

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JS1109/01

In the matter between:

1st Applicant

2nd to Further Applicants

and

Respondent

–

JUDGMENT

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FRANCIS J

Introduction

1. The first applicant is a registered union that is acting on behalf of 144 of its members (“the individual applicants”) whose names and particulars appear on exhibit D.
2. The first applicant’s case is that the dismissal of the individual applicants is unfair for three reasons:
 - 2.1 It is automatically unfair in terms of section 187(1)(c) of the Labour Relations Act 66 of 1995 (“the Act”) in that the reason for the dismissal was to compel the employees to accept the respondent’s proposals on changing their terms and conditions of employment;
 - 2.2 It is procedurally unfair in terms of section 188(1)(b) of the Act in that the respondent failed to prove that the dismissal was affected in accordance with a fair procedure;
 - 2.3 It is substantively unfair in terms of section 188(1)(a)(ii) of the Act in that the

respondent failed to prove that the reason for the dismissal was a fair reason relating to its operational requirements.

3. The respondent denied that the individual applicants' dismissal was automatically unfair. It contended that the individual applicants' dismissal on 26 April 2001 was based on the respondent's operational requirements. The dismissal took place, as envisaged in terms of section 189 of the Act. The said dismissals, were both substantively and procedurally fair.

The Evidence led

4. Three witnesses testified for the respondent. They are Michael James Tully, Walter Lukhuleni and Lesley Proctor. The applicants closed their case without calling any witnesses.
5. The respondent's case is that the respondent was founded in 1927 with the purpose of quarrying slate tiles for roofing and flooring purposes. Since 1995 there was a softening of the market and trading conditions became more difficult. Competition became fierce and smaller and cheaper producing companies continued to enter the market. The result of this was that the respondent found itself out priced and in a situation where serious restructuring was required in order to remain competitive. The respondent raised the issue of productivity and restructuring during the wage negotiations with the first applicant in 1997, 1998 and 1999.
6. During the wage negotiations in June 2000, the respondent once again raised the question of restructuring. Prior to the signing of the wage agreement on 20 June 2000, the respondent indicated to the applicants that it required changes to the working conditions to be included in the annual wage negotiations. On three previous occasions over the previous four years the applicants have refused to entertain this and indicated that it was only prepared to discuss wages at the annual wage negotiations. It was agreed at the signing of the 99/2000 wage

agreement on 20 June 2000 that a separate forum outside of the wage negotiations would be set up for the changes to conditions of employment and specifically as far as the long term restructuring was concerned.

1. 7. On 28 June 2000 the respondent proposed three dates for the restructuring consultations. There was no response from the first applicant. On or about 5 July 2000, the first applicant received a letter from HHA Business and HR Consultants (“HHA”) inviting it to attend a consultation meeting on the proposed restructuring of the benefits of the respondent’s employees. HHA introduced them in this letter as the representatives of the respondent. The said letter was entitled “Proposed Restructuring of Benefit”. Three dates namely 5, 6 and 11 July 2000 were proposed for the first applicant to attend a consultation meeting on the benefits’ issue. On 6 July 2000 the respondent again invited the first applicant to attend a meeting on 11 July 2000. No union official attended this meeting despite two invitations. The first applicant’s shop stewards were urged to contact the respondent and ensure their attendance at the next meeting.
8. A meeting was held between the first applicant’s members and the respondent to discuss the issues relating to the benefits. The respondent in essence proposed to restructure its quarry by abolishing the hostels and allocating land to the government to provide alternative housing to the employees, by abolishing the feeding scheme and by changing the employees’ terms and conditions of employment. The individual applicants were advised during the said meeting that the proposed change of benefits would not affect their positions within the respondent and further that their remuneration would increase in order to cover the costs of food and accommodation which would be terminated.
9. The respondent’s proposal was to establish a joint forum with the Government to discuss the above plan. A meeting was arranged with the mayor of Rustenburg with the view to expediting a housing project, which was to replace the hostel that was currently used to provide accommodation to the respondent’s employees. The

respondent undertook to make available vacant land and to approach the Government for financial assistance.

