REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN **Case No: C1008/2001**

In the matter between:

FOOD AND ALLIED WORKERS UNION First Applicant

CLINT ABRAHAMS AND 113 OTHERS Further Applicants

and

SOUTH AFRICAN BREWERIES LIMITED Respondent

JUDGMENT DELIVERED ON FRIDAY, 3 SEPTEMBER 2004

Gamble, AJ

INTRODUCTION

1. The Respondent, SOUTH AFRICAN BREWERIES LIMITED (hereinafter "the company") has for many decades dominated the local beer market. It currently controls approximately 98% of that market and through a process of international corporate acquisition to be discussed below, is now the second largest brewer in the world. One of the company's best known local brands is marketed under the adage *"The taste that stood the test of time".* This judgment will examine whether the company's human resources and employment practices measure up to the same standards.

2. The First Applicant (hereinafter "the union") is a trade union duly registered in accordance with the Labour Relations Act, 66 of 1995 ("the LRA") and

represents workers employed in the food, beverage and hospitality industry. For more than a decade it has had an on-going relationship with the company, representing the rights of its members in regard to a myriad of labour relations issues. The relationship between the union and the company is, of course, governed at various levels by the LRA.

3. In mid-2001 the 2nd to 113th applicants (hereinafter "the individual applicants") were all employed in various blue collar positions at the company's Newlands brewery in Cape Town. The individual applicants were retrenched by the company (some at the end of May 2001 and the rest at the end of August 2001) for reasons which the company claims were legally justified. The union contends that the dismissal of the individual applicants was unfair, both substantively and procedurally, and it claims appropriate relief consequential upon a finding by the Court in its favour.

4. The hearing of this matter lasted some 23 days with the bulk of the evidence being presented by the company in pursuance of its attempt to discharge the onus which it attracted in terms of section 192 of the LRA. The union and the individual applicants were represented by Advocates COLIN KAHANOVITZ and MICHELLE NORTON while the company was represented by Advocates JEREMY GAUNTLETT SC and LIESL FICHARDT. The Court is indebted to both sets of counsel and their respective attorneys for the thorough manner in which the case was presented, particularly in respect of the documentary evidence. The very detailed heads of argument filed by the parties have greatly facilitated the writing of this judgment.

5. The relevant facts of the case, and the legal conclusions to be drawn therefrom, are unusual, and in many ways, unique. On certain of the crucial issues there is a paucity of precedent. Given the broad nature of the issues debated between the parties at the end of the case, a fairly comprehensive exposition of the material facts is unavoidable. Fortunately these are largely common cause and have been extensively detailed in the heads of argument. The necessity to resort, in this judgment, to the use of much of the corporate jargon which permeated the hearing is unavoidable.

THE MATERIAL FACTS

Corporate Structure:

6. The company now operates numerous breweries throughout the world: from America, through Europe and Africa to the Far East. Its South African operation has breweries in all the major commercial centres. Included in this number are the following breweries which were referred to during the evidence given in this case: Pietersburg, Alrode (in Gauteng), Rosslyn (near Pretoria), Prospecton (in Durban), Port Elizabeth and Newlands in the Western Cape.

7. The company's organisational structure is such that each brewery has a general manager who assumes overall responsibility for the operational side of the facility, and who is given wide powers in relation to issues affecting his/her particular brewery. The company's main board of directors apparently met on a six-weekly basis during the years relevant to this case, while the day to day running of the company's business at a head office

level was managed by its operating committee ("the OC").

8. While the events described below led to a number of retrenchments throughout the company's South African brewing operations, this case relates only to the Newlands brewery. Nevertheless, developments at certain of the other breweries in the run up to the retrenchments are relevant.

9. At the commencement of the trial, the Court conducted a thorough inspection *in loco* of the Newlands brewery (the only notable omission being the necessity to sample product). From this it was apparent that the brewery operates in clearly defined manufacturing units, including a brewing section, a fermentation section and a bottling and packaging section. The latter are colloquially referred to as **"lines"** and are randomly allocated distinguishing numbers.

10. The Newlands brewery is a highly mechanised operation with extensive hi-tech and computerised equipment and includes large items of plant and machinery. The daily volumes of beer produced on the continuous 24 hour shifts (and there were several of them on the individual lines) are of exceptional magnitude.

Changing Circumstances:

11. In 1992 the company, then the biggest brewer in South Africa, was confronted with a political and economic environment which it says was radically different to that in which it had operated previously. With the end of

economic sanctions, the South African markets opened up for international companies to compete in South Africa with local entities. At the same time, international markets also opened up for local companies to position themselves to compete globally. The company says that it realized that if it was to survive it would have to compete internationally. There were apparently two important *"drivers"* for change. Firstly, the company had to determine how best to protect its local market share against international competition. Secondly, it says it was also forced to compete with a global market in order to expand internationally.

12. The company says that it found that its local labour practices were outdated compared to trends in the rest of the world and that, given the change in competitive environment in which it operated, it had to improve operating costs to ensure ongoing competitiveness. As a result, the company faced the likelihood that it would become less competitive in the local market and would not be able to compete in the international market.

13. At that time, the company utilised an operating practice which later became colloquially known as "BOP I". ("BOP" is the acronym for *"best operating practice".)*

14. The company's strategy in addressing the post-*apartheid* challenges was not only disclosed to, but actively canvassed with, the union. It was first formally discussed during the 1994 national wage negotiations; indeed, a National Substantive Agreement ("NSA"), a collective agreement as contemplated in section 23 of the LRA, was signed. In terms thereof, the

parties expressly committed themselves to "*work together to make the company a successful world class manufacturer*".

15. Various of the company's witnesses attempted to convey their understanding of the concept of world class manufacturing ("WCM"). I must confess that no clear explanation was given as to what is clearly a chameleonic concept best understood by those familiar with current *"corporate-speak"*. As I understand it, WCM's central feature is the need to be internationally competitive: to manufacture products which consumers consider to be *"world class",* in content, pricing and presentation. This in turn apparently has implications for the calibre of the workforce, as the union had been told since at least 1994.

Attempts at Joint Problem Solving:

16. Over an extended period after 1994 representatives of the company and the union engaged in joint information-gathering opportunities and consultations. This process included the following:

16.1. The company and the union embarked upon a joint overseas study tour during February 1995 to investigate and evaluate various options to achieve WCM. They visited, *inter alia*, international breweries in Germany and the USA. During this tour the parties (according to the company) learned that it was essential to the WCM process to build a team-based, multi-skilled and process-driven structure.

16.2. In March 1995 a joint *"relationship building"* WCM workshop was held

at the Riverside Sun resort near Vanderbijlpark to enable the study team to give feedback to management and the union officials. The conference was addressed by a cross-section of speakers representing corporate and union interests, and highlighted the concern on the part of both parties in relation to the issue of job losses, retrenchments and job security as part of the WCM process.

16.3. At this workshop the company's erstwhile managing director, Norman Adami, laid emphasis on the role played by the company in society - stressing that it could fulfill this role by having *"enlightened employment practices"* which involved investment in the training and development *"of all staff"* and in so doing *"develop a positive relationship with the community" and "become SA's favourite company".* Emphasis was laid on the building of a co-operative partnership with the union to meet the challenges of the future. Job security came up at the workshop as the number one issue to deal with.

16.4. Derek van der Riet, the company's erstwhile manufacturing consultant, told the workshop that a world class company was one that had developed and empowered all employees with the required skills, performance measures and awards to enable constant improvement. He also spoke of *"world class competitiveness with a social conscience"*.

16.5. The participants understood that threats to job security could be

minimised with a proper understanding about how people would be up-skilled to meet the challenges of the future - an understanding of the necessity to define the time horizon for education and training and to prepare a proper plan. There was implicit acceptance that standards of education and training at the company had in the past not been good enough to enable it to compete as a world player. However (as one of the company's witnesses later testified), at this stage *"nobody had a clue exactly what we were going to be doing, we didn't have BOP 2 yet, we didn't know what it was."*

16.6. As pointed out above, during April 1995 and during the national wage negotiations, the parties amended clause 21 of the NSA to record that they committed themselves to engage in constructive discussion and to work together to make the company a successful world-class manufacturer. In particular the parties agreed that skills development was essential in order to achieve the status of a successful world class manufacturer and they agreed not to boycott training at any level. There was also consensus that joint taskforces be established to deal with, *inter alia,* WCM and job grading.

