



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 75/24

In the matter between:

SAHARA AFRICAN LIVING (PTY) LTD

Appellant

and

SOLIDARITY obo MEMBERS

Respondent

Heard: 23 September 2025

Delivered: 06 November 2025

Coram: Van Niekerk JA, Djaje AJA et Chetty AJA

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is a case, one of many, no doubt, about the employment-related consequences of the Covid-19 pandemic that swept the world in 2020. The appellant is in the business of providing aircraft and crew, mainly outside of the borders of the Republic of South Africa, including destinations such as Comoros,

Mozambique, Iraq and Sudan. The individual respondents, Burton, Steyn and Clark (the employees) are pilots, represented by their trade union Solidarity.

- [2] During March 2020, the national state of disaster declared by the President because of the pandemic had the result that commercial flights were prohibited, borders and other points of entry closed, and travel banned. Many countries introduced similar measures, with the result that the aviation industry was profoundly affected world-wide.
- [3] In consequence, the appellant introduced temporary measures to reduce the employees' remuneration, in return for their remaining employed. It is not in dispute that the variation was introduced by the appellant without any consultation with or agreement by the employees. Although the employees appear initially to have accepted these measures without protest, as the temporary period for which the measures were introduced became more extended, they became contested during the second half of 2020. Various attempts to resolve the impasse failed, and after a failed attempt at conciliation, the employees were ultimately retrenched, with effect from 31 July 2021.
- [4] In a dispute referred to the Labour Court, the employees contended that the reduction in their remuneration constituted a breach of their employment contracts, that their retrenchments were substantively and procedurally unfair, and that the appellant had failed to pay them their statutory notice pay.
- [5] The Labour Court delivered its judgment on 17 April 2024. The Court held that the appellant had breached the employees' contracts of employment for the period March 2020 to June 2021 and, in so doing, failed to comply with section 34 of the Basic Conditions of Employment Act¹ (BCEA). The Court held further that the retrenchment of the respondent employees was substantively and procedurally unfair, and that the appellant had failed to pay each of the employees their statutory notice pay of one months' remuneration. The Court awarded each of the employees the equivalent of three months' remuneration in

¹ Act 75 of 1997.

compensation for the breach of section 34, eight months' remuneration for their unfair retrenchment, and the equivalent of a month's remuneration as notice pay. The Court made no order as to costs.

- [6] The appellant appeals against the Labour Court's findings in respect of the contractual claims by Steyn and Clark, and the findings relating to the unfair retrenchment dispute. While the appellant did not appeal against the Labour Court's finding in Burton's favour, all three employees filed a cross-appeal against the Court's award of compensation and contending that they should have been awarded the difference between their contractual and actual remuneration for the period March 2020 to July 2021. This Court is entitled to decide the merits of that part of the Labour Court's order that Burton be compensated for what he alleged to be a breach of contract.

Background

- [7] The factual background is largely undisputed. The employees were permanently employed by the appellant as pilots. Steyn and Burton were engaged as captains; Clark was a senior captain. The employees were typically on-tour for periods of about eight weeks, and off-tour for about four weeks. Prior to March 2020, Steyn earned a salary of \$6 400 while on-tour, and \$3 200 while off-tour. Burton earned a salary of \$ 6000 on-tour, and \$ 2800 off-tour. Clark earned a salary of \$8 000 on-tour and \$5 000 off-tour, all calculated *pro rata* according to the number of days spent on- or off-tour in any given month.
- [8] As noted above, in mid-March 2020, with few exceptions, the aviation industry ground to a halt. Most countries began suspending both international and domestic flights. The appellant was largely prevented from conducting its business.
- [9] On 16 March 2020, the appellant advised its employees that there would be major disruptions to business and that while the nature and extent of the disruption was unknown, the impact of the Covid-19 pandemic was anticipated to

be severe. On 20 March 2020, the appellant addressed a communication to its employees, stating that they would receive their full salaries for the month of March 2020, but that from the next pay cycle, commencing on 26 March 2020, on-tour salaries would be reduced by 30%, and off-tour salaries would be reduced by 20%.

- [10] During the last week of March 2020, some of the appellant's employees, including Clark and Steyn, were placed on temporary layoff until further notice. On 24 March 2020, the appellant notified the employees that the 30% deduction for on-tour salaries and 20% reduction for off-tour salaries would take effect from the end of March 2020, and not from the end of April as previously communicated. Further, the appellant advised that off-tour salaries would be reduced to 50% for the pay period 26 March 2020 to 26 April 2020. On 26 April 2020, employees were advised that those of them who had not been temporarily laid off would only receive 50% of their salaries while on-tour and 50% of the normal subsistence allowance while on contract, for April 2020. The communication concluded:

'We understand the huge impact that this will have on our crew, however this situation is dire and beyond our control. Our goal is to keep the company alive and to keep as many jobs as possible so that when this crises (sic) passed we are in a position to move forward positively.'

