THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 195/21

In the matter between:

MICHAEL DE WEIJER **Plaintiff**

and

BABCOCK AFRICA SERVICES (PTY) LTD **Defendant**

Heard: **17 – 19 March 2025**

(Heads of argument submitted on 26 March 2025)

Delivered: **19 May 2025**

JUDGMENT

PRINSLOO, J

Introduction

[1] The Plaintiff was dismissed in October 2020 for reasons related to the Defendant's (Babcock) operational requirements, as provided for in section

189 of the Labour Relations Act[1] (LRA). He filed a statement of claim, challenging the fairness of his dismissal.

The pleadings and pre-trial minute

[2] It is trite law that this Court and the parties are bound by the pleadings and the pre-trial agreement[2] and the issues they agreed to in the pre-trial minute.[3] This Court cannot and should not go beyond the issues it is required to determine, with reference only to the pleadings and the pre-trial minute.

[3] Jacob and Goldrein[4] aptly capture the position as follows:

> 'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings… For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.
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> The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties…
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> The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the

[1] Act 66 of 1995, as amended.
[2] *Chemical, Energy, Paper, Printing, Wood & Allied Workers Union and Others v CTP Ltd and another* [2013] 4 BLLR 378 (LC).
[3] *Professional Transport & Allied Workers Union on behalf of Khoza and Others v New Kleinfontein Gold Mine (Pty) Ltd* (2016) 37 ILJ 1728 (LC); *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and another* (2000) 21 ILJ 142 (LAC).
[4] JIH Jacob, IS Goldrein, '*Pleading: Principles and Practice',* (Sweet & Maxwell) at pp 8 - 9.

parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.'

[4] In *Candy and Others v Coca Cola Fortune (Pty) Ltd,*[5] the Court considered the purpose of a statement of claim and held that:

> 'In its simplest terms, the statement of case must at least inform the Respondent party what the pertinent facts are on which the Applicant will rely in the case, and further, what the cause of action is that the Applicant will pursue as founded on these facts. That must be done in sufficient particularity so as to enable the Respondent to provide a proper answer to these facts and the related cause of action. The statement of claim and the answering statement thereto are not just for the benefit of the parties. They also serve the court, in that the issues in dispute are properly determined and other possible alternative causes of action are eliminated from having to be considered by the court. A proper statement of claim and answering statement are imperative to the fundamental requirement of expeditious resolution of employment disputes in terms of the LRA. As the court said in *Harmse v City of Cape Town:*
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> "[6] The statement of claim serves a dual purpose. The one purpose is to bring a Respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the Respondent of the material facts and the legal issues arising from those facts upon which Applicant will rely to succeed in its claims.
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> [7] The material facts and the legal issues must be sufficiently detailed to enable the Respondent to respond, that is, that the Respondent must be informed of the nature or essence of the dispute with sufficient factual

[5] (2015) 36 ILJ 677 (LC) at para 38.

and legal particularity so that it knows what it is that the Applicant is relying upon to succeed in its claim."'

[5] In *SA Breweries (Pty) Ltd v Louw*[6] (*Louw*), the Labour Appeal Court (LAC) was required to, *inter alia*, determine a complaint by the appellant that the court *a quo* decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pre-trial conference minute. The LAC held that:[7]

> '[4] To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.
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> [5] The critical complaint in this matter is that the court a quo decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pretrial conference minute. The complaint had been raised during the hearing and in argument at the conclusion of the trial, considered by the court a

[6] (2018) 39 ILJ 189 (LAC).
[7] Ibid at paras 4 – 5.

quo and dismissed. In our view, the complaint is justified and the court a quo was in error.’

[6] The LAC further held that:[8]

> ‘The relationship between the pleadings and the pretrial conference minute has been the subject of several judicial pronouncements[9]. In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pretrial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving of an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pretrial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pretrial conference need to be carefully thought through, seriously made, and scrupulously

[8] Ibid at para 8.
[9] See: *Price NO v Allied - JBS Building Society* 1980 (3) SA 874 (A) at 882D - E; *Zondo and others v St Martin’s School* (2015) 36 ILJ 1386 (LC) at paras 10 – 11.

adhered to. It is not open to a court to undo the laces of the straitjacket into which the litigants have confined themselves.'

[7] In *Louw,* the LAC held that the mantra expressed in a statement of claim where an applicant averred that his dismissal was both 'procedurally and substantively unfair', is a stock phrase that is hardly ever useful in communicating what exactly is the *causa* of the unfairness, which is what both court and counsel need to know in order to address it. The terms of the pre-trial minute narrow the permissible grounds upon which the cause of action is to be presented.

[8] In summary, a statement of claim must inform the defendant of the material facts and the legal issues arising from those facts upon which the plaintiff will rely to succeed in its claims. Those must be sufficiently detailed to enable the defendant to respond and to be informed of the nature or essence of the dispute. Each side must be given an unambiguous warning of the case they are to meet.

[9] A plaintiff's pleaded case must be supported by evidence during the trial. As was held in *Harmse v City of Cape Town:*[10]

> '[8] The rules of this court do not require an elaborate exposition of all facts in their full and complex detail - that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings - the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pretrial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pretrial conference must attempt to reach consensus on facts that are common cause, facts that

[10] (2003) 24 ILJ 1130 (LC) at paras 8 – 9.

are in dispute, the issues that the court is required to decide and the precise relief claimed.

[9] Accordingly the rules of this court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The rules of this court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the [pretrial] conference. The rules therefore anticipate that the parties at the pretrial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadow this activity but are not a substitute for it. It is for this reason that the rule on pretrial conferences provides for reaching consensus on the issues that the court is required to decide.'

[10] The issues raised by the Plaintiff must be considered against the backdrop that pleadings give the architecture and that the evidence at the trial provides the detail and texture.

<u>The Plaintiff's pleaded case</u>

[11] In his statement of claim, the Plaintiff challenged the procedural and substantive fairness of his dismissal. He also claims a shortfall in his notice and severance pay.

[12] The parties signed a pre-trial minute, and the precise relief sought by the Plaintiff is for an order to declare that his dismissal was procedurally and substantively unfair and that he be paid the shortfall in respect of notice and severance pay.

[13] I have alluded to the importance of pleadings. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings and narrowed in the pre-trial minute.

[14] I will deal with the issues pleaded and narrowed in the pre-trial minute in turn *infra.*

The background facts

[15] The following background facts are common cause and provide context to the issues this Court has to decide.

[16] Babcock International Group is a multinational entity, and Babcock International Group Africa has its head office at Riley Road, Bedfordview. The Defendant is a subsidiary of Babcock Africa.

[17] In January 2007, the Plaintiff was employed by Babcock Central Flying Academy on a 12-month fixed-term contract. The contract became a permanent one in April 2008, when the Plaintiff was appointed as the Chief Operating Officer of Babcock Central Flying Academy. The contract provided for termination in clause 2 thereof, which provided that:

> 'The contract of employment may be terminated by either party giving one month's notice in writing on either the 1st or 15th day of the month.'

[18] The Babcock Central Flying Academy was closed down during 2013, and the Plaintiff transferred to Babcock Equipment, with effect from 1 November 2013. His job title changed to property manager: projects, and his previous terms and conditions of employment remained the same.

[19] The Defendant's undisputed evidence was that the aforesaid position was created for the Plaintiff after the Babcock Central Flying Academy closed down, as the Defendant was trying to keep the Plaintiff employed and to save his job. At that stage, the Defendant was considering the upgrading of its branch in Middelburg, Mpumalanga, and moving to new premises. The Plaintiff was appointed as project manager to oversee the building of the new premises in Middelburg and to assist with the renewal of lease agreements.

The Plaintiff occupied the same position until his services were terminated in 2020.

[20] On 28 July 2020, Babcock issued an invitation to consult in terms of section 189(3) of the LRA to the Plaintiff. The parties held consultation meetings on 3 August 2020 (first consultation), 31 August 2020 (second consultation), 28 September 2020 (third consultation) and 2 October 2020 (final consultation).

[21] The Plaintiff was advised on 2 October 2020 that he would be retrenched. He did a handover, and his last day of service was 9 October 2020. He was not required to work his notice period, and he was paid up until 9 November 2020.

[22] The Plaintiff holds an honours degree in mechanical engineering from the University of Pretoria and a certificate in financial analysis from Wits. It was undisputed that he had qualifications in engineering and finance and that he has a predominant finance background.

<u>Substantive fairness</u>

[23] The Plaintiff challenges the substantive fairness of his dismissal and claims that he should not have been dismissed. His pleaded case is that there was no genuine operational requirement for his retrenchment and that his position was not redundant, alternatively that the Defendant failed or refused to consider him for available vacant, alternative positions and further alternatively, the Respondent should have and could have applied bumping.

Was there a need to retrench?

[24] The first challenge is that there was no genuine operational requirement for the Plaintiff’s retrenchment.

[25] The core business of Babcock Equipment, where the Plaintiff was employed, is to sell equipment, commonly referred to as ‘yellow metal’, primarily to the mining industry as well as to the construction industry and plant hiring

companies. The term ‘yellow metal’ is a widely used colloquial term, which is not strictly defined, but it commonly refers to off-highway vehicles for the construction, mining and agricultural sectors. It is a generic term used to describe construction and earthmoving equipment. In the context of this case, it refers to earthmoving machines and equipment. Mr David Vaughan, the managing director (MD) of Babcock Equipment, testified that the smallest machine would cost in the region of R 500 000 and that the large machines are sold for R 24 million per piece.

[26] Babcock is the licensed agent for Volvo earthmoving equipment for Southern Africa, and the Defendant sells yellow metal in Zambia, Botswana and Namibia. The machines so sold come with a warranty, and the Defendant has workshops to honour the warranty. The Defendant also services and repairs the parts or components of the Volvo machines sold. The Defendant does the repairs, and if it is a warranty issue, it would submit the claims to Volvo and be reimbursed.

