THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS432/20

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) — **First Plaintiff**

THULISILE SITHOLE & 11 OTHERS — **Second to Further Plaintiffs**

and

CHABO AND JOUBERT AIR CONDITIONING (PTY) LTD — **Defendant**

Heard: 12 – 14 May 2025

Oral Arguments: 13 June 2025

Delivered: 26 June 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 26 June 2025.

JUDGMENT

MAKHURA, J

Introduction

[1] The second to further plaintiffs (individual plaintiffs) are members of the first plaintiff, the National Union of Metalworkers of South Africa (NUMSA). They were employed by the defendant in various positions until their dismissal, on a month's notice, for operational requirements on 1 June 2020. The plaintiffs have now referred this claim in terms of section 191(5)(b)(ii) of the Labour Relations Act[1] (LRA), seeking an order that their dismissal was substantively unfair. In terms of the remedy, they seek retrospective reinstatement or compensation.

Material facts

[2] The defendant is a private company with areas of operation in the maintenance, construction and/or installation of air conditioning systems. On 28 January 2020, it issued a letter to its employees titled *"notice of anticipated retrenchment"*. The letter informed the employees that:

> 'Due to economic circumstances and the need for restructuring within the company, the employer is considering retrenchments.
>
> In order to ensure due compliance with the law and accepted industrial relations practice, the company now intends consulting you formally regarding the contemplated restructuring, alternatively retrenchment.
>
> You are further invited to provide your written concerns and proposals regarding the contemplation to restructure. It should be emphasized that no final decision has yet been taken in this regard nor will any final decision be taken in the absence of full and proper consultation with you the employee and/or your representative. Obviously, the view adopted by the company has received serious consideration and has not been adopted lightly.

[1] Act 66 of 1995, as amended.

> We fully appreciate that you may be concerned and apprehensive about the possible consequences which the contemplated restructuring will have upon you and we are committed to conclude the process as soon as reasonably possible. We rely on your co-operation to conclude the process in order to meet the representation deadline.
>
> Should you require any further information or assistance or have any proposals regarding the above, please do not hesitate to contact the writer.'

[3] Copies of the above letter were handed to the employees on 28 January 2020. The employees also signed an attendance register document, which contained a paragraph stating that the defendant was:

> 'issuing the appropriate notification of its intention to embark on a retrenchment exercise, as such the company … hereby initiated the process with employees and employee representative. Further to the process [the defendant] wishes to enlist the services of the CCMA to facilitate the process in terms of Section 189A of the Labour Relations Act.'

[4] On 24 February 2020, the defendant addressed a letter to the Metal and Engineering Industries Bargaining Council (MEIBC). This letter was also submitted to the Commission for Conciliation, Mediation and Arbitration (CCMA) by the defendant for the purpose of facilitation. The letter stated that the defendant considered the following alternatives - implementation of short time and suspension or reduction of payment of bonuses. Further, the letter recorded that the defendant employed 70 employees and that the number of employees likely to be affected was 16, made up of 6 in Bethal, 6 in Sasol (Secunda) and 4 in Sasolburg.

[5] Under the proposed selection criteria, the defendant stated that four positions in Bethal have become redundant, that two positions would be affected and removed because there was more than one employee employed in the same position and that the last-in-first-out (LIFO) criterion would apply to the two positions. In Secunda, three

positions had become redundant, and three would be affected and removed as there was more than one employee in the same position.

[6] The first facilitation meeting was held on 16 March 2020 at the defendant's premises in Bethal. At the meeting, the union and the non-unionised employees' representatives raised several questions, including the rationale for the contemplated retrenchment, which were not answered. In his outcome report, the facilitator directed the defendant to answer the questions in writing by emailing them on 1 April 2020. Further, the defendant was directed to prepare the draft agreement to be made available in the next meeting scheduled for 3 April 2020. The meeting was adjourned accordingly.

[7] Due to the lockdown regulations in response to Covid-19 pandemic[2], the second meeting scheduled for 3 April 2020 did not take place. It is common cause that the defendant did not email its responses to the queries on 1 April 2020.

[8] The second meeting only convened on 14 May 2020. On that day, all parties were present except the NUMSA shop stewards, Thabo Khoza (Khoza) and Thulisile Sithole (Sithole). The meeting was again held in Bethal. The defendant's evidence, led through its only witness, Catharina Elizabeth Viljoen (Viljoen) was that the meeting did not proceed because of the absence of the shop stewards, an allegation that was disputed by the plaintiffs and its only witness, Jabulani Makhathini (Makhathini), who testified that the facilitator made the decision to adjourn the meeting after hearing arguments on the expiry of the 60 day period. NUMSA, so Makhathini testified, argued for the extension of the 60 days or for the 60 days to expire on 30 June 2020 in order for the parties to achieve a meaningful consultation and the defendant argued against the extension of the 60 days, stating that it was possible to finalise the consultation process within May 2020.

