



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA28/23

In the matter between:

BKL MONITORING & INSPECTORATE CC

Appellant

and

MADUKA PAUL AND 36 OTHERS

Respondents

Heard: 25 September 2026

Delivered: 26 November 2025

Coram: Van Niekerk JA, Nkutha-Nkontwana JA, Basson AJA

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] This is an appeal against the judgment and order of the court *a quo* delivered on 6 October 2022. The key issues raised at the court *a quo* were whether the dismissals of the respondents were automatically unfair in terms of section 187(1)(c) of the Labour Relations Act¹ (LRA), or whether they were based on

¹ Act 66 of 1995, as amended.

the appellant's operational requirements as contemplated in sections 188 and 189 of the LRA.

- [2] The court *a quo* found the respondents' dismissals not automatically unfair. That finding is not assailed; hence, it is not the subject of this appeal. Notwithstanding, the court *a quo* found the respondents' dismissals substantively unfair under section 189. That is the finding the appellant impugns in this appeal.

Condonation for the late filing of the notice and record of appeal

- [3] The first hurdle the appellant faces is that the appeal lapsed due to the late filing of the notice and the record of appeal after it successfully petitioned this Court for leave to appeal. The order granting the petition was delivered on 31 May 2023. However, the appellants failed to file the further processes in the prosecution of the appeal in accordance with the Rules of this Court.² The notice of appeal was filed on 20 August 2024, almost a year after the order of 31 May 2023 was rendered. Similarly, the appeal record was filed on 19 December 2024, more than a year after the order of 31 May 2023 was rendered.
- [4] The appellant does not accept the fact that the delay is inordinate. It contends that the delay must be viewed in the context of the overall delay in this litigation, which has been approximately five years since the respondents were dismissed in April 2021. I disagree. While the delay in the prosecution of this matter in the court *a quo* is regrettable, it is well explained in the impugned judgment. Notably, most of it is attributable to the administrative challenges consequent to the COVID-19 pandemic. The delay of more than a year in prosecuting the appeal is egregious.
- [5] The appellant contends that it was not served with the order of 31 May 2023. It only became aware of that order when it was served with the respondents' *ex parte* application and the rule *nisi* for contempt of court. Mr Gordon Mokoboto (Mr Mokoboto), the co-member of the appellant, a close

² GN 1666 of 14 October 1996: Rules for the Conduct of Proceedings in the Labour Appeal Court (repealed, 17 July 2024).

corporation, and deponent to the founding affidavit in support of the application for condonation and reinstatement of the appeal, asserts that the email address, ramalatsosobane@gmail.com, used by the Registrar of this Court to serve the order of 31 May 2013 on the appellant's attorneys of record is incorrect. The correct email address is ramalatsosobane1@gmail.com. Therefore, they were not aware that the order of 31 May 2013 had been rendered.

- [6] The respondents dispute the appellant's assertion that the email used to serve the order of 31 May 2023 is incorrect because it was provided by the appellant's attorneys of record when they filed the petition papers. The appellant's bald assertion that it was served on an incorrect email address should therefore be rejected, so the argument went.
- [7] The appellant's explanation for what transpired over a period of almost a year, while they were still unaware of the order of 31 May 2023, is curious. Mr Mokoboto asserts that, as a lay person, he was not familiar with the processes of this Court and relied on his legal representative, who assured him that the petition was being processed. Yet he wants us to believe that he constantly followed up with the nameless officials of this Court regarding the status of the appellant's petition, without success. At the same time, his attorneys, who had always been on record and assisted him in filing the petition, rested on their laurels.
- [8] The appellant was clearly awakened by the respondents' contempt of court application. It filed the notice of appeal in August 2023. Notwithstanding the inordinate delay, the appeal record was filed on 19 December 2024, four months after the filing of the notice of appeal. No cogent explanation was proffered for the further delay. Appellant and its legal representatives showed no sense of urgency in prosecuting the appeal.
- [9] In the whole, the appellant lays the blame for the delay squarely at the door of its attorneys of record. In my view, there is traction in the respondents' contention that the appellant should not be allowed to hide behind his attorneys' ineptness, as it can avail itself of recourse in delict for any damages

it would suffer due to their conduct. Conversely, the respondents are seriously prejudiced by the poorly explained inordinate delay, as they had been out of employment since April 2021. It is a well-accepted tenet that a litigant cannot hide behind the ineptness of the legal representatives it has freely sourced.³

