



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA37/2024

In the matter between:

FAEROES PROPERTIES (PTY) LTD

Appellant

and

**SOUTHERN AFRICAN CLOTHING &
TEXTILE WORKERS UNION**

First Respondent

M E RATOPOLA & 27 OTHERS

Second to Further Respondents

Heard: 4 March 2025

Delivered: 5 June 2025

Coram: Savage AJP, Sutherland and Davis AJJA

Summary: Procedural fairness – party may approach Labour Court expeditiously in terms of section 189A(13) in large-scale retrenchment to ensure fair procedure – if not Court not to determine procedural fairness of dismissals - dismissals substantively unfair – no fair reason shown - meaningful alternatives to retrenchment not considered – selection of employees subjective and unfair – while reinstatement the primary remedy, on facts no reason to interfere with finding that not reasonably practicable – appeal and cross-appeal dismissed - compensation order stands - no order of costs

JUDGMENT

SAVAGE AJP

Introduction

[1] This appeal, with the leave of the Court *a quo*, is against the judgment and orders of the Labour Court in which the dismissal of the second to further respondents, (the employees) was found to be procedurally and substantively unfair. The appellant, Faeroes Properties (Pty) Ltd, was ordered to pay each of the respondents R38 860,32 in compensation, equivalent to 12 months' remuneration. The respondents cross-appeal against the compensation order seeking that it be substituted with an order of reinstatement.

[2] The appellant farms avocados and macadamia nuts commercially in the Tzaneen area. It employed 88 permanent employees and 11 seasonal workers prior to the dismissal of the employees on 21 April 2020 based on its operational requirements. Prior to their dismissal, the employees worked predominantly in the appellant's macadamia orchards. In 2015 the appellant harvested close to 500 tons of macadamia nuts. During 2019 and 2020 Tzaneen and its surrounding areas suffered a drought which placed strain on the appellant's macadamia trees. The appellant had to thin-out and prune such trees, which led to lost yield, decreasing from 500 to 184 tons over the period. To remain financially solvent the appellant implemented cost-cutting measures, which led it to identify an operational need to reduce labour costs. Despite contemplating a large-scale retrenchment of employees and being assisted by a labour consultant in the process, the appellant issued no notice to employees in terms of section 189(3) of the Labour Relations Act¹ (the LRA).

¹ Act 66 of 1995 (as amended).

[3] On 28 February 2020 the appellant instructed employees to elect three additional employee representatives to an existing workers' committee to represent employees in future meetings. Although the respondent employees were members of the South African Clothing and Textiles Union (SACTWU), no recognition agreement had been concluded and the union was not involved in the consultation process. On 4 March 2020, at a meeting with committee members, the reduction in yield and staff numbers were discussed as concerns. Committee members reported these discussions to employees.

[4] On 9 March 2020 a second meeting was held with committee members at which retrenchments were discussed given the appellant's reduction in yield and the drought. The alternatives stated by the appellant at the meeting were voluntary retirement, retrenchment of half the staff *"using LIFO"*, the implementation of a short work week, the possible transfer of staff and possible *"contract/extra picking"*. These were reported to employees but were rejected.

[5] On 13 March 2020, a third meeting was held with committee members who reported back to the appellant that one employee would take early retirement but that the proposal of short time or a shortened work week was not accepted. The names of 37 employees earmarked for retrenchment with effect from 21 April 2020 were thereafter read out to employees by a committee member.

[6] On 16 March 2020 a document was signed by the appellant and committee members. Before its signature, the appellant's labour consultant stated that it *"was given to the representatives in order to assist them to communicate the outcome"*. Ms Phalane, who testified at the trial for the appellant, stated that she did not read the agreement before signing it and that she signed it as confirmation only of the fact that she was part of the meeting. The document purported to be a retrenchment agreement in which it was recorded that no employees were to take the early retirement option, no transfer possibilities were available, a short-work week was not acceptable to employees and that LIFO was used to select employees for retrenchment, with certain skills retained. It stated further that of the 99 employees employed by the appellant, one employee had taken early retirement, 11 were contractors employed until 31 March 2020 and 37 employees were to be retrenched

with effect from 21 April 2020. The document noted that one week's severance pay would be paid to retrenched employees and contract picking, when available, would be offered to those retrenched.

