from the applicants was forthcoming to this letter. There was no attempt on their part to convince the respondent otherwise, where it came to these clear views expressed.

[24] As also indicated in the letter of 1 November 2016, and then on 2 November 2016, the respondent provided what it called a severance agreement to each of the applicants. The applicants all refused to sign the agreement.

[25] On 24 November 2016 the respondent then gave each one of the applicants written notice that their employment would be terminated effective 30 November 2016. The notice further provided that they would be paid *in lieu* of notice, receive their severance pay, and all outstanding statutory payments.

[26] The difficulty faced by the respondent as a result of all the above events is that it still needed individuals to do the required handover as part of the ramp down plan. Jozwicki testified that if the applicants simply did what was expected of them, there would have been no need to engage anyone else, and the applicants would have worked to the agreed termination dates which would have concluded the handover. It was common cause that the respondent only after 1 November 2016 employed temporary employees on fixed term contracts to assist the respondent with completing the handover. It was also common cause that this decision was taken after the completion of the consultation process and for the reasons set out above.

[27] It was common cause that the respondent employed the following temporary employees:

27.1 Jennifer Hull: She was engaged from 14 November 2016 to 31 March 2017, and then again from 1 April 2017 to 30 June 2017. Jozwicki explained that she was a former employee of the respondent that had retired, and was brought in mainly for the handover of Shoprite, which was a customer she had some familiarity with.

27.2 Natasha Luiters: She was engaged from 2 May 2017 to 31 July 2017 and from 1 August 2017 to 30 November 2017. Jozwicki explained that she was one of the employees that was actually retrenched, and was brought back to finalize handover issues, unrelated to the duties the applicants would be doing in this regard.

27.3 Gillian Maggot and Charmelle Robie: These employees were engaged between 1 November 2016 / 1 December 2016 and 31 March 2017. With regard to these employees, Jozwicki explained that they were employees that had been retrenched earlier and were brought in to specifically attend to the handover because they knew the business and operations.

27.4 Charmaine Koen: She was appointed from 19 September 2016 to 30 November 2016, and 1 December 2016 to 31 March 2017. It turned out she was fulfilling temporary duties not associated with the positions of the applicants, and her appointment was in reality of no relevance to this matter.

[28] There was also a TES employee used from 7 November 2016 to 31 March 2017, being one Bonita Maasdorp, to finalize the handover. But she was also only involved in back office work, which was only part of the duties which the applicants normally did.

[29] Jozwicki testified that the engagement of the temporary employees was a measure of last resort and because of the approach adopted by the applicants, this left the respondent with no choice in this regard. He explained, which was never challenged, that it would be far more operationally advantageous and efficient to have used the applicants for the handover, hence their extended termination dates and participation in the ramp down plan. It was also more expensive to engage these external resources instead of the applicants. It would not have been necessary to have procured the additional temporary resources if the applicants simply did what was expected of them.

[30] It was not possible to say which of the duties of each individual applicant was being fulfilled by each of these temporary employees. They did not specifically replace a particular applicant. They were engaged to do handover duties in general, as needed and when needed. Jozwicki specifically explained this in evidence, and the two applicants that testified, being Linda Van Vuuren ('Van Vuuren') and Adele Britz ('Britz'), conceded this as well.

[31] In the end, the employment of all the applicants then ended on 30 November 2016. This was in any event in line with the agreed termination dates of Rankin, Allies and Campbell. It did however result in the termination date of Britz being pushed up by 1 (one) month, and that of Van Vuuren and Abrahams by 2 (two) months.

[32] Dissatisfied with their termination of employment under the circumstances as set out above, the applicants then pursued an unfair dismissal dispute based on operational requirements to this Court. As stated above, procedural fairness was not in dispute, leaving me only to decide the issue of substantive fairness. As to consequential relief, the applicants seek compensation.

Was the dismissal substantively unfair?

[33] As a point of departure, the issue of whether a dismissal for operational requirements is substantively fair is decided by way of answering what is called a general question and a specific question. As said in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*[5]:

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

[34] In this instance, I need not concern myself with answering the general question articulated in *Latex*. The parties have agreed in the pre-trial minute the respondent's need to retrench and the fairness of its rationale in this regard is not in dispute.

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[5] (2006) 27 ILJ 292 (LAC) at para 55.