[27] In the section 189(3) notice, the Defendant recorded the reasons for the proposed retrenchment as follows:

> ‘1. Despite our best efforts to adjust our operations and reduce costs as a result of the COVID-19 crisis, we have had to take a number of further measures to safeguard the future of the business during the poor economic environment. These cost containment measures were outlined in the group CEO’s communication dated 3rd July 2020, including the possible reduction of a number of positions. It has unfortunately become necessary for the Company to propose possible redundancy of certain positions within the Group. As a consequence of such redundancies there’s possible retrenchment of certain employees. Accordingly, the company wishes to consult with you in relation to your role and your possible retrenchment.
>
> 2. Reasons for the proposed retrenchments:

2.1 The Covid-19 crisis has had a negative effect on economic activity in all our major markets in both the short and medium term, which has negatively impacted our volume of work.

2.2 Looking forward we are facing a pessimistic trading scenario and we need sufficient liquidity to carry us through the poor economic environment, thus the complete closure of certain branches and the combining of Equipment's Eastern and Southern regions.

2.3. The lack of work is affecting all our standard operations and key projects, which has now forced the company to outsource and automate certain DAF operational activities.

2.4 Reducing costs will safeguard our ability to perform and transform, today and tomorrow thereby ensuring possible future employment, this includes how we operate from home and reduce dependency on property leases.

2.5 As a result of the above, the Company proposes to re-position its businesses. The positions that may be affected by this process are identified in annexure "A", and it is proposed by the Company that these positions be made redundant.'

[28] In the pre-trial minute, Babcock indicated that there was a need to retrench and recorded that:

> 'The Applicant was one of a number of employees who were retrenched due to the need by the company, as a result of the Covid 19 crisis, to reposition its business and to reduce costs in the poor economic environment.'

[29] The Plaintiff did not admit the need to retrench and stated that his dismissal was not based on a *bona fide* economic rationale and that he was presented with a *fait accompli.*

[30] The first issue this Court has to decide is whether there was a need to retrench.

[31] Mr Vaughan testified that the Defendant had found itself in a very difficult situation due to Covid, and Babcock International in London took a decision to cut costs worldwide as a result of the Covid crisis. He explained that the Defendant used to deliver between 30 and 40 machines per month, but in April 2020, only one piece of equipment was sold.

[32] The Defendant's primary client was the mining industry, and from April 2020, the mines were standing still due to the COVID-19 lockdown measures and no services were rendered. This meant that not only were machines not sold, but the Defendant did not service or repair any of the Volvo machines in its workshops and could not do any business in Zambia, Botswana and Namibia. This had a negative impact on the Defendant's economic activity and volume of work.

[33] The Plaintiff testified that he had always questioned the rationale for retrenchment. He was of the view that due to Babcock's substantial market share in the mining sector, the effect of Covid was not 'as bad' and that the mining sector is always the first to bounce back. Although he took issue with the financial information that was provided, the Plaintiff conceded that he could see from the information provided to him that the Defendant was behind its target and budget. He explained that it was to be expected due to the COVID-19 crisis, but that the Defendant would bounce back very quickly.

[34] In my view, the need to retrench must be assessed considering the prevailing circumstances at the time when the decision to retrench was taken. One cannot take an armchair approach, many years later, and say that the need or the rationale at the time was questionable or not real, based on the possibility or ability to 'bounce back'.

[35] At the time, the Defendant was confronted with a situation which could not be ignored in assessing the need to retrench.

[36] On 15 March 2020, the coronavirus pandemic was declared a national disaster in South Africa, and the government announced a package of extraordinary measures to combat this grave public health emergency. On 23 March 2020,[11] President Cyril Ramaphosa (President) announced a nationwide lockdown for 21 days with effect from midnight on 26 March 2020, which was to be enacted in terms of the Disaster Management Act[12]. The three-week lockdown entailed that all South Africans were required to stay at home, except a handful of categories of workers who were regarded as necessary and essential in the response to the pandemic.

[37] The President made it clear that South Africa found itself confronted not only by a virus that has infected millions of people across the globe but also by the prospects of a very deep economic recession that will cause businesses to close and that will result in many people losing their jobs. As a first phase of the government's economic response, measures were announced, and these interventions included support for persons whose livelihoods would be affected.

[38] On 9 April 2020,[13] the President announced that the National Coronavirus Command Council decided to extend the nationwide lockdown by a further two weeks beyond the initial 21 days, and the lockdown measures remained in force until the end of April 2020.

[39] On 21 April 2020,[14] the President announced economic and social measures in response to the COVID-19 epidemic. He confirmed that the coronavirus pandemic had damaged the economy, resulting in a sudden loss of income

[11] Statement by President Cyril Ramaphosa on escalation of measures to combat Covid-19 epidemic, Union Buildings, Tshwane, 23 March 2020.
[12] Act 57 of 2002.
[13] Message by President Cyril Ramaphosa on Covid-19 epidemic, 9 April 2020.
[14] Statement by President Cyril Ramaphosa on further economic and social in response to the Covid-19 epidemic, Union Buildings, Tshwane, 21 April 2020.

for businesses and individuals and that it was to continue in the months to come.

[40] On 23 April 2020,[15] the President announced that the nationwide lockdown could not be sustained indefinitely, as people need to earn a living and companies need to be able to produce and trade, they need to generate revenue and keep their employees in employment. A gradual and phased recovery of economic activity was announced to commence after 30 April 2020, when the lockdown restrictions were eased gradually. The President announced that as of 1 May 2020, the country would operate on alert level 4, which allowed some businesses to resume operations under specific conditions, including that they would not be able to return to full production and the workforce would only be able to return in limited batches.

[41] On 13 May 2020,[16] the President announced that by the end of May 2020, most of the country would be placed on alert level 3, and this was confirmed on 24 May 2020[17]. It had been said over and over that the COVID-19 crisis presented an unprecedented challenge, unmatched since the Spanish Flu and the Great Depression. It has depressed global economies and caused a material shrinkage in global trade.

[42] During this period, international and inter-provincial travel was not allowed or was strictly limited, and businesses did not operate as normal. The restrictions on travel continued much longer.

[43] The COVID-19 pandemic had hit the world and South Africa without much warning and there was not much time between the declaration of the state of disaster and the announcement of the lockdown for companies to plan or budget for the most unforeseen event, which transpired to hit even harder and with more brutal force than what was initially expected or anticipated.

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[15] Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 23 April 2020.
[16] Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 13 May 2020.
[17] Address by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 24 May 2020.

[44] Modern businesses and entities are part of a global value chain and do not operate in a static environment. It is almost impossible to escape the ripples caused by a shock induced in the global system, desirable or otherwise. These shocks would leave a mark on the size and shape of many business entities, and as a result, they need to reinvent themselves.[18] This was indeed true about the Covid pandemic, which had hit the world and affected many economies, business entities and individuals.

[45] It was within this context that the Defendant had to reconsider, reposition and adjust its business operations.

[46] In my view, there was a rationale to retrench.

Redundancy

[47] The second issue taken with substantive fairness is that the Plaintiff's position was not redundant, alternatively that Babcock failed or refused to consider him for available vacant alternative positions, further alternatively that the Defendant should have and could have applied bumping as the Plaintiff had longer service than a number of other employees and he had the required skills, experience and expertise to be bumped into their positions, but Babcock failed or refused to do so.

[48] The LRA defines a dismissal based on the operational requirements of an employer as one that is based on the economic, technological, structural or similar needs of the employer. In the 'Code of Good Practice on Dismissal Based on Operational Requirements'[19] (Code), a dismissal based on operational requirements is understood to include a dismissal as a result of redundancy due to a restructuring of the workplace. The redundancy of posts consequent to restructuring is regarded as a structural need of the employer.

[18] R Le Roux '*Retrenchment Law in South Africa'*, (LexisNexis) pp 1-3.
[19] Published under GN 1517 in GG 20254 of 16 July 1999.

[49] The Code suggests that an employer's structural needs imply that posts have become redundant as a result of restructuring. An employer has the right to decide how to run its business, and the employer does not need the employees' permission or blessing to make such a policy shift to accommodate its operational requirements. An employer does not need to consult on the decision to restructure, but where the new structure is advanced as a reason for retrenchment, the affected employees must be consulted.

[50] The Defendant made it clear that the COVID-19 crisis has had a negative effect on its economic activity in both the short and medium term, which had negatively impacted Babcock's volume of work. Mr Vaughan explained that the aforementioned process of identifying affected positions is what was referred to as 're-positioning' in paragraph 2.5 of the section 189(3) invitation to consult. It stated that:

> 'As a result of the above, the Company proposes to re-position its businesses. The positions that may be affected by this process are identified in annexure "A", and it is proposed by the Company that these positions to made redundant.'

[51] Mr Vaughan testified that after Babcock in London took the decision that costs must be cut due to Covid, the Defendant had to consider the positions they could do without, without hurting the business. The Defendant identified such positions and they were listed in 'Annexure A' to the section 189(3) invitation to consult. A total of 38 affected positions were identified and ultimately, 22 employees were retrenched.

[52] The MD explained that the affected positions were identified in an EXCO meeting where all the MD's were together, after he had a meeting with his own management team to identify positions that they could do without, which would not hurt the business operations as a whole. In the Exco meeting, they considered positions or functions which could be combined with other positions, they looked at the amalgamation of positions, and they identified

the positions which the business could do without. They identified various positions which were duplicated and could be combined, without hurting the business.

[53] To the extent that the Plaintiff seeks to infer some unfairness in the process followed by Babcock in identifying the affected positions prior to the commencement of the consultation process, the LAC has held in *SAA v Bogopa and Others*[20] (*Bogopa*) that where the employer made the decision to declare the employees' positions redundant before there could be consultation with them, it was procedurally wrong. Whether something was procedurally wrong is different from the question of whether it was procedurally unfair. In *Bogopa*, the LAC considered a case where the employees' positions were declared redundant before the consultation and it was held that[21]:

> 'There may well be circumstances where the consultation offered after the declaration is even fairer than the consultation to which such employee was entitled before the declaration. In such a case, if the employee rejects an offer of such consultation, and a dismissal follows, the dismissal might not be procedurally unfair… However, where the employee agrees to consult with the employer after the employer has declared his position redundant prior to consultation, the procedural fairness or otherwise of any subsequent dismissal would depend largely on what happens during the consultation process.'