16.7. During April 1996 to 1998 a WCM pilot project was implemented on Line 12 at the Alrode Brewery where the learnings from the international *"benchmarking"* tour referred to in paragraph The company and the union embarked upon a joint overseas study tour during February 1995 to investigate and evaluate various options to achieve WCM. They visited, inter alia, international breweries in

Germany and the USA. During this tour the parties (according to the company) learned that it was essential to the WCM process to build a team-based, multi-skilled and process-driven structure. were implemented in the local environment. (This project subsequently became known as *"the Alrode Line 12 pilot"*.)

16.8. The Alrode Line 12 Pilot was run by a team comprising representatives of both parties. The project represented an opportunity to experiment with the structure of the operating teams. The outcome of the pilot was that the company favoured a very different packaging line which comprised of four *"building blocks"*, namely the positions described as *"BOP operators", "process operators", "process artisans" and "team leaders"*. The structure entailed that the three core processes of work (operating, maintaining and performing quality control ("QC") checks, including data capturing) were performed by a single team with competencies vested in non-functional positions. The central idea was that an employee could progress incrementally up the corporate employment structure from one *"building block*" to another.

16.9. The Alrode Line 12 pilot team suggested, as part of the project, entry level specifications suitable for the positions developed during the pilot. Thereafter, a joint project team (under the leadership of the company's erstwhile human resources specialist, Denise Smith ("Smith")) was tasked to consider these entry level specifications. In addition, an independent company, Flagship Consulting, was

approached to recommend actual entry level specifications relating to the proposed positions. The company's board eventually accepted the recommendations of Flagship Consulting.

16.10. In evidence, Smith described her role as being an important actor and influencer of the way in which the WCM process evolved. She was the person tasked to initiate the redesigned manufacturing process. She conceded that BOP I was already **"team-based"** - evidently a central component of WCM. BOP I was therefore already a WCM strategy, but the trigger for BOP II (as the revamped model was later known) was that by 1996 the revised manufacturing strategy (introduced in 1992) was not *"delivering"*. The *"numbers"* in respect of training investment, when compared to time and the related performance improvement, "*filled the business with unease as it was taking too slow*".

16.11. In November 1996 another company/union workshop was held at Gordon's Bay. At this workshop all parties again agreed to continue to work towards WCM and attempt to address the major issues, including job security, competency acquisition and job losses.

16.12. In February 1997 the parties conducted a joint workshop in Geneva under the auspices of the International Labour Organisation. The focus there was the issue of job security. In terms of an agreement reached subsequently between the company and the union, "Project Noah" was established. The object of this structure was to provide a

security net and assistance for employees who lost their jobs as a result of any restructuring connected to the implementation of WCM. Project Noah (no doubt so-called to provide a safe haven against the consequences of the anticipated deluge) was strongly promoted by management because it understood that retrenchments were coming. It also formed an important part of the *"communication phase"* of the WCM implementation strategy - which had as a focal point the following:

"*To position SAB management in a positive light i.e. as a socially responsible employer who has done all in its power to address the negative side of WCM – here the work done in Project Noah is our best weapon (as it was intended to be!)".*

16.13. In August and September 1997 a national strike took place as a result of a deadlock in wage negotiations. This interrupted discussion between the parties on WCM.

16.14. On 8 April 1998 the company and the union met at the Monkey Valley conference centre in Noordhoek near Cape Town to discuss progress on the WCM initiative. It was then agreed to move from joint workshopping to negotiating a Workplace Change Agreement ("WCA"). The deadline for completing negotiations for the WCA was set for 31 July 1998. Clearly the company wanted to reach consensus on issues which would otherwise have to be dealt with under section 189 of the LRA.

16.15. Pursuant to the Monkey Valley discussions, the company presented a

draft agreement. The parties, however, failed to reach agreement as a result of the union's insistence on a moratorium on retrenchments: the union wanted the inclusion of a clause which said that the company should "*impose a moratorium on retrenchments for a two to three year period during the period of negotiation and implementation of workplace change"*. In the company's opinion this was not a reasonable proposal because it meant that it would have to put WCM implementation on hold for another three years. The parties, however, agreed that in the absence of a WCA, they would be bound to follow the agreed procedures set out in the National Recognition Agreement and the relevant clauses in the LRA.

16.16. I pause to mention that the breakdown of the WCA negotiations in mid-1998 at a national level meant that any pre-retrenchment consultation processes under the LRA would thereafter have to be conducted at plant level. The potential site of conflict was therefore removed from a national to a local level. Smith described this change, from endeavouring to implement WCM by consensus to implementing it through a retrenchment procedure, as *"simply a change in implementation methodology"*.

16.17. During the national wage negotiations that were held during July 1998 the parties again confirmed the existing terms of clause 21 of the NSA.

BOP II Implementation

17. After considering its position, the Main Board of the company decided to implement the WCM *"learnings"* from the Alrode Line 12 Pilot. The new operating practice which had been developed at Alrode was then referred to as "BOP II". BOP II was first implemented at the Prospecton Brewery on Line 4. While the union raised no disputes during this particular implementation, either of a substantive or procedural nature, it bears mention that neither this implementation nor Alrode Line 12 had any implications for reduction of jobs.

18. In about May or June 1999 the OC decided that BOP II would proceed at Newlands as per its *"implementation plan"*. This decision enjoyed the confidentiality of the boardroom and was not conveyed to the union. Implementation then took place in three separate phases:

18.1. The first phase related to Line 1 only and was completed in August 1999. During this implementation, the union was informed in the company's business case that it was the start of the process and that further implementations would take place at a later stage as the restructuring was *"rolled out"* to all the manufacturing lines at the Newlands brewery. The company's business case for Line 1 records the following at p 17 thereof:

"As the learnings from Line 1 are implemented in other business areas, redundancies may result:

- *Further redeployment will be sought;*

- *Phased implementation will allow time for employees to enhance basic education -- thus improving their chances of meeting selection criteria in future restructuring processes;*

- *Voluntary versus forced retrenchment options will be discussed when consultation for other business areas takes place .....".*

The company decided that the parties would consult only in relation to line 1 at that stage to ensure a wide level of understanding of the restructuring process and the impact thereof once implemented, and also to learn from the implementation on this line. Once again, this implementation did not have any impact on staffing levels as all/any redundancies were accommodated on other lines at the brewery.

18.2. The second phase at Newlands related to engineering which was implemented in 2000. The business case in respect of this phase again reiterated the principles of WCM and the need for restructuring.

18.3. The third phase, which is the subject-matter of this enquiry, took place during 2001 and involved the following work areas:

18.3.1. Lines 2 and Draught;

18.3.2. Lines 3 and 4;

18.3.3. Packaging Engineering, Training and Raw Materials;

18.3.4. Brewing;

18.3.5. Quality Control; and

18.3.6. Other non-core business.

The company's business case in respect of this phase again reiterated the principles of WCM.

19. As stated above, the consultation process in relation to each of these phases at Newlands was preceded by a decision, at national level, by the company's board. Implementation at each plant was, however, determined at that level pursuant to a consultation process with the union. The reason for this was that each brewery had its own particular requirements and the details of implementation differed depending on the layout of the lines and the technology involved.

20. Generally, implementation at regional level occurred after a business case was presented in respect of each region by the relevant general manager to the OC. (One business case was not presented in respect of the whole country.) The OC then approved in principle the individual business cases presented to it, whereafter the particular region entered into a local consultation process with the union.

Newlands 2001 Restructuring:

21. It is common cause that the consultation process in respect of the 2001 restructuring at Newlands commenced on 18 January 2001. At this meeting the business case was presented to the union. (On 20 December 2000 the company had invited the union to a consultation meeting which was, at that stage, scheduled for 10 January 2001. The union requested that the latter meeting be postponed in view of the alleged unavailability of union representatives.)

22. Prior to the invitation to the union to consult, the company conducted an internal *"Change Planning Workshop"* at Newlands in mid-November 2000. This was exclusively for management and dealt meticulously with the process to be followed, highlighting the anticipated hurdles and pitfalls which may be encountered during the consultation phase. The company was evidently anticipating strong resistance from the union.

23. The Human Resources Manager at Newlands, Barbara Pinto, prepared the company's business case - which was subsequently presented to the union at the first consultation meeting of 18 January 2001 - in November-December 2000. This document was intended to constitute compliance by the company of its obligations under section 189(3) of the LRA.

24. At the meeting of 18 January 2001 the parties agreed that joint communication sessions be held on 19 January 2001 and 26 January 2001. At these communication sessions the business case was presented to the assembled employees (both unionized and non-unionized) by the company and questions were answered.