[7] Mr Kgatla, a foreman and committee member, testified for the appellant that no reason was given by the appellant why employees had to be elected to the committee. He said that the appellant explained that "*we could see for ourselves that the production has gone down*", "*the issue of the drought*" was problematic and that the intention was "*to reduce the number of trees*" by chopping them down. In addition, committee members were told by the appellant that "*the money that he is paying us as employees was so high, to such an extent that he was no longer making any profit*".

[8] On 21 April 2020, 37 employees were retrenched by the appellant, including the 28 second to further respondents. Aggrieved with their dismissals, the respondents referred a dispute an unfair dismissal dispute first to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation and thereafter to the Labour Court for adjudication.

Before the Labour Court

[9] At the commencement of the trial on 3 May 2022 the appellant objected to the respondents' late filing of the their statement of case. The matter was removed from the roll to allow the respondents the opportunity to seek condonation for the late filing, which was granted by the Labour Court on 7 February 2023. The appellant thereafter raised a special plea before the Labour Court that the CCMA had lacked jurisdiction to issue the certificate of outcome on the basis that the referral to the CCMA had been out of time and no application for condonation had been filed or determined.

[10] In support of this special plea the appellant placed the contents of the CCMA file in the matter before the Labour Court with, Mr Aubrey Tshirobha, a senior CCMA case management officer, called to testify to confirm the contents and explain a note on the file which recorded that condonation was required. Mr Tshirobha confirmed

that an email from Mr Daniel Kgwale from SACTWU dated 21 April 2020, during the national Covid-19 lockdown, was included in the file, the subject matter of which email reflected that it concerned a LRA7.11 referral. The attachment to this email was named SCAN_20200421_13390879.pdf. The appellant argued that the file name of the attachment differed to the attachment named SCAN_20200421_130944359.pdf sent to it on 21 April 2020 by SACTWU. The CCMA's certificate of outcome dated 6 July 2020 recorded that the dispute had been received by the CCMA and stamped on 5 June 2020.

[11] The Labour Court found that the respondents had demonstrated that the referral to the CCMA was timeously made given the evidence that it had been sent to the CCMA on 21 April 2020, and despite the date of referral recorded by the CCMA on the certificate. It was found therefore that the CCMA had held the necessary jurisdiction to conciliate the dispute and the special plea was dismissed.

[12] The appellant thereafter raised a preliminary point relating to the jurisdiction of the Labour Court to determine the procedural fairness of the dismissals given that the respondents had failed to seek the protection of section 189A(13) in relation to alleged procedural unfairness. It contended that the respondents were therefore barred from taking issue with the procedural fairness of their dismissals at the trial.

[13] The Labour Court found that the appellant had undertaken a large-scale retrenchment exercise in that it intended dismissing half of its 99 employees but that it failed to comply with the provisions of section 189A. The preliminary point raised by the appellant was rejected on the basis that since section 189A was not applied by the appellant, the provisions of section 189A(13) were not available to the respondents; and that the objectives of section 189A would be defeated if an employer was permitted to hide behind section 189A(13) in its own retrenchment process when it had not complied with the provisions of the LRA.

[14] The appellant raised still a further preliminary point at the trial that the dispute had been settled following the signature of a settlement agreement generated on 16 March 2020 and signed by committee members on behalf of the respondents. The Court rejected this contention, finding that such committee members not only lacked

authority to sign the purported agreement on behalf of the respondents but did not understand what they were signing. The document was therefore found not to constitute a settlement of the dispute and the preliminary point was dismissed.

[15] Turning to the merits of the dispute, the Labour Court concluded that the dismissal of the respondents was procedurally unfair given that the appellant had failed to comply with the provisions of section 189. The Court noted that the appellant's own witness accepted that the approach taken by the appellant fell far short of compliance with section 189 and that the members of the committee with whom the appellant sought to consult on behalf of the respondents were not aware that they were elected to represent their fellow employees. It was consequently concluded that the dismissals of the respondents had been procedurally unfair.

[16] As to the substantive fairness of the dismissals the Court took account of the fact that the appellant presented its decision to reduce the workforce by 50% to the respondents without demonstrating how this decision had been reached. It did not disclose information relating to dwindling production caused by drought and was found to have applied unexplained arbitrary and subjective criteria in deciding to retrench the respondents. It was found therefore that the respondent had failed to prove the existence of a fair reason for the dismissals and that the retrenchment of the respondents had therefore been substantively unfair.