- [11] On 2 April 2020, the appellant notified its employees regarding its operations and the prospect of TERS² payments. This state of affairs persisted beyond the easing of Covid-related restrictions during the latter half of 2020. On 22 November 2020, a group of the appellant's pilots, including the employees, clearly frustrated by the continued reduction in their remuneration for more than six months, submitted a grievance to the appellant. The grievance raised queries and complaints regarding the work situation and salary reductions, and concerns

² The Temporary Employer/Employee Relief Scheme.

that the employees had not been consulted about the reduction in their remuneration. The grievance included the following requests:

- '7. We require exact charity as to how long these measures will remain in force, and when will the employer review the position and consult with us on this matter?...
- 11. Given that additional crew and aircraft have been supplementing the contract in Iraq, and the borders being mostly opened now, when can we expect the layoffs to be suspended and salaries to be reinstated as per our employment contracts?'

[12] On 9 November 2020, the appellant posted a questionnaire for completion by its pilots. The pilots were requested to answer yes or no to the following questions:

- 'a. Are you willing to be rostered to fly on tour on your current Covid 19 impacted salary?
- b. Are you willing to be fostered per location Iraq – Ballad airbase?'

[13] Clark answered yes to the first question and no to flying in Iraq; Steyn answered yes to both questions, and Burton answered no to both questions. Apart from the employees, two other pilots indicated that they were not prepared to fly in Iraq; Mr Ortmann, who resigned before the retrenchment that is the subject of the present dispute, and Mr Jansen van Vuuren, who later agreed to fly in Iraq.

[14] On 6 December 2020, the head of the appellant responded to the grievance and indicated that "*immediate and drastic measures*" needed to be implemented by the appellant for the company to survive. He stated further:

'We review the situation on a month-to-month basis and have provided feedback where relevant. We cannot predict how long these measures will remain in force...

We still continue to suffer a significant and devastating impact on our business. Those employees who have indicated their willingness to work on the reduced

salaries have and will be rostered to work. We continue to plan and manage the crew roster to ensure all crew who are willing to work on the reduced salary are given an equitable chance to recover their loss of income whilst temporarily laid off. We cannot predict how long these measures will remain in force.'

[15] On 11 February 2021, the employees' trade union Solidarity began engaging in correspondence with the appellant. In a series of letters and emails, Solidarity expressed its members' unhappiness at the lack of consultation at the outset and also at the lack of any clear indication of how long the Covid-induced measures would remain in place.

[16] In a letter to the appellant dated 11 February 2021, Solidarity recorded that it was mandated to engage with the appellant to:

'... establish an agreement on the continuation of these changes on mutual terms, inclusive of timelines and measurable outcomes, in the hope that some normality can be achieved sooner than later, and that both parties, the Employer and Employees, have a legally binding reference point (refer to alterations and variations of the contract of employment) dealing with this the required business changes and sacrifices for the short term.'

[17] Solidarity further acknowledged that the appellant's business could not continue successfully without "*flexibility*" at that stage and concluded by requesting the appellant to consult with a view to concluding a new agreement.

[18] On 19 February 2021, a telephonic discussion took place between the appellant's general manager and a Solidarity representative. In an email that followed, Solidarity sought to discuss, among other things:

'(1) The impact of the changes (2) the length of the changes (3) alternatives if any (4) an agreement to regulate these temporary changes to ensure legal certainty.'

[19] In a letter addressed to the appellant by Solidarity on 16 March 2021, the following is recorded:

'It is our instruction to inform you of our members continued unhappiness...

2. ... What was understood and believed to be short term immediate measures, appear now to enjoy the status of permanent changes. This was in essence confirmed by you, upon your failure to prescribe a plan of action to return to normal.
3. Your actions [as explained] had risen by cause of the pandemic. Whilst this is noted and acknowledged by our members, this justification can no longer survive or be used to justify the continued breach of our members contracts of employment and did not warrant a draconian approach...

Our members have instructed us to request the following stipulations and measures to be implemented to correct the breaches of their employment contracts...

8. To pay our members their full salaries while on tour with effect from March 2021, in line with their respective employment contracts.
9. To terminate the temporary layoff with immediate effect and implement no less than 50% of their contractual salaries for OFF-duty periods.'

[20] The appellant responded by stating that it had to review the situation on an ongoing basis, as the future remained uncertain.