25. At the same meeting (on 18 January 2001), the union requested that it be given a period of one month "*to study management's proposals and to come up with viable options or alternatives*". The company said that it did not wish to delay the process and requested on-going weekly consultation meetings. As became apparent later, the union did not attend these meetings.

26. On 24 January 2001 the union was notified of the second consultation

meeting scheduled for 25 January 2001. In this notification the company again reiterated its perceived need to consult on an ongoing basis. The next consultation meeting was held on 25 January 2001. The union did not attend.

27. The following consultation meetings were held on 1 February and 8 February 2001. The union failed to attend these meetings. Various letters were addressed by the company to the union during January and February 2001 inviting them to participate.

28. Thereafter, the next meeting was held on 15 February 2001. This was also not attended by the union. At this meeting the company took the decision to implement the proposal set out in the business case in its erstwhile current form.

29. Despite the decision to implement, the company maintained that it was prepared to consider any proposals made by the union. The company indicated such willingness in its letter dated 22 February 2001. Accordingly, various further meetings followed:

    29.1. On 20 February 2001 the union requested the company to meet on 26 February 2001. It requested the company to withdraw the implementation of the proposal and to consult. The company replied and stated that it had scheduled consultation meetings to be held on 22 February and 1 March 2001 and was willing to meet on those dates. The union did not attend the consultation meeting on

22 February 2001.

29.2. At the next consultation meeting held on 1 March 2001, both parties were represented. During this meeting, the union made certain demands that had to be met before presenting its proposal to the business case.

29.3. On 8 March 2001, both parties attended a consultation meeting. At this meeting it was minuted that the union had intentionally stayed away from the consultations. The union tabled its proposals to the business case at that meeting.

29.4. A further consultation meeting was held on 15 March 2001. The company tabled its comments in relation to the union's response to the business case.

29.5. Then followed two meetings on 22 and 29 March 2001. They were also not attended by the union. Various meetings were thereafter held in April 2001.

30. The company proceeded to implement the proposals set out in the business case. The recruitment and selection process was already in place and was similar to that used in respect of the 1999 and 2000 restructuring processes at Newlands Brewery.

31. The evidence relating to the selection procedure is also largely undisputed. This procedure entailed the following:

31.1. On 16 February 2001 an internal memorandum was distributed to all

employees informing them of management's decision to implement the proposed business case in its current form.

31.2. On 19 February 2001, once the decision had been taken to implement the proposal as presented by management, the recruitment process commenced.

31.3. On 22 February 2001 a personal letter was handed to each employee whose position was affected by the decision to restructure the organisation. This letter outlined the process that was followed to date, the attempts to consult with the union and the fact that the position had become redundant.

31.4. The first recruitment process took place from 19 February 2001 to 30 March 2001 and the second process took place from 15 March 2001 to 30 April 2001.

31.5. In both these processes the following steps were taken:

31.5.1. All new positions were advertised internally for a period of two weeks. These were placed on notice boards and circularised via e-mail.

31.5.2. All applications were submitted to one central source and a recruitment database was maintained for all applicants to monitor their progress through the recruitment process.

31.5.3. Initial screening took place during this period to determine whether applicants possessed the required entry level qualifications as set out in the advertisements. Where the applicants were unable to provide documentary evidence of their highest educational qualification, Adult Basic Education and Training (“ABET”) screening was conducted to determine their ABET levels.

31.5.4. Oral feedback was provided to those applicants who were unable to demonstrate the requisite ABET level based on screening results.

31.5.5. Applicants who did not have the minimum entry level qualification as applicable to the position applied for were handed documents, euphemistically termed *"regret letters".*

31.5.6. Those applicants who proved to be at the required ABET level were included in the list of potential candidates and proceeded to the next stage of the recruitment process.

31.5.7. In respect of successful candidates, panel interviews were conducted in all instances. Panels consisted of two to three members, including an HR specialist, in most cases. The applicants were also required to

undergo psychometric assessment.

31.5.8. A standard recruitment interview guide was used for all the different positions throughout the process to ensure consistency.

31.5.9. A short list for each position was compiled, based on the outcome of interviews, recognition of prior learning, attributes and psychometric assessment results.

31.5.10. The selection panel, with the involvement of the head of department, considered the shortlist and arrived at a decision as to who the most suitable candidates for the new positions were.

31.5.11. All unsuccessful applicants received verbal feedback from the recruiting manager, in addition to being handed a *"regret letter."*

32. As a result of the restructuring, a total of 164 positions were declared redundant: 26 employees were successfully redeployed and 138 employees were retrenched by 31 August 2001.

33. The individual applicants before Court who were affected by this process are listed in an agreed schedule. In total there are 115. They can usefully be classified in the following categories:

33.1. Those applicants who failed to apply for any new positions, who were not screened and whose ABET levels were not known to the company. There are 46 in total. For the sake of convenience I shall hereinafter refer to these persons as *"category 1 applicants"*;

33.2. Those applicants who did apply for the new positions, but who failed to meet the entry level specifications. In total, 55 applicants fall into this category. (One applicant who applied for redeployment but who was unsuccessful is included in this number). These will be referred to as *"category 2 applicants"*;

33.3. Those applicants who did apply for the new positions, who met the entry level specifications and entered the recruitment process, but who were found to be unsuitable for the new positions. In total, there are 6 applicants in this category. These will be termed *"category 3 applicants"*;

33.4. Those applicants whose positions were declared redundant and who were dismissed for reasons unconnected to the introduction of WCM. They number 6 and will be termed *"category 4 applicants"*.

33.5. Two deaf mute applicants. These employees will be referred to as *"category 5 applicants".*

RELEVANT STATUTORY PROVISIONS

34. The union claims that the individual applicants' dismissals were based on

operational requirements. The procedure for a fair dismissal based on the employer's operational requirements is found in section 189 of the LRA, which reads as follows in the form in which it was prior to amendment in 2002 (it being common cause that this is the applicable wording):

"189. Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -

(a) any person whom the employer is required to consult in terms of a collective agreement;

...

(2) The consulting parties must attempt to reach consensus on

(a) appropriate measures -

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

(3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to -

(a) the reasons for the proposed dismissals;

i. the alternatives that the employer considered before proposing the dismissals, and the

reasons for rejecting each of those alternatives;

ii. the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method of selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

(h)the possibility of the future re-employment of the employees who are dismissed.

...

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.

(6) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(7) 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."

35. Section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to rely on

fair labour practices and, where appropriate, to dismiss for operational reasons. The respective obligations under the section are geared to a specific purpose, namely to achieve a joint consensus-seeking process. This section does not impose obligations only on the employer. All consulting parties have a duty to attempt to reach consensus. (**Johnson & Johnson (Pty) Ltd v CWIU** (1999) 20 ILJ 89 (LAC)).

36. A dismissal for operational requirements is a no fault dismissal, unlike dismissals for misconduct or incapacity. The Code of Good Practice: Dismissal (Schedule 8 to the LRA) provides as follows:

"*Dismissals for operational requirements have been categorised as "no fault" dismissals - in other words, the employee is not responsible for the termination of employment, the effective cause of termination is one or more external or internal factor related to the employer's business needs. For this reason, together with the human costs of retrenchment, this Act places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that those employees to be dismissed are treated fairly.*" (Emphasis added)

37. As set out above, section 189 provides a list of the various issues in respect of which the parties should attempt to reach consensus and information which is required to be provided in writing. While a purposive approach may be adopted, fairness is always to be regarded as the touchstone in relation to the whole process. A mechanical *"check list"* approach to determine whether section 189 has been complied with is inappropriate (**Johnson & Johnson (Pty) Ltd v CWIU**, *supra)*. The proper approach by a court considering a complaint of unfair dismissal under section 189, is to

ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved.

38. It is the union's case that the company has failed to prove:

38.1. that the reason for the dismissals was a reason based on its operational requirements;

38.2. alternatively and in any event, even if the reason was one based on operational requirements, that the reason was a fair one; and

38.3. that the dismissals were effected in accordance with a fair procedure.

I shall proceed to analyse the case along these broad categorizations.

SUBSTANTIVE FAIRNESS : THE LAW

39. The test for substantive fairness in dismissals for operational reasons has traditionally been described by the Labour Appeal Court as being whether the retrenchment is *"properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances".*

Decision Surveys International (Pty) Limited v Dlamini [1999] 5 BLLR 413 (LAC).