[10] In *Grootboom v National Prosecuting Authority*,⁴ the Constitutional Court instructs that the standard for considering an application for condonation is the interests of justice, which includes '*the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success*'.⁵ An inquiry into what is in the interests of justice entails due regard for all relevant factors, including those dictated by the particular circumstances of each case.⁶

[11] Notwithstanding the inordinate delay and the insufficiency of the explanation proffered, the importance of the issues raised and the appellant's prospect of success, it is in the interest of justice that the appeal be disposed of on the merits. Still, litigants and their legal representatives are warned that the flagrant disregard of the periods prescribed in the Rules can no longer be countenanced, as it is at odds with one of the dictates of the LRA that labour disputes be expeditiously prosecuted.

Factual background

[12] There is not much controversy over the facts. The appellant provides monitoring and inspection services to various transport companies that operate passenger buses or rail services. It is contracted to supply clients with inspectors whose duties include checking vehicles and driver compliance, as well as monitoring scheduled bus trips to ensure compliance with regulatory prescripts for safe transport services to bus and rail commuters. The portfolio

³ See: *Saljee and another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 14C; *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2442 (LAC) at para 22.

⁴ 2014 (2) SA 68 (CC) at paras 22 and 23.

⁵ Ibid at para 22.

⁶ Ibid.

of its client companies at the time included PRASA (Autopax), Brakpan Bus Company, Atamelang and Putco bus services.

- [13] The respondents began their employment with the appellant around 2010. They have held various positions, including inspector, cleaner, driver, and administrative staff. The appellant had a total staff complement of 91 employees when it terminated the respondents' services on 30 July 2017.
- [14] The appellant's operational challenges began in 2016, when some of its clients failed to pay or made sporadic payments for services rendered. On 10 August 2016, the appellant held a meeting with its employees, including the respondents, and shared its financial challenges. The outcome of the meeting was an agreement that employees would forfeit their 2016 annual salary increases and bonuses. However, there was no discussion on the possibility of retrenchments. Mr Mokoboto testified that the appellant took an overdraft to mitigate cash flow problems and pay employees' salaries.
- [15] Nothing eventful happened thereafter until, as it appears, some of the appellant's employees joined the trade union, TAWUSA. On 14 June 2017, Mr Lucky November (Mr November), a TAWUSA official, sent an email seeking an audience with the appellant in a meeting he had scheduled for 5 July 2017. The email was impolite and threatening, accusing the appellant of intimidating employees who wished to exercise their right to join a trade union. The appellant responded on 19 June 2017, declining Mr November's invitation and making clear that it was disinclined to engage with TAWUSA until it could provide proof of its eligibility for organisational rights per the LRA.
- [16] What followed was an antagonistic communication between the appellant and Mr November, which adversely affected the relationship between the appellant and the employees who had joined TAWUSA. The employees accused Mr Mokoboto of union-bashing. At the same time, the appellant was adamant that it would only engage TAWUSA once it had complied with section 21 of the LRA.⁷

⁷Section 21 regulates the exercise of organisational rights, and subsections (1) and (2) provide:

- [17] The employees lodged a complaint with the Department of Employment and Labour (DEL) regarding their conditions of employment. Following an investigation by the DEL, it was found that the appellant's employees did not have formal employment contracts. The appellant was directed to enter into month-to-month employment contracts with its employees, as it had no long-term agreements with its clients following payment challenges that commenced in 2016.
- [18] The appellant attempted to dissuade the employees from joining TAWUSA, but was unsuccessful. It also failed to encourage the employees to sign month-to-month employment contracts. On 11 July 2017, the appellant issued the employees with a 48-hour ultimatum to accept a month-to-month extension of their employment contracts pending permanent agreements with its clients; failing to do so, it would be assumed that they were no longer interested in the employment relationship. The respondents refused to sign the month-to-month employment contracts because they viewed the ultimatum as a retaliation for joining TAWUSA and a ploy to get rid of them.
- [19] On 12 July 2017, the appellant gave Autopax notice of intention to terminate the service contract, effective from 31 July 2017, due to the sporadic nature of the payments. On 20 July 2017, the respondent issued a section 189(3) notice to the employees, inviting them to a consultation meeting on 26 July 2017. The notice explained, *inter alia*, the rationale for the proposed retrenchments; that the proposed timing for the retrenchments would be 31 July 2017 if nothing came out of the negotiation with the appellant's clients; that the possible number of affected employees had not been determined; and that the selection criteria would be informed by that the appellant's operational requirements, (including established skills, specialised positions and disciplinary record of the employees). Subsequently, the appellant also