[35] This then only leaves the specific question to answer, namely whether it was fair to have retrenched the applicants themselves. In this regard, the basis on which the applicants have sought to bring their case must first be established. The applicants must set out the basis of their case in the statement of claim, and then the pre-trial minute, and are then bound to the case so articulated.[6] In *SA Breweries (Pty) Ltd v Louw*[7] the Court said the following:

> '... the premises upon which the issues were to be advanced had been refined and limited by the terms of the minute, which is the very purpose of the minute and, more particularly, the very purpose of the directives in the Practice Manual. It was therefore inappropriate to fall back on the generalities of averments about procedural and substantive unfairness. Were that approach to be permissible, there would be no point at all to efforts to narrow issues and trim down the scope of contestations. It was suggested in argument on behalf of Louw that the contention on behalf of SAB was that Louw had narrowed his cause of action; that understanding is incorrect. The argument, properly understood, was that the terms of the minute narrowed the permissible grounds upon which the cause of action was to be presented.
>
> Accordingly, the judgment cannot be sustained because its findings are based on issues not put to the court for a decision. If the court a quo took the view that the case as pleaded and refined was not proven, the order ought to have been a dismissal of the application. If a litigant pleads a bad case, it must lose, and it cannot be rescued from failure because it is possible to conceive and construct a better case.'

[36] What is then the case as pleaded by the applicants, where it comes to the *Latex* specific question relating to substantive fairness? Crystalized down to is simplest form, the factual basis of this case is the following:

36.1 After the completion of the retrenchment process, it was expected of the applicants to do an in depth knowledge transfer to remaining employees

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[6] See *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D; *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 *ILJ* 142 (LAC) at paras 16 and 83; *GE Security (Africa) v Airey and Others* (2011) 32 *ILJ* 2078 (LAC) at para 20 – 21

[7] (2018) 39 ILJ 189 (LAC) at paras 14 – 15

and the new service provider, which is contrary to the conditions in the retrenchment procedure.

36.2 The applicants completed what was expected of them, and the respondent unilaterally changed these conditions.

37.3 The termination dates of the applicants were then moved to an earlier date contrary to the agreed termination dates.

37.4 The respondent then employed temporary employees to fill the positions of the applicants.

37.5 There was no discussion in the consultations with the applicants of the possibility of alternative employment as temporary employees.

37.6 The applicants were not contacted and offered these temporary positions before or after the retrenchment process.

[37] As to the legal basis of the applicants' case, they accept that there existed no alternatives to their retrenchment. They also do not contend that someone else should have been retrenched in their stead. There is further no dispute where it comes to the placement of employees in the 5 (five) remaining available positions, and the applicants do not contend that the fact that they were not placed in these positions was in any way unfair. In summary, the legal basis of the applicants' case is as follows:

37.1 The respondent contravened the provisions of sections 189(2)(iii) and (iv) of the LRA.[8]

37.2 The applicants should have been appointed to assist with the handover instead of the temporary employees and the TES employee, and should have remained employed until after their exit dates for this purpose.

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[8] Section 189(2) reads: 'The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on (a) appropriate measures to … (iii) change the timing of the dismissals; and (iv) to mitigate the adverse effects of the dismissals …'

[38] The above being the case to be decided, one of the issues the applicants placed considerable emphasis on in the trial, can be immediately disposed of. Both Van Vuuren and Britz referred in their testimony to the e-mail from their representative of 28 October 2016 in which it was proposed that the parties appoint a mediator to resolve the issue about compliance with the ramp down plan. According to both Britz and Van Vuuren, the current matter would not have been pursued if the respondent had agreed to the mediation proposal and consulted further on the issue, and the respondent's failure to agree to this mediation rendered the retrenchment unfair. However, this issue was never raised in the statement of case, or pre-trial minute. It was never part of the applicants' articulated case that their retrenchment was unfair because the respondent did not agree to the proposed mediation and consult further on the issue of the ramp down plan. As such, it is simply not permissible for the applicants to rely on this issue as an alleged ground of unfairness at trial.

[39] But even if this issue of mediation is considered, it simply cannot establish a case of substantive unfairness. The proposed mediation was only about whether the applicants were complying with the ramp down plan obligations. These obligations had nothing to do with the retrenchment process and the fairness of the ultimate retrenchment of the applicants. The retrenchment process ended on 16 September 2016, with commissioner Fataar himself saying that the issue of ramp down and extended termination dates was an 'internal matter'. As at 16 September 2016, the respondent was entitled to terminate the employment of the applicants, and if it had simply done so, there could have been no question of the fairness of the retrenchment of the applicants.