[2] With effect from midnight on 26 March 2020, the national state of disaster was declared in terms of the Disaster Management Act 57 of 2002 in response to the Covid-19 pandemic and in an attempt to prevent and reduce the spread of the coronavirus, which inter *alia* restricted movement and gathering of people.

[9] The facilitator's outcome report corroborates the plaintiffs' version. It recorded that the parties made submissions regarding the expiry of the 60 days and that the CCMA would revert on the issue. Further, the facilitator stated that the *"reasons and draft agreement"*[3] were to be discussed on 21 May 2020.

[10] On 18 May 2020, the facilitator issued a written ruling on the request for extension of the 60-day period to 30 June 2020. He ruled that the 60 days would expire on 31 May 2020.

[11] At the meeting of 21 May 2020, NUMSA stated that it intended, in light of the facilitator's ruling, to approach the Labour Court to seek an extension of the period. Makhathini testified that this was because the parties had not consulted on the relevant issues until that date. Makhathini testified further that they were of the view that they needed more time, as they had not even consulted on the reason or rationale for the retrenchment. In his outcome report, the facilitator recorded NUMSA's intention to approach the Labour Court and adjourned the meeting to 28 May 2020 *"unless an interdict is received from the Labour Court"*. On the same date, the defendant also informed the meeting that it had added 5 more employees to the number of employees who are likely to be retrenched, and that the number had increased from 16 to 21.

[12] It is common cause that NUMSA did not approach the Labour Court as per its intention on 21 May 2020. At the meeting of 28 May 2020, NUMSA again requested an extension of the 60-day period to 30 June 2020. The defendant objected to the request and submitted that:

> 'corona virus resulted in an extra 5 weeks salary to be paid. Further extension will result in further retrenchments. (currently 21)
> To extend will not be reasonable for the employer…
> Employer's auditor to disclose financial information to the Auditors of NUMSA…'

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[3] This refers to the directive issued by the facilitator on 16 March 2020, which directed the defendant to email the responses to the union and non-unionised employees' queries, which included the reason for the contemplated retrenchment.

[13] As per the above, which is recorded in the facilitator's outcome report, the defendant undertook to provide the financial information to NUMSA. In terms of the pre-trial minute, the parties agreed that the financial information in the defendant's possession was sent on Saturday, 30 May 2020. There is a dispute between the parties on the financial information that was sent by the defendant on 30 May 2020. The defendant's case is that it sent the financial statements whereas the plaintiffs' version was that it only received extracts of the 2018/19 financial statements and management statements for the period March 2019 to end of August 2021. It is common cause that the audited financial statements for the period March 2019 to February 2020 were only signed on 17 February 2021. Therefore, the defendant could not have sent the audited financial statements on 30 May 2020.

[14] The defendant's evidence on its financial position focused specifically and ultimately on the summary of its revenue and income statements. For the 2019/20 financial year, the management statements submitted to the plaintiffs on 30 May 2020 showed the defendant's estimated loss as at 31 August 2019 to be R3 797 832.00. However, the audited financial statements show that the respondent turned a profit of R1 009 155.00 for the 2019/20 financial year despite its estimated loss.

[15] Both Viljoen for the defendant and Makhathini for the plaintiffs testified that as at the last facilitation meeting on 28 May 2020, the parties had not discussed the rationale for the contemplated retrenchment, the alternatives and the selection criteria. On 1 June 2020, the defendant issued termination letters to the individual plaintiffs and 9 other employees.

[16] Subsequent to the retrenchment, the defendant re-employed Odwa Kulati (Kulati) and Lucky Mahlangu. Viljoen led evidence to this effect and further that Kulati was subsequently dismissed for misconduct. He referred an unfair dismissal dispute, which was resolved before the CCMA. Viljoen's evidence that these two employees were re-employed was not placed in dispute.

<u>Evaluation</u>

Dismissal for operational requirements

[17] Section 189A of the LRA applies to large-scale retrenchment.[4] This section is applicable in this case because the defendant employed more than 50 employees at the time of retrenchment and had contemplated retrenching more than 10 employees. Employers who contemplate retrenching employees in terms of section 189A must still comply with section 189. The notice issued in terms of section 189(3) must disclose to the consulting parties all relevant information. This relevant information must include the *reason* for the proposed retrenchment or dismissal, the *alternatives* considered before proposing the dismissal and the *reasons* for rejecting each of those alternatives, the *number of employees* likely to be affected and the *job categories* in which they are employed and the *proposed selection criteria* for the employees to be dismissed. These issues must be discussed during the consultation process.[5]

[18] There are other requirements that the employer must comply with, which are not contentious in this matter.[6] Section 189A(2) of the LRA provides that:

> '(2) In respect of any dismissal covered by this section –
>
> …
>
> *(c)* the consulting parties may agree to vary the time periods for facilitation or consultation;
>
> *(d)* <u>a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation</u>.'