[54] In *Fletcher v Elna Sewing Machine Centres (Pty) Ltd*[22], a similar sentiment was expressed:

> 'In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and bona fide reason to reorganize, restructure or in some other manner,

[20] [2007] 11 BLLR 1065 (LAC).
[21] Ibid at para 44.
[22] (2000) 21 ILJ 603 (LC) at para 39.

redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so. What I consider to be the legitimate purpose of consultation with employees who might thereby be affected therefore, is not to assist them in making up their minds, but to determine, by way of consensus, whether there is any practical and viable basis for changing them. There is, to my mind, nothing unfair in that concept. In its broad context, it is a realistic and prevailing phenomenon of commercial life.'

[55] *In casu,* the Plaintiff's position was identified as a position that 'may be affected' by a proposed repositioning exercise, and it was proposed to be made redundant. It is evident from the section 189(3) invitation that the positions as identified in 'annexure A' thereto were not declared redundant, but rather were identified as possibly affected and proposed to be redundant. Babcock identified the position as one they could do without as the position 'looked after leases and projects' only, and at that point, the leases slowed down dramatically, and there were no new projects which required project management. Mr Vaughan explained that the Middelburg project was done, and the reality was that this position was specifically created for the Plaintiff to absorb him after he was transferred from the flying academy. The functions performed by the Plaintiff could be absorbed into Mr Ward's position, part of it could be handled by the Head Office, and the commercial directors in the southern and northern regions could also assist with the functions. The said functions related to the renegotiation of lease agreements and identifying premises.

[56] The MD made it clear that the position previously held by the Plaintiff no longer exists and will not exist in the future, as the position was no longer required.

[57] In cross-examination, it was put to him that the Plaintiff's position was not redundant because the property portfolio remained. Mr Vaughan agreed that the property portfolio remained, and he explained that the position was redundant, but the functions remained, and those remaining functions were

distributed to other employees to perform them. He testified that prior to the Plaintiff's transfer from the flying academy, Babcock had new projects and leases, which were successfully managed by other employees. The position was created for the Plaintiff to accommodate him, but the functions were previously handled by other employees, and it is currently again handled by other employees.

[58] Mr Vaughan reiterated that the post of property manager no longer existed in the Defendant's organogram or HR system. He conceded that the 'task is there, but the position no longer exists' and that the task is performed by other employees.

[59] The Plaintiff's pleaded case is that his position was not redundant. In *National Union of Mineworkers and Others v Free State Consolidated Gold Mines (Operations) Ltd President Brand Mine*[23], the meaning of redundancy was considered:

> 'According to *The Oxford Dictionary* the meaning of 'redundant' (which is an adjective) is superfluous, excessive or, in the case of an employee or his post, liable to be dispensed with because it is no longer necessary. The noun is 'redundancy'. On the other hand, 'retrench' (which is a verb) means cut down, reduce amount of (especially expenses), economize, reduce expenses. The noun is 'retrenchment'. It follows that one can only retrench someone or something that is redundant. One cannot 'redund'.
>
> Support for my view is to be found in Brassey et al *The New Labour Law*. Chapter 8, written by Halton Cheadle, deals with retrenchment. At 279 he says 'retrenchment means dismissal because the employee is redundant. The redundancy can be caused by the introduction of new technology, the reorganization of the enterprise, the rationalization consequent upon a merger, or a drop in production caused by an economic downturn or *any number of other circumstances*' (emphasis

[23] (1994) 15 ILJ 1161 (IC) at 1165I – 1166D.

added). He points out that in English law the term retrenchment is not used. The phrase 'dismissal for redundancy' is employed instead. He refers to the English statute which reinforces his view.

Whether a business is closing down completely, or just doing badly, if it is necessary to reduce the workforce they will be retrenched and the reason will be because they or their jobs have become redundant. The fact that in the one case the job loss may be permanent and in the other not, does not alter the fact that the workers are being retrenched.'

[60] In *Plaaslike Oorgangsraad van Bronkhorstspruit v Senekal*[24], the Supreme Court of Appeal considered the meaning of redundancy. The majority held that:

'[24] Myns insiens moet aan die begrip oortolligheid ('redundancy') 'n wye betekenis gegee word. Die voor die hand liggende geval van oortolligverklaring kom voor waar die werkgewer sy bedryf sluit of afskaal, met die gevolg dat *poste* verdwyn. Maar die begrip slaan klaarblyklik ook op 'n herorganisasie van 'n bedryf of onderneming waar 'n spesifieke *werknemer*, om operasionele of ander redes, in die slag moet bly. Dit is wat in die onderhawige geval gebeur het. In *National Union of Mineworkers* is met goedkeuring verwys na Brassey et al *The New Labour Law* op 279:

'[R]etrenchment means dismissal because the employee is redundant. The redundancy can be caused by the introduction of new technology, the reorganization of the enterprise, the rationalization consequent upon a merger, or a drop in production caused by an economic downturn or *any number of other circumstances* .' (Beklemtoning bygevoeg.)

[25] Ek meen nie dat daar 'n *numerus clausus* van omstandighede, wat tot oortolligverklaring kan lei, bestaan nie. …'

[24] (2001) 22 ILJ 602 (SCA).

[61] In the minority judgment, it was held that:

> '[7] I turn to consider what is meant by the expression 'having been declared redundant or having been retrenched'. I am unable to agree that the words 'redundant' or 'retrenched' should be given a wide or extensive interpretation. The context requires that they should be given their ordinary dictionary meaning. That is how the words have been construed in this court. In *West Rand Bantu Affairs Administration Board v Jaques* 1976 (4) SA 903 (A) Van Winsen AJA said the following at 911D-E:
>
> > 'There is no reason to suppose, regard being had to the context in which the word is used in the Act, that the Legislature intended to use the word "redundant", translated in the Afrikaans text - which is the signed one - by the word "oortollig", in any meaning other than its ordinary dictionary meaning. In English "redundant" is defined in *The Shorter Oxford English Dictionary* as "superabundant, superfluous, excessive" and "oortollig" is assigned the meaning in *HAT: Verklarende Handwoordeboek van die Afrikaanse Taal* , of "meer as wat nodig is, wat gemis kan word".'
>
> In *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court & others* 1986 (3) SA 786 (A); (1986) 7 ILJ 489 (A) it was said at 797J-798A:
>
> > "To retrench in the present context means to cut down, to reduce, the numbers of the work force because of redundancy - a superfluity of employees in relation to the work to be performed. Retrenchment does not necessarily involve the abolition of "posts"; the employer may merely lay off a number of his employees."
>
> [8] Redundancy and retrenchment are sometimes used interchangeably. They both involve the dismissal of an employee because of a reduction in the employer's workforce,

whether because of the abolition of a post or because the employees are superfluous for the employer's requirements. In Barker & Holtzhausen *SA Labour Glossary* , the following definitions are given:

> "[R]edundancy (*oortolligheid*) Reduction in the labour force of a firm for reasons for which the employees are not responsible, eg the closure or transfer of the place of work, the introduction of new technology or a reduction in the demand for certain categories of employees. There is thus a surplus of labour to be made redundant. This is normally referred to as dismissal for reasons based on the employer's operational requirements. Sometimes distinguished from retrenchment."
>
> "[R]etrenchment (*personeelafflegging,personeelbesnoeiing*) The dismissal of employees for reasons connected with economic, technological, structural or similar requirements (*see* operational requirements). Often used interchangeably with *redundancy* , but in some countries, eg the USA, retrenchment refers to the adoption of a smaller scale of operations in an organization, which may result in lay-off as part of the effort to reduce the workforce."

According to *OED* vol XIII 'redundant' means 'superabundant, superfluous, excessive' (at 429) and 'retrench' (at 792) means 'to cut down, reduce, diminish in extent, amount or number'. The dictionary meanings coincide with the manner in which this court has interpreted the words and with the way in which the expressions would ordinarily be understood, ie a reduction in the labour force.'

[62] Considering the aforementioned authorities and the evidence placed before this Court, it is evident that the position of project manager, previously held by the Plaintiff, indeed became redundant.

Alternative positions

[63] Having found that there was a genuine operational rationale for retrenchment and that the Plaintiff's position was indeed redundant, it is necessary to consider his case in the alternative - that is, that Babcock failed or refused to consider him for available vacant alternative positions.

[64] In the pre-trial minute, the Plaintiff's case is recorded as that the Defendant failed and/or refused to properly consider and/or explore the 'viable alternatives to retrenchment' he had proposed, being vacant positions which existed at the time and the application of bumping. I will deal with bumping *infra.*

[65] During the trial, it became evident that there were no vacant alternative positions available. This was even conceded by the Plaintiff during consultation 2. Mr Vaughan indicated that there were no vacancies and the Plaintiff responded that: *"I have looked on the intranet and David there are no vacancies apparently in this group or none that I have seen published".* Mr Vaughan then confirmed that to be the position as 'everything is on hold' and was 'frozen' at the time.

[66] In my view, there is no merit in the Plaintiff's case that the Defendant failed or refused to consider him for available vacant alternative positions. The evidence adduced showed that there were no vacant alternative positions available.

[67] In the pre-trial minute, the Plaintiff indicated that someone else should have been selected for retrenchment in his place, and he listed Mr Grant Sheperd and Mr Jonathan Howe, who should have been selected for retrenchment through the process of bumping, as the Plaintiff had longer service than they had. He also listed Mr Mannie Augistino and Ms Beulah Ferreira, who were due to retire.

[68] During the trial, Mr Short, for the Plaintiff, attempted to distinguish between the positions of Messrs Sheperd and Howe, as being positions relevant for purposes of bumping, and Mr Augistino and Ms Ferreira as being 'alternative positions'.

[69] The difficulty is with the Plaintiff's pleaded case. His case is that Babcock failed or refused to consider him for available vacant alternative positions which existed at the time. The Plaintiff could not point to any alternative vacant position which was available at the time, as per his pleaded case. Instead, his case was that Mr Augistino and Ms Ferreira were due to retire and that Babcock should have offered these positions to him. If they were indeed 'alternatives', they were not 'available vacant positions'.

[70] There is, in any event, no merit in this claim. The undisputed evidence was that Mr Augistino was Babcock's national technical manager, with more than 40 years of experience in the industry. All technical specialists reported to him, and his position was a key technical position. Mr Augustino was sent on more than 100 courses on the Volvo machines, and he was highly technical and specialised in Volvo. The Plaintiff did not attend a single course on Volvo, and Mr Vaughan was clear in his evidence that the Plaintiff did not have the necessary skills, experience, and qualifications to be placed in the position of national technical manager. He explained that although the Plaintiff is a mechanical engineer, the position does not require a mechanical engineer, but it requires someone who is 'Volvo technical', which is different from being a mechanical engineer. Babcock could not put someone in that division who does not have the required skills.