[40] Further, and as both Van Vuuren and Britz conceded, what they wanted was further consultation after the consultation process had been concluded. Not only was the respondent not obliged to do so, but this would be a matter of procedural fairness which was not open to challenge in the current proceedings. On the facts, there was clearly a disagreement between the parties as to whether the applicants complied with their ramp down plan obligations, and there is no legal requirement that the parties had to agree on this. All that was required was consultation, and that indeed happened. And

finally, even if the respondent as wrong in its assessment of the applicants' compliance, what would follow is still the agreed retrenchment of the applicants, albeit one and two months later for three of the applicants. The failure to agree to mediation, even if considered, thus cannot render the retrenchment of the applicants substantively unfair.

[41] Finally, I am in any event satisfied that the applicants did not comply with what was expected of them where it came to the handover. Jozwicki's testimony in this regard emerged unscathed from cross examination. He maintained that it became difficult to discuss day to day business matters with the applicants, and that in the end, there was a communication breakdown with them. He added that the backlog was increasing. He was also adamant that the applicants, in some instances, did not even complete the customer handover template provided and in other instances only completed minimum detail. The applicants did not want to in any way work with Accenture.

[42] As opposed to the testimony by Jozwicki, Van Vuuren and Britz did not fare that well. Van Vuuren acknowledged that she did not complete the template provided. Instead, she simply extracted a document relating to vendor processes from the Shoprite website, which according to her was sufficient. But she was compelled to concede under cross examination that this document did not provide all the information the customer template required. She conceded that the applicants refused to co-operate with the Accenture personnel and that she personally was distressed by the retrenchments. Britz, in giving evidence, clearly displayed her aggravation towards the respondent for being retrenched. It emerged that she was upset about being selected for retrenchment in the first place, despite never challenging it. Britz even sought to contend that the respondent never explained to them what to do in the handover and why they had to leave earlier, which was clearly not the case.

[43] In my view, and in the end, it was clear that the applicants were not happy with being retrenched, and were not going to assist the respondent in any way in transitioning its account functions to a third party like Accenture. I believe Jozwicki to have been correct when he said in testimony that the applicants wanted to sit around and do nothing, whilst getting paid, as a mark of their displeasure.

[44] The conduct of the respondent is in any event inconsistent with an employer that knew the applicants had complied their handover duties, and simply sought to let them go for some or other ulterior motive. The various approaches to get the applicants to commit to doing their handover duties makes it evident that the respondent was fostering a genuine view that the applicants were not doing their handover duties and it then attempting to get them to commit. Under cross examination, Britz was specifically asked what possible motive the respondent could have had to simply terminate their employment earlier if they were doing their handover duties, and she was unable to provide any reason why the respondent would do so. It was also uncontested that it would make no financial and operational sense for the respondent to behave in such a fashion as the applicants allege it did.

[45] I thus conclude that the first part of the applicants' case of substantive fairness has no merit. It is simply unfounded to suggest that the respondent did not comply with sections 189(2)(iii) and (iv) of the LRA. It was beyond contestation that the respondent did consult on these issues and in the end, consensus was achieved with agreed extended termination dates. But this agreement was reciprocal, in that the applicants had to do a proper handover, which they refused or simply failed to do. With the applicants not doing their part, there was no need for the respondent to still apply the extended termination dates. What the respondent in the end did in this regard was justified, and fair.

[46] This then leaves the issue of the applicants being replaced with temporary employees. It was common cause that temporary employees were engaged, but what is of critical importance to consider is the context in which it happened. What was abundantly clear from all the evidence, and even the testimony of Britz and Van Vuuren, is that there was never an intention or even contemplation on the part of the respondent to replace the applicants with temporary employees once they were retrenched. After all, this would defeat the very object of outsourcing these functions to Accenture in India. That is why this was not even a topic for consultation in the retrenchment consultations themselves.

[47] This being the case, then why use temporary employees? The only plausible and logical answer has to be because of what the applicants themselves did.

To illustrate as simply as possible – had the applicants done the handover as required, they would have all worked until the agreed termination dates, the functions would have gone over to Accenture, and there would never have been any temporary employee engaged. However, because the applicants refused to do the handover, someone had to do it. Hence the temporary employees. Therefore, the temporary employees had a specific function and purpose. This was to do the handover, which the applicants did not want to do.

[48] It is untenable to suggest that the applicants were unfairly retrenched because they were not offered these temporary positions, considering that they were the cause of this very necessity. The applicants cannot be seen to benefit from their own obstructive conduct.[9] In any event, it would have been rather naïve for the respondent to have offered these positions to the applicants hoping that they would then do what they had been refusing or failing to do until that point. It is simply not a realistic proposition that the applicants would have executed these handover tasks, as required. In my view, the following *dictum* in *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union and Another*[10] can equally be applied to illustrate the proper consequences of the applicants' own conduct:

> 'In any event both in its letter of 27 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.
>
> 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

[9] Compare *Viljoen v Johannesburg Stock Exchange Ltd* (2017) 38 ILJ 671 (LC) at paras 93 – 95.
[10] (2006) 27 ILJ 2537 (LAC) at paras 40 – 42.