See also: **SACTWU v Discreto (A Division of Trump & Springbok Holdings)** (1998) 19 ILJ 1451 (LAC).

40. More recently the Labour Appeal Court endorsed a less deferential test for proof of substantive fairness – an approach which calls for a more rigorous or exacting examination by the courts of the reasons advanced by the

employer. This requires the employer to show that the dismissals were "*a measure of last resort*" which "*could not be avoided*". (See **CWIU and Others v Algorax (Pty) Ltd** (2003) 11 BLLR 1081 (LAC).) To the extent that they may previously have been the subject of debate, the following guidelines have now been laid down by the Judge President in the **Algorax** case:

40.1. Whether the dismissal is fair or not is a question which must be answered by the court and the court must not defer to the employer for purposes of answering that question (para 69);

40.2. The court should not hesitate to deal with an issue that requires no special expertise or business knowledge. Some problems require simple common sense and do not involve any complicated business transactions or decisions (para 70);

40.3. If there is a way in which the employer could have addressed the problems by using solutions which preserve jobs rather than which cause job losses (or which could lead to further job losses), the court should not hesitate to deal with the matter on the basis that the employer should have used that solution, rather than the one which causes job losses:

"*This is especially so because resort to dismissal, especially so-called no fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort."* (at para 70).

See also:

W.G. Davey (Pty) Ltd v NUMSA (1999) 20 ILJ 2017 (SCA) at 2024F.

40.4. Referring to sections 189(2) and (3) the Judge President held as follows in the **Algorax** case:

"*It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer to only resort to dismissing employees for operational requirements as a measure of last resort. If that is correct, the court is entitled to intervene when it is clear that certain measures could have been taken to address the problems without dismissals for operational reasons or where it is clear that dismissal was not resorted to as a measure of last resort."* (at para 70). (Emphasis added.)

41. In **County Fair Foods (Pty) Ltd v OCGAWU and Another** (2003) 7 BLLR 647 (LAC), a judgment handed down before the decision in the **Algorax** case at p.656, para 27 it was held by the Judge President that:

"*If the employer relies on operational requirements to show the existence of a fair reason to dismiss, he must show the dismissal of the employee could not be avoided. That is why both the employer and the employee or his representatives are required by section 189 of the Act to explore the possibilities of avoiding the employee's dismissal."*

42. In reply, Mr Gauntlett argued strenuously against the *"measure of last resort"* approach. He said that to do so would require words to be read into the statute which postulates simply a test of fairness cast in wide and unrestricted language (see sections 188(1)(a) and (b)). He argued that the **Algorax** case did not lay down general principles, but that the remarks of the Judge President are to be restricted to the facts of that case.

43. I cannot agree with Mr Gauntlett on this score. The *dictum* in the **Algorax** case is one of general application and is based on a thorough analysis of sections 189(2)(a)(i) and (ii) read with subsections (3)(a) and (b). The **County Fair** case is to the same effect. In the **W.G. Davey** case the Supreme Court of Appeal suggested a similar approach in respect of a strike dismissal - why then should there be any lesser test in respect of a no fault dismissal?

44. In the recent decision in **General Food Industries Ltd v FAWU** [2004] 7 BLLR 667 (LAC) at p.682J, para 55, Nicholson JA summarised the position as follows:

"*The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that - even though reasons to retrench employees may exist - they will only be accepted as valid if the employer can show that* ***all viable steps*** *have been considered and taken to prevent the retrenchments or to limit these to a minimum."* (Emphasis added.)

45. Finally, I am enjoined by the aforementioned Code of Good Practice to consider whether *"all possible alternatives to dismissal ...* [have been] ... *explored."*

46. Prior to the 2002 amendments to the LRA, the provisions of section 194 accentuated the distinction between substantive and procedural unfairness in relation to retrenchment dismissals. For purposes of compensation, that distinction has now largely disappeared, except that a finding of procedural unfairness alone precludes a Court from reinstating an employee dismissed

for operational requirements. While this Court may therefore, in the future be less inclined to draw so clear a distinction between substantive and procedural unfairness (particularly in cases where the dismissed employee does not seek reinstatement), I shall proceed to examine the issue of fairness in this case along traditional lines, more particularly because it is common cause that the LRA in its pre-2002 amended form applies here.

47. Bearing in mind that **"fairness, not correctness is the mandated test"**, the judgment of Davis AJA in **BMD Knitting Mills (Pty) Ltd v SACTWU** (2001) 22 ILJ 2264 (LAC) at 2269I-2270B is to the following effect:

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

That approach was recently confirmed by Davis AJA in **Enterprise Foods (Pty) Ltd v Allen and Others** [2004] 7 BLLR 659 (LAC) at p.663, para 17. As stated earlier, I intend applying a similar approach in the present case.

48. I pause to mention that in considering issues of fairness, the Court is obliged to have regard to fairness to both parties. There is no room for any suggestion (and Mr Kahanovitz for the applicants did not argue this) that fairness is confined to its effect on employees only.

National Union of Metal Workers of SA v Vetsak Co-operative Ltd and Others 1996 (4) SA 577 (A) at 589C-D;

Woolworths (Pty) Ltd v Whitehead 2000 (3) SA 529 (LAC) at 559F;

National Education Health and Allied Workers Union v University of Cape Town and Others (2003) 24 ILJ 95 (CC) at p.112C-E.

49. In his celebrated concurring judgment in the **Woolworths** case, *supra,* Willis JA (in an uncontroversial passage) made the following remarks about the concept of fairness (albeit in the context of a discrimination complaint):

"[127] Fairness is an elastic and organic concept. It is impossible to define with exact precision. It has to take account of the norms and values of our society as well as its realities. Fairness, particularly in the concept of the LRA, requires an evaluation that is multi-dimensional. One must look at it not only from the perspective of prospective employees, but also employers and the interests of society as a whole. Policy considerations play a role. There may be features in the nature of the issue which call for restraint by a court in coming to a conclusion that the particular act of discrimination is unfair."

SUBSTANTIVE REASONS ADVANCED

50. There is no dispute between the parties regarding the company's entitlement to embark upon the WCM strategy. Indeed, in the National Substantive Agreement concluded between the union and the company on 29 June 1995, the following was expressly recorded in that regard:

"*21.* ***World class manufacturing***

21.1 It is agreed that SAB and its employees have a significant contribution to make towards the rebuilding of the national economy and the Reconstruction and Development Programme. The parties commit themselves to engage in

constructive discussion, within accepted Procedures and Agreements, and will work together to make the Company a successful, world class manufacturer.

21.2 The parties agree that skills development is essential in order to achieve the status of a world class manufacturer and marketer of fine quality beers. The parties, therefore, agree not to boycott training in the event of any dispute, either at a local or national level.

21.3 The parties agree that the following joint task forces be established under the auspices of the National Forum:

...

21.3.2 task force on world class Manufacturing/Job Grading."

51. I should point out that the present case differs significantly from the usual retrenchment scenario one encounters where jobs are shed to save an ailing company. Here, the company has openly come to Court and explained that its decision to restructure was motivated by a desire to become more efficient and competitive (both locally and globally) and to increase its profitability. In a market-driven economy there can be no objection, in principle, to retrenching to increase profit margins (there is after all a duty to shareholders to do so), provided always that the employer's conduct is found to be fair on a general assessment of all the evidence. (**Hendry v Adcock Ingram** (1998) 19 ILJ 85 (LC).) See also **Fry's Metals (Pty) Ltd v NUMSA and Others** [2003] 2 BLLR 140 (LAC) at

152-3, para 33 and **General Food Industries Ltd v FAWU**, *supra*, at p.682, para 52; p.684, para 62.

52. Arising from the mutual commitment towards a strategy of WCM, and no doubt in an endeavour to obviate the necessity to later enter into section 189 consultations at a local/plant level, the company, in 1998, proposed that the Workplace Change Agreement be concluded. I shall revert to the WCA hereunder. Suffice it to say at this stage that the relevant document drawn up by the company for discussion purposes to attempt to reach consensus on this point, is replete with references to WCM and the corporate jargon associated therewith. The uncontested evidence of Burger in relation to this document was that negotiations in relation thereto broke down when the union demanded a moratorium on job losses which the company was not prepared to give. There was no evidence to suggest that the union, at any stage during the WCA negotiations or the other discussions and interactions leading up thereto, did not appreciate or object to the introduction of WCM *per se*.

53. In the circumstances I am satisfied that the company's reliance upon WCM as the primary factor motivating change in its workplace constitutes a valid *"commercial rationale"*, in the context in which that concept has been used in the cases referred to above. At this level, then, I am satisfied that the company did not treat the individual applicants unfairly.