[71] In cross-examination, it became clear that the Plaintiff was not pursuing his claim in respect of Mr Augistino's position.

[72] Ms Ferreira was primarily a store manager, doing stock control. She was employed on a fixed-term contract, but she passed away due to Covid before the expiry of her contract. After Ms Ferreira's passing away, her position was scrapped, and it was merged with the position of Hans Roos. Mr Vaughan

testified that the Plaintiff never performed the function of store manager or supply chain management. During his evidence, it became clear that the Plaintiff was not pursuing his claim in respect of Ms Ferreira's position as he was of the view that it was too operational for him and he wanted a position on a higher, more strategic level.

Bumping

[73] The Plaintiff's further alternative case is that the Defendant should have and could have applied bumping as he had longer service than a number of other employees, and he had the required skills, experience, and expertise to be bumped into their positions, but Babcock failed or refused to do so.

[74] In the pre-trial minute, the Plaintiff listed Mr Grant Sheperd and Mr Jonathan Howe to have been selected for retrenchment through the process of bumping as he had longer service than they had.

[75] During the trial, the Plaintiff did not persist with his claim in respect of Mr Howe, and the only question which remains is whether bumping should have been applied in respect of Mr Sheperd.

[76] Before I deal with the aforementioned question, it is prudent to first consider: What is bumping?

[77] In *Amalgamated Workers Union of SA v Fedics Food Services*[25], the Court considered bumping and held that:

> '[3] This brings me to the question of precisely what 'bumping' is. M H Cheadle 'Retrenchment: The New Guide-lines ' (1985) 6 ILJ 127 at 137, says the following:
>
> > "The LIFO principle is to retain long-serving employees at the expense of those with shorter service in like or less

[25] (1999) 20 ILJ 602 (LC).

skilled categories of work. Accordingly, LIFO would not apply to employees in a different grade if the longer-serving employee could not do the work of the employee with shorter service in that grade. The principle, if not qualified by agreement, should apply throughout the establishment or the collective bargaining unit provided that it falls within like or lesser categories of work. In other words, should an employee with long service be made redundant in one department he should be transferred to a similar post elsewhere in the establishment, even though it may be occupied by an employee with shorter service. Should there be no such post, the practice is to offer the longer-serving employee a less skilled position occupied by employees with shorter service. This procedure is graphically called "bumping". In short, one "bumps" sideways and down. The restriction of this principle to departments can lead to abuse. Long-serving employees can be transferred to departments where redundancy is expected and thereby retrenched at a later stage. Such a practice would clearly subvert the objective application of the principle."

[4] 'Bumping' as a practice has been accepted in the Labour Appeal Court. See *Reckitt &Colman (SA) (Pty) Ltd v Bales* (1994) 15 ILJ 782 (LAC); [1994] 8 BLLR 32 (LAC), where the following is said, at 46G-H:

"Whilst every case must be considered on its merits, there is no immutable rule that in applying the LIFO principle, an employee should not be downgraded. Indeed as appears from the article by Cheadle "Retrenchment: The New Guide-lines" (1985) 6 ILJ 127 at 137-8, in reallocating of posts, as between employees on the LIFO principle, there may be a process of "bumping" both sideways and down. This is sometimes also referred to as horizontal and vertical "bumping".

See *Contemporary Labour Law* vol 2 no 1 (August 1992) at 8-10 and vol 2 no 8 (March 1993) at 1991."'

[78] In respect of bumping, the LAC found in *Porter Motor Group v Karachi*[26] *(Karachi)* that:

> '[15] The Code of Good Practice on dismissal in schedule 8 to the Act deals with selection criteria and lists length of service, skills and qualifications as generally accepted considerations. Selection criteria laid down by case law, in addition to the three factors mentioned, for determining which employees are to be retrenched, would include the employee's competence and merit; technical knowledge or experience; conduct; service record; age; and gender.
>
> [16] Early mention of bumping in South African labour law comes from Professor H Cheadle's article 'Retrenchment: The New Guide-lines' (1985) 6 ILJ 127 at 137, and this article has been considered in a number of decisions and has received some academic attention. See inter alia *Reckitt & Colman (SA) (Pty) Ltd v Bales* (1994) 15 ILJ 782(LAC), *Amalgamated Workers Union of SA v Fedics Food Services* (1999) 20 ILJ 602 (LC), *SACCAWU & others v Wimpy Aquarium* [1998] 9 BLLR 965 (LC) at 969E-F, *Unilever SA (Pty) Ltd v Salence* [1996] 5 BLLR 547 (LAC) at 557, *Shangase & others v BKB Ltd* (1999) 20 ILJ 2475 (CCMA), *Fisher v Sylko Paper Co* (1998) 8 Arb 5.2.2, *Nyathi & others v Queensburgh Equipment Rental* NHN 11/2/3939 (1992) (IC), Professor Alan Rycroft's article 'Bumping as an Alternative to Retrenchment' (1999) 20 ILJ 1489 and Le Roux & Van Niekerk *The SA Law of Unfair Dismissal* . In determining a fair selection of employees for retrenchment bumping has often been implemented and the following principles have developed in relation thereto. This

[26] (2002) 23 ILJ 348 (LAC).

does not purport to be an exhaustive list and merely catalogues the rules laid down which are relevant to this case.

(1) It should be reiterated once again that fairness is not a one-way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.

(2) Bumping is situated within the 'last in first out' (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise are an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated hereinafter, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.

(3) The nature of bumping depends on the circumstances of the case. A useful distinction is that of dividing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.

(4) The first principle is well established, namely that bumping should always take place horizontally, before vertical displacement is resorted to. The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping.

Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.

(5) Where large-scale bumping, sometimes referred to as 'domino bumping', necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimizing the disruption to the employer. Examples of disruption include difficulties caused by different pay levels, client or customer reaction to a replacement of employees and staff incompatibility. In evaluating the competing interests of the employer and the affected employees the consulting parties should carry out a balancing exercise. Where minimal benefits accrue to employees, while vast inconvenience is the lot of employers, fairness requires that fewer employees should move.

(6) There will always be geographical limitations to bumping in that fairness will require that limits be placed on how far an employee is expected to move to bump another. Although prejudice to the employer in long-distance relocation cannot be excluded, in practice this will be rare. Generally speaking it is the employee who will suffer as a result of being removed from a cultural and social environment he or she has become accustomed to. Second guessing the desires of employees is undesirable; if they are happy to translocate then bumping should take place whatever the distances involved.

(7) The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of a company within the parameters of its

activities, national or international; fairness requires that the same circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.

(8) The independence of departments as separate business entities may be relevant but the argument that a company's departments are managed separately should be strictly scrutinized. Even if there is no past practice of transferring between branches or departments, the employer must consider interdepartmental bumping unless it is injurious to itself and to other employees.

(9) Bumping does not apply to employees in a different grade if the longer serving employee cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised skills are involved. Where the necessity arises of retraining those, who are transferred, this should be carried out, unless it places an unreasonable burden on the employer.

(10) The status of the post into which an employee is bumped is relevant, as the employer's prerogative to choose someone of managerial/supervisory level should be respected. Management concerns that downgrading an employee will be demoralizing will not justify a decision not to bump downwards where the employee is prepared to accept downgrading. On the other hand the unwillingness of the affected employee to accept a lower wage may justify not bumping.’

[79] In *Mtshali v Bell Equipment*[27] *(Mtshali),* the LAC held that LIFO (last in, first out) as a method of selection entails that employees are selected for retrenchment according to the period they have been with the employer. It simply means that employees who have served for a shorter period would be higher on the list of those likely to be retrenched. Although it has its own difficulties, LIFO is still regarded as the most objective and fair method of selecting employees. The LAC confirmed that bumping is situated within the LIFO principle.

[80] This means that whenever LIFO is the agreed criterion, bumping must be applied as a selection criterion.

[81] The issue of bumping is also relevant for purposes of the Plaintiff's challenge to procedural fairness, and I will deal with that aspect when considering procedural fairness *infra*.

[82] The Defendant's evidence was that Mr Sheperd is employed as regional manager: export, and he is responsible for the export regions. Mr Sheperd was appointed in 2013, and he was responsible for the Defendant's new SDLG unit, which was set up at the time. SDLG is equipment that was sourced from China, as the Volvo equipment was too expensive for a certain segment of the market.

[83] Mr Vaughan testified that prior to joining the Defendant in 2013, Mr Sheperd had been employed with Daimler for many years, where he had sold trucks and worked in five African countries. After that, he was employed by Volvo, where he sold Volvo trucks and was responsible for eight African countries. Mr Sheperd was employed by the Defendant in 2013 as he had experience in selling trucks, he was already selling to Babcock's clients, and he was used to doing business in Africa. He still occupies the same position, and he has good and established relationships in *inter alia* Zambia, Namibia and Botswana, and he does very well in his position.

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[27] (DA16/12) [2014] ZALAC 37 (22 July 2014) at paras 21 and 22.

[84] Mr Vaughan testified that Mr Sheperd could not be bumped as he was experienced in selling trucks and doing business in Africa, which was a complex and challenging market. The Plaintiff never held such a position, and he has no experience in dealing with the African markets.

[85] The MD explained that the Plaintiff was academically qualified as a mechanical engineer and he has no experience in selling, doing business in Africa or yellow metal. Mr Sheperd was working with trucks, yellow metal and in the African market since 2000. It was the Defendant's case that the Plaintiff did not possess the skills and experience to fulfil a regional manager's position.

[86] The Plaintiff's version was that he could have been bumped into Mr Sheperd's position because he was exposed to equipment since 2007, when he joined the flying academy, that the plant was not rocket science, and he was, after all, an engineer with a diverse skill set. The Plaintiff testified that he had crossed paths with the export division. His evidence was that he was financially and technically competent to do Mr Sheperd's job because 'nobody is better suited to deal with engineers than an engineer and he is holistically well-rounded'.