10. As far as the employees' terms and conditions of service were concerned, the respondent proposed that the employees be given two options. The first option was for the employees to become independent contractors. In terms of this scheme, the respondent proposed that the employees would be self-employed: they would receive no benefits or fixed income, and would be paid solely according to their production outputs. The second option was for the employees to become incentive employees. In terms of this scheme, the respondent proposed to give the employees a reduced basic wage and to make the balance of their remuneration variable, depending on their production output.
11. During the initial restructuring meetings, the applicants agreed in principle to the abolition of the feeding scheme and the hostel system, subject that the hostel system should only be abolished once alternative housing had been furnished to the employees and the employees had been guaranteed a minimum fixed salary to compensate them for the loss of food and accommodation. The employees did not agree to the independent contracting scheme. The respondent stated that none of the employees would be forced to become independent contractors.
12. On 13 July 2000 a standard letter furnishing all the information that was required was forwarded to the first applicant by facsimile, as well as to all the shop stewards. On the same day the applicant, represented by Thulani Tshozane was invited telephonically to a meeting on 19 July 2000. On the same day a letter confirming such invitation was faxed to the first applicant.
13. On 19 July 2000 a meeting was held with the first applicant's shop stewards. No official of the first applicant attended the meeting. The applicants were advised that a meeting with the Mayor of Rustenburg had been arranged for 20 July 2000.

The purpose of the Mayor's intervention was to expedite the housing project with the housing project with the City's Council.

14. On 20 July 2000, a letter was sent to the District Council of Housing Development. A meeting was set up with the Council. On 20 July 2000 a further meeting was held with the first applicant's shop stewards. No union official attended. The first applicant's shop stewards were again urged to ensure that the first applicant's official attended as the meetings would in the future decide the course and structure of the respondent.
15. On 31 July 2000 all the documentation that was generated to date, including a copy of a letter dated 27 July 2000, was posted by registered post to the first applicant.
16. On 2 August 2000, a further meeting was held with the first applicant's shop stewards and again no union official attended. The first applicant's shop stewards were again urged to ensure the first applicant's attendance at the next meeting on 13 September 2000.
17. On 13 September 2000 a further meeting was held with the first applicant's shop stewards. Mr Z Sontonga attended on behalf of the first applicant. On 21 September 2000, Mr D Boss of the Metropolitan Council and Mr Dikgang, the Mayor of Swartruggens was invited to the meeting at the respondent on 28 September 2000 at 14H00, at which all the envisaged changes would be spelt out to local government. On 27 September 2000 the first applicant was invited to a further meeting on 28 September 2000. On the same day, the District Council was invited to the same meeting.
18. On 5 October 2000 the first applicant was informed in writing that it was in breach of the agreement reached during the wage negotiations to pursue restructuring.

The respondent mooted legal action to deal with this breach. On 9 October 2000 minutes of the previous restructuring meeting were faxed to the first applicant. On the same day, the proposed wage structure envisaged post restructuring was also faxed to the first applicant. On 16 October 2000 a meeting was held at the respondent's premises with the Mayor of the Local Metropolitan Council as well as the District Council. On 20 October 2000 a meeting was held with the first applicant and the first applicant's shop steward. Mr A Mdinwa attended on behalf of the first applicant.

1. 19. On 10 November 2000 a further meeting was held between the respondent and the first applicant and its shop stewards. Tshozane represented the employees. On 21 November 2000 the respondent faxed the first applicant a letter indicating its unhappiness with the manner in which the first applicant had approached and was conducting the restructuring process. On 28 November 2000 a further letter indicating the respondent's concern was again faxed to the first applicant.
20. On 1 December 2000 a further meeting took place with the first applicant and its shop stewards. Mdinwa attended on behalf of the first applicant and Tshozane represented the employees. At this meeting the areas of agreement and disagreement were clearly identified. A further meeting was agreed upon for 12 December 2000. The meeting failed to take place as a result of the first applicant's failure to attend the meeting. The first applicant was informed by telefax of the respondent's position and progress as to the restructuring.
21. On 18 January 2001 a further meeting took place between the respondent and the first applicant and its shop stewards. The respondent issued a recap document at this meeting in order to ensure that all parties were aware of the standing of the talks. The recap document reiterated the views of the parties. The respondent's proposals basically entailed that all employees would have to opt for either the incentive scheme or have their employments terminated in return and become independent contractors. All the employees who opted for the incentive scheme