[21] On 19 March 2021, Solidarity referred a dispute to the CCMA alleging a unilateral change to its members' terms and conditions of employment. A conciliation hearing was convened to determine picketing rules. For reasons that are not apparent, this resulted in an advisory arbitration award, issued on 6 May 2021. The presiding commissioner noted the following:

- '5. The dispute pertains to the financial impact of the Covid 19 Lockdown regulations on the business and employees and the measures taken by the respondent to mitigate the negative impact...

11. The relief sought by the Applicants is salary for March that is outstanding and consultation on the alternatives to the status quo, rotation of employees to be structured fairly.

ADVICE/RECOMMENDATIONS

2. Parties should meet to reassess the situation with the objective of reaching an agreement that has the interest of both at heart, e.g. the structure of rotation of employees, the duration of the layoff going forward, etc.
3. Possibility of using a Section 189A facilitation process as a forum for discussions.

- [22] The advisory award appears to have been made at the commissioner's own initiative, but the proposal that the dispute be treated as one of a potential retrenchment found traction.
- [23] On 14 May 2021, the appellant addressed an email to Solidarity indicating that a retrenchment process was to take place. The appellant lodged a request with the CCMA for the appointment of a facilitator in terms of section 189A of the LRA.
- [24] In a letter dated 19 May 2021, Solidarity again indicated its commitment to negotiate an agreement to deal with the temporary reduction in remuneration implemented since March 2020. Solidarity placed its commitment to *'finding solutions that aim to deal with the temporary reductions in salary that have perpetuated for the last 14 months, and which are causing severe financial hardship for our members'*. Solidarity further placed on record that the appellant had ignored its prior requests to negotiate *"an outcome of a more permanent nature"*. Although Solidarity accused the appellant of being in breach of the original contracts of employment, it asserted that the original contracts had not to date changed on a *'permanent basis via any form of agreement from the side of the employees'*. The appellant was asked to negotiate and enter:

‘... formal temporary agreements (suitable for both parties and without taking advantage of the current situation and circumstances), for a limited duration before the terms of our member’s original employment contracts (which have not changed) can be honoured by the company.’

- [25] The letter concluded by Solidarity requesting the appellant to make a proposal to include, among other things, a timeframe for the return to normal salaries and conditions of employment.
- [26] On 29 June 2021, the employees were notified of their retrenchment, to take effect on 31 July 2021.

Labour Court

- [27] As I have indicated above, in the referral made to the Labour Court, Solidarity made three claims. The first was the employees’ claim of breach of contract and payment of their outstanding remuneration for the period 1 March 2020 to 31 July 2021; secondly, the substantive and procedural unfairness of the employees’ retrenchment; and thirdly, a claim for payment of statutory amounts consequent on the employees’ termination of employment.
- [28] The appellant denied that it had breached the employees’ employment contracts and relied on the defences of supervening impossibility of performance on the part of both the appellant and the employees, thus excusing the appellant from performing its reciprocal obligations in terms of the employees’ contracts of employment. Secondly, what the appellant relied on what it contended to be at least the tacit agreement of the employees to the payment of reduced remuneration, in return for a continuation of the employment relationship. The appellant further denied that the employees had been unfairly retrenched.
- [29] In its judgment, the Labour Court made no reference to the defence of supervening impossibility of performance.³ The Court considered at some length

³ This despite the finding made by the Labour Court in its consideration of an appropriate remedy:

the provisions of section 64 of the LRA in circumstances where it is not entirely clear from the judgment to what extent the Court's finding in relation to the uncontested unilateral change by the appellant to the employees' conditions of employment implicates section 64.⁴ Be that as it may, the Court concluded ultimately that the appellant had unilaterally imposed changes to the employees' terms and conditions of employment and thus breached their contracts of employment.

[30] Regarding the defence of tacit consent to the reduction in remuneration, the Court concluded:

'[45] Having considered the documentary and oral evidence of the employees in this matter, which in my view established the employees' vulnerability during the period, I am not persuaded that the employees evinced clear and unambiguous intention to work on the unilaterally amended terms and conditions of employment. I am also not persuaded that the conduct of the employees could lead a reasonable person to believe that they intended to so work. The employees did not tacitly consent to nor did they acquiesced (sic) themselves to the company's unilateral decision. The fact that they understood the reasons for imposing the measures is not tantamount to an acceptance of the new terms and conditions, more so without them being afforded an opportunity to engage and decide.'

And further:

'[46] The Court is not oblivious to the greater social and economic power that employers, including the company in this case, enjoy. In the current matter, with borders closed and commercial flying halted in many countries, the company was acutely aware of the vulnerability of the employees in the aviation industry. To impose such a decision, without any form of consultation, during the Covid-19 pandemic and later argue

⁵² It is common cause that the borders remained closed for at least 6 months and commercial flights only resumed in October 2020. Until the end of September 2020, the employees, even if they were ready and willing to work, could not render any service.'