'(1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade union's certificate of registration and must specify—

- (a) the workplace in respect of which the trade union seeks to exercise the rights;
- (b) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and
- (c) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.'

undertook to consider LIFO (last-in, first-out) as a fair and objective selection criterion.

- [20] The events that transpired at the consultation meeting held on 26 July 2017 are controversial. Mr Mokoboto testified that the consultation meeting ended on a negative note due to the confrontation that ensued between the appellant's representatives and the employees. The respondents, on the other hand, disavowed the allegation that the consultation meeting was marred by conflict. Their version is corroborated by the minutes of that meeting, which were interestingly signed off by Mr Mokoboto. He is recorded to have '*... asked employees to come up with suggestions on how to minimise the effect of retrenchments. He is still busy with clients to see if they cannot pay and extend the contract. If the client refuses, the company unfortunately has no choice because the power is in the hands of the client*'. The court *a quo* correctly accepted the respondents' version.
- [21] On 28 July 2017, Autopax duly accepted the appellant's notice of intention to terminate the service contract and confirmed that the termination would be effective as of 31 July 2017. The appellant, in turn, effected the retrenchments. On 30 July 2017, the respondents were served with retrenchment letters at their respective homes. The retrenchments took effect on 1 August 2017, and the respondents were paid *in lieu* of one month's notice and severance pay.
- [22] The respondents challenged the fairness of the retrenchments, alleging that there was no genuine economic rationale for them and that their dismissals were automatically unfair because they were selected solely because they had joined TAWUSA. The appellant, in defence, persistently contended that the retrenchments were justified as it had a serious cash flow problem due to its clients' sporadic payments. It also defended the selection criterion it ultimately implemented, contending that respondents were selected for retrenchment because they had refused to sign month-to-month employment contracts.

At the court *a quo*

[23] The court *a quo* accepted the appellant's version that there was a commercial rationale for the retrenchments, especially for those employees attached to or servicing the Autopax contract, which terminated on 31 July 2017. Having found that the respondents' dismissals were not automatically unfair, the court *a quo* interrogated the fairness of the retrenchments as contemplated in section 189. The only issue for determination was whether the selection criterion implemented by the appellant was fair and objective.⁸ It found that the appellant abandoned its undertaking to the respondents that the selection criteria would include LIFO. Accordingly, it made the following instructive observations:

[46] Mr Mokoboto unequivocally conceded that the employees that were selected for retrenchment were all those who had refused to sign the month-to-month employment contracts, and these employees happened to be the 37 applicants [respondents]. He also accepted that this method of selecting the employees for retrenchment was not discussed with the employees, and they were never warned that their refusal to sign these month-to-month contracts could expose them to selection for retrenchment. Indeed, this selection criterion does not appear in the section 189 letter dated 20 July 2017 and the follow-up letter dated 26 July 2017. Even the termination letters dated 30 July 2017 do not indicate the selection criteria applied. These concessions by Mr Mokoboto are fatal to the respondent's case.

[47] It does not require a rocket scientist to come to a conclusion that the selection criterion used by the respondent was arbitrary, unfair and subjective. There is no rational connection whatsoever between the commercial reason for retrenchment (termination of Autopax contract) and the selection criterion used. There is no evidence as to how many and which employees were attached to or servicing the Autopax contract or any other contract whose termination may have been imminent.'

⁸ Section 189 (7) of the LRA reads as follows:

'The employer must select the employees to be dismissed according to selection criteria –
 (a) that have been agreed to by the consulting parties; or
 (b) if no criteria have been agreed, criteria that are fair and objective.'

[24] The court *a quo* found the respondents' retrenchments to be substantively unfair and ordered their reinstatement with 18 months' back pay.