would forfeit their monthly salaries and would only be remunerated R550 per month and according to achievement of production targets. Those employees who would opt to become independent contractors would only be paid in terms of the square metres they produced. After a year from the date of the signing of the agreement, all incentivised employees would become independent contractors and the incentivised employees' scheme would fall away.

22. The first applicant had reservations about the respondent's proposals and the parties failed to reach an agreement. The primary reason for the first applicant's reservation was that its members stood to lose their guaranteed monthly salary and job security under the scheme proposed by the respondent.
23. After a lengthy discussion with the respondent, the first applicant's informed respondent that the proposed changes to conditions of employment could only be introduced and be put to test for a period of one year. This was, however, conditional upon the members of the first applicant accepting the arrangement. The respondent was advised of this condition that the first applicant needed to obtain a mandate from the members on whether to accept the proposals. It was agreed that a draft agreement would be presented before 29 January 2001 for consideration by the first applicant.
24. The parties met on 29 January 2001. The draft agreement was presented to the first applicant. The proposal was unacceptable to the individual applicants and the respondent was advised accordingly. Clause 8 of the agreement provided that after one year from the date of signing of the agreement, all incentivised employees would become independent contractors and the incentivised employees scheme would fall away. The first applicant discussed the clause at length with the respondent and it was then changed to provide that after one year of the date of the agreement, and subject to consultation, it was the intention of the respondent that all incentivised employees would become contractors and the incentivised

employee scheme would fall away. The first applicant undertook to sign the agreement subject to the sanction of its legal unit that it was legally correct. The meeting was adjourned on the basis that the first applicant would contact the respondent for the signing of the agreement once its legal unit had sanctioned it.

25. The final meeting for the signing of the agreement was scheduled for 6 February 2001 in Randburg at the respondent's offices. On 6 February 2001 the respondent transported the first applicant's shop stewards to Randburg from Swartruggens in order to witness and attend to the signing of the agreement. No official from the first applicant arrived at Randburg to sign the agreement. The respondent made a telephone call to Tshozane who said that he could not make it for the meeting. He said that there was a problem but did not specify what it was. The respondent signed the agreement and handed it to the shop stewards for signing. They refused to sign it.
26. From 6 February to 20 February 2001 the respondent did not have any contact either from the first applicant or the shop stewards' committee. The respondent's response was that it would proceed to implement the proposed changes without the consent of the applicants. On 13 February 2001 the respondent embarked on a meeting within each department of the respondent and all employees were briefed on the restructuring process, the options available to the employees and the results of failure to choose between the options. These departmental briefings continued on an ongoing basis until 27 February 2001. Lukhuleni met with the individual applicants and advised them that the restructuring would be implemented on 1 March 2001, and further that with effect from 1 March 2001, the kitchen would be closed. On 20 February 2001 the respondent issued individual letters addressed to each individual employee in which they were given the option to sign one or the other option. The individual applicants were advised that the respondent would implement the restructuring of benefits with effect from 1 March 2001. The first applicant immediately arranged a meeting with the respondent to discuss the

notices. It was agreed that the respondent would not implement the proposed changes and that the first applicant would explore other proposals with the individual applicants.