INCAPACITY DISMISSAL?

54. Mr Kahanovitz took the argument in relation to substantive fairness to a

further level and contended that the real reason for the dismissal of the individual applicants was their incapacity to perform the work required of them by the company under the BOP II model. To this extent, Mr Kahanovitz contended that the retrenchment was a sham intended to mask the real reason for the dismissal.

55. Mr Gauntlett readily conceded that if the union's argument on this score was correct, the company was in trouble and that it would not be able to justify the dismissals on the basis of section 189 of the LRA. However, Mr Gauntlett argued strenuously against any suggestion of an incapacity dismissal. The issue is not as simple as it seems and requires some detailed analysis.

56. The union's argument draws succour from a number of recent decisions including **Greig v Afrox Ltd** (2001) 22 ILJ 2102 (ARB), **SA Mutual Assurance Society v Insurance and Banking Staff Association and Others** (2001) 9 BLLR 1045 (LAC), **Wolfaardt and Another v Industrial Development Corp of SA Ltd** (2002) 23 ILJ 1610 (LC), **Ntshanga v South African Breweries Ltd** (2003) 8 BLLR 789 (LC) and an article by Prof Rycroft (who incidentally wrote the arbitration award in **Greig v Afrox**, *supra*) entitled ***C*orporate *restructuring and "Applying For Your Own Job"*** (2002) 23 ILJ 678.

57. Prof Rycroft's article is a critique of the **SA Mutual Life** case and provides a useful summary of the principles underpinning the argument advanced by Mr Kahanovitz. It commences with the following remark:

"An industrial relations trend has taken root in terms of which an employer, for operational reasons, seeks to introduce a restructured organisational template, and in so doing redefines the requirements and competencies for jobs in the new structure. Existing staff are then told that all existing positions have become redundant and that if they want to continue in employment with the employer, they must apply for the 'new' positions. Those who fail to apply or who are not appointed, are considered to have resigned or are retrenched."

58. After a thorough discussion of the **SA Mutual Life** case and various other decisions of the Labour Appeal Court and the Labour Court, Prof Rycroft concludes with the following remarks:

"In summary, an employer intending to restructure by way of defining jobs and making all or a group of existing jobs redundant must be able to show: (i) a reasonable and commercial rationale for the decision to restructure; (ii) that the particular decision has been taken in a manner which is also fair to the employees to be retrenched; (iii) that the retrenchment of the employees is essential to achieve the purposes of the restructuring; (iv) that the criteria for appointment to the 'new' jobs are clear and justifiable, linked specifically to the new job description; (v) that guidance is given to employees as to which of the restructured jobs they might be eligible (sic); (vi) that employees are given an opportunity in the interview to answer any questions about past performance that might be used as a criterion for not appointing them to the job; and (vii) that the eventual selections are objectively justifiable."

59. It is worth noting that Prof Rycroft suggests, too, that the deferential approach towards the commercial efficacy of an employer's decision (cf. **SACTWU and Others v Discreto (A Division of Trump and Springbok Holdings)** (1998) 19 ILJ 1451 (LAC)), has yielded to an enquiry in which the Court is now entitled to examine the content of the reasons given by the employer in assessing whether it has established substantive fairness.

60. Relying on Prof Rycroft's article in the main, Mr Kahanovitz argued that the employer's classification of **"redundancy"** in the present case should be carefully scrutinised because:

60.1. unless an employer is closing down or moving its operation, the designation of all jobs as **"redundant"** is not an accurate description of what changes the employer is seeking to make; and

60.2. modifying a job or its responsibilities does not make that job **"redundant"** because jobs are always in the process of being adapted and fine-tuned.

61. The decision by Davis AJA (Zondo JP and Du Plessis AJ concurring) in the **SA Mutual Life**, case, is worth quoting at some length:

"… *Mr. Bozalek* [who appeared for the employees] *submitted that the very documentation upon which appellant had relied to justify the restructuring of the department indicated that much of the problem with the department lay in the 'inadequate skill level and qualifications of several of the recruitment consultants'. During the consultation period second to fifth respondents had taken the approach that, with improved training and skill development, many of the difficulties which the department had encountered could be resolved. Accordingly Mr. Bozalek submitted that the decision to restructure the department represented a guise under which the appellant sought to address problems of perceived non-performance or incapacity of the individual respondents which on its own documentation was caused by a skill shortage.*

When the restructuring of the department is examined within this factual context it appears that it represented a means of the dismissal of the individual respondents based upon incapacity and poor work performance. …

… Furthermore, when asked as to how the incumbents of the old department were expected to perform successfully in their new posts, Ms. Griffiths was constrained to answer that they were assessed according to the required level of competence for the new jobs and that they had received further training, the very point on which second to fifth respondents had sought to negotiate.

… When the evidence is evaluated holistically, a clear picture emerges of appellant

being dissatisfied with the performance of certain members within the department, and choosing not to initiate proper disciplinary enquiries (sic) in relation to performance and incapacity. Rather appellant sought to restructure the department as a means of dismissing those employees with whom it was dissatisfied, namely the individual respondents.

In the circumstances, appellant was not able to discharge the onus of establishing that second to fifth respondents were retrenched because their jobs had become redundant pursuant to a process of restructuring the department. It was also not able to show that the individual respondents would not have been able to perform to the acceptable level of competence in the restructured department. … The ultimate decision to change the department was predicated upon appellant's manifest dissatisfaction with the performance of certain personnel in the department rather than the grounds of operational requirements. …" (at paras 12 to 17).

62. In argument Mr Kahanovitz relied heavily on the **SA Mutual Life** case as support for his contention that the dismissals in the present case were effected for reasons of incapacity. While there are certainly similarities between the two cases, in my mind there is a fundamental factual difference between the two:

62.1. Davis AJA found at p.1050F (para 17) in the **SA Mutual Life** case that -

"The ultimate decision to change the department was predicated upon appellant's manifest dissatisfaction with the performance of certain personnel in the department rather than on the grounds of operational requirements, namely requirements based on the economic, technological, structural or similar needs of the employer (section 213 of the Act)."

62.2. In the present case the unchallenged evidence is that the decision to move from BOP I to BOP II was aimed at improving the overall efficiency of the company's entire production facility countrywide. (The focus was on a more generalised and macro scale.)

63. The company's production efficiency (according to Michael Short who gave evidence on behalf of the company) is measured on a percentage basis and is calculated to reflect the amount of time that any production line is operative. So, for example, to achieve 100% efficiency a production line would have to operate for every hour within a 24 hour cycle. When the line is static and not running, the efficiency factor reduces and is reflected by a percentage lower than 100.

64. The uncontested evidence is that, at the Newlands brewery, the efficiency prior to the restructuring was of the order of 53%, while currently it is close to 70%. This, according to the company, is a significant increase in efficiency and is one which is based on the overall structural changes which were introduced with the BOP II model. This is a wholly different situation to a complaint by an employer about poor work performance in a particular area. I find, therefore, that the **SA Mutual Life** case, while persuasive authority in respect of the principles postulated, is based on a fundamentally different set of facts and is therefore distinguishable.

65. Mr Gauntlett argued that the facts of the present case do not reflect a dismissal for incapacity. As I will attempt to demonstrate hereunder, certain of the dismissed employees were considered by the company to be incapable of being sent on training courses to enable them to work in the new structure. The union did not dispute that the new structure (BOP II) was a materially different structure to the BOP I structure. While it may be that certain of the individual BOP II tasks remain unaltered, the unchallenged evidence of Smith, Burger and Ingmar Boesenberg (the

general manager at Newlands) was that the organisation of work at the Newlands brewery under BOP II has been materially changed: BOP II employees are now required to perform a variety of tasks. The affected employees were capable of rendering services in the old structure, and there was never any suggestion by Mr Kahanovitz in the cross-examination of the company's witnesses that the inability of the employees to work in the old (BOP I) structure was a factor which led to their dismissals.

66. In the circumstances of the present case, I am of the view that an incapacity dismissal does not arise because the alleged incapacity on the part of the affected workers was not in relation to their *extant* position. I am to be guided in this regard by the provisions of section 9 of Schedule 8 to the LRA in which guidelines are set out for the evaluation of evidence in cases of dismissal for incapacity.