In this Court

[25] The appellant impugns the above findings on the following grounds of appeal:

25.1. Whether the court *a quo* was entitled to consider and extend the enquiry beyond the scope of an automatically unfair dismissal in terms of section 187;

25.2. Whether there was a genuine economic rationale to justify the need to retrench the respondents; and

25.3. If the retrenchment of the respondents is found to be substantively unfair, whether the legal principles applicable under section 193 (2) were correctly applied to justify the relief ordered by the court *a quo*.

Was the court a quo entitled to extend the enquiry beyond the scope of an automatically unfair dismissal?

[26] The appellant submits that the court *a quo*'s finding that the dismissals were not automatically unfair was dispositive of the matter. That is so, it further submits, because the respondents' pleaded case was solely premised on the allegation that their dismissals were automatically unfair '*in that the reason for the dismissal was victimisation of union members, rather than genuine economic reasons*'.

[27] It further submits that the court *a quo* was alive to the fact that the pleaded case was limited to an automatically unfair dismissal claim. Hence, it invited the respondents' legal representative, Ms Norton, to reflect on the implications of a finding that the dismissal was not automatically unfair and make submissions in her closing arguments whether it would be dispositive of the matter. Notwithstanding the invitation, the respondents did not seek leave to amend their statement of case to include a section 189 dismissal claim.

[28] The appellant further submits that its contention that the scope of enquiry was limited to the automatically unfair dismissal claim is corroborated by the relief sought in the statement of case, the expressly listed issues for determination in the pre-trial minute, the respondents' opening arguments, the evidence that was led during trial; and respondents' closing arguments which solely addressed the automatically unfair dismissal claim.

[29] The respondents support the court *a quo*'s finding that their dismissals were substantively unfair. They submit that their cause of action was not limited to a section 187 automatically unfair dismissal claim, as it is apparent from paragraph 23 of the statement of case, which reads:

'Applicants submit that the Respondent's dismissal of the Applicants failed to adhere to the principles of substantive fairness in that the reason for the dismissal was victimisation of union members, rather than genuine economic reasons. The dismissal was substantively unfair.'

[30] It is a well-established tenet that the role of pleadings is to define the issues for the opposing party and the court.⁹ A party has a duty to allege in the pleadings the material facts upon which it relies and cannot be allowed to establish a different case at trial.¹⁰ This tenet was confirmed in *Damons v City of Cape Town*¹¹ (*Damons*), per the majority judgment penned by Majiedt J, which rejected the observation by the minority judgment, penned by Pillay AJ, that the pre-trial minute supersedes the pleadings and defines the causes of action for determination.¹² Therefore, *Damons* instructs that a pre-trial minute cannot be used to introduce a new cause of action not properly pleaded; precisely because '*... pleadings fulfil an essential role in litigation – they foster legal certitude, which is a central element of the rule of law*'.¹³

[31] While I accept that the respondents' statement of the case is not articulately drafted, a close reading of the pleadings reveals two causes of action. Firstly, the respondents assert, in paragraph 23 of the statement of claim mentioned

⁹ *Molusi and others v Voges NO and others* 2016 (3) SA 370 (CC) (*Molusi*) at para 28; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA), referred to with approval in *Molusi*.

¹⁰ *Ibid*.

¹¹ (2022) 43 ILJ 1549 (CC) at paras 117-119.

¹² *Ibid* at para 25.

¹³ *Ibid* at para 119.

above, that their dismissals were not for a genuine economic reason and, therefore, were substantively unfair. Secondly, they assert, in paragraph 24 of the statement of case, that the appellant violated their right to freedom of association in terms of section 5 of the LRA and consequently, their dismissal was automatically unfair in terms of section 187 of the LRA.

[32] The appellant was not oblivious to the case it had to meet because it asserts the following in paragraphs 1.1 and 1.2 of its statement of response:

‘1.1 Firstly, this Response constitutes a notice of opposition to the Applicants' referral based on the averments made in the statement of case insofar as it is alleged that the Respondent acted in contravention of the provisions of Section 189A (8); as well as in breach of Section 187(1) of the LABOUR RELATIONS ACT 66 OF 1995 (AS AMENDED) (hereinafter referred to as "the LRA").