27. On 28 February 2001 a mass meeting was held with all the employees at which meeting the respondent explained the process to date as well as its intention to implement changes.
28. On 1 March 2001 the employees embarked on an unprotected strike action. The respondent issued a series of ultimatums throughout the day urging the employees to return to work or face further action. The first applicant was informed of the unprotected strike action of its members. Tshozane came to the premises of the respondent with the objective of resolving the unprotected industrial action of the first applicant's members. After attempting to address the employees, he was escorted off the premises by the said employees. Tshozane did not respond to the respondent thereafter.
29. On 2 March 2001 a meeting was held between the respondent and the first applicant which was represented by its regional chairperson. The first applicant urged the respondent to suspend the implementation of the restructuring. The first applicant raised the question whether the respondent was conducting these restructuring discussions in terms of section 189 of the Act. During the discussions to end the industrial action the respondent made the following options available to the applicant:-
 - 29.1 Option 1: - Employees who return to work on 2 or 5 March 2001 would receive final written warnings and must choose between becoming contractors and the incentive scheme and the union must sign the draft agreement;
 - 29.2 Option 2: - The union does not sign the agreement, employees do not return to work, disciplinary hearings will be held and their services terminated. If the respondent wished to employ them after the disciplinary hearings, they would be

engaged as independent contractors.

The respondent made it clear that it would only accept the employees back on changed terms and conditions of service. It was agreed that the first applicant would hold a mass meeting with the employees on 4 March 2001 to obtain a mandate from them.

30. The applicants were not happy with the options and none of them were chosen. On 5 March 2001 the employees tendered their services in accordance with the terms and conditions which applied to their employment prior to 1 March 2001. The respondent rejected this tender. The disciplinary inquiry that had been scheduled for 5 March 2001 was postponed until 6 March 2001. The outcome was that all employees who participated in the industrial action were issued final written warnings.
31. On 7 March 2001 a meeting was held with the first applicant, in Rustenburg. The first applicant was reminded of the provisions of section 189 of the Act. The first applicant promised to meet with its members and to return to the respondent with alternatives.
32. The next meeting between the first applicant and the respondent took place on for 14 March 2001. The first applicant requested that the implementation of the proposed changes be put on hold pending a mass meeting that would be held with the individual applicants on whether or not to accept the respondent's proposal. The said meeting was held on 15 March 2001 and the individual applicants reiterated their position that the status quo should remain, i.e., with the introduction of sub-contractors there is no job security and the incentive system did not guarantee a fixed salary.
33. The respondent and the first applicant met again on 19 March 2001. The respondent stated, *inter alia*, that it would have to close down if it did not

restructure. The respondent advised that it would proceed with the implementation of changes to the conditions of employment. The first applicant and its shop stewards rejected all the respondent's offers that were made over the past nine months. The first applicant proposed that the status *quo* remain. The respondent undertook to respond in writing.

34. On 22 March 2001 the respondent responded to the first applicant in writing indicating that the first applicant's standpoint was unreasonable, unrealistic and totally impractical to longevity of the respondent. On the same day, the respondent issued letters of termination to all employees being 19 April 2001 and gave notice that they were to vacate the respondent's premises by 22 April 2001. The said notice further invited the first applicant to attend a further consultation meeting on 29 March 2001.
35. The applicants responded to the above letter on 22 March 2001 and advised the respondent that all the previous consultations conducted were regarding changes to conditions of employment and further that they were prepared to meet with the respondent on 29 March 2001 to commence consultations in terms of section 189 of the Act. Further that the respondent had neither advised the first applicant about the possibility of a retrenchment nor was there an operational need for such retrenchments.
36. During the meeting of 29 March 2001, the first applicant informed the respondent that it had to comply with the provisions of section 189 of the Act if it was its intention to retrench the individual applicants. The respondent advised that all the issues pertaining to retrenchment were discussed and that there would not be any severance package as the individual applicant had to decide whether to accept the incentive system or to be employed by as an independent contractor. The meeting ended up in a deadlock.