[19] As already mentioned above, the defendant in this case requested the assistance of a facilitator and this triggered the application of section 189A(7). In terms of this section, where the facilitator has been appointed and 60 days have elapsed from the date of the section 189(3) notice, the employer may give notice to the employees of termination of the contracts of employment.

[4] Section 189A(1) of the LRA.
[5] Section 189(2).
[6] Section 189(3)(e) – (j).

[20] The Labour Appeal Court (LAC) in *SA Clothing & Textile Workers Union & others v Discreto - A Division of Trump & Springbok Holding*[7] *(Discreto)*, has provided the following guidance when determining dismissal disputes based on operational requirements. It said that:

> '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 scrutinizing 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 have 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, <u>properly taking into account what emerged during the consultation process</u>.'[8]

[7] [1998] ZALAC 9; (1998) 19 ILJ 1451 (LAC).
[8] Ibid at para 8.

[21] It is clear from the above that the requirement for a consultation process has both procedural and substantive purposes. Secondly, the decision to retrench must be informed by genuine commercial or business rationale. Third, the court's duty is to scrutinise the consultation process, without encroaching on the employer's prerogative to operate its business. In carrying out this duty, the court has to determine whether the consultation process requirement was satisfied and whether there was a genuine commercial or business rationale which operationally justified the retrenchment. Fourth, in determining whether a dismissal based on operational requirements, the court should take into account what emerged during the consultation process.

The onus

[22] The plaintiffs have challenged the dismissal on the basis of non-compliance with section 189 of the LRA – that there was no rationale for the retrenchment, there was no meaningful consultation, the defendant failed to consider alternatives and that the selection criteria were not fair and/or were not applied fairly.

[23] The onus is on the defendant to show on a balance of probabilities that the dismissal was fair for inter *alia* it complied with section 189, that is, that there was a need for the retrenchment, there was meaningful consultation, that it considered alternatives and that it adopted the selection criteria that were fair and/or objective and applied the criteria fairly and objectively.

The meaningful joint consensus-seeking process

[24] The plaintiffs have alleged that there was no meaningful consultation before the defendant's decision to dismiss. In *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[9] *(Kotze)*, the LAC made the following observation:

> '(e) A fair retrenchment process imposes an obligation on the employer to disclose to the employees all relevant information and that obligation has since

[9] [1999] ZALAC 25; (2000) 21 ILJ 129 (LAC.

been codified in the terms set out in s 189(3) of the Labour Relations Act 66 of 1995 (the Act).

(f) The duty to engage in meaningful and genuine consultation is owed to all employees from the lowest to the executive level.

(g) The process's fairness to the employee finds expression in the recognition of its prerogative to make the final decision to retrench...

<u>(h) The final decision to retrench must be informed by what transpired during consultation. That is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but it also has a substantive purpose</u>. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by commercial or business rationale... '[10] (Own emphasis)

[25] The Constitutional Court in *Solidarity obo Members v Barloworld Equipment Southern Africa and others*[11] weighed in on the concept meaningful consultation. It held that:

'[43] The concept of a meaningful joint consensus-seeking process that is envisaged in section 189(2) is not defined in the LRA. In *Atlantis Diesel Engines*, the Appellate Division had the following to say about it:

"[This] approach requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached. It proceeds on the premise that consultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management only after there has been consultation in good faith…"

[44] Sufficient information must be disclosed to make the process of consultation meaningful. This includes information concerning the need for retrenchment, as well as information that will assist the employees or Trade

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[10] Ibid at para 18; *Discreto* at para 8; see also *Ndhlela v SITA Information Networking Computing BV (Incorporated in the Netherlands)* [2014] ZALCJHB 64; (2014) 35 ILJ 2236 (LC) at para 45, where the Court held that there are no bright lines distinguishing process from substance in the area of dismissals for operational requirements and that the procedure mandated by s 189 has a substantive purpose.

[11] [2022] 9 BLLR 779 (CC); (2022) 43 ILJ 1757 (CC) at paras 43 – 44.

Union, as the case may be, in making contributions about ways of avoiding retrenchment.'