1.2 Secondly, the Respondent categorically denies and take issue with the assertions by the Applicants that it unfairly terminated the service of the Applicants in breach of the provisions of Section 189, 189A of the LRA, 'Dismissals based on operational requirements'; as well as violated the Applicants rights of freedom of association in terms of Section 187; read with Section 5 of the LRA.’ (Emphasis added)

[33] Unlike in *Damons*, in this instance, the pre-trial minute did not introduce a new cause of action but records the issues for determination as follows:

‘5.1 Whether the Applicants were unfairly dismissed, specifically whether the provisions of s 189A were not followed.

5.2 Whether the dismissal was automatically unfair.’

[34] The parties proceeded to conclude the addendum to the pre-trial minute, which specifically addressed the dismissal due to operational requirements as required by clause 10.4.2 of the repealed Labour Court Practice Manual.¹⁴ The addendum to the pre-trial, signed by the parties' legal representatives, clearly records that the respondents took issue with the criteria used to select them for retrenchments, contending that it was unfair because only union

¹⁴ Practice Manual of the Labour Court of South Africa, 1 April 2013 (repealed, 17 July 2024).

members were targeted. In response, the appellant persisted with its contention that respondents were retrenched solely because they had refused to sign the month-to-month employment contracts as directed by the DEL.

- [35] As mentioned above, the court *a quo* found that there was a genuine economic rationale for the retrenchments. Since the rationality of the selection criteria unilaterally adopted by the appellant was in dispute, there is nothing untoward in the court *a quo*'s decision to interrogate same. The court *a quo* might indeed have created some confusion and uncertainty when it requested that the respondent's counsel address the effect of its finding that the dismissal was not automatically unfair. Nothing much turns on that, however, as the pleadings and evidence on record support its approach. Moreover, it is not the appellant's case that the respondents abandoned their impugn against the selection criteria.

Was there a genuine economic rationale to justify the need to retrench the respondents?

- [36] The appellant contends that the court *a quo* erred in finding that there was no economic rationale to justify the respondents' retrenchments. The court *a quo* pertinently found that '*... although there was, generally, a need to retrench; there is no acceptable evidence justifying the retrenchment of the 37 applicants [respondents]....*' My understanding of this finding is that, while there may have been an overall economic rationale to justify the retrenchments, the appellant could not justify the selection of the respondents.

- [37] In the present case, the fairness of the implementation of the selection criteria was not in issue. Hence, the enquiry turns on the fairness and objectivity of the selection criteria, which is part of the enquiry into the substantive fairness of the retrenchments. Recently, this Court confirmed this notion in *Umicore Catalyst South Africa (Pty) Ltd v National Union of Metalworkers of South Africa and Others*.¹⁵ In that case, *Umicore* embarked on a retrenchment process and implemented LIFO in most departments. However, during the consultation process, *Umicore* abandoned LIFO and introduced a different

¹⁵ [2024] 11 BLLR 1138 (LAC) at paras 42 – 34.

assessment for the laboratory department, which was based on behavioural and competency-based questions. Four of the laboratory employees refused to participate and were retrenched. NUMSA challenged the substantive fairness of the retrenchments, particularly contending that Umicore's selection criterion was subjective and unfair. The Labour Court found in favour of NUMSA and ordered the reinstatement of the retrenched employees. Umicore was unsuccessful in its appeal against the Labour Court's judgment and order. This Court reiterated the tenet that, where there are no agreed selection criteria, the employer must adopt fair and objective selection criteria. It found the behavioural assessment inherently subjective.

[38] In this case, the appellant similarly abandoned the selection criteria it proposed during the consultation meeting, which included LIFO. The evidence reveals that the signing of month-to-month employment contracts was not among the issues discussed during the consultation meeting. In fact, the discussion of month-to-month employment contracts occurred before the issuance of section 189(3) notices. Mr Mobokoto readily conceded that the month-to-month employment contracts were introduced in response to the DEL directive.

[39] As I see it, what may have exacerbated the situation is the brevity and haste with which the consultation process was undertaken. Nothing more to be said, though, because the procedural fairness is not in issue. However, the respondents were never forewarned that failure to sign the month-to-month employment contracts would result in their selection for retrenchment.