37. On 29 March 2001 the first applicant received a letter from the respondent informing it that the individual applicants' dismissal would be effected on 26 April 2001. Further that they would not be paid any severance package, as they had been offered an alternative to dismissal which they had refused. Further that all affected employees were expected to vacate the respondent's accommodation by 22 April 2001.
38. On 30 March 2001 the respondent sent the first applicant a letter stating that all employees who had refused alternative job offers would be retrenched without severance pay.
39. The individual applicants were dismissed on 26 April 2001.
40. The first applicant referred a dispute to the CCMA on 30 March 2001 in respect of a matter of mutual interest

The parties submissions

41. The first applicant submitted that the dismissal of the individual applicants is unlawful and in breach of section 64 and 189 of the Act in that:
- 41.1 the reason for their dismissal is not about operational reasons but to compel them to accept changes to their terms and conditions of employment;
- 41.2 prior to receipt of the notice dated 22 March 2001, no consultation had taken place between the applicants and the respondents regarding the proposed termination of services based on operational reasons;
- 41.3 the retrenchments not having been preceded by any consultations as required by section 189 of the Act, are unlawful and unfair and a breach of individual applicants constitutional right to fair labour practices and the right not to be unfairly dismissed.
42. The respondent contended that a bona fide and rational economical rationale

existed for the proposal to change the terms and conditions of employment and the decision to restructure the business. When the first applicant refused to agree to the respondent's proposals on changes to terms and conditions of employment in circumstances where the parties in the respondent's view had reached an oral agreement on the substance of the matter, the respondent was justified in retrenching the employees. The respondent denied that the dismissals were automatically unfair and contended that they were based on the respondent's operational requirements. The dismissals were both substantively and procedurally fair.

The issues that the court is required to decide

- 43. This Court is required to determine:
 - 43.1 Whether the dismissals were automatically unfair because their reason was to compel the employees to accept a demand in respect of a matter of mutual interest between the employer and employee.
 - 43.2 Whether the reason for the dismissals were a fair reason based on the respondent's operational requirements.
 - 43.3 Whether the respondent followed the procedural requirements set out in section 189 of the Act.
 - 43.4 Whether the respondent engaged in a joint consensus-seeking exercise with the first applicant.
 - 43.5 Whether the first applicant, acting on behalf of the individual applicants, properly participated in the joint consensus-seeking exercise with the respondent.
 - 43.6 If the dismissals were unfair, the relief to which the individual applicants are entitled.

Were the dismissals automatically unfair in terms of section 187(1)(c) of the Act?

- 44. Section 187 (1) of the Act provides as follows

“(1) A dismissal is automatically unfair if the employer, in dismissing the employee, act contrary to section 5 or, if the reason for the dismissal is -

- (a)
- (b)
- (c) *to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.”*

45. The question that arises is whether the reason for the dismissal by the respondent of the individual applicants was to compel them to accept a demand “*in respect of a matter of mutual interest*”. The enquiry is a factual one based on the evidence. The parties are *ad idem* that the dispute involves a matter of mutual interest.

46. The parties had reached a deadlock in respect of the changes to conditions of employment. There are prescribed procedures in the Act that the respondent should have complied with if it wished to pursue the matter further. The process of redundancy and changes to conditions of employment are two distinguishable aspects and each has a specific procedure to be complied with.

47. The only inference that can be drawn from the evidence that was led is that the reason for the retrenchment was to compel the individual applicants to accept the respondent’s proposals on changes to their terms and conditions of employment. The material facts in this regard are the following:

47.1 The respondent tried its best to get the individual applicants to accept its proposals over a period of approximately nine months.

47.2 Even at the end of this period, the respondent had, at all material times, the desire to continue to utilise the services of the individual applicants. It is not the respondent’s case that it had finally realised that it could no longer use these employees to perform their services and that it needed to replace them with other employees. This remained the case even after the individual applicants went on an unprotected strike and, in the perception of the respondent, reneged on an agreement reached. Tully in his evidence went as far as to say that even after they had finally decided to retrench the individual applicants, they were still prepared

to consider further discussions about the matter and were willing to retain the employees. The evidence also shows that even after the retrenchments were finally effected, the respondent did its best to find jobs for the individual applicants with new contractors. In fact more than 50% of the retrenched employees were re-employed by the contractors.