⁴ The Court made extensive reference to *Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of SA & Others* (2020) 41 ILJ 2670 (LC); [2021] 12 BLLR 1235 (LC).

that the employees tacitly agreed and/or acquiesced to it is, in my view, disingenuous and unfair.

[47] The crux of the matter is whether there was unilateral change to terms and conditions of employment and a breach of their contracts of employment... The unilateral decision is in breach of the employees' contracts of employment, which expressly required that any alteration or variation be signed by both parties after a process of consultation. The conduct of the company is also in breach of section 34 of the BCEA which requires that any deduction to the employee's salary must be consented to by the employee and after following a fair procedure and providing the employee a reasonable opportunity to show why the deductions should not be made. The deductions were not authorised by the law, collective agreement, court order or an award. In the final analysis, the company effected salary reduction without the employees' consent.'

[31] The Labour Court came to the following conclusion:

'[48] To conclude, the decision to reduce the employees' salaries was taken and implemented unilaterally, which is in breach of the contract of employment and section 34 of the BCEA. The employees' subsequent conduct did not undo the breach already committed, nor did the employees acquiesced (sic) to the unilateral decision. At best for the company, the conduct of the employees may be relevant to the enquiry on the appropriate remedy.'

[32] The Court noted that it had a discretion in determining the remedy for breach of contract found to exist, and made specific reference to section 77A(e) of the LRA, which empowers the Labour Court to make any order including:

'making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation.'

[33] The Court considered the circumstances that prevailed, including the fact that the employees had worked significantly fewer hours during the period when they were called to render services, that borders had remained close for at least six months and that until the end of September 2020, the employees could not render services even if they were willing and able to do so. In the result, in respect of their contractual claim, the Court awarded compensation equivalent to three months remuneration, payable at the off-tour salary, to each of the employees.

[34] In relation to the alleged unfair retrenchment, the Labour Court came to the following conclusion:

‘The company has not consulted the employees. The result is that it deprived the employees of the opportunity to know and understand the basis for the retrenchment, to discuss the alternatives to retrenchment, the selection criteria, severance packages, and make representations about any matters relating to the retrenchment. The inevitable conclusion is that the dismissal is procedurally and substantively unfair and I find accordingly.’

[35] In relation to remedy, the Court concluded that it would be ‘just and equitable’ for the appellant to pay each of the employees’ compensation in an amount equivalent to eight months’ remuneration, payable at the employees’ off-duty salary.

[36] In respect of the employees’ claim for notice pay, the Labour Court observed that the notices of termination were issued on 29 June 2021, advising the employees that their services would be terminated with effect from 31 July 2021. The Court held that *‘[T]he company did not pay the employees notice pay’*, that they were entitled to four weeks’ notice pay each and that the appellant was liable to pay each of them the equivalent of four weeks’ remuneration, payable at their off-tour salary.

Sahara 1⁵

[37] Mention should be made of the fact that after delivery of the judgment under appeal, this Court heard an appeal in a matter concerning other employees of the appellant but broadly speaking, the same factual matrix. What was at issue in those proceedings was a judgment by the Labour Court to the effect that while the employees engaged in that litigation had in fact agreed temporarily to a reduction in their remuneration from March 2020, that consent had been withdrawn with effect from March 2021, when the employees relied on their original terms and conditions to enforce a claim for remuneration. This Court held that there was no evidentiary basis to draw this conclusion, and said (per Davis AJA):

[1] As counsel for the appellant correctly submitted, there was no evidence before the court *a quo* which justified the conclusion that an agreement had been entered into in March 2021 to vary the temporary agreement which was initially sourced in the Covid 19 pandemic. In short, there is no evidence to suggest that respondent or its members during the relevant period had unequivocally indicated to appellant that they no longer accepted the reduced salaries but now relied on the original contracts of employment.

[2] The correspondence generated by respondent and which is cited earlier in this judgment indicates to the contrary. Respondent had sought to conclude a further agreement with appellant to enter into 'formal temporary agreements suitable for both parties and without taking advantage of the current situation or circumstances' and which would be for a limited period. Furthermore, the evidence before the court *a quo* indicates that these employees carried on working in return for the reduced salaries; certainly in the case of Mr Ortmann until June 2021 and in the case of Mr van der Merwe and Mr Berry until 1 September 2021. The conduct of respondent does not appear in any way to suggest that its

⁵ Unreported, *Solidarity obo Members v Sahara African Living (Pty) Ltd* (JS829/21) [2024] ZALCJHB 166 (17 April 2024).

members had evidenced an intention to revert to the rights which flowed from their original contracts of employment.