[26] The evidence led by both parties shows that what emerged from the four meetings held is that the parties did not even get to or discuss the first item on the agenda, which is the rationale or need for the retrenchment. The purported section 189(3) notice issued to the employees on 28 January 2020 lacked the necessary and relevant details. During the first meeting on 16 March 2020, the union and non-union employees' representatives raised specific questions, which included the rationale for the retrenchment, which the defendant was directed to provide the answers thereto. There is no evidence when the answers, which are part of the record before this Court, were provided to the union and non-union employees. However, what is common cause is that the parties did not discuss these answers or the rationale for the dismissal during any of their meetings until the dismissal of the individual plaintiffs.

[27] When the union requested an extension of the period to meaningfully discuss the issues, the defendant refused and decided to proceed with the dismissal.

The rationale

[28] In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*[12] *(BMD Knitting Mills)*, the LAC held that:

> '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 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,

[12] (2001) 22 ILJ 2264 (LAC); [2001] 7 BLLR 705 (LAC) at para 19; see also *Discreto* and *Kotze*.

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.'

[29] In *Super Group Supply Chain Partners v Dlamini and Another*[13], the LAC affirmed the employer's right to dismiss for operational requirements, but warned that employers are:

> '… obliged to have a *bona fide* economic rationale for the dismissal and to comply with the provisions of sections 189 as well as section 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimise the effect of the dismissal. The consultation envisaged by the Act is a 'meaningful joint consensus-seeking process' in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.'[14]

[30] Accordingly, the defendant must show that it had a bona fide reason to dismiss the individual plaintiffs for operational requirements. Its duty does not end there. It must further show that it complied with the retrenchment consultation provisions, in this case sections 189 and 189A. It is common cause that whatever the rationale was for the retrenchment, it was not discussed, or meaningfully discussed between the parties during the consultation process. The request by the union to extend the period to afford the parties an opportunity to discuss the relevant issues fell on deaf ears because, so the defendant submitted, it had already paid the employees an extra five weeks salary and was not prepared to incur an additional one month salary on the employees.

[13] [2012] ZALAC 25; (2013) 34 ILJ 108 (LAC).
[14] Ibid at para 24.

[31] In my view, considering that there were no discussions on the substance of the retrenchment, the defendant's refusal to extend the 60-day period was unreasonable. The defendant's argument that the union frustrated the facilitation meetings and caused the delay is baseless and unsustainable. The defendant was fixated on the expiry of the 60-day period at the expense of the meaningful joint consensus-seeking process.

[32] Insofar as the undiscussed rationale for the retrenchment is concerned, this can be gleaned from the purported section 189(3) notice issued to the employees on 28 January 2020, the letter to the MEIBC dated 24 February 2020, the defendant's answers to the queries raised by the union and non-union employees and the financial information provided to the union on 30 May 2020.

[33] The purported section 189(3) notice is thin on any information employers are required to disclose. It simply refers to *"economic circumstances"* and then immediately informed the employees that it intends to retrench and invited them to provide their *"written concerns and proposals regarding the contemplation to restructure"*. Further details of the retrenchment were contained in the letter to the MEIBC, which referred to the number of employees likely to be retrenched, which was 16, the severance package offered, alternatives considered and the selection criteria.

[34] In its answers to the questions raised by NUMSA and non-union employees' representatives, the defendant cited the reduction in its work from September 2019. In Secunda, where eight of the 12 individual plaintiffs were based, the defendant stated that the site it operated at was split between the defendant and another contractor during November or December 2019. The work in Sasolburg had ceased, where it had already retrenched seven of the eleven employees. The four that remained behind were working on the last orders. The defendant stated further that the move outside the borders of the Republic of South Africa was not possible because it had completed the work in the parts of Africa it operated in.

[35] On the request for the defendant's past three years' financial statements, the defendant refused to disclose this information, citing it as confidential information. It is however common cause that the defendant provided NUMSA with some financial information on 30 May 2020, as already articulated above. The extract of the management reports for the six months period ending August 2019 shows the defendant's estimated loss to be R3 797 832.00. It is, however common cause that despite this staggering estimated loss recorded in the management reports, by the end of February 2020, the defendant had turned a profit of R1 009 155.00 for the 2019/20 financial year. There is no evidence why, on the face of the defendant's finances, it still proceeded with the retrenchment at the time that it did.

[36] In *Faeroes Properties (Pty) Ltd v SA Clothing and Textile Workers' Union and Others*[15], the LAC clarified:

> 'A fair reason for retrenchment is one that is *bona fide* and rationally justified, informed by a proper and valid commercial or business rationale. 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. 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…'

[37] None of the individual plaintiffs worked in Sasolburg, where the site was closed. The alleged split of the contract was not substantiated by any documentary evidence. As a result, the Court is not placed in a position to scrutinise the extent of the defendant's financial loss as a result of this loss of part of the contract. Further, the fact that the defendant may have lost part of the contract, which, per Viljoen's evidence, was reinstated later in 2020 as the contracted party for the other part, could not perform, does not axiomatically lead to a fair reason for the retrenchment.