[17] In considering appropriate relief, the Court noted that although the LRA contemplates reinstatement as the primary remedy, it was not reasonably practical to reinstate the 28 respondents when only 17 employees would have work. Payment of the maximum compensation of 12 months' remuneration was ordered on the basis that this was the most appropriate remedy. No order of costs was made in the matter.

On appeal

[18] The appellant took issue with all of the findings of the Labour Court on appeal. It contended that the Court had erred in dismissing its special plea that the CCMA had lacked jurisdiction to conciliate the dispute and in dismissing its preliminary

points raised. It contended that the dismissals were both procedurally and substantively fair, that the Court had erred in rejecting its contention that the appellants were prevented from raising procedural fairness given that they had not brought an application in terms of section 189A(13) and in finding the dismissals were substantively unfair despite evidence of the drought and the financial difficulties faced by the appellant. The appellant sought that the appeal be upheld with no order of compensation made even if the dismissals were to be found to have been unfair; and that in relation to the cross-appeal, since it was not reasonably practicable to reinstate the employees, the cross-appeal ought to be dismissed with costs.

[19] The respondents opposed the appeal on the basis that the evidence before the Court indicated that the dispute had been timeously referred to the CCMA and that the preliminary points raised were without merit. Since the appellant had not issued a notice in terms of section 189(3), the Labour Court had correctly found that that the appellants were not obliged to invoke the provisions of section 189A(13) and it was clear that the dismissals were procedurally unfair. As to the substantive fairness of the dismissals, the absence of any evidence to support the claim that from an operational perspective retrenchments were necessary, the Court could not be faulted for finding the dismissals were substantively unfair.

[20] The employees sought that the cross-appeal be upheld on the basis that reinstatement was reasonably practicable in circumstances in which the appellant had failed to adduce satisfactory evidence to establish that it was futile or impossible. The Labour Court, the employees contended, erred in not finding as much and in using the wrong test in considering whether reinstatement was reasonably practical as opposed to considering its reasonable practicability, as required by section 193(2)(c).

Discussion

[21] The Labour Court correctly dismissed the appellant's special plea that the unfair dismissal dispute had been referred to the CCMA out of time and that such delay had not been condoned by the CCMA. The evidence of SACTWU's union official was that on 21 April 2020 the respondents' unfair dismissal dispute was

referred to the CCMA, with the referral form attached to the email sent to the CCMA during the national Covid-19 lockdown. Given this evidence and the proof that an email with the subject line indicating that a dispute was referred and with a scanned document attached to the email, it was reasonable and plausible to infer that the dispute was referred timeously to the CCMA, with the document attached to the email being the dispute referral form. The fact that a differently named attachment, which contained the same dispute referral form was sent to the appellant does not justify a conclusion, without more, that the document attached to the appellant was not the same dispute referral form sent to the CCMA; and the fact that the dispute was referred to the CCMA during the national Covid-19 lockdown explained why it was not stamped on the date it was received, but only thereafter, by the CCMA. It followed that on a conspectus of the evidence before the Labour Court, the Labour Court correctly rejected the appellant's special plea as being without merit.

[22] Also without merit is the appellant's contention that the Labour Court erred in dismissing its preliminary point raised that the dispute had been settled following the signature by committee members on 16 March 2020 of an agreement on behalf of the respondents. Not only did the purported settlement agreement not record that it was agreed that the retrenchments were effected in a procedurally and substantively fair manner, but it was not evident that the committee members held the requisite authority to enter into the agreement on behalf of the respondents, or that they understood what they were signing. The Labour Court cannot therefore be faulted for finding that the dispute had not been settled and in dismissing the preliminary point raised.

Procedural fairness

[23] Section 189 and 189A provide for the procedures to be followed by an employer when contemplating retrenchments to ensure a fair and consultative process, minimise job losses and mitigate the impact of retrenchments on employees. Section 189(1) requires an employer, when it contemplates retrenchments, to consult the employees likely to be affected, or their representatives nominated for that purpose. Section 189(2) requires the employer and other consulting parties to "*engage in a meaningful joint consensus-seeking*

process and attempt to reach consensus” on the issues listed in section 189(2)(a) to (c) which include appropriate measures to avoid dismissals, to change the timing of dismissals, to mitigate the adverse effects of the dismissals and the method for selecting employees to be dismissed. Section 189(3) requires that the employer “*must issue a written notice*” inviting employees to consult with it “*and disclose in writing all relevant information*” regarding the proposed retrenchments. There is no dispute that the appellant failed to do so.