[3] The central basis of the court *a quo*'s finding in effect was that respondent had sought to reinstate the original contracts of employment and that temporary arrangements were no longer in force and effect. There is however no evidential basis by which this finding can be justified. In other words, the distinction drawn by the court *a quo*'s judgment for the period until February 2021 as against the period until September 2021 (in the case of Mr Berry and Mr van der Merwe) cannot be sustained.'

[38] In short, this Court accepted that there had been a tacit agreement between the appellant and its employees to the effect that they would temporarily accept reduced terms and conditions of employment in return for the continuity of employment, and held that the Labour Court had erred by finding, on the facts, that the agreement had been withdrawn (by the employees party to that appeal) with effect from March 2021.

Grounds of appeal

[39] The appellant appeals against the Labour Court's finding in respect of the employees' contractual claim, but for the findings in respect of Burton, and the employees' claim in respect of the shortfall in salaries for the month of March 2020. The appellant further appeals against the Labour Court's orders in respect of all three employees consequent on its findings of a substantively and procedurally unfair retrenchment.

[40] The employees have filed a conditional cross-appeal against the Labour Court's award of compensation, in the event that this Court sets aside the Labour Court's order of compensation. The employees seek an order requiring the appellant to pay to each of them the shortfall in their salaries for the period March 2020 to July 2021. I have indicated, despite the appellant's more limited grounds of appeal, by virtue of the cross-appeal, this Court is entitled to make an order in respect of Burton's contractual claim.

- [41] The issues raised are whether the reciprocal rights and obligations under the appellant's original contracts of employment were rendered unenforceable on account of the supervening impossibility of performance; whether the employees at least tacitly agreed that instead of the appellant terminating the employment relationship, they would work fewer hours for less pay; whether the employees' retrenchment was substantively and procedurally unfair; and if so, whether the amount of compensation awarded each of the employees both in respect of their contractual claims and their claim of unfair retrenchment, ought to be reduced.

Evaluation

- [42] I deal first with the Labour Court's findings in terms of the alleged breach of contract and breach of section 34 of the BCEA. A breach by the appellant of section 34 is not a cause of action that was pleaded by the employees, nor does the pre-trial minute make any reference to that section. In other words, the appellant was never asked to meet a claim based on any breach of section 34. It was not open, in these circumstances, to the Labour Court to find, as it did, that the appellant had breached section 34 of the BCEA or to account for this, as the Court appeared to do, in the assessment of the amount of compensation to be paid by the appellant to the employees.
- [43] In any event, to the extent that the employees' claim is one of a failure to pay remuneration against a tender of services, section 34 does not apply. That section is concerned, as the heading of the section records, with deductions and other acts by an employer concerning remuneration. A deduction from remuneration must be distinguished from a reduction in remuneration. The non-payment of remuneration is not a deduction. An employee aggrieved by a non-payment of remuneration, in whole or in part, has a remedy in contract, or may have a right of recourse in terms of section 32 of the BCEA, which requires an

employer to pay remuneration not later than seven days after the completion of the period for which the remuneration is payable, or on termination of the contract of employment.⁶not in the statutory prohibitions established by section 34. Section 35 of the BCEA is not applicable in the present case, and the Labour Court was wrong to apply it.

- [44] To the extent that the employees (and the Labour Court) referred to and sought to apply section 64(4) of the LRA, that section similarly has no application in the present instance. Section 64(4) does no more than establish a right to interim relief when an employee refers a claim to the statutory dispute resolution structures when the dispute so referred concerns an alleged unilateral change by an employer to employees' terms and conditions of employment. The section functions to preserve the status quo (or to require the restoration of the status quo where terms and conditions of employment have been changed), pending the conclusion of a conciliation process. Section 64(4) is not intended to provide a substantive, self-standing remedy when an employer unilaterally changes an employee's terms and conditions of employment. Rather, the section affords an employee an interim remedy to protect the integrity of the conciliation process, a remedy that expires once a certificate of non-resolution has been issued by a commissioner or 30 days (or any agreed, extended period) has elapsed after the referral of the dispute. Further, a dispute that concerns a unilateral change to terms and conditions of employment is not a dispute that is arbitrable, nor is it a dispute justiciable by the Labour Court. Should conciliation fail, the LRA contemplates that the dispute be determined by a resort to the exercise of economic power. However, those provisions aside, to the extent that any unilateral change by an employer to an employee's terms and conditions of employment constitutes a breach of the employment contract, the employee may elect to pursue whatever contractual remedies may be available, either in the civil courts or in the Labour Court in terms of section 77(3) of the BCEA.