[38] The defendant was required to show that the dismissal of the individual plaintiffs was operationally and commercially justifiable on rational grounds. Whether there are

[15] [2025] ZALAC 35 at para 36.

rational grounds that justify the retrenchment is considered with regard to what emerged from the consultation process. Nothing or very little emerged during the consultation process. The defendant rejected, unreasonably so in my view, an opportunity to extend the consultation period. What emerged in the courtroom during trial is of no assistance to the defendant’s case because whilst its estimated loss in its management statements for the financial year 2019/20 showed a deficit of over R3.7 million, it turned a somewhat bleak outlook into a profit of over R1 million by the end of February 2020.

[39] Accordingly, the defendant failed to show that its decision to dismiss the individual plaintiffs for operational requirements was based on a commercial or business rationale. This renders the dismissal of the individual plaintiffs substantively unfair.

Alternatives

[40] The letter informing the employees of the contemplated retrenchment is silent on the alternatives considered by the defendant. The issue of alternatives is raised in a letter to the MEIBC, where the defendant stated that it had considered the implementation of short time and suspension or reduction of payment of bonuses as alternatives.

[41] The Court heard that the alternatives were rejected on the basis that the defendant could not implement short time because its *“clients do not work short hours and [the defendant is] governed by the hours they work”* and that due to Covid-19, it was working on limited personnel and the administration employees were already on short time.

[42] It is common cause that there was no discussion on this issue during the consultation process. In the absence of consultation on the alternatives, the details relating to alternatives considered and reasons for rejecting those alternatives, I am unable to find that the retrenchment of the individual plaintiffs was operationally

justifiable on rational grounds or that the defendant had properly considered alternatives before its decision to retrench.

[43] Other than being informed in a letter to the MEIBC dated 24 February 2020 that 16 employees would be affected, and during the facilitation meeting on 21 May 2020 that the number had increased to 21, the plaintiffs were never at any stage informed prior to the dismissal letters on 1 June 2020 which employees and/or job categories would be affected and likely to be retrenched. There was no information disclosed concerning the reasons why each individual plaintiff had to be retrenched, which would have enabled the plaintiffs to make any contribution to the consultation process by inter *alia* proposing ways of avoiding the retrenchment. The plaintiffs were kept in the dark as to who or which job categories were affected.

[44] The absence of consultation on substantive issues and the rejection of the request to extend the consultation means that this important aspect of the consultation process was never discussed. This has a direct impact on the substantive fairness of the dismissal and renders the retrenchment of the individual plaintiffs substantively unfair.

Selection criteria

[45] It is common cause that the defendant did not consult and/or discuss the selection criteria to be applied, and there was therefore no agreement. However, the absence of an agreement on selection criteria is not determinative of the issue. The employer may still proceed to select employees to be retrenched, using fair and objective criteria.[16] The defendant proceeded to select employees to be retrenched using its own selection criteria.

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[16] Section 189(7) of the LRA; *Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd* [2006] 2 BLLR 142 (LAC); (2006) 27 ILJ 292 (LAC) at para 84; *Super Group* at para 26.

[46] Viljoen testified that the selection criteria adopted and applied by the defendant were LIFO, skills and age. She testified further that the defendant consulted a labour consultant to assist with the application of the criteria. With regard to age, she testified that the retirement age is 60 years, but that if an employee is *“still fit enough”*, he or she could continue working. She justified this criterion by stating that the nature of work is manual, which includes removal and/or lifting the air conditioners and placing them in a bakkie or trolley. She said that if a person is nearing retirement age, they lose strength, and the defendant opted to make use of the employees with more strength and/or younger in order to *“generate money”*.

[47] Thulisile Sithole (Sithole) was employed as a Quality Controller. The evidence of Viljoen was that Simon Otto was more skilled and had more years of service compared to Sithole. After the split of the contract, the defendant decided to retain Otto because of his years of experience and skills. The split of the contract in itself is not sufficient to show a genuine commercial rationale to retrench an employee. The defendant had to go further and show how the split affected its operations and why Sithole could not be placed in any alternative position. Further, when the defendant was re-appointed to the contract later in 2020, Sithole was not offered re-employment.

[48] Julius Mngwevu (Mngwevu) was 62 years old at the time of the retrenchment. He had worked for the defendant for 13 years. Daniel Mahlangu (Daniel Mahlangu) was 59 years old and had 2 years of service with the defendant. Viljoen testified that Mngwevu was selected for retrenchment because he had passed the age of retirement, being 60 years and that Daniel Mahlangu was selected because he was close to retirement with only two years of service. During cross-examination, it was established that Flip Louw (Louw), who was over 69 years and Leonard Stoffberg (Stofberg), who was over 62 years, were not retrenched despite their age. The defendant applied age as a selection criterion to Mngwevu, who was 62 years of age, on the basis that he had reached the retirement age. However, despite applying age to Mngwevu, the defendant did not apply the same criterion to Louw (69) and Stofberg (62). The defendant elected to retrench Mngwevu, and not retire him. It had a duty to comply with the retrenchment provisions.