[24] Section 189A regulates dismissals for operational requirements by employers with more than 50 employees. Section 189A(2) requires that an employer must give notice of termination of employment in accordance with the provisions of the section, that an employee may participate in a strike and an employer in a lock out, and that the consulting parties may agree to vary the time periods for facilitation or consultation.

[25] There is no dispute that, despite being assisted in the process by a labour consultant, the appellant issued no section 189(3) notice. It therefore failed to notify the respondents as required by section 189(3) that it intended to embark on a retrenchment exercise. No facilitator was appointed, the appellant did not invite the respondents in writing to consult with it regarding the proposed retrenchments, nor did it disclose in writing all relevant information to the respondents regarding such retrenchments.

[26] In *Steenkamp v Edcon Ltd (Steenkamp I)*² the Constitutional Court emphasised that the sole underlying purpose of section 189A(13) is to provide a convenient and expedient mechanism to ensure that a fair procedure is followed during retrenchment large-scale consultations. The provision provides special protection to be given to employees and to protect the integrity of the procedural requirements of dismissals governed by section 189A.³

² *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) (*Steenkamp I*).

³ *Steenkamp I* at para 163.

[27] Section 189A(13) permits a party to approach the Labour Court in a large-scale retrenchment expeditiously to ensure that a fair procedure is followed. In *Steenkamp v Edcon Ltd (Steenkamp 1)*⁴ the Court noted that:

'In terms of [section 189A(8)(b)(ii)(bb)] only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred to it in terms of section 191(5)(b)(ii). It reads:

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

[28] The Court found that in its operation, subsection (18) is not harsh in that subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure.⁵ Given as much, it is clear that the Labour Court is barred later from determining the procedural fairness of a large-scale retrenchment when it is approached to adjudicate a dispute in terms of section 191(5)(b)(ii). There is no dispute that the employees failed to invoke the protection available to them in section 189A(13). Consequently, on the authority of *Steenkamp I*, it was not open to them to seek that the Labour Court adjudicate their dispute about the procedural fairness of their dismissal for operational requirements. In finding differently, the Labour Court erred.

Substantive fairness

[29] A dismissal based on the employers' operational requirements must be for a fair reason in addition to being effected in accordance with a fair procedure.⁶ This Court in *SACTWU and others v Discreto (A Division of Trump and Springbok Holdings)*⁷ (*Discreto*) stated that:

⁴ *Steenkamp I* at para 64.

⁵ *Steenkamp I* at para 158.

⁶ Section 188(1).

⁷ [1998] 12 BLLR 1228 (LAC) at para 8.

‘As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer’s ultimate competence to make a final decision on whether to retrench or not....For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer’s ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer’s ultimate decision on retrenchment, it is not the court’s function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.’

[30] Thereafter in *BMD Knitting Mills (Pty) Ltd v SACTWU*⁸ (*BMD Knitting Mills*) it was stated:

‘The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists

⁸ (2001) 22 ILJ 2264 (LAC) at para 19.

on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test’.

[31] In 2002 the LRA was amended to introduce section 189A(19) which provided that a retrenchment is substantively fair if “*it was operationally justifiable on rational grounds*”. The Constitutional Court in *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited*⁹ indicated in relation to section 189A(19) that it was considered to be a deeming clause directing the Labour Court, in the case of large-scale retrenchments, to equate fairness with rationality.

[32] In *SA Transport and Allied Workers Union v Old Mutual Life Assurance Co SA Ltd*¹⁰, it was stated that the notion of proportionality ought to form part of the assessment of the substantive fairness of a dismissal for operational requirements. The Court took the view that the decisions in *Discreto* and *BMD Knitting Mills* were “*not entirely at odds with one another ...[but were] simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context.*”¹¹

[33] Section 189A(19) was repealed in 2014, with the explanatory memorandum to the LRA Amendment Bill stating that this was because:

‘Specifying the test to be applied in section 189A retrenchment has led to uncertainty about whether and to what extent this should apply to cases of retrenchment where section 189 applies. The courts should retain their discretion to develop the jurisprudence in this area in the light of the

⁹ [2018] ZACC 44; (2019) 40 ILJ 87 (CC); 2019 (3) BCLR 412 (CC); [2019] 4 BLLR 323 (CC); 2019 (3) SA 362 (CC) at para 26.

¹⁰ [2005] ZALC 50; (2005) 26 ILJ 293 (LC).