⁶ See section 32(3) of the BCEA.

- [45] In the present instance, the employees initially contended that the appellant's action in reducing their remuneration constituted a unilateral change to their terms and conditions of employment, referred a dispute to this effect to the CCMA and invoked the interim relief afforded by section 64(4). For reasons that are not apparent, the employees appear to have abandoned that election and changed tack, electing instead during October 2021 to refer a claim to the Labour Court in terms of section 77(3). In essence, the employees' claim was one in which they sought an order of specific performance in the form of payment by the appellant of their remuneration, against a tender to work.
- [46] In these circumstances, the Labour Court's analysis of section 64(4) in relation to the employees' claim was misplaced. The Court's failure to distinguish between a statutory remedy intended to provide status quo relief during the phase of conciliation and prior to the exercise of a right to strike, and a common law claim for specific performance, resulted in conceptual confusion. The employees' claim was one of breach of contract. The Labour Court, enjoying as it does concurrent jurisdiction with the civil courts in such a claim, was required to evaluate the claim as a civil court would.
- [47] Regarding the remedy awarded by the Labour Court in respect of the employees' contractual claim, both counsel agreed that it was not open to the Labour Court to make the order for the payment of compensation. Although section 77A of the BCEA empowers the Labour Court to make an award of compensation in any matter that concerns a contract of employment, the appropriate remedy must be determined with reference to the nature of the claim. Given that the employees' claim was contractual in nature, the employees were either entitled to an order for payment of their remuneration for the period in question, or not. The employees had claimed that the appellant breached their contracts by refusing to pay them against their tendered services and sought an order for the payment of the difference in their remuneration between that payable as at March 2020 and the reduced remuneration paid between March 2020 and 31 July 2021, the date on which their employment terminated. There is no scope for an appeal to

considerations of fairness in these circumstances, or any award of compensation. The Labour Court erred when it made that award.

- [48] As recorded above, the Labour Court simply did not deal with the defence of supervening impossibility of performance, and rejected the defence of express, alternatively tacit, consent by the employees to the varied contractual terms.
- [49] The facts disclose that while the employees may not have been happy about the amendment to their terms and conditions of employment, they did not expressly reject the unilateral change. On the contrary, the employees conducted themselves in a manner which gave rise to the inescapable inference that they consented to a temporary reduction in their salaries. This is consistent with the finding by the Labour Court in *Sahara 1*, a finding that was left intact by this Court in the appeal against that judgment. What concerned the employees was the protracted duration of the temporary measures introduced by the appellant – their demands were directed at the certainty of a timeline for the restoration of the original terms and conditions of employment. Steyn, for example, testified that the appellant *'had to do these measures to try and keep the company floating, have everybody still the job at the end of the day and that I think a lot of us softened up to that idea, but he just continued'*.
- [50] It is not in dispute that Steyn and Clark's responses to the 9 November 2020 survey were that they expressly agreed to fly on the reduced salary. Over and above this express election to continue flying on the reduced terms, the employees remained in agreement with the temporary reduction in remuneration post-February 2021, as disclosed in Solidarity's letters to the appellant. Solidarity's mandate, as communicated to the appellant in its letter dated 11 February 2021, was not to insist that the appellant reinstate the terms of the original contracts of employment. Rather, Solidarity sought to formalise a temporary agreement on terms more favourable to its members than the status quo. At no stage did Solidarity insist on a reversion to the pre-March 2020 contractual arrangements. On the contrary, the proposal submitted by Solidarity

is consistent only with the acceptance of the status quo as the starting point for a negotiation of a new agreement. The proposal is certainly incompatible with any assertion either that the pre-March 2020 contracts remained in force, or that they should immediately be reinstated. Even during mid-May 2021, Solidarity remained primarily focused on concluding an interim agreement more favourable for its members than the status quo, as opposed to restoring the terms of the original contracts of employment. In the absence of consent by the appellant to revert to the original contracts of employment, the options open to the employees were to compel the appellant to revert to the original contract by way of industrial action, or to terminate the temporary agreement, which would not have resulted in the original contractual terms being reinstated rather than the employment relationship coming to an end. The employees initially sought to exercise the first option by relying on section 64(4) of the LRA and referring a dispute to the CCMA, an option that was abandoned. None of the employees who are party to these proceedings resigned from the appellant's employ, and none of them claimed a constructive dismissal. The inescapable conclusion is that despite their dissatisfaction, the employees elected to continue in their employment on the terms implemented by the appellant.