- 47.3 Yet, despite all this, when the respondent's proposal was finally rejected by the individual applicants, the respondent retrenched the employees.
- 47.4 It is further significant that right through the consultations on changes to the terms and conditions of employment, the respondent alluded to the threat of closing its business down or retrenching the employees if the respondent's proposals were not accepted.

48. The purpose of the retrenchment was simply to put pressure on the dismissed employees to accept the respondent's proposed changes to their terms and conditions of employment. The dismissal accordingly falls squarely within the prohibition contained in the provisions of section 187(1)(c) of the Act. The dismissals amount to an automatically unfair dismissal.

1. *The dismissal were also procedurally unfair*

49. When the respondent started the consultation process on 11 July 2000, the respondent's understanding was that if one consults with your employees and their union on changes to terms and conditions of employment because of the operational requirements of the company, such consultations are under the auspices of section 189. The respondent further understood that after such consultations are exhausted without agreement on the changes to terms and conditions of employment that management considers necessary in the circumstances, then the employer is entitled to retrench the employees concerned.
50. On this basis, the consultations on terms and conditions of employment were conducted with the first applicant and its members from 11 July 2000 until 29 January 2001. Progress was slow but in January 2001, the parties were close to a

settlement. On 6 February 2001, the respondent believed it had reached agreement with the first applicant and its members on these proposed changes. Thereafter, the employees indicated that they were not accepting the terms and conditions and on 1 March 2001 went on strike. At the meetings that were held after the strike, the respondent indicated that they were going to retrench the employees, if the employees were not prepared to render their services on the basis of the new terms and conditions of employment. The respondent made it plain that as far as they were concerned, the consultation process had been exhausted and despite the first applicant's contention that no retrenchment consultations as envisaged in section 189 of the Act had been held up to that point, when the employees finally rejected the proposals, it decided to retrench the individual applicants on 22 March 2001.

51. It is clear from the evidence that the reference to the retrenchment and closure of the business during the consultations on terms and conditions of employment during the period July to February did not amount to an indication by the respondent to the applicants that it wanted to discuss retrenchments with the first applicant as contemplated in section 189 of the Act. The discussions between the parties related to the respondent's proposed changes to terms and conditions of employment and did not amount to retrenchment consultations in terms of section 189 of the Act.
52. After the meeting held on 29 January 2001, and until the final decision to retrench was taken and communicated to the work force on 22 March 2001, there were no further consultations regarding retrenchment between the parties at the meetings held during this period.
53. Where the respondent had finally decided on 22 March 2001 to retrench the employees and where it had communicated that decision to the employees on that day, the discussions on 29 March 2001 and the notice issued on 30 March 2001

cannot take the matter any further. The respondent merely went through the motions of discussing the implementation of its decision to retrench at this meeting and in the said notice. It had firmly decided that all the first applicant's members would be retrenched and that it would not pay any severance pay. Not only does the evidence show that the respondent had as early as December 2000 already decided that it was not going to pay severance pay if the individual applicants did not accept its proposals on the terms and conditions of employment, but the fact that the respondent did not even inform the individual applicants that it was going to retain four employees, including the first applicant's branch secretary, demonstrates clearly that the respondent was simply going through the motions.

54. The type of consultation concerning retrenchments required by section 189 was not initiated by the respondent in this matter. The respondent did not prove that the retrenchment was effected in accordance with a fair procedure.

Substantive fairness

55. Section 188 of the Act requires an employer in a retrenchment case to prove that the reason for a dismissal is a fair reason based on the employer's operational requirements. The Act requires the employer to prove on a balance of probabilities that the operational requirements on which the decision to retrench is based, indeed constitutes a fair reason for the termination of the employment of the employees concerned. In this regard see *SACWU v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at 1727-8, especially paragraphs 33-38 and 42.
56. In *BMD Knitting Mills (Pty) Ltd V SACTWU* (2001) 22 ILJ 2264 (LAC), Davis AJA a paragraph 19 referred to the approaches adopted by the courts assessing the fairness of an employer's decision to dismiss for operational reasons, as follows: "*I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an*

employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, “the reason for a dismissal is a fair reason.” The word ‘fair’ introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, the court is entitled to examine whether a 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 entitled 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, 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”.