[87] In *Karachi,* the LAC confirmed that bumping does not apply to employees in a different grade if the longer serving employee cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised skills are involved.

[88] In my view, the same principle applies *in casu.*

[89] The Plaintiff could not show, on a balance of probabilities, that he had the required skills and experience to justify the bumping of Mr Sheperd. The Plaintiff could not convince this Court that he had the experience and skills which were required to perform Mr Sheperd's position. It was undisputed that

the Plaintiff had qualifications in engineering and finance and that he has a predominant finance background, but this is not what was required to perform the job of regional manager: export.

[90] For the reasons recorded *supra,* I cannot find that the Plaintiff's dismissal was substantively unfair.

<u>Procedural fairness</u>

[91] The Plaintiff's pleaded case is that his dismissal was procedurally unfair because his retrenchment was presented as a *fait accompli* and because the Defendant failed and/or refused to share sufficient information and/or engage with him so as to allow him a proper opportunity to consult in respect of the reason for the restructure, alternatives to his retrenchment and his severance benefit.

[92] In the pre-trial minute, it was recorded that this Court should decide the issue of procedural fairness by making findings as to whether the Plaintiff's retrenchment was presented as a *fait accompli* and whether the Defendant failed and/or refused to share sufficient information and/or engage with the Plaintiff so as to allow him a proper opportunity to consult in respect of the reason for the restructure, alternatives to his retrenchment, the method for selecting the employees to be dismissed and his severance benefit.

[93] It is evident that the Plaintiff's pleaded case did not include a complaint that he was not consulted in respect of the method for selecting the employees to be dismissed. This was added in the pre-trial minute. Such cannot be permitted.

[94] In *Louw,* the LAC made it clear that a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a pre-trial minute and if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of

the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical pre-trial minute will shrink the scope of the issues to be advanced by the litigants.[28] I will consider the Plaintiff's pleaded case on procedural fairness.

[95] In my view, the pleaded challenge to procedural fairness is twofold – one is that there was no genuine consultation process and that he was presented with *a fait accompli,* and the second relates to the sharing of information, which deprived the Plaintiff of an opportunity to consult on certain aspects. I will deal with them in turn.

<u>Was there disclosure of information?</u>

[96] The Plaintiff challenges procedural unfairness on the ground that the Defendant failed or refused to accede to the request to disclose relevant information, as contemplated in section 189(4) of the LRA. The Plaintiff's pleaded case is that the Defendant failed or refused to share sufficient information, and this deprived him of an opportunity to properly engage and consult on the reasons for the restructuring and alternatives to retrenchment.

[97] The Plaintiffs' case is that, at the first consultation meeting held on 3 August 2020, he was informed that his position was redundant, and he proposed positions for which he could be considered, but the Defendant was dismissive of his proposals. He reiterated that he questioned the rationale for retrenchment, and in the second consultation meeting of 31 August 2020, he requested the financial statements for Babcock Equipment from April to July 2020. The Plaintiff's case is that the mining sector had practically recovered from the imposed lockdown, and as the equipment division was deeply correlated with the mining sector, analyst opinions predicted a buoyant year ahead for the said sector. The Plaintiff requested the financials, as referred to *supra,* so that he could get some insight into the business and see how bad things really were. He stated that he always had access to the financial

[28] *Louw supra* at para 8.

information and that he was in possession of the detailed financial accounts for the 2020 financial year, which had ended in March 2020.

[98] The Plaintiff explained that he had requested the detailed financial information, as that would give him an opportunity to drill into the issues of profitability and to see in which divisions there were the most problems. He also asked about the financial impact of the proposed retrenchment on the payroll. On 31 August 2020, Mr Ward sent him a document, which was a screenshot of flash results for Babcock Equipment. The Plaintiff explained that it was a snapshot for the period April to July 2020, and it was not the document he requested or expected, as he had always been provided with the full financial details.

[99] The Plaintiff testified that he was expecting an Excel spreadsheet with the financial information of all the branches, which would have enabled him to look at profits, losses and problem areas. Instead, he was provided with a snapshot of the Defendant's financial position. He explained that he could see from the information provided that Babcock was behind target, but this was expected due to COVID-19. According to the Plaintiff, Babcock would 'rebounce' very quickly and although the Defendant was behind forecast and budget, there was a R 24 million profit.

[100] The Plaintiff testified that he had requested the full financial information for April to July 2020, and later he also requested for August 2020, but it was never provided, and no reason as to why it was not given to him.

[101] In the third consultation meeting of 28 September 2020, Mr Vaughan referred to the Plaintiff's request for financial information, which was not given to him and said that *'so the process has carried on and it is nearly, I think nearly at the end now. So the company feels that to show you all the financial information at this point is kind of irrelevant'.* Mr Vaughan further said that *'So whilst the exercise, a by-product I suppose and obviously if you need people going you do the cost saving, but it is a repositioning of the company etcetera. So that is why I do not think that a whole lot of financials and you studying a*

lot of financials is actually going to impact the situation or it is going to, we think it will not be really relevant. That is the thought at this stage'. The Defendant's position was that the retrenchment was more of an exercise of business repositioning than cost-cutting.

[102] It is evident from the section 189(3) notice that Babcock recorded the reasons for retrenchment as: despite the best effort to adjust operations and reduce costs as a result of the COVID-19 crisis, they had to take a number of measures to safeguard the future of the business during the poor economic environment, cost containment measures included the possible redundancy of certain positions, which could result in the retrenchment of certain employees, COVID-19 had a negative effect on economic activity in the major markets, Babcock needed sufficient liquidity to carry them through the poor economic environment, the lack of work affected all standard operations and key projects, reducing costs would safeguard the Defendant's ability to perform and transform and as a result of all the aforementioned, Babcock proposed to re-position its business.

[103] Notwithstanding the efforts by the Defendant to paint a picture that the reason for retrenchment was not only for economic and financial reasons, but that it was also a restructuring exercise which had little to do with its financial position, I am of the view that the reason for retrenchment was indeed the poor economic environment and the financial challenges Babcock faced as a result thereof. The re-positioning of the business was not a self-standing restructuring exercise, divorced from any economic considerations, but in fact, it was directly linked to and as a result of the financial challenges faced by Babcock at the time and as a result of the COVID-19 crisis.

[104] It is evident from the facts placed before this Court that the Defendant did not absolutely refuse to make the requested financial information available, but indeed agreed to make it available. The information that was made available on 31 August 2020 was, however, not what the Plaintiff requested or expected to receive.

[105] The question is whether the information that was provided was sufficient for purposes of meaningful consultation and whether the failure to provide the detailed information requested renders the Plaintiff's retrenchment procedurally unfair.

[106] Section 189(3) of the LRA obliges the employer to 'disclose in writing to the other consulting party all relevant information, including, but not limited to' the information listed in paras *(a)* -*(h)*. The use of the words 'including, but not limited to' makes it clear that the information which must be disclosed in writing to the other consulting party is not confined to the listed information - all relevant information must be disclosed.[29]

[107] Section 189(4) provides that the provisions of section 16 of the LRA apply, read with the changes required by the context, to the disclosure of information in terms of section 189(3). Section 16 is a general provision governing the disclosure of information. Section 16(3) provides:

> 'Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.'

[108] The effect of sections 189(4) and 16(3) read together is that, in a retrenchment consultation situation, the employer is obliged to disclose all relevant information that will allow the other party concerned to engage effectively in consultation on the contemplated retrenchments. This is, however, subject to section 16(5), which provides:

> 'An employer is not required to disclose information -
>
> *(a)* that is legally privileged;

[29] See *Chotia v Hall Longmore & Co (Pty) Ltd* [1997] 6 BLLR 739 (LC) at 743I-744B.

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.'

[109] Section 16(6) provides:

> 'If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.'

[110] Section 16(8) requires the CCMA to attempt to resolve such a dispute through conciliation. Section 16(9) provides that if such a dispute remains unresolved, any party thereto may request that the dispute be resolved through arbitration. Section 16(10) requires the commissioner who arbitrates the dispute first to decide whether or not the information is relevant.

[111] *In casu,* the Plaintiff did not refer a dispute to the CCMA in respect of the information he sought.

[112] What seems clear is that, in terms of section 16, it is for a commissioner of the CCMA, and not for this Court, to determine disputes about what information is required to be disclosed in terms of section 16. Does this imply that it is not the function of this Court to determine whether the information concerned should have been disclosed and that, if the applicant was aggrieved in this regard, he was confined to his remedies as provided for in section 16 of the LRA?

[113] In *Robbertze v Marsh SA*[30], the Court held that:

> '[50] Section 189(3) casts a positive obligation on an employer contemplating a dismissal for reasons based on its operational requirements to disclose all relevant information. It is clear that compliance with the requirements of s 189 is highly material to, if not determinative of, the question as to whether a dismissal based on the employer's operational requirements is fair. (See eg *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC); [1998] 12 BLLR 1209 (LAC) at paras 26-31; *Alpha Plant & Services (Pty) Ltd v Simmonds & others* (2001) 22 ILJ 359 (LAC); [2001] 3 BLLR 261 (LAC) at paras 7-10.) It is the duty of this court to adjudicate disputes concerning the fairness of a dismissal based on the employer's operational requirements. If this court should find that relevant information required to be disclosed in terms of s 189(3) was not disclosed, it is in my view required to consider and determine whether such non-disclosure rendered the dismissal unfair, for example, on the basis that it prevented fair and adequate consultation. The fact that it was open to the employee to invoke the procedures contemplated in ss 16(6)-16(14) does not, in my view, deprive this court of the right, and indeed the obligation, to determine whether the non-disclosure of the information rendered the dismissal unfair.'

[114] In *United People's Union of SA v Grinaker Duraset*[31], the Court held that

> 'The only issue for decision in these proceedings is whether the respondent's failure to comply with the request for financial statements amounted to a breach of its duty to consult in terms of s 189. In my view it did not. The duty to provide information in the context of a dismissal for operational reasons arises from subsections (3) and (4) of s 189, read with s 16, subject to the changes required by the context.

[30] (2002) 23 ILJ 1448 (LC).
[31] (1998) 19 ILJ 107 (LC) at 116H – 117D.