- [51] To the extent that the Labour Court found that any consent to the varied terms and conditions of employment was vitiated by duress, I fail to appreciate how, in these circumstances, it can be said that the employees acquiesced in the variation to their contractual terms only because they were under duress. The employees had access to the assistance and advice of their trade union throughout. As I have indicated, the employees were clearly not satisfied with the state of affairs occasioned by the reduction in their employment conditions, especially when it persisted through late 2020 and early 2021. But it does not necessarily follow that the employees did not accept the rationality or necessity for the reduction.
- [52] In short, as evidenced by their conduct and that of their collective bargaining representative, the employees acquiesced in the variation to their pre-March

2020 terms and conditions of employment. The Labour Court thus erred in finding that the appellant had committed a breach of contract.

- [53] Given this finding, it is not necessary to canvass the parties' submissions concerning the impossibility of performance of the employees' employment contracts.

Retrenchment

- [54] It will be recalled that the Labour Court found that the employees' retrenchment was both substantively and procedurally unfair. It did so on the basis that the appellant had failed to consult the employees, thus depriving them "*of the opportunity to know and understand the basis for the retrenchment, the selection criteria, severance packages, and make representations about any matters relating to the retrenchment*". Put another way, the Labour Court decided that the absence of any fair procedure had the result that the employees' retrenchments were substantively unfair.

- [55] The LRA draws a clear distinction between the substantive and procedural requirements of fair retrenchment. The relationship between substance and procedure is strongly symbiotic, but both remain independent values.⁷ Although there may be the exceptional case where an abject failure to comply with the relevant procedural requirements may have the result of a retrenchment that is also substantively unfair,⁸ this is not an inevitable consequence especially where, as in the present instance, there is ample evidence of the substantive reason for retrenchment. For example, in *Enterprise Foods (Pty) Ltd v Allen & others*⁹ this Court found that although no proper consultation process had taken place, there was nonetheless a fair reason for the retrenchments, after taking into account the evidence presented by the employer.

⁷ See R le Roux *Retrenchment Law in South Africa* (LexisNexis 2016) at 13.

⁸ See the judgment of this Court in *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC) where the Court recognised that the two notions of substance and procedure "*may be so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure*" (at para 48).

⁹ (2004) 25 ILJ 1251 (LAC); [2004] 7 BLLR 659 (LAC).

[56] There is no real dispute that the appellant's business was profoundly affected by the measures taken, both nationally and internationally, to address the Covid 19 pandemic. Certainly, between March 2020 and October 2020, the appellant's business was reduced to one of care and maintenance. The reason provided by the appellant for the retrenchments was that it had not secured new work for its fleet and in consequence, had a surplus of pilots, more specifically, a surplus of captains and that it could retain only those pilots who were willing and able to fly in Iraq. It is not in dispute that by January 2021, only the contracts in Iraq, Sudan and Comoros remained in place and that all other contracts had been cancelled. Clark, Steyn and Burton were clearly selected for retrenchment because they were the only three employees who would not or could not go on tour to Iraq. The employees were aware that the only place where there was rarely any work was in Iraq. Comoros did not present a viable alternative, with the client retaining its own captain with the result that the employees would be rostered one month in every eighteen. Even then, there were sufficient crew members in Iraq to rotate to Comoros. In short, the appellant had been exploring alternatives to retrenchment for more than a year by the time of the retrenchments, having placed its employees on layoff and reducing salaries. One aircraft had been sold. New contracts that had been the subject of tenders had not materialised, and the situation remained unimproved.

[57] The evidence discloses several meetings and discussions between the appellant and Solidarity regarding the appellant's situation and the prospects of securing new work. Solidarity was aware of what the appellant was doing in order to avoid the retrenchment of its pilots. The appellant found itself in a situation where the employees could not be scheduled to tour in Iraq, the only viable contract then in existence. In these circumstances, it is difficult to appreciate are the Labour Court decided that, on the one hand, it was unfair to keep employees on the payroll for a prolonged period without providing them with work and allowing them to earn a living, but on the other hand, there was no fair reason to retrench them. The Labour Court failed to have regard to the obvious commercial rationale presented by the appellant, and its finding that the employees' retrenchment was

substantively unfair solely because of a failure to properly consult cannot be sustained. The evidence discloses that the employees and their trade union, Solidarity, were well apprised of the appellant's situation and, at the very least, were in as good a position to refute the appellant's evidence at trial that there was a fair reason for the retrenchments as they would have been had the formal consultations been more extensive. It cannot be in the circumstances that the procedural shortcomings that existed led to the conclusion that the retrenchments were, for that reason alone, substantively unfair.