¹¹ *Ibid* at para 58.

circumstances and facts of each case and to articulate general principles applicable to all retrenchment cases.’

[34] Recently, in *National Union of Food Beverage Wine Spirits and Allied Workers v Coca Cola Beverages South Africa (Pty) Ltd*,¹² this Court reiterated that fairness rather than correctness is the applicable benchmark, with a court obliged to determine the rationality between the retrenchment and the company’s commercial objectives and, in particular, whether the decision to retrench was a reasonable option in all the circumstances. It is against this standard that the substantive fairness of the dismissals in the current appeal are considered.

[35] While the appellant’s case before the Labour Court turned on its commercial *rationale* for the retrenchments based on the financial distress due to the drought, on appeal it contended that its case was always that in order to remain financially solvent it had to reduce costs, including changing fertilizer products, water saving measures and the cost of labour. It stated that it was visibly clear that the macadamia yield had decreased from previous years and that documents put up, which were dated April 2022, supported its commercial rationale for the retrenchments.

[36] A fair reason for retrenchment is one that is *bona fide* and rationally justified,¹³ informed by a proper and valid commercial or business rationale.¹⁴ The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair.¹⁵ From the outset the appellant failed to provide any reasons or information in writing to employees to explain or justify the need for the proposed dismissals. Before the Labour Court its attempt to prove the substantive fairness of the retrenchments was equally lacking, with limited documentary evidence from third parties dated April 2022 produced for purposes of the trial for the first time as evidence of the yield reduction and

¹² [2024] ZALAC 26; (2024) 45 ILJ 1813 (LAC) at para 41.

¹³ *Johnson & Johnson (Pty) Ltd v CWU* [1998] 12 BLLR 1209 (LAC).

¹⁴ *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC); *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 36.

¹⁵ *Havemann v Secequip (Pty) Ltd* (JA91/2014) [2016] ZALAC 53 (22 November 2016).

consequent financial strain it faced. No supporting documentation was attached to these documents and no proper evidence of financial or profit decline was produced.

[37] What is clear is that the appellant failed to prove a rational connection between the retrenchments and the company's commercial objectives, or that the decision to retrench was a fair. While Mr Bramley claimed that the work available was mainly avocado harvesting and avocado and macadamia pruning which the respondent employees would not have been suitable to perform, there was no objective basis advanced why this was necessarily so or why the retrenchment of the employees was a reasonable option. From the record it is apparent that meaningful alternatives to retrenchment were not properly considered and that the manner in which employees were selected for retrenchment was patently subjective and unfair. As much was apparent from Mr Bramley's evidence that, in addition to LIFO and the retention of skills, employees were selected for retrenchment on his subjective determination of consideration of "*familiarity, trust, aptitude, attitude [and] performance*".

[38] Having regard to all of the circumstances, it followed that the retrenchment of the employees was not proved to have been effected for a fair or rational reason and the Labour Court cannot be faulted for finding the dismissal of the employees to have been substantively unfair.

Remedy

[39] The appellant appeals against the compensation order made by the Labour Court on the basis that given the financial state of its business, the order made should be revisited by this Court on appeal. It relied on the evidence of its operations manager, Mr Burelli, who stated that:

'2020 was still below the 200 tons, still not getting to the 400 tons due to the drought. In 2021 we had 30 percent hail damage, which still kept us below the 200 tons. In 2022 we had another hail damage, which was 100 percent, where we dropped to below 100 tons and it was in the region of 90 tons. Then in 2023 this current season, we had a stick bug infestation in the macadamia crop, which impacted the quality. Farm waste quality should be over 10

percent, around 11 percent, whereas in this case we went up to 36 percent farm waste. Unsound kernel should be in the region of six percent, whereas again we were over 10 percent. Certain macadamia factories were not allowing product that was over 10 percent unsound, so there were certain orchards that we couldn't pick. This obviously impacted the yields again, which was still below the 200 tons, where we should have been at the 400 tons. So, volume was down. Quality was down and then to top matters, the price dropped below 50 percent, so there was a huge price crash. This had to do with the stagnation of the Chinese market, who is a main exporter and then in the European market consumer buying behaviour was down, due to high cost of living. So, this had a major impact from 2020 through to 2023. Operational loss was first in 2020 and then the proceedings years to 2023 where it seems the biggest operational loss were being forecasted.