Read thus, s 16 requires the disclosure of all relevant information that will allow the other consulting party to engage effectively in consultation. Although a dispute over whether information is relevant is reserved for arbitration under the Act, it is material to an assessment of the fairness of a retrenchment in that relevancy is one of the prerequisites to a duty to disclose: see *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1994) 15 ILJ 1257 (A); *FAWU v Premier Foods Industries Ltd (Epic Foods Division)* (1997) 18 ILJ 1082 (LC); [1997] 6 BLLR 753 (LC).

Apart from the duty to provide information regarding the specific matters referred to in s 189(3), an employer is not obliged to comply with a generalized demand for 'information' unless the party making such demand lays some foundation for its relevance. This is not a case, like *NUMSA & others v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC); [1997] 5 BLLR 589 (LC) in which the employer had specifically claimed that it was considering retrenchment because it was in financial difficulties. In the present case, the applicant first raised a demand for financial disclosure on 21 January 1997 - some four months after the respondent had taken several steps to the detriment of the earning capacity of a number of its members. When it did, it was raised in the form of a generalized demand for 'the books', which Mr Luthuli conceded simply meant the amount of money the respondent had in the bank.'

[115] If this Court finds that relevant information required to be disclosed in terms of section 189(3) was not disclosed, it is required to consider and determine whether such non-disclosure rendered the dismissal unfair, for example, on the basis that it prevented fair and adequate consultation. This Court must determine whether the non-disclosure of the information rendered the Plaintiff's dismissal unfair.

[116] The Plaintiff requested financial information, which was provided to him. His evidence was that he wanted more detailed financial statements, as that would give him an opportunity to drill into the issues of profitability and to see

in which divisions there were the most problems. This was also evident from the third meeting when the Plaintiff stated that one of the reasons he wanted the detailed financial statements *'was in my feeling there is probably a plethora of losses running through the place that might need to be arrested or might need a different commercial perspective to look at this and I have worked with Tim. Tim knows I am a strategic thinker. I might not come up with a solution immediately, but I do my research…'*

[117] In my view, the Defendant furnished financial information to the Plaintiff, which enabled him to see the financial status of the Defendant, necessary for purposes of a section 189 consultation process.

[118] The Plaintiff requested more detailed financial information. It is clear that the purpose of such request was not to enable him to consult meaningfully, but it was rather for his own desire to drill into issues of profitability and to come up with a solution – that is not information required for a consultation process and it is not the purpose of providing financial information in a section 189 consultation process.

[119] The Defendant's failure to make the detailed financial information available to the Plaintiff, in addition to what was provided to him for purposes of consultation, was not inconsistent with its obligations in terms of s 189(3) of the LRA. The Plaintiff was unable to show that the financial information that was provided to him was insufficient to allow a proper opportunity to consult. He requested more detailed information for other purposes.

<u>Was there meaningful consultation?</u>

[120] The Plaintiff challenges the procedural fairness of his dismissal and claims that the consultation process was not a genuine process, as his retrenchment was a *fait accompli.* He testified that although there were four consultation meetings held, there was no genuine consultation, there was no meeting of the minds or consensus. He went into the consultation process, confident that he would be able to weather the storm due to his qualifications and

credentials, but he was met with a *fait accompli.* Every proposal he made was shot down, and by the second consultation meeting, it became clear that he would be retrenched. The Plaintiff's view was that the Defendant was merely going through the motions.

[121] The Defendant's case on the other hand is that the Plaintiff was consulted extensively over a period of three months, his proposals were not ignored or rejected at the outset, but instead he was consulted extensively, his proposals were considered and the mere fact that he did not get what he wanted, does not mean that the Plaintiff was not consulted or that his proposals were not considered.

[122] The first question to be decided is whether there was meaningful consultation as contemplated in section 189(2) of the LRA. I first deal with the applicable principles that apply in general.

[123] Section 189(1) of the LRA requires an employer to consult with certain parties when it contemplates retrenchment. The employer must invite the relevant parties to consult by way of a notice issued in terms of section 189(3). Section 189(3) enumerates the relevant information that is required to be disclosed to the consulting parties.

[124] Section 189 (2) provides that:

> '(2) 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 –
>
> (i) to avoid the dismissals;
>
> (ii) to minimize the number of dismissals;
>
> (iii) to change the timing of the dismissals; and
>
> (iv) to mitigate the adverse effects of the dismissals
>
> (b) the method for selecting the employees to be dismissed;

and

(c) the severance pay for dismissed employees.'

[125] Section 189(2)(a) of the LRA provides that the employer and other consulting parties must consult and engage in a meaningful joint consensus-seeking process to attempt to reach consensus on certain prescribed issues. The Plaintiff was indeed invited to consult on these issues.

[126] The main objective of consultation before a final decision on retrenchment is taken must be to avoid retrenchments altogether, alternatively, to reduce the number of retrenchments and to mitigate the consequences.[32] The objective is not to ensure that the *status quo* is maintained.

[127] Section 189 of the LRA imposes a number of obligations in peremptory terms, for instance, the employer 'must consult', 'must issue a written notice' and that the employer and the other consulting parties 'must' engage in a meaningful joint consensus-seeking process.

[128] Consultation in a retrenchment process must be distinguished from negotiations during a collective bargaining process. Consultation in anticipation of retrenchment calls for a joint problem-solving approach, so that the needs of all the parties can be explored.[33] Section 189(2) places an obligation on both parties to consult. The employer has to invite the other parties to consult, but the consultation process is a two-way street and requires engagement by all the consulting parties, with the aim to reach consensus. There is a duty on the other consulting party to put alternatives on the table and to make an effort to participate in a meaningful way. Adopting an obstructive attitude does not assist the process.

[129] As the LAC found in *Karachi:*

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[32] *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A).

[33] *Karachi supra*.

> 'It should be reiterated once again that fairness is not a one-way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.'[34]

[130] The obligation to consult placed on the employer by section 189 places a correlative duty on the other consulting party to cooperate in the attempt to reach consensus before the employer ultimately exercises its right to take the final decision.

[131] The employer has a duty to consult, but it has no duty to reach consensus, as is reflected in the wording of section 189(2) that the parties must 'attempt' to reach consensus. Consultation may be terminated by the employer if a deadlock is reached, that would be a point where the employer may proceed unilaterally.

[132] The Plaintiff's pleaded case is that he was met with a *fait accompli* and that the consultations that were held were superfluous. He also complains that he was not allowed a proper opportunity to consult in respect of the reasons for the restructure, alternatives and his severance benefit.

[133] It is evident that the reason why the Plaintiff's position was identified for retrenchment was discussed during the first meeting on 3 August 2020. It was recorded that the Plaintiff's position was identified for the reasons mentioned in the section 189(3) invitation to consult, as well as the fact that there were no projects that Babcock would be pursuing. On his own version, the Plaintiff was in agreement with the fact that there were no projects at the time.

[134] I am satisfied that the reasons for the retrenchment were discussed with the Plaintiff, and there is no merit in his case that he was not afforded an

[34] Ibid at para 16.

opportunity to consult in respect of the reasons for the retrenchment. To the extent that the Plaintiff takes issue with the fact that he was not provided with sufficient information as to the reasons for the retrenchment and restructure, I have dealt with that aspect *supra.*

[135] The Plaintiff also took issue with the fact that he was not properly consulted in respect of alternatives. His case is that he was told that he would be retrenched, all his proposals were shot down, and the alternatives he proposed were not considered.

[136] I already alluded to the fact that the alternatives referred to the available vacant positions and bumping. These issues were fully considered *supra,* and this Court found that bumping was not possible or feasible, but left the question of the procedural fairness thereof to be decided separately. The only position relevant for purposes of this judgment is that of Mr Sheperd.

[137] The Plaintiff's case is that he proposed the position of Mr Sheperd for purposes of bumping, as he was of the view that he could perform the tasks of the said position. In Court, Mr Vaughan provided an explanation as to why the Plaintiff was not suitable for Mr Sheperd's position, and he explained in length why Mr Sheperd was the most suitable candidate for the position.

[138] The reasons advanced on behalf of the Defendant why Mr Sheperd was not retrenched at the time, clearly considered that the Plaintiff did not have the required experience and that he was not capable of performing the functions of Mr Sheperd, as he never occupied the position of regional manager and he had no experience in working in the African market. Cogent evidence was presented to show that the employee identified by the Plaintiff and who was retained was better skilled and capable than the Plaintiff in respect of the position he was retained in.

[139] In *Mtshali,* the LAC held that:

> ‘It is clear from the authorities referred to above that bumping forms part of LIFO as a method for selection of employees to be retrenched. It was therefore incumbent on the respondent to have consulted on its application to determine whether its application would have been appropriate in the circumstances of this case. It was not for the respondent to decide unilaterally that it would not be appropriate to apply bumping especially where it was not specifically prohibited in the collective agreement. Reasons why the respondent considered the application of bumping inappropriate or unfair should have been tabled for consideration by the consultation parties before a final decision could be taken.’[35]

[140] It is evident from the transcript of the second consultation meeting that the Plaintiff asked Mr Hlope, the Defendant’s HR business partner, whether Babcock explored bumping, and Mr Hlope responded that *‘We, firstly we are exploring what is in the letter, under section five of the letter. Remember in your position, in the whole of Equipment you are the only project manager. So if that position is redundant there is no LIFO because you are the only person in that position’.*

[141] Also in the second meeting and as the consultation progressed, the Plaintiff requested Mr Hlope to invoke bumping. Both Mr Vaughan and Mr Hlope indicated that they would do so and that they would give feedback to the Plaintiff. Mr Vaughan undertook to give feedback, and he stated that *‘...in Equipment we have had a look at the whole gambit and at all vacant positions. But now I am not sure, where do you think you would fit in Michale, because I mean what you are doing now is asking us in Equipment to bump somebody else and keep you’.* The Plaintiff then indicated that Babcock should consider the positions of Grant Sheperd and Jonathan Howe, upon which Mr Vaughan indicated that the Plaintiff would not be able to do their jobs and the Plaintiff responded *‘granted, granted, yes…’.*

[35] *Mtshali supra* at para 30.