Daniel Mahlangu was retrenched because he was 59 years old and had only 2 years' service. Viljoen's testimony was that because the defendant's work is largely manual, if an employee is nearing retirement age, he would not have the necessary strength and that the defendant would prefer an employee with more strength. This same logic clearly did not apply to Louw and Stoffberg.

[49] Fanyana Shongwe (Shongwe) was retrenched because, according to Viljoen and her recollection, he was Mngwevu's assistant, and because the defendant had decided to retrench Mngwevu, they had to *"let him (Shongwe) go"*.

[50] Lucky Mahlangu and Odwa Kulati (Kulati) were re-employed in or around 2022. That these two plaintiffs were re-employed is not in dispute. Lucky Mahlangu was subsequently disciplined for misconduct and dismissed. The dismissal dispute was later settled before the CCMA. Kulati was re-employed because he was, according to Viljoen, a good worker. His re-employment allegedly followed the defendant's re-appointment to the part of the contract it lost to another contractor in November or December 2019.

[51] Oscar Sebalabala (Sebalabala) allegedly had a lung problem. He was an assistant mechanic or technician at the workshop. There were allegedly two reasons for retrenching Sebalabala. First, his lung problem, and second, the defendant decided to close down its mechanical workshop and utilise a third party local workshop to service and maintain its vehicles.

[52] Insofar as the reason was the lung problem, there was no evidence on how this affected his employment and how it would affect his employment in any other alternative position. There are no details regarding this alleged lung problem, when he started having the problem, when the defendant became aware of it, how it prohibited him from carrying out certain duties and to the extent it was sufficiently serious to affect his job, why he was not subjected to an incapacity enquiry.

[53] The second reason, the closure of the workshop, also applied to Makhosi Mahlangu, who was also an assistant mechanic. The defendant's evidence was that it had closed the workshop, and all three employees in the workshop were retrenched. It then utilised the local workshop to service its cars. No details have been provided on how this saved the defendant any money, if at all. The defendant did not provide the cost to the company payable to three employees, including Sebalabala and Makhosi Mahlangu, in comparison with how much it paid to the local workshop. The defendant did not provide any evidence to show that its decision to close the workshop and outsource the services, which led to the retrenchment of Sebalabala and Makhosi Mahlangu, was properly and genuinely justifiable by a commercial or business rationale.

[54] Bongani Hosi (Hosi) was retrenched allegedly because he had only worked for the company for 6 months. This evidence by Viljoen was proven wrong during cross-examination, and she conceded that Hosi had 3 years' service with the defendant at the time of his dismissal. No further explanation was provided for selecting Hosi.

[55] Zama Prudence Maseko (Prudence) had worked for the defendant for 6 years at the time of her dismissal. In 2018, she went on maternity leave. In her absence, the defendant employed her sister, Zandile Maseko (Zandile). When Prudence returned after maternity leave, the defendant continued to employ Zandile to work half day. Prudence continued to work her normal hours. The defendant decided to keep Zandile and selected Prudence for retrenchment. During cross-examination, Viljoen, who earlier testified that she was involved in the retrenchment process from its inception to the end and who also testified that they were advised on the selection criteria by the labour consultant, distanced herself from this decision. She said that she was not involved in the decision to retrench Prudence. Mr Swanepoel conceded in his arguments that there was no justification for selecting Zandile over Prudence.

[56] Gabriel Mthethwa (Mthethwa), who worked as an assistant and had 6 years of service, was retrenched because other assistants had better skills. No further

information was placed on the skills that these other assistants possessed. However, Viljoen's testimony was that the assistants were trained on the job.

[57] Khoza worked for the defendant for approximately 10 years. The decision to select him was not explained.

[58] From the above, it is clear that the retrenchment was allegedly based on the loss of part of the contract with Sasol Secunda and the closure of the workshop which both led to redundancy. In *South African Breweries (Pty) Ltd v Louw*[17], the LAC held that the fact that the position is declared redundant does not axiomatically lead to the dislocation of the incumbent employee and that such an employee may only be fairly dismissed after the opportunities to relocate him or her in another suitable post have been explored and exhausted.

[59] In *casu*, the defendant failed to adduce evidence to show the commercial rationale for the retrenchment. Second, the parties did not discuss the alternatives nor did the defendant lead evidence alternatively sufficient evidence to show why the alleged redundant employees could not be relocated to other positions. Third, the defendant adopted unfair and/or subjective selection criteria and further failed to apply the selection criteria fairly and objectively.