"Any person determining whether a dismissal for poor work performance is unfair should consider -

a) whether or not the employee failed to meet a performance standard; and

b) if the employee did not meet a required performance standard whether or not -

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standards;

(ii)the employee was given a fair opportunity to meet the required performance standard; and

(iii)dismissal was an appropriate sanction for not meeting the required performance standard."

67. Consideration of these guidelines clearly requires that the employee is to be evaluated against a performance standard fixed in respect of his/her past performance. In my view, it would be fallacious to argue that the inability to meet an entry level requirement for a new and re-designed job constitutes incapacity in respect of past performance. Further, I consider that it would be unfair to an employer, which was contemplating the introduction of a new work regime (which of itself might require a smaller workforce) to retain its entire old workforce and to follow the provisions of the aforementioned section 9 of Schedule 8 to establish who was liable to be dismissed. Such a system would be chaotic to say the least.

68. The case of **Wolfaardt and Another v Industrial Development Corp of SA Ltd (2002) 23 ILJ 1610 (LC)** also involved a decision to do away with all current positions whereafter employees had to apply for the new positions. There were fewer new positions than old positions. Of relevance to this matter are the following findings made by Landman J:

68.1. The key was whether it is permissible for an employer to make all employees redundant and then select, albeit according to certain broad criteria, the employees it wishes to retain (at para 24). This process was somewhat colourfully described as being one of pouring old wine into new skins, but as "*the new skins were smaller than the old, there would be some plonk left over. This case is partly about who decided what goes into the new skins and what happens to the plonk.*" (at para 10).

68.2. The employer argued that employees had been selected for retrenchment using only one criterion, namely a failure to be appointed to a position in the new structure (at para 25).

68.3. At para 26 - referring to Rycroft's article where it is submitted that restructuring should not be used to dismiss employees who cannot be dismissed for misconduct or incapacity - Landman J held that this principle would apply not only where the employer uses restructuring as a sham or stratagem but also where the employer cannot show that the non-employment is fair, e.g. where the employees are not afforded an opportunity to deal with the perceptions of their incapacity.

68.4. The process of having to apply for a new job places an employee in the precarious position of being a *"supplicant"*. Having to apply for a job may ignore, sometimes unconsciously, that an existing employee enjoys job security (at para 27).

69. It would seem that the facts in the **Wolfaardt** case, too, differ from the present to the extent that the selection criteria applied to all ***"redundant"*** employees in that case were regarded by the Court as being too arbitrary:

"[32] When it comes to selection the procedure was simply the choice made by management. The procedure and selection criteria remind one of schoolboys picking a team by calling out names until the less desirable players are left and discarded or accepted reluctantly. This is not objective. It is palpably unfair."

70. The conclusion which I draw from the debate on this issue is that Prof

Rycroft's approach set out above provides a useful tool in deciding whether there was substantive fairness or not in cases of this nature. Save for the category 4 employees (to which further reference will be made hereunder), I am satisfied that the positions in which the present applicants were previously employed can properly be described as being *"redundant"* with the introduction of the BOP II model which was indisputably a new method of work-organization.

SELECTION CRITERIA

71. As pointed out above, one of the areas which the LRA enjoins the parties to attempt to seek consensus on is *"the proposed method of selecting which employees to dismiss"* (section 189(3)(d)). The issue of selection criteria (or more properly, the fairness thereof) is one of those categories which can resort under either substantive or procedural fairness, depending on the circumstances. In the present case I propose considering the primary selection criterion as part of the substantive fairness enquiry.

72. The collective agreement referred to above ("the NRA") contains a negotiated retrenchment procedure (colloquially referred to in evidence as "Annexure F"). Clause 5 of that annexure requires the company and the union to consult on, *inter alia*, the following issues when no alternatives to retrenchment are found:

"5.2 The criteria for the selection of employees to be effected by the retrenchment:

5.2.1 the criteria for the selection of retrenchees should, as far as possible, be LIFO coupled with retention of skills; and

5.2.2 where LIFO coupled with the retention of skills is not conclusive, efficiency at the job and attendance records may be used as additional criteria for selection."

73. It will immediately be observed that the primary agreed selection criteria (paragraph 5.2.1 of Annexure F) played no part whatsoever in the present case. The company's contention is that these were not capable of application in the prevailing circumstances and that its choice of alternate criteria was justified and fair.

74. In a document prepared in 1998 (post-Alrode Line 12), Smith attempted to illustrate the *"fall-out points"* which would accompany the implementation of BOP II. In summary, that document envisaged the following process:

74.1. All positions in the existing BOP I structure to be declared redundant;

74.2. Entry level specifications ("ELS") to be established for all applicants for posts in the new structure. (The ELS for external applicants were to be higher than for existing employees.)

74.3. Existing employees who did not meet the minimum entry specifications were to be redeployed where possible.

74.4. If redeployment was not feasible those employees were to be retrenched.

74.5. If the existing employees did meet the ELS, they were to be sent on pre-implementation training courses, whereafter they were required to undergo competency assessments. If they did not pass these assessments, they were to be retrenched.

74.6. Employees who successfully passed the competency assessments were then employed on the new lines and were subjected to further scrutiny. Such employees who were not assessed as competent after a *"third summative assessment"* were then retrenched.

75. From this proposed procedure it can be seen that the setting of entry level specifications for existing employees had the potential of materially affecting their job security. In respect of certain employees, the fixing of a new hurdle which they had to surmount before their continued employment could be considered, effectively amounted to a selection criterion for retrenchment in the event that they were unable to comply with the entry level requirements for the restructured jobs. In the cross-examination of Smith it was put thus:

"... (T)hen one can also infer that the people you're not even letting into the training zone as it were you're making the call, you're making the prognosis that they're not going to have the necessary levels of competence? --- Correct."

76. The category 2 applicants were directly affected by this policy. Simply put, they were dismissed because the company held the view that they were not capable of being trained (or even being sent for training) to work in the BOP II structure and they were not deployed elsewhere in the brewery.

77. The obvious question that follows then is: *"Did the company act fairly in setting the relevant entry level specification in regard to existing employees?"*

78. In its amended statement of claim the union attacked the unfairness of the

company's approach in this regard as follows:

"5.6.B2... (v) Respondent also adopted the view that for the BOP II strategy to achieve its goals only employees with certain minimum levels of general education would be considered for training as BOP II employees.

(vi) Employees' levels of general education would, so respondent decided, be measured by reference to assessments made under the Adult Basic Education and Training ("ABET") system.

(vii) Respondent decided that to be eligible for training as a BOP II operator/employee the following minimum entry specification would apply in the case of internal candidates:

(a) Attendant: ABET Level 2 (Literacy and Numeracy);

(b) BOP Operator: Abet Level 3 (Literacy and Numeracy);

(c) Process Operator: ABET Level 4 (Literacy and Numeracy).

...

5.6.F In terms of a carefully planned preconceived 'WCM implementation strategy' ... respondent implemented a plan to retrench approximately 25% of its national workforce. This plan was executed in the following manner ...

(ii) Fixed selection criteria were set which would either have the result of leading to the retrenchment of employees with the lowest education levels (who were more often than not the longest serving employees). This occurred in circumstances

where respondent was clearly aware that its conduct would not only result in the retrenchment of a large number of the employees but moreover, that its claim to be a company occupying a 'high moral ground' (sic) would be seriously questioned in consequence of its decision to exclude from its business employees who had, to a large extent, been the victims of so-called Bantu education."

79. The union contended further that the legal conclusions flowing from these allegations included:

"6.1.(f) The selection criteria used by the respondent were unfair, to wit:

i) numeracy and literacy levels;

ii) experience;

iii) 'personal attributes';

iv) various factors unknown to the applicants."

80. The Company's response to these averments is as follows:

"3.11. <u>Ad para 5.6.B</u>

...

3.11.3 The core features of BOP II entailed, inter alia, the following:

3.11.3.1 Team-based structures from management to shop floor;

3.11.3.2 A step change in general level of competence;

3.11.3.3 Self-sufficient, shift-based teams;

3.11.3.4 A three-tiered team structure

in packaging;

3.11.3.5 Focussed business units and process areas;

3.11.3.6 Asset care and QC accountability at source;

3.11.3.7 Smaller teams of multi-skilled, cross-functional team members;

3.11.3.8 Autonomous maintenance at shop floor;

3.11.3.9 Appropriate engineering skills required at Level 1 for situational problem-solving;

3.11.3.10 High levels of literacy and numeracy at Level 1 amongst operators for, inter alia, capturing of data;

3.11.3.11 A team-based structure consisting of the four building blocks (BOP operator, process operator, process artisan and team leader);

3.11.3.12 Building blocks to create career pathways ...

3.11.4 ...