[142] The second meeting concluded with Mr Hlope stating that *'we will give you feedback on the issues you have raised and although we have given you feedback which will answer bumping, we will provide feedback again on bumping and then we need to close the consultation'.*

[143] In the third consultation meeting, Mr Vaughan gave feedback to the Plaintiff on the issue of bumping, and it is evident from the transcript that there was a discussion on the issue of bumping. Mr Vaughan stated, with reference to the previous discussion, that: '*...I know we have spoken about Manny and Jonathan and Grant and things like that. But we don't need mechanical engineers in those positions, we don't need finance guys in those positions. You know it is ploughing the seeds, you know customer relationships, product knowledge, machine product knowledge, Volvo knowledge, SLG and all the other stuff that goes with it. That is what makes bumping not possible in this instance…'.*

[144] Mr Hlope then asked, *'Michael, in your opinion, if I may ask, which position do you think you can be bumped into, considering the skill set of the position, the requirements and qualification?'* The Plaintiff responded that he had been with the Babcock group for so long, and he understands so much about it, and he believed that he had exposure to look at the division holistically and that he was fully competent to 'catch the ball.'

[145] The LAC in *Karachi* and *Mtshali* confirmed that an employer is obliged to consult with an employee about the possibility of bumping and that it is incumbent on an employer to consult on its application to determine whether its application would have been appropriate. It is not for an employer to decide unilaterally that it would not be appropriate to apply bumping.

[146] In my view, there is no merit in the Plaintiff's complaint that the Defendant refused or failed to consult with him on alternatives to retrenchment or the issue of bumping.

[147] The transcribed record of the consultation meetings show that the alternatives and bumping were discussed, and it was indicated to the Plaintiff that his skills and experience were not required for the positions he identified as positions where bumping could take place and the Defendant made it clear that for that reason, bumping would not be possible.

[148] The termination of the Plaintiff's employment was being contemplated for reasons that had nothing to do with fault on his part. In these circumstances, the LRA required the Defendant to consult in good faith and to give the Plaintiff a fair opportunity of seeking to persuade it not to retrench him. The Plaintiff was afforded such an opportunity, and in the circumstances, the process followed complied with the consultation requirements of the LRA and the principles of procedural fairness.

[149] I am also not convinced that the Plaintiff was met with a *fait accompli* and that the consultations that were held were superfluous. There was no convincing evidence placed before this Court to show that the Defendant approached the process with a predetermined outcome or that a decision was already taken, and that the Plaintiff was faced with a *fait accompli.* The mere fact that his name was included on a list of positions which may be affected and be made redundant is not sufficient to establish a *fait accompli,* nor is the fact that the Plaintiff was unable to come up with sufficiently persuasive arguments for the employer to change. In *National Education Health and Allied Workers Union and others v University of Pretoria,*[36] the LAC considered a matter where the employees challenged the fairness of their dismissals *inter alia* on the ground that their union was faced with a *fait accompli* by the time the consultation in terms of section 189 of the LRA commenced. were held that:

> '[51] Section 189 of the Act does envisage that the employer may come to the first consultation table with a proposal that can be said to be not only his preferred proposal but, indeed, one that he strongly views as the solution to the problem. The obligation

[36] (2006) 27 ILJ 117 (LAC) at paras 51 – 53.

placed upon the employer to consult only arises in terms of s 189(1) of the Act when a situation has been reached where he "contemplates dismissing one or more employees" for operational requirements. In other words, before he reaches such stage, he is under no obligation to consult and is within his rights to try and deal with the problem on his own with such assistance and advice as he may in his discretion feel he needs which need not be that of the consulting parties envisaged in s 189(1). This is because the employer is entitled to deal with the problems of his business without consulting the parties envisaged in s 189(1) as long as he is not contemplating the dismissal of any employees for operational requirements. It would be natural for him to form a view or even a strong view about one or other possible solution to the problem out of all those that he might have applied his mind to while trying to solve the problem before contemplating the dismissal. Section 189(1)(b), (c),(3)(c) and (g) refer to "employees likely to be affected." The frequent reference in those provisions to "employees likely to be affected" is an indication that it is permissible for the employer to have already grappled with the problem to the extent that he has in mind "employees likely to be affected by the proposed dismissal."

[52] Section 189(3) requires the employer to disclose the reason for the proposed dismissals, the alternatives that he considered *before* proposing the dismissals and the reasons for rejecting each one of those alternatives, the number of employees likely to be affected and the categories in which they are employed, the time when or the period during which the dismissals are likely to take effect. The content of what s 189(3) requires the employer to disclose suggests quite clearly that the employer is allowed to initiate the consultation process after he has done a lot of work to try and resolve the problem on his own. He is permitted to have done so much work that –

a) he is in a position to propose dismissal because in his view there are no other acceptable alternatives that can address the problem satisfactorily without dismissals.

b) he has reasons for proposing dismissals as opposed to other alternatives.

c) before proposing the dismissal, he has considered other alternatives and has rejected them.

d) he has reasons for rejecting other alternatives and is ready to articulate them.

Section 189 contemplates that, when the employer initiates the s 189 consultation process, he contemplates the dismissal of one or more of his employees for operational requirements; that is why already in paragraph (b), (c) and (d) of sec 189(1) there are references to "proposed dismissals". So what s 189(1) contemplates is that the employer is already proposing a dismissal or dismissals when he initiates the s 189 consultation process.

[53] The fact that s 189(3)(b) contemplates that, when the employer initiates the consultation process in terms of s 189(1) of the Act, he has already considered alternatives to dismissals which he has rejected for certain reasons and requires him to disclose the reasons why he rejected such alternatives does not mean that such alternatives cannot be revisited in the consultation process. Of course, they can be because the other consulting party or parties may view them as potentially viable solutions. Obviously, the employer may have strong views on such alternatives because he will have had an opportunity to consider them already and will have already rejected them before. For the employer to pretend as if he has no views on such alternatives would be dishonest because he will already have formed some or other view on them. However, what will be required is that the employer should consider honestly and properly whatever the other consulting party may have to say on such alternatives and change its mind or view on them if the other consulting party

comes up with sufficiently persuasive arguments for the employer to change. Before considering such alternatives, the employer may have found it necessary to launch some or other research or investigation into the viability of such alternatives and may, therefore, seem to have strong views on them because it has considered them properly and thoroughly.'

[150] The LAC concluded that[37]:

> 'In the light of the above I conclude that there is nothing wrong with an employer coming to the consultation table with a predisposition towards a particular method of solving the problem which has given rise to the contemplation of dismissal of employees for operational requirements. What is critical is that the employer should nevertheless be open to change its mind if persuasive argument is presented to it that that method is wrong or is not the best or that there is or may be another one that can address the problem either equally well or even in a better way. He should engage in a joint problem-solving exercise with the other consulting party or parties.'

[151] In short, the LAC found that an employer may have strong views on alternatives because the employer would have had an opportunity to consider and reject them already and for the employer to pretend as if it has no views on such alternatives would be dishonest, because it would already have formed some or other view on them. However, what will be required is that the employer should consider honestly and properly whatever the other consulting party may have to say on such alternatives and change its mind or view on them if the other consulting party comes up with sufficiently persuasive arguments for the employer to change. *In casu,* the Plaintiff could not come up with sufficiently persuasive arguments to avoid his retrenchment. That does not equate to a *fait accompli.*

[37] Ibid at para 55.

Severance pay

[152] The Plaintiff's pleaded case is that the Defendant refused to engage him and to consult on the issue of his severance benefit.

[153] In my view, there is no merit in this complaint.

[154] It is evident that in the section 189 notice, Babcock proposed severance pay in accordance with the Basic Conditions of Employment Act[38] (BCEA) and the Main Agreement's dispensation, namely one week's remuneration for each completed year of service.

[155] The transcript of the consultations held also show that the issue of severance pay was canvassed and discussed. It was raised by the Plaintiff in the third consultation meeting and he wanted the MD to raise the issue with Babcock's CEO and to revert on the possibility of a separation agreement. The Plaintiff requested that the proposed severance pay of one week's remuneration for each completed year of service be reconsidered and that he be paid more. This request was motivated by the Plaintiff and he stated that his request was based on his feeling that he had contributed significantly to Babcock, he added a lot of value over the years, he was 55 years old which was *"the worst age in the worst economy to be retrenched. I am a 55 year old white male and it will probably take me a year to find another job."* Mr Vaughan undertook to raise the issue with the CEO the following day.

[156] On 30 September 2020, Mr Vaughan sent an email to the Plaintiff, giving him feedback, following the meeting held on 28 September 2020. He was informed that: *'Your request that the company considers increasing the current severance package of one week's salary for every full year of service completed with the company has been denied'.*

[38] Act 75 of 1997.

[157] In the final consultation meeting, Mr Vaughan reported back on the request for an improved severance pay to be paid, and he confirmed that the request was denied. This was perceived by the Plaintiff as there being '*no will to soften or mitigate the risks of retrenchment'.* Mr Vaughan responded that *'the overriding thing is that they still want to treat everybody the same, because there's also some other people that are unfortunately in the same position here, you know that were with the company for a long time and it is a standard thing across the board for everybody. That is the way I understand it. That they wouldn't like to single out certain people for fairness'.*

[158] The fact that the Plaintiff's request for an increased severance benefit to be paid to him was denied does not mean that there was no proper consultation on the issue. The Defendant wanted to treat all retrenched employees the same, by paying the prescribed statutory severance pay to all of them. The Plaintiff did not get what he had requested, but that does not mean that the issue was not consulted on, nor does it mean that it was unfair. On the contrary, the Defendant's refusal to pay him more was to ensure fairness and equality among all retrenched employees.

[159] The Plaintiff further claims the sum of R 84 797.89 as the shortfall in the severance pay which was paid to him. His claim is that the severance pay was not paid in terms of section 41(1) of the BCEA in that the severance pay was calculated on the Plaintiff's basic remuneration, excluding benefits, and not on his gross remuneration, inclusive of all benefits.

[160] Mr Hlope testified that the Plaintiff's severance pay was calculated as one week's remuneration for every completed year of service, and the Plaintiff had 13 years of completed service. His severance pay was R 244 975,48 and it was calculated on the Plaintiff's basic salary only (R 81 595), excluding his benefits.

[161] The Plaintiff testified that his total remuneration was R 107 000 per month, including his benefits and that his severance pay should have been calculated on his total remuneration, instead of his basic salary only.