[40] The appellant submits that employers enjoy unfettered prerogative to adopt selection criteria, including the option to avoid retrenchments by offering alternative employment. Well, the selection criteria that have been unilaterally adopted must still pass the fairness and objectivity muster. In my view, the present case is distinguishable from the *National Union of Metalworkers of SA and others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and another*,¹⁶ where the Constitutional Court affirmed the employers' right to offer employees an alternative employment to avoid retrenchments. Here, the

¹⁶ (2021) 42 ILJ 67 (CC) at paras 94 – 96.

appellant did not and could not have offered the month-to-month employment contracts to avert retrenchments because its case was that it had lost not only Autopax's contract but also other contracts thereafter.

- [41] Therefore, the court *a quo* cannot be faulted for finding that there was no connection between the directive issued by the DEL to conclude month-to-month employment contracts and the retrenchment process. Nor can it be assailed for finding that the selection criterion adopted by the appellant was marred by subjectivity and unfairness.

Whether the legal principles applicable under section 193 (2) were correctly applied to justify the relief ordered by the court a quo.

- [42] The court *a quo* found, based on the dictum of the Constitutional Court in *SA Commercial Catering & Allied Workers Union v Woolworths (Pty) Ltd*¹⁷ (*Woolworths*), that the appellant had the onus to lead evidence to show that reinstatement of the respondents was not reasonably practicable, but failed. Hence, it ordered the reinstatement of the respondents with 18 months' back pay.
- [43] The appellant impugns this finding and contends that the court *a quo* ignored the evidence on record, which showed that it was in a financial detriment; that its business operations were further reduced following the termination of other contracts after Autopax; and that it had been experiencing continuous financial distress. It further contends that, as a result, the respondents' positions had become redundant due to the reduction in business operations. Given these circumstances, reinstatement was not reasonably practicable.
- [44] The respondents, on the contrary, contend that the court *a quo* correctly ordered the primary remedy of reinstatement, as the appellants failed to address the impracticability of reinstatement in the event that the respondents' retrenchments were found to be substantively unfair.

¹⁷(2019) 40 ILJ 87 (CC) at paras 43 – 47; see also *Booi v Amathole District Municipality & Others* (2022) 43 ILJ 91 (CC) (*Booi*) at paras 34 – 43.

- [45] The Constitutional Court and this Court have had to consider, on several occasions, the remedy of reinstatement contemplated in section 193(1), and instances in which it is not appropriate to grant it in terms of section 193(2).¹⁸ What emerged from the body of authorities is that, while reinstatement is a primary remedy, it does not consequentially follow a finding that a dismissal was substantively unfair.¹⁹ Ignoring the requirements of section 193(1) and (2) may cause the Labour Court or arbitrator to grant a reinstatement order in circumstances where section 193(2) expressly excludes that remedy.²⁰
- [46] The overriding consideration in the enquiry, *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others*²¹ (*Billiton*) instructs, should be the underlying notion of fairness between the parties, rather than the legal onus.²² Still, '[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'.²³ However, as correctly observed by the court *a quo*, in *Woolworths*,²⁴ it was found that the onus is on the employer to demonstrate to the court that reinstatement is not reasonably practicable by adducing compelling evidence.
- [47] Despite differing observations by the Constitutional Court on the onus in *Billiton* and *Woolworths*, there is clear alignment on the fundamental premise that the enquiry requires an assessment of the facts to establish whether the statutory exceptions in section 193(2) are met. Since it is the employer that

¹⁸ Section 193(2) provides:

'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

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

¹⁹ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2507 (CC) (*Equity Aviation*) at paras 36 -39; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 ILJ 273 (CC) (*Billiton*) at para 43; *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha and Others (Xstrata)* [2017] 4 BLLR 384 (LAC) at para 11; *Dunwell Property Services CC v Sibande and Others* [2012] 2 BLLR 131 (LAC) at para 32; *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97 (CC) (*SARS*) at paras 37 – 38;

²⁰ See: *SARS supra* at para 38.

²¹ *Billiton supra*.

²² *Ibid* at para 42.

²³ *Equity Aviation supra* at para 39.