3.11.5 The minimum entry level specifications for internal candidates in respect of the positions were as follows:

3.11.5.1 Packaging attendant: ABET Level 2 literacy, ABET Level 2 numeracy, mechanical aptitude, one-year experience in a packaging environment;

3.11.5.2 Packaging BOP operator: ABET Level 3 numeracy, mechanical aptitude, two years experience in a packaging environment;

3.11.5.3 Packaging process operator: ABET Level 4 literacy, ABET Level 4 numeracy, mechanical aptitude, two years experience in a packaging environment;

3.11.5.4 Packaging process artisan: trade test qualification (preferably in mechanical, electrical or millwright), two years in a packaging environment, job specific assessment;

3.11.5.5 Those employees who failed to apply for the new positions or who were unsuccessful in applying for the new positions were retrenched in circumstances where they could not be redeployed.

3.11.6 Save as aforesaid, these allegations are denied."

81. In response to the union's legal conclusions. the company pleaded as follows:

"3.47.6 Ad Paragraph 6.1(f):

3.47.6.1 The selection criteria for internal candidates are set out in paragraph 3.11 above.

3.47.6.2 Save as aforesaid, these allegations are denied."

82. The question of the selection criteria was a hot-bed of dispute between the parties and took up a major portion of the 23 days over which this trial ran. The company relied, in the main, on this issue on the evidence of Smith, Felicity Miller and Short, as well as the Flagship Report. The union adduced only the evidence of an expert, Daryl McLean, in rebuttal. In evaluating this evidence and the legal conclusions flowing therefrom, I shall broadly approach the case in the manner suggested by Prof Rycroft in the article referred to above.

83. In summary, the company argues on this aspect of the case, that its choice of ABET as the entry level specification was a fair comparator which was justified as an initial assessment tool in the circumstances. It contends that this choice was found by Flagship to be appropriate. Even if it is now found to have been wrong, the company argues that its choice was *bona fide* and reasonable and that it is not for the Court to sit in judgment as an *"appellate body"* over its decision. Rather, Mr Gauntlett argued, the Court's function is

to consider the position as if it were reviewing an administrative act. The test then is one of rationality rather than accuracy or correctness. I do not think that it is necessary to lay down yet another approach in a matter such as this. The abovementioned *dictum* of Davis AJA in the **BMD Knitting Mills** case clearly reflects that in appropriate circumstances a wrong decision may be excusable: *"fairness not correctness is the mandated test."*

84. The union's argument, in reliance on McLean's evidence, is that the company's point of departure in regard to ABET was fatally flawed in the circumstances and that Flagship's endorsement thereof does not address the real enquiry, *viz.* was ABET an appropriate yardstick at all in the instant case and should it ever have been considered by the company as an ELS? In other words, was the use of ABET reasonable in the prevailing circumstances?

85. An evaluation of certain of the evidence on this point then becomes necessary. In determining the reasonableness of the company's reliance on ABET as an ELS, one has to consider, as well, whether the employees who did not possess the designated ABET levels were fairly afforded an opportunity to enhance their prospects of attaining those entry levels. I consider it convenient to consider all these issues at the same time.

THE COMPANY'S USE OF ABET AS AN ENTRY LEVEL SPECIFICATION

Generally:

86. The agreed schedule of the 115 individual applicants reflects that:

86.1. all are males;

86.2. the vast majority are Black Africans;

86.3. the average length of service with the company was of the order of 15 years;

86.4. many of them had served the company for more than 20 years and in some cases for 35 to 40 years;

86.5. the majority had been employed in the packaging department on lines 2 or 3/4;

86.6. the company had no record of the educational level of the educational level of 34 (almost 30%) of the employees;

86.7. about half of them (approximately 57) did not have the requisite ABET entry level specifications.

87. In respect of those employees who claimed to have recognised levels of education Pinto said that the company relied implicitly on the school-leaving certificates which the individuals possessed (or claimed to possess).

88. In relation to certain of the employees whose levels of formal education were not known, the company arranged for ABET screening in March 2001. Some employees evidently were not willing to undergo such screening.

89. There was considerable debate, both in cross-examination of various of the company's witnesses (in particular Pinto) and in argument, as to whether the company advertised only ABET levels as entry qualifications for BOP II

operator positions or whether employees were informed that proof of school-leaving qualifications would be equally acceptable. The clear implication was that if prospective employees were only told that ABET was the entry level specification (as opposed to a formal educational standard), they did not apply because they were confused or misled as to the requisite entry qualification.

90. The evidence of Pinto certainly was strongly suggestive of the fact that ABET alone was advertised as the appropriate qualification. However, in my view, not much turns on this point because the union did not adduce cogent and reliable evidence to warrant the reasonable inference that category 1 retrenchees did not apply for new positions because they were confused about the criteria. I do not think that long-standing employees whose jobs are under threat will easily labour under a misapprehension as to what they need to do (or should do) to retain employment.

91. Of far greater significance in regard to ABET as an entry level requirement is the structural approach of the company to the relevance of ABET as a determination factor in regard to future employability.

ABET - The Early Years:

92. Felicity Miller (an experienced human resources practitioner with the company) testified that she had been responsible for the introduction of an ABET programme in the company nationally as far back as August 1992. The purposes of this intervention were described by the witness as follows:

"(T)he first one was taking cognisance of the historical background of our workers, many of whom lacked the necessary literacy levels to survive in a changing world; and secondly the changing world of work that would require new skills and new competencies and they required literacy and numeracy levels to operate in the changing world of work."

93. Prior to the introduction of that ABET programme nationally, management and certain of the union's shop stewards formed a committee which planned and implemented the programme. Participation in the initial ABET programmes on the part of the workers was completely voluntary and was facilitated through the union shop stewards. One of the shop stewards on that 1992 committee was Neville Mphanga, who still serves the union. He was responsible for furnishing Mr Kahanovitz with instructions during the course of the trial, but did not give evidence.

94. Miller stated that, as far as she was concerned, the decision by an employee not to participate in any ABET programme had the potential consequence that that person *"would not have the necessary skills for the changes in the workplace".* She said, too, that this consequence was made clear to the shop stewards in discussions within the ABET committee referred to above. She was unable to say whether this position filtered through to the rank and file of the workforce via the shop stewards.

95. Under cross-examination Miller said that initially the ABET intervention was part of the company's general social responsibility plan, but that there was also a general need in the company for skills upliftment due to the changing nature of work globally.

96. I might add that McLean, who evidently has extensive experience in ABET

practice and policy, said that the company's early ABET interventions were known to him. I understood him to convey that, as a practitioner in the ABET field, he was informed of, and impressed by, the manner in which the company had embarked on this area of corporate responsibility.

97. During the workshop at the Riverside Sun in 1995 referred to above, a certain Gavin Hartford addressed the participants. He was described as a full-time national organizer of the union. According to the minutes of the workshop, Hartford made it quite clear that the pursuit of a WCM strategy would have the following consequences:

97.1. the necessity to reassess the skills levels of workers;

97.2. the need to address training in the workplace so as to provide a degree of *"portability and accreditation across the company"*;

97.3. a new level of work organization, including *"team work"* and multi-skilling;

97.4. the need for appropriate managerial adjustment or transformation;

97.5. a threat to employment security *("It is understood that jobs will change fundamentally, but a guarantee of no retrenchments is essential")*.

98. In answer to a question from the floor during discussion time, Hartford is recorded as having said:

"It is unworkable to make Adult Basic Education compulsory. You cannot force people to learn if they don't want to. It must be a voluntary system. In terms of managing the

company's commitment to ABE and achieving high education standards among employees, in support of increased flexibility and productivity, it is important to negotiate minimum entry standards for new employees. This stops the flow of illiterate and innumerate people into the business.

If retrenchments take place, older employees whose education and training levels are inadequate for the new direction the business is taking, can be targeted for retrenchments. However, this cannot be done without providing them with a social security net."

99. In argument Mr Gauntlett relied on Miller's evidence and Hartford's alleged statements (which were not disputed by the union) as establishing a foundation for the contention that ABET as an entry level specification was fundamentally fair. In my view, the emphasis placed thereon by the company is excessive. At best, I think it can be said that the union was aware of the importance of ABET training and the potential influence that it could have on employees' advancement in the workplace. However, it cannot be said that, before the Alrode pilot, workers at the lower level of the corporate structure would have had reason to contemplate job losses due to inadequate ABET qualifications.