[162] The Plaintiff explained that his total weekly remuneration was R 24 795,85, which should have been multiplied by 13 weeks' severance pay, which equals R 322 346,05. He was paid severance pay of R 244 975,48, which leaves a shortfall of R 77 370,57.

[163] In my view, there is merit in this part of the Plaintiff's claim.

[164] Section 41 of the BCEA provides for severance pay, and section 41(2) provides that:

> 'An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements… severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.'

[165] Section 41(2) of the BCEA provides the default position.

[166] In *Barrier v Paramount Advanced Technologies (Pty) Ltd*[39] *(Barrier),* the LAC considered the issue of severance pay and held that:

> '[32] It is generally accepted that a fair severance allowance, upon the termination of employment for operational requirements, is one based (at least) on the employee's length of employment with the employer and his (or her) remuneration.
>
> [33] Section 41(2) of the BCEA deals with severance pay. The section in particular (as has been mentioned above, albeit in paraphrasing) provides as follows: "An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements, or whose contract of employment terminates or is terminated in terms of section 38 of

[39] (2021) 42 ILJ 1177 (LAC).

the Insolvency Act, 1936 (Act No. 24 of 1936) severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35."

[34] The section is relatively unambiguous. An employer who dismisses an employee, inter alia, for operational reasons is obliged to pay that employee severance pay, the amount of which, at least, must be equal to one week's remuneration for every completed year of continuous service with that employer.'

[167] Prior to its amendment in 2002[40], section 35, which is referred to in section 41(2), dealt with the calculation of remuneration, and section 35(5) specifically provided for the calculation of remuneration for the purposes of severance pay and provided that:

'(5) For the purposes of calculating an employee's …. severance pay in terms of section 41 an employee's remuneration—

(a) includes the cash value of any payment in kind that forms part of the employee's remuneration unless the employee receives that payment in kind; but

(b) excludes—

(i) gratuities:

(ii) allowances paid to an employee for the purposes of enabling an 15 employee to work; and

(iii) any discretionary payments not related to the employee's hours of work or work performance.'

[168] The Minister of Labour has passed regulations in terms of section 35(5) of the BCEA to assist with the determination of whether a particular category of payment forms part of an employee's remuneration for purposes of the calculation of *inter alia* severance pay. The Government Notice No. 691 in Government Gazette 24889 of 23 May 2003, published the notice in terms of

[40] The Basic Conditions of Employment Amendment Act 11 of 2002.

section 35(5) of the BCEA and stipulates what benefits must be included and which benefits must be excluded for purposes of calculating severance pay. A housing or accommodation allowance or subsidy, a car allowance, an employer's contributions to pension, provident fund or similar schemes, medical aid contributions and funeral or death benefit schemes are specifically included.

[169] The Defendant indeed excluded categories of benefits which should have been included for purposes of calculating the Plaintiff's severance pay, and in considering only the basic salary, the Defendant indeed short-paid the Plaintiff in respect of his severance pay.

<u>Notice pay</u>

[170] The Plaintiff claims damages in the sum of R 30 440,62 as the shortfall in respect of the payment of notice pay. This claim is premised on a breach of contract in respect of notice period.

[171] It is trite that in a contractual claim for damages, the plaintiff has to plead the terms of the contract, the breach thereof and the damages suffered as a result of the breach. A plaintiff must specify the terms that were breached, the nature of the breach, as well as the nature and extent of the damages suffered as a result of the defendant's breach.

[172] In *Toyota SA Motors (Pty) Ltd v Nzuza and another*[41], the LAC considered the difference between a claim in terms of the LRA and the BCEA and held that in claims made in terms of the BCEA:

> '….Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory where a dismissal is found to be substantively unfair, specific performance

[41] (2020) 41 ILJ 908 (LAC) at para 10.

consequent upon a breach is not, and generally it is a discretionary relief. Furthermore, in terms of the LRA an employee whose dismissal is found to be unfair will receive compensation. In an action in terms of s 77, if the employee is able to prove a breach by the employer the only amount s/he will receive is the loss s/he has proved to have suffered as damages. Here s/he must also show that s/he has tried to mitigate the damages etc. There is no way s/he can receive damages equal to the amount they would have earned from the date of the breach to the date that they would eventually have retired! This absurd prayer which is so regular seems to take leave of the basic rule that one is awarded damages that are proved not what you would have been paid had you remained in your employ till retirement.'

[173] In *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana*[42] *(Ramabulana),* the LAC confirmed that an employee proceeding in terms of the BCEA must prove the damages she has suffered to obtain monetary relief and held that:

> 'With regard to damages, as I said earlier, there was a duty upon the respondent to prove the quantum of her damages — to simply demand damages in the amount that she would earn until her retirement is totally misconceived. Damages in a breach of contract needs to be proved, she failed to prove any, nor does she allege that she has been out of work from the date of her employment being terminated. In the circumstances, had the respondent proved a breach, she would not in law be entitled to any relief.'

[174] In *KwaZulu-Natal Tourism Authority and Others v Wasa*[43]*,* the LAC held that:

> 'The employee did not seek compensation based on her dismissal being unfair in terms of the Labour Relations Act (LRA), she sought damages in terms of the BCEA consequent upon a breach of contract. She instituted a civil claim for damages. Two issues arise in this

[42] (2019) 40 ILJ 2723 (LAC) at 32.
[43] (2016) 37 ILJ 2581 (LAC) at para 32.

respect. Firstly, she had to prove that she suffered damages as a consequence of the breach, that there is a link between the damages she suffered and the breach; and, secondly, the quantum of damages she actually suffered.'

[175] In his statement of case, the Plaintiff stated that he was advised on 2 October 2020 that he would be retrenched. He was not required to work out his notice period, and he was paid up until 9 November 2020, being his date of dismissal.

[176] His pleaded case is that his employment was terminated in breach of his contract of employment. This is so because the contract of employment should have terminated on one month's notice, with effect from 15 October 2020 and terminating on 15 November 2020. His contract was, however, terminated on 9 November 2020.

[177] There are two material difficulties with the claim.

[178] First, the Plaintiff did not plead the necessary averments to support his claim for breach of contract. He failed to plead the specific and relevant terms of his contract, he failed to plead a breach and to establish that he had suffered damages as a result of the breach.

[179] The Plaintiff's pleaded case in respect of the damages he seeks is limited to the following:

> 'The applicant was advised on 2 October 2020 that he would be retrenched. He was not required to work out a notice period and was paid up until 9 November 2020 ('the date of dismissal').'
>
> 'The applicant's employment was terminated in breach of the contract of employment. In terms thereof his employment should have been terminated on one month's notice with effect from 15 October 2020 terminating on 15 November 2020. Rather his employment was terminated on 9 November 2020.'

> 'damages in the amount of R 30 440,62 been the shortfall in remuneration due to the applicant as a result of the respondent's breach of the contract of employment in respect of the notice period, together with interest thereon calculated at the prime rate as from the date of dismissal.'

[180] The Plaintiff testified that the clause in his contract of employment, dealing with termination, provided that the contract may be terminated by either party giving one month's notice in writing on either the first or the 15th day of the month. For this reason, the Respondent could only have given him notice on either the first or the 15th of October 2020. The notice was given on 2 October, his last day of work was 9 October 2020, and he was paid notice pay until 9 November 2020.

[181] According to the Plaintiff, the notice could have only been given on 15 October 2020, and he had to be paid notice pay until 15 November 2020. He claims the shortfall as damages.

[182] The second and fatal difficulty with this claim is that the Plaintiff was unable to prove the damages he claims to have suffered.

[183] The contract of employment provided for termination on a month's notice. It is evident that the Plaintiff was given and paid a month's notice. The question which leaps out is what damages did the Plaintiff suffer when he was paid a month's notice, as per the contractual terms?

[184] Even if I were to find that the Defendant acted in breach of the termination clause of the employment contract by not giving notice on 1 or 15 October 2020, the only relief open to the Plaintiff was either specific performance or damages. In view of the facts of this case, it would not be appropriate to grant specific performance – in any event, the Plaintiff seeks damages. Regarding damages, the Plaintiff had to prove the quantum of his damages, as damages in a breach of contract need to be proved. The Plaintiff failed to prove any

damages. Even if he had proved a breach, he would not in law be entitled to any relief.

[185] The Plaintiff could not adduce an iota of evidence to prove his damages, and in my view, it is because he did not suffer any damages. To uphold the claim for damages, would have the result that the Plaintiff is paid in excess of the month's notice period, as he would be given notice on 2 October, his last day of work was 9 October, yet he seeks to be paid beyond a month's notice up to 15 November 2020.

[186] The Plaintiff could not prove that he was entitled to more than a month's notice, which is what he effectively claims, and he could not prove that he indeed suffered any damages in respect of the payment of his notice pay. He was paid a month's notice, which is what he was entitled to.

[187] It is clear that in pursuing this claim, the Plaintiff lost sight of the fact that when he seeks damages, he must be able to prove the damages he had suffered as a result of the breach of the contract. To show that there was a breach of contract in respect of the date on which notice was given is not enough. As the LAC has held, he had to first prove that he suffered damages as a consequence of the breach, that there is a link between the damages he suffered and the breach; and, secondly, the quantum of damages he actually suffered. None of this was proved, and in my view, this claim should not have been pursued.

<u>Costs</u>

[188] Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness.

[189] This Court has a broad discretion to make orders for costs.

[190] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having

been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and* others,[44] it was emphasised that:

> '… unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

[191] Mr Short, for the Plaintiff, submitted that costs should follow the result.

[192] Mr Bleazard, for the Defendant, left the issue of costs in the discretion of this Court.

[193] In *Zungu v Premier of Province of KwaZulu-Natal and Others,*[45] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[194] This is a case where I have to strike a balance, and in my view, the interest of justice will be best served by making no order as to costs.

[195] In the premises, I make the following order:

<u>Order</u>

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[44] (2012) 33 ILJ 2117 (LC) at para 176.
[45] (2018) 39 ILJ 523 (CC).

1. The Plaintiff's case is dismissed, save for his claim in respect of severance pay;

2. The Defendant is ordered to pay the Plaintiff severance pay in the sum of R 77 370,57;

3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Plaintiff: Mr D Short from Fairbridges Wertheim Becker Attorneys

For the Defendant: Mr B Bleazard from Brian Bleazard Attorneys