[60] The selection criteria of age, health and/or strength or fitness, and the application thereof were subjective, inconsistent, flippant and arbitrary. Accordingly, the selection criteria were therefore unfair, there was no fair reason for selecting the individual plaintiffs for retrenchment, and this renders the dismissal of the individual plaintiffs substantively unfair.

Appropriate remedy

[17] [2017] ZALAC 63; (2018) 39 ILJ 189 (LAC) at para 19.

[61] The defendant's unchallenged evidence was that the retirement age is 60 years. Whilst there were other employees who worked way beyond this retirement age and were not dismissed, it is my view that it would not be reasonably practicable to reinstate Mngwevu and Daniel Mahlangu, who the evidence established that at the time of their dismissal 5 years ago, they were 62 and 59 years of age respectively. The appropriate remedy for these plaintiffs is compensation. There are no facts before this Court to deprive them of maximum compensation for their substantively unfair dismissal.

[62] The defendant further led unchallenged evidence that Kulati and Lucky Mahlangu were re-employed. Mr Masutha, for the plaintiffs, submitted that he was unable to take their claim any further. These two plaintiffs' claims must therefore fail.

[63] The remaining eight individual plaintiffs seek reinstatement. Section 193 of the LRA deals with remedies for unfair dismissal. Section 193(2) enjoins this Court to reinstate a substantively unfairly dismissed employee unless he or she does not wish to be reinstated or it is not reasonably practicable to reinstate the employee.

[64] In *DHL Supply Chain (Pty) Ltd v De Beer NO and Others*[18], the LAC reiterated that:

> 'The Labour Relations Act 66 of 1995 prescribes reinstatement unless it is proven to be intolerable or impracticable. (Section 193(2)*(b)* and *(c)*). The evaluation of this question is clinically objective, having regard to the balance of fairness between employer and employees and a decision is the outcome of the exercise of a discretion: (*Equity Aviation Services (Pty) Ltd v CCMA & others* 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC) at para 48). A decision in terms of this Section is therefore, in part, a value judgment and, in part, a factual finding made upon the evidence adduced about the unworkability of a resumption. Core equitable values demand that a worker who is not proven to be guilty of dishonesty should not forfeit a valuable and scarce employment opportunity. This is precisely the reason why reinstatement is the primary and default remedy,

[18] [2014] ZALAC 15; (2014) 35 ILJ 2379 (LAC) at para 21.

unless it is displaced by factors that serve to outweigh its underlying rationale. Those factors are intolerability or impracticability and set high thresholds.'

[65] In *Mthethwa v Commission for Conciliation, Mediation and Arbitration and others*,[19] the LAC, in finding that upon a finding of substantive unfairness, retrospective reinstatement is the primary remedy to be awarded, said the following:

> 'The word "must" in section 193(2) should be interpreted to import a peremptory meaning as to when the Labour Court or arbitrator is obliged to either reinstate or re-employ a dismissed employee. The arbitrator's discretion is, therefore, fettered if none of the factors enlisted in subsection (2) of section 193(a)-(d) is absent. In other words, in that event, reinstatement or re-employment is obligatory to be ordered against a finding of unfair dismissal. In this instance, none of the factors listed in section 193(2)(a) to (c) were established against the appellant.'[20]

[66] This being a no-fault dismissal, this Court may refuse to reinstate the employees if it would not be reasonably practicable to do so. The LAC in *Mediterranean Textile Mills (Pty) Ltd v SACTWU & others (Mediterranean Textile Mills)*,[21] held that where the dismissal is found to be substantively unfair, the default position is retrospective reinstatement, that is, that *"the dismissed employee who is ordered to be reinstated should ordinarily be entitled to his or her full arrear remuneration (the so-called "back pay") as if the dismissal never took place"*[22]. The LAC emphasised, with reference to the Constitutional Court judgment in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others*[23] that fairness is a yardstick. It held:

> '... It is notable that in terms of the earlier decisions, section 193(2) was construed as placing an onus on the employer to establish the existence of any of the non-reinstatable conditions, but since *Equity Aviation* there has been a constitutional paradigm shift in this regard. Rather than departing from the premise of a legal onus, the focal point and overriding consideration in this

[19] [2022] 9 BLLR 814 (LAC); (2022) 43 ILJ 1786 (LAC).
[20] Ibid at para 17.
[21] [2012] 2 BLLR 142 (LAC); (2012) 33 ILJ 160 (LAC).
[22] Ibid para 27.
[23] (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC).

enquiry should be the underlying notion of fairness between the parties and that "[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment". In further amplification, the Constitutional Court, in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others*, stated:

"The remedies awarded in terms of s 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation*. That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an enquiry into fairness with notions of a legal onus."'[24]

[67] Viljoen testified that the defendant has recovered, though not to the level it was before the retrenchment. At the time of retrenchment, the defendant had just turned a profit of over R1 million at the end of February 2020. Regardless, this Court has found that the decision to retrench these individual plaintiffs was substantively unfair. In other words, there was no fair reason to dismiss, and further, there was no fair reason to dismiss these individual plaintiffs. Whilst the defendant produced the financial statements until the 2020/21 financial year, it has elected not to provide any evidence of its current financial position, nor any evidence whatsoever to show that it would not be reasonably practicable to reinstate the individual plaintiffs. Accordingly, there are no facts before this Court upon which to deviate from the statutory obligation and deprive the qualifying individual plaintiffs of reinstatement.

[68] Should the reinstatement apply retrospectively in the sense that the qualifying individual plaintiffs must be paid their wages from the date of dismissal to the date of reinstatement?

[69] Mr Swanepoel, appearing for the defendant, sought to persuade the Court that the onus is on the employee to show that he is entitled to retrospective reinstatement and backpay. He relied on the Constitutional Court judgment of *Maroveke v Talane NO*

[24] *Mediterranean Textile Mills* at para 28.

& others[25] *(Maroveke)*. The issue before the Constitutional Court in *Maroveke* was the appropriate amount of backpay due to an employee whose dismissal had been declared unfair.[26] The Court reiterated that the purpose of reinstatement is to restore the position of the employee to that which he or she would be in but for the unfair dismissal.[27] I do not understand *Maroveke* to place an onus on the dismissed employee to prove his or her rands and cents earned from other means or employers subsequent to the date of his or her dismissal.

[70] To the extent that the defendant sought to suggest that the individual plaintiffs should have led evidence of their earnings, that is not the applicable legal principle. If the defendant wanted to use any unverified information about the individual plaintiffs' employment and earnings subsequent to their dismissal, it should have in my view sought discovery of this information. It did not do so nor did it lead any admissible evidence to this effect. As a result, there is nothing before this Court to show when any of the individual plaintiffs obtained employment, the details of their new employers or other means of income, the costs of obtaining that employment or generating that income, the costs of transportation to and from work compared to that of going to the defendant's workplace, the salary at the new employer compared to the salary at the defendant and any benefits associated with the new employment compared to the defendant. These are some of the relevant factors that would have to be taken into account if this Court is to deprive a substantively unfairly dismissed employee his or her backpay. Accordingly, I am unable to deprive the individual plaintiffs their full backpay in the absence of evidence to demonstrate that the above evidence.

<u>Costs</u>

[71] The plaintiffs were represented by a trade union official. The issue of legal costs does not arise. Insofar they called a second witness and later withdrew her from the witness stand and her evidence before the start of cross-examination, which in the

[25] (2021) 42 ILJ 1871 (CC); [2021] 9 BLLR 851 (CC).
[26] Ibid at para 1.
[27] Ibid at para 26.

Court's view was a waste of time and resources, they argued that there is an on-going relationship between NUMSA and the defendant. I have considered that they are the successful party in these proceedings and that the time wasted was no more than 3 hours on the scheduled day of trial. No financial prejudice was suffered as the parties were required to appear on the day for continuation of the hearing of another witness' testimony. There shall be no order as to costs.

[72] In the premises, the following order is made:

<u>Order</u>

1. The claims by Odwa Kulati and Lucky Mahlangu are dismissed.
2. The dismissal of the individual plaintiffs, except Odwa Kulati and Lucky Mahlangu, by the defendant is declared substantively unfair.
3. The defendant is ordered to pay Julius Mngwevu and Daniel Mahlangu 12 months' compensation each calculated at the rate of their remuneration at the time of their dismissal on or before 31 July 2025.
4. The defendant is ordered to reinstate the following individual plaintiffs - Thulisile Sithole, Thabo Khoza, Oscar Sebalabala, Makhosi Mahlangu, Zama Maseko, Gabriel Mthethwa, Fanyana Shongwe and Bongani Hosi - retrospectively from 1 July 2020 on the same terms and conditions of employment that existed prior to their dismissal and without any loss of benefits.
5. The defendant is ordered to pay each of the individual plaintiffs mentioned in paragraph 4 of this order backpay calculated from the date of their dismissal until 7 July 2025, on or before 31 July 2025.
6. The individual plaintiffs mentioned in paragraph 4 of this order are ordered to report for duty on 7 July 2025 at 8h00.
7. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiffs: Mr NJ Masutha (Union official)

For the Defendant: Mr AJ Swanepoel

Instructed by: Jay Incorporated