²⁴ *Woolworths supra* at para 50.

seeks to avail itself of the statutory exceptions, it follows, by necessary implication, that it bears the burden to show that reinstatement would not be reasonably impracticable, which means it would not be feasible or reasonably possible in the sense that it may be potentially futile.²⁵ The view I take is buttressed by the jurisprudence of the Constitutional Court and this Court, which emerged post-*Woolworths*, endorsing its dictum that the onus is on the employer to adduce compelling evidence to show that the statutory exceptions in section 193(2) are met.²⁶

[48] The appellant conceded that it did not adduce any specific evidence during the trial regarding the impracticability of the reinstatement order. Still, the appellant's undisputed evidence was that it was in an operational predicament upon termination of the Autopax contract, which was soon followed by the termination of contracts with other clients, Brakpan and Putco. In *Mediterranean Textile Mills (Pty) Ltd v SACTWU & Others*,²⁷ confronted with a similar situation, this Court decried the respondent's failure to adduce specific evidence on the impracticability of the reinstatement. Even so, it found that:

'...at the conclusion of each case it remains the responsibility of the court or the arbitrator to determine whether or not, on the evidentiary material properly presented and in the light of the *Equity Aviation* principle, it can be said that the reinstatement order is justified. In other words, even in a situation, such as the present, where no specific evidence was canvassed or submissions made during the trial on the issue of the *non-reinstatable* conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant in the determination of whether or not such conditions exist.'²⁸

[49] It follows that the court *a quo* erred in failing to consider the uncontroverted evidence that the appellant lost three service contracts in succession, with an

²⁵ See: *Xstrata*, which is referred to with approval in *Woolworths supra* at para 49.

²⁶ See: *Faeroes Properties (Pty) Ltd v Southern African Clothing and Textile Workers Union and Others* [2025] 9 BLLR 901 (LAC) at paras 42-42. See also *Booi supra* at paras 34 – 43; and *Mathebula v General Public Service Sectoral Bargaining Council and Others* (2024) 45 ILJ 979 (LAC) at para 19. In both these authorities, the courts dealt with the intolerability of reinstatement in the context of section 193(2)(b).

²⁷ [2012] 2 BLLR 142 (LAC) at paras 29-30.

²⁸ *Id.*

adverse effect on its operations. Notably, the court *a quo* accepted that there was an overall economic rationale for the retrenchment. Yet it was incongruously found that reinstating the respondents may result in genuine redundancies. It is also curious that, having noted the possibility of further retrenchments due to the appellant's prolonged financial strain and loss of contracts, the court *a quo* did not appreciate the futility of the reinstatement order.

- [50] The appellant is therefore correct in its contention that the court *a quo*'s reinstatement order and the 18 months' back pay would unreasonably exacerbate its financial woes. Consequently, it is not reasonably practicable under the circumstances. Fairness, as mentioned above, entails a balanced and equitable evaluation of the positions and interests of both employees and employers, and it involves a value judgment based on proven facts and circumstances.²⁹

Compensation

- [51] In terms of section 194(1), the compensation to be awarded to an employee whose dismissal is found to be substantively unfair must be just and equitable in all the circumstances, but not be more than the equivalent of 12 months' remuneration. The compensation order that I grant is, therefore, informed by a consideration of various factors, which include the fact that the retrenchments constitute a no-fault dismissal, the LRA's imperative in promoting security of employment, the operational challenges that confronted the appellant, and the fact that the appellant had acquiesced to the prospect of paying up to six months' salary. Thus, I am inclined to grant the respondents compensation equivalent to six months' remuneration, respectively.

Conclusion

- [52] The appeal succeeds in part, and the court *a quo*'s order reinstating the respondents ought to be set aside and substituted with an order that the

²⁹ See *Equity Aviation supra*, *Billiton supra* at para 43.

appellant shall pay the respondents compensation equivalent to six months' salary.

Costs

[53] As to costs, since both parties are considerably successful, each should bear its own costs.

[54] In the result, the following order is made:

Order

1. The late filling of the notice and the record of appeal is condoned.
2. The appeal is upheld in part.
3. The order of the court *a quo* reinstating the respondents is set aside and substituted with the following order:
 - 3.1 The appellant shall pay each respondent compensation equivalent to six months' remuneration.
 - 3.2 The above payments shall be effected within two months of this order.
4. There is no order as to costs.

Nkutha-Nkontwana JA

Van Niekerk JA et Basson AJ concur.

APPEARANCES:

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FOR THE THIRD RESPONDENT: Khomola Attorneys