57. The respondent’s case is that a bona fide and rational economical rationale existed for the proposal to change the terms and conditions of employment and the decision to restructure the business. When the first applicant refused to agree to the respondent’s proposals on changes to terms and conditions of employment in circumstances where the parties in the respondent’s view had reached an oral agreement on the substance of the matter, the respondent was justified in retrenching the employees.

58. The respondent has not discharged the onus to prove that this was a fair reason. There were clear alternatives to dismissal available to the respondent. The respondent could for example have implemented its agreement with the individual applicants and if necessary, used discipline to enforce it. Moreover, the respondent could have utilised a lockout to effect the changes to terms and conditions of employment it desired. In this regard see *National Union of Metal Workers of South Africa and Others v Fry’s Metal and Others (Pty) Ltd* (2001) 22

ILJ 701 (LC) at 708 and *SACWU v Afrox Ltd* (1999) ILJ 1718 (LAC) at 1731.

59. The respondent has not shown that the factors they relied on to motivate the desired changes during the consultation process, namely the alleged decrease in production, the alleged rise in costs and the consequent alleged unprofitability, justified the retrenchment of all its production employees in April 2001. The fact that the respondent, despite its threats to close its quarry, did not close it, it simply out sourced it and that there are still jobs for all the retrenched employees, clearly shows that the respondent has not established a reason that justifies the retrenchment of all the employees. Moreover, the fact that the financial statements of the respondent show that the respondent made a significant profit in 1999 and 2000, casts serious doubt on its allegations concerning the escalating costs and diminished production. It certainly does not support a case that retrenchment of all the employees was necessary, and certainly not at that stage.
60. The respondent has failed to prove that the retrenchment of the individual applicants was justified because of its operational requirements.

The relief

61. I have found that the dismissals were automatically unfair. They are also found to be unfair on other substantive and procedural grounds. No evidence was led about the contract that the respondent has with the independent contractors. Mr van Zyl, who appeared for the respondent, stated that the contract is terminable on notice.
62. It is trite that where an employee is unfairly dismissed, (s)he suffers a wrong. Fairness and justice require that such a wrong should be redressed. The fullest redress obtainable is provided by the restoration of the *status quo ante*, namely retrospective reinstatement. See *NUMSA v Henred Freuhauf Trailers (Pty) Ltd* [1995] 2 BLLR 1 (AD) at 6G.

63. In opposing reinstatement, the respondent relies on the provisions of section 193(2)(c) of the Act. Section 193(2)(c) provides that where it is found that a dismissal is unfair this Court must require an employer to reinstate the employee unless it is not reasonably practicable for the employer to reinstate.
64. The fact that the respondent has out sourced its business to contractors does not bring the matter within the contemplation in section 193(2)(c) of the Act. Firstly, the respondent failed to explain what its arrangement with the contractors is. At best for the respondent, it may be liable to a claim for damages. Moreover, it cannot be contended that what the respondent has done is unfair, but that the wrong cannot be redressed in the most appropriate way because it is not practical for the respondent.
65. The purpose of this reinstatement order is to ensure that the individual applicants are placed, as far as it is possible, in the position in which they would have been had they not been dismissed.

Costs

66. I do not believe that this is a matter where costs should follow the results. I have taken into account that the parties have an ongoing relationship.

The order

67. In the circumstances the following order is made:
- (a) The dismissal by the respondent of the 144 individual applicants is an automatic unfair dismissal and is also substantively and procedurally unfair.
 - (b) The respondent is to reinstate fully with no loss of benefits the dismissed individual applicants with effect from 26 April 2001, and to ensure that they are placed in the position they would have been in had they not been dismissed.
 - (c) There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

TS : J G VAN DER RIET S.C. INSTRUCTED BY CHEADLE
THOMPSON AND ASSOCIATES

ENT'S : MR VAN ZYL OF VAN ZYL'S INC

: 26 AUGUST TO 2 SEPTEMBER 2002

T : 17 OCTOBER 2002