[40] Mr Burelli continued that:

'In 2023, once again because of the financial state of the business management then reviewed again all cost 20 items and one of that was going back to retrenchment where we retrenched 39 employees in August 2022. Currently in Fairview 1 we have 15 employees after the recent retrenchment of 39.'

[41] In their cross-appeal, the employees seek that the Labour Court's order of compensation be set aside and substituted with an order of retrospective reinstatement given that their dismissals were substantively unfair and they were therefore entitled to reinstatement as the primary remedy. In addition, the employees contend that in finding that reinstatement was not "*reasonably practical*", the Court applied the incorrect test when the correct test was whether it was "*reasonably practicable*" in terms of section 193(2)(c).¹⁶

¹⁶ Section 193(2) states: '*The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –*

- (a) *the employee does not wish to be reinstated or re-employed;*
- (b) *the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
- (c) *it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
- (d) *the dismissal is unfair only because the employer did not follow a fair procedure.'*

[42] Reinstatement is considered the primary remedy in cases of unfair dismissal.¹⁷ Given as much, and in considering which of the remedies in section 193(1) is appropriate,¹⁸ regard must be had to section 193(2)¹⁹ on the basis that:

‘[a] court or commissioner must order the appellant to reinstate or re-employ the respondent unless one or more of the circumstances specified in section 193(2)(a) - (d) exist, in which case compensation may be ordered depending on the nature of the dismissal.’²⁰

[43] Whether reinstatement or re-employment “is not reasonably practicable” under section 193(2)(c) requires a determination of whether it is feasible or not.²¹ Where it is said not to be reasonably practicable, compelling evidence must be adduced that it is futile or impossible.²²

[44] The court or commissioner exercises a discretion when ordering reinstatement, even where there is no specific evidence or pleadings to that effect.²³ Any factor considered relevant to the determination of whether or not such non-reinstatable conditions exist is to be taken into account.²⁴

[45] The uncontested evidence of Mr Burelli was that:

‘Reinstatement wouldn’t be possible, due to the financial state of the business and furthermore, management made a decision during 2023 due to the price

¹⁷ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (Equity Aviation)* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) at para 33.

¹⁸ Section 193(1) states:

‘If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—

- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
- (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
- (c) order the employer to pay compensation to the employee.’

¹⁹ *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374 (CC) (Toyota) at para 135.

²⁰ *Equity Aviation* (supra at fn 17) at para 33.

²¹ *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha and others* [2017] 4 BLLR 384 (LAC) at para 11.

²² *SACCAWU v Woolworths (Pty) Ltd* [2019] 4 BLLR 323 (CC) at para 49.

²³ *Booi v Amathole District Municipality and Others* [2021] ZACC 36; [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC); 2022 (3) BCLR 265 (CC) at paras 36-7.

²⁴ *Mediterranean Textile Mills* at para 30, confirmed in *Booyesen v Safety and Security Sectoral Bargaining Council* [2021] ZALAC 7; (2021) 42 ILJ 1192 (LAC) at paras 16-7.

crash and the quality of the macadamias, where we have removed 10 to 20 hectares of macadamias and the remaining 80 hectares of macadamias we aggressively pruned. So, we removed every second tree and then brought down the height by four metres with the view that that would be abandoned for the next three years.'

[46] There was no dispute that additional retrenchments had taken place subsequent to the retrenchment of the respondent employees; and that the appellant had identified its task as being to "*regrow the farm*", a process which could take from four to seven years.

[47] The fact that the employees' retrenchment was substantively unfair does not necessarily warrant a conclusion that reinstatement must follow. On the material before the Labour Court there were weighty reasons accompanied by tangible evidence advanced by the appellant from which it was apparent that reinstatement was not feasible and that it would be futile, if not impossible. This included the challenges the farm faced and the fact that further retrenchments had been effected following the dismissal of the employees. In such circumstances, reinstatement was clearly not reasonably practicable. In exercising its discretion to order the maximum compensation, the Labour Court cannot be faulted and there is no reason to interfere with such order on appeal.

[48] Having regard to considerations of law and fairness, there is no reason to order that costs be paid in the matter.

[49] For these reasons, the following order is therefore made:

Order

1. The appeal and cross-appeal are dismissed with no order of costs.

Savage AJP

Sutherland AJA and Davis AJA agree.

APPEARANCES:

APPELLANT:

P H Kirstein

Instructed by Thomas & Swanepoel Inc.

RESPONDENTS:

J Phillips

Cheadle Thompson & Haysom Inc.

LABOUR APPEAL COURT