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. ... 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.

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

[49] Jozwicki explained in his testimony, which I have touched on above, that replacing the applicants with temporary employees to do the handover was quite an onerous task. Even though these employees were sourced from former permanent employees with some institutional knowledge and experience, they still had to be brought 'up to date', so to speak, with operations and customer relationships. Considerable management resources were committed into this. There was also the issue of the growing backlog. This resulted in a longer than contemplated handover at much greater expense to the respondent, all because of the approach the applicants decided to adopt.

[50] It must also be considered that the temporary employees in fact did not replace the applicants in the positions they occupied, which shows that the decision simply cannot be seen to be unfair vis-à-vis the applicants.[11] The temporary employees were working more in the context of a team with management to conclude the handover, doing what was required as and when needed. The following dictum from the judgment in *Smith and Others v Courier Freight*[12] is comparable to the matter *in casu*:

'There was no evidence to corroborate the evidence of the employees that after their dismissals their positions were filled by temporary casual employees who carried out the same functions as they did prior to their dismissals. Both

[11] See *CRWUSA and Others v Girlock SA (Pty) Ltd* (2001) 22 ILJ 2008 (LC) at para 28.
[12] (2008) 29 ILJ 420 (LC) at paras 57 – 58.

Baloyi and Jacobs testified that people with specialized skills were brought in on temporary contracts to reverse the slide in the company's profits and to bring in the requisite skills in line with the new vision of the restructured finance department.

I am satisfied that the employer has proved on a balance of probabilities that there was a genuine need to restructure the finance department …'

[51] I am therefore satisfied that these temporary positions filled by the temporary employees referred to above, were never a viable alternative to the retrenchment of the applicants. Considering the preceding events and what actually gave rise to these positions, the applicants were never competent to fill same. Also because these positions only arose because of what the applicants did after the consultation process concluded, these positions were never contemplated to exist during the course of the consultations and to be the subject matter of consultations. I thus conclude that there is nothing unfair in not having offered the applicants these positions.

[52] I may add that the real gripe of Britz came out in her testimony, being that one of the successful incumbents for the remaining positions in the accounts department, one Lindiwe, later the following year resigned, and she (Britz) was not contacted and offered the position. But this case was never raised, nor pleaded, and can in any event not have rendered the earlier retrenchment unfair. She was simply barking up the wrong tree.

[53] In sum, what exists in this case was overall a fair retrenchment. Consensus was achieved on all the consultation topics under section 189 of the LRA. Consensus was specifically achieved on termination dates for the applicants, which was only departed from because of the applicants' own obstructive conduct. As said, the respondent was justified in doing what it did in this regard. But even if the respondent was wrong in its conclusions in this regard, it simply could not contaminate the underlying fairness of the retrenchment of the applicants, as it would not have changed the reality that the actual retrenchment of the applicants was justified and fair. Further, the alleged alternative of the temporary positions was not a feasible alternative available to the applicants, considering that the very necessity for these positions were

caused by the obstructive conduct of the applicants in the first place, and that these positions only came into existence to fulfil what the applicants had refused or failed to do.

Conclusion

[54] Therefore, the applicants' dismissal by the respondent for operational requirements is in my view substantively fair. The applicants' unfair dismissal claim thus falls to be dismissed.

[55] As to costs, I accept that in terms of section 162 of the LRA I have a wide discretion in this regard. I must say that I have a measure of understanding of the applicants' unhappiness for having lost their jobs because of what a global conglomerate considers to be more efficient, especially where there was no question that the applicants were doing their jobs properly. Their frustration spilled over into a misguided form of indirect protest, and when the respondent reacted, ill-advised litigation. I however must also consider that they properly participated in the consultation process until the point of conclusion and agreed termination dates. I do not believe the applicants were malicious or *mala fide* in pursuing this matter. The reality is that they lost their jobs due to circumstances beyond their control in an environment where jobs are already scarce. It is my view that a costs order against the applicants, all considered, would not be appropriate. I consider it fair and justified that no order as to costs be made.

Order

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

1. The applicants' dismissal by the respondent is substantively fair;
2. The applicants' application is consequently dismissed;
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate K Pask
Instructed by:	Labuschagne Van Der Walt Inc
For the Respondent:	Advocate J Grogan SC
Instructed by:	Joubert Galpin Searle Attorneys