[58] This leaves the question of procedural fairness. The importance of fair procedure in retrenchment has been underscored by this Court¹⁰ and has been emphasised by the Constitutional Court. In *Solidarity on behalf of Members v Barloworld Equipment Southern Africa & others*¹¹ the Constitutional Court said the following:¹²

'What may be gleaned from the authorities is that for a consultation process to be meaningful, in the context of s 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations, and seriously consider the representations. This entails that the employer is under an obligation to furnish reasons for rejecting representations after it has considered them carefully. Approaching the consultation with the pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful.'

[59] As I have noted, the appellant conceded during the trial that the procedure adopted prior to the employees' retrenchment was not ideal, and that it was not in formal compliance with the provisions of section 189 in a number of respects. The process that did transpire included the issuing of a section 189 (3) notice, an invitation extended to Solidarity to examine the appellant's accounts, a number of discussions and meetings between the appellant and solidarity which had

¹⁰ See, for example, *SA Commercial & Allied Workers Union & others v JDG Trading (Pty) Ltd* (2019) 40 ILJ 140 (LAC); [2019] 2 BLLR 117 (LAC).

¹¹ (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC).

¹² Ibid at para 46.

resulted in Solidarity understanding that the appellant's operational and financial position was at the time and that its operational requirements were to maintain and support its Iraq contract. There was also a virtual meeting between the appellant and Solidarity on 1 March 2020 and informal discussions during the CCMA hearing on 18 June 2021. At the appeal hearing, counsel submitted that if anything, a token award of compensation was appropriate.

- [60] A procedural shortcoming attracts an award of compensation in the form of a solatium.¹³ Having regard to the relevant facts and circumstances and the appellant's admitted failure to meet the threshold of fair procedure, a sum equivalent to three months' remuneration in compensation for unfair procedure is just and equitable. Considerations of fairness dictate that for the purposes of calculating compensation, the rate of remuneration to be applied is that which applied immediately prior to the appellant's letter addressed to the employees on 20 March 2020, at their off-tour rate.

Notice pay

- [61] Section 37 of the BCEA requires an employer to terminate a contract of employment on notice. In the case of employees employed for more than one year or more (the employees all fall into this category), the notice period is four weeks. Section 36 provides that an employer, instead of giving notice in terms of section 37, may pay the employee the remuneration that the employee would have received if the employee had worked during the notice period. Put another way, an employer may elect to pay the employee in lieu of notice should the employer require the employee to leave the workplace on the giving of notice of termination of employment.

- [62] The Labour Court appears to have regarded the employees as entitled to 'notice pay' over and above the notice of termination of employment that they were

¹³ *Johnson and Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at para 41; see also *Kemp t/a Centralmed v Rawlins* (2009)30 ILJ 2677 (LAC) at para 20 and *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (2021) 42 ILJ 1643 (CC).

afforded. Notice was given on 29 June 2021, to expire on 31 July 2021. This is more than the prescribed period of four weeks' notice. In the absence of proof that the employees were not paid for the month of July 2021, the employees were thus not entitled to any additional 'notice pay', and the Labour Court erred by finding that they were.

Costs

[63] Ordinarily, when parties seek the adjudication of a contractual claim in terms of section 77(3) of the BCEA, costs follow the result. In a claim under the LRA, such as the employees' claim for unfair retrenchment, any liability for costs is to be determined according to the requirements of the law and fairness, read to mean that costs do not ordinarily follow the result and will be granted only in exceptional circumstances.

[64] In the present instance, the claim is hybrid in nature. It is not possible, in the face of a lengthy record in which evidence was tendered in respect of both the contractual claim and the claim of unfair retrenchment, to arrive at any fair estimate apportionment of the costs in each of the respective claims. In these circumstances, for the purposes of section 179(1), the requirements of the law and fairness are best satisfied by each party bearing its own costs.

Order

1. The appeal is upheld, with no order as to costs.
2. The order of the Labour Court is varied to read as follows:
 - a. 'The applicant's claim for remuneration is dismissed.
 - b. The applicants' retrenchment was substantively fair but procedurally unfair.

- c. The applicants are each awarded compensation in a sum equivalent to three months' remuneration, to be calculated at the rate of remuneration payable to each of the individual applicants at their off-tour rate, as it applied immediately prior to 20 March 2020.
- d. There is no order as to costs.'

A. van Niekerk

Judge of the Labour Appeal Court

Djaje AJA *et* Chetty AJA concur.

APPEARANCES:

FOR THE APPELLANTS: C Watt-Pringle SC, with him J Withaar

Instructed by Richard Spoor Inc.

FOR THE RESPONDENTS: W Bekker SC, with him CR Dames

Instructed by Serfontein, Viljoen & Swart