Alrode Line 12 Pilot:

100. The pilot project on Line 12 at Alrode emerged as a joint initiative of management and the union. It involved the formation of a completely new production line to be staffed in accordance with the WCM (*"building blocks"*) principles referred to above. In corporate-speak Smith referred to Alrode Line 12 as *"a green-field site"*. The term refers to the establishment of a new facility being staffed for the first time in contra-distinction to a *"brown-*

field site" which apparently is an existing facility that is being renovated and/ or restructured and which has a work-force in place.

101. The development of the Alrode pilot took place over more than a year and it was intended to serve as a model for possible future development of the company's organizational (work) structure. The evidence shows that there was significant participation in the pilot from the union's side and that it wasn't simply a case of management imposing its will on the workforce.

102. Smith testified that at the conclusion of the Alrode pilot the joint team applied its mind to the minimum entry level specification that would be appropriate for workers employed on a similar line. There was evidently consensus that ABET levels would be acceptable and, in particular, at Numeracy Level 2 and Literacy Level 3.

103. In arriving at the particular ABET levels, the joint team had to determine what kind of English literacy and numeracy would be required from a (new) BOP II operator. According to Smith, this was done on a fairly detailed basis: the team looked at a large number of documents and data which such an operator would be required to deal with on a daily basis and then attempted to establish the ABET levels appropriate thereto.

104. In considering these ABET levels regard was also had to the National Qualifications Framework ("NQF") as monitored by the South African Qualifications Authority ("SAQA"). Smith testified that the team was satisfied that the contemplated ABET levels fell within NQF level 1, the so-called *"General Education and Training Band"*. Given that BOP II operators

would have to undergo pre-implementation training of some two to three months, it was also considered important that the trainees' levels of numeracy and literacy be adequate to enable them to be trained.

Flagship Report:

105. Upon completion of the Alrode Line 12 pilot, Smith headed up a further project team (this time consisting only of management representatives) which set about refining the experience gleaned at Alrode and, in particular, the entry level specifications.

106. Smith said that she was concerned that the levels which had been agreed upon by the joint team may have been too low, particularly with regard to the levels needed for training. Consequently, it was decided by the management project team that the requisite ABET levels should be raised to Literacy 4 and Numeracy 3.

107. In relation to this proposal Smith said the following:

"*The moment the project team came up with that view in a* [main] *board presentation, it was fundamentally contentious, because if you move your entry spec, your minimum spec up, you move your number up, there's a direct link between the two, so there was no under-estimating the significance of this view. At the same time, it was felt quite strongly that if you are going to do an initiative of this size and impact and cost, then you do it right, so review the stuff properly, which is why at that point we then got in Flagship ... so we got Flagship involved, we briefed them, we did not give them the internal specs as they stood at that time, nor did we give them the project team's view that these specs were too low, in fact it was as hands off an involvement with a consulting company as I have ever done, simply because we knew that whatever they came up with will be the decision and we will live with it, and we must be able to defend*

it."

The Flagship proposal, in mid-1998, was that, in relation to a BOP II operator, the appropriate ABET levels would be Literacy 3 and Numeracy 3.

108. The report, euphemistically described by Mr Gauntlett as a *"comprehensive cure for insomnia",* was prepared by an independent external consultancy (Flagship Mentoring and Training CC). No attempt was made by the company to adduce any evidence in support of the views set out in the report, allegedly because the author thereof was working in the Middle East at the time.

109. Mr Kahanovitz correctly, in my view, challenged the admissibility of the expert opinion contained in the report in the absence of *viva voce* evidence from its author. Mr Gauntlett indicated that the company did not seek to rely on any opinion evidence arising out of the Flagship report. Rather, it seems that the company simply wished to adduce evidence that it ultimately fixed the ABET levels after a thorough external investigation had been conducted. Nevertheless, McLean made extensive reference to the content of the report in his evidence.

110. Shortly after receipt of the Flagship report a special meeting of the company's main board took place at which the entry level specifications as recommended by Flagship were approved.

111. At this juncture it may be observed that by the middle of 1998:

111.1. the company had taken a decision nationally that BOP II should be

implemented;

111.2. the entry level specifications for the new positions under BOP II had been determined by the company;

111.3. the implementation of BOP II at the various breweries would take place on an *ad hoc* basis at a time when both the board and the general manager of the relevant brewery were satisfied that such implementation was warranted;

111.4. the company appreciated that the introduction of a world class manufacturing strategy such as BOP II would be likely to lead to retrenchment of staff who did not meet the pre-determined entry level specifications.

112. The evidence before me suggests that, in relation to the Newlands 2001 restructuring, there was no serious debate between the parties as to the appropriateness of the abovementioned ABET levels as entry level specifications. I am left with the clear impression that, as far as the company was concerned, the crossbar had been set by the Board in mid-1998 and that there was no need for local management at Newlands to consider any other ELS.

113. The union, on the other hand, had had limited input on the ELS via the joint team at Alrode Line 12, although it must be borne in mind that it was never the company's case that this input bound the union to a mandated position. In this regard Smith stated that *"It was definitely not meant to be the mandated view for the world, it was an input into a national decision".*

114. Under cross-examination by Mr Kahanovitz, the following passage in Smith's evidence on this point is important:

"*Yes so in other words it follows from that that they* [i.e. the shop stewards on the joint team*] were unwilling to enter into an agreement with the company that what you call the lessons from Alrode could be rolled out to all the other plants in the country, they were unwilling to reach such an agreement with you? -- I'm saying it was uncontentious when we agreed it for line 12. The moment you make that a mandate for your division it has tremendous retrenchment impact which the shop stewards would not associate themselves with understandably."*

115. It should be remembered, too, that Alrode Line 12, being a *"green field site"*, never really presented potential retrenchment problems: there was no existing staff complement. Newlands on the other hand was regarded as a *"brown field site"*, i.e. there were existing lines that were staffed and if changes thereto were to be made, these may have led to retrenchments.

116. In summary then, the company contends that the process whereby it fixed the entry level specifications for BOP II operators and process operators was neither arbitrary nor subjective. It says that the process, at least at the initial stage (Alrode Line 12), involved certain of the union's representatives who agreed to the ELS on that line. Thereafter, the company relies on the Flagship report as a validation of its decision. Finally, it says that the uncontested evidence of Pinto and Michael Norton (both human resource practitioners) is that literacy and numeracy levels were implicit in the new job descriptions and the work itself.

117. In addition, the company maintains that it was at all times *bona fide* in the choices that it made: I did not understand the union to argue to the

contrary. I might add that it is clear from an overall assessment of the evidence that the company went to great lengths in selecting and designing its new work structure. It consulted extensively with the union at a national level in an endeavour to procure consensus at that level and only when this process resulted in deadlock on the issue of job security did the company move on to invoking the provisions of section 189 of the LRA. When it did so, the procedure was *"driven"* at plant level. However, as I have pointed out above, there was no real debate at that level in regard to the ABET levels and, to that extent, it may be said that the company's choice of selection criteria was unilateral.

McLean's Critique:

118. Under cross-examination Smith was asked what justified the use of ABET as entry level criterion. She responded as follows:

"I think it's a principle that says if education of a tertiary or secondary level can be used as an entry spec why can't adult basic education be used as an entry spec. If you look at the NQF definition of education it talks about it in terms of learning, be it formal learning or informal learning or non-formal learning. So if you can say that somebody must be a chartered accountant why can't you say that somebody must have ABET 3? It's all defined on the same educational park."

119. I think that Smith's answer demonstrates the relatively superficial level of her understanding of the use of ABET as an instrument of measurement. Indeed, she went on to say under cross-examination, in response to a question as to whether she had ever asked anyone with expertise in ABET whether there was a foundation for her statement quoted above, that Miller

was the company's ABET specialist and that *"she would have been the specialist that we asked and she checked with external people ...".* Miller's evidence was that she was no longer responsible for ABET at the company after 1997, when she moved to a new position.

120. No evidence of any expert nature (or otherwise) was presented by the company in relation to the appropriateness or otherwise of choosing ABET as the instrument of measurement. Miller, who gave evidence after Smith, was not led on this aspect nor was she cross-examined thereon.

121. The principal witness for the union was McLean whose evidence was presented in an attempt to deal with the perceived shortcomings in the company's case on the ABET issue.

122. McLean relied on his expertise and experience in the ABET field over a number of years to criticise the approach adopted by the company in assessing its employees' continued employability against an ABET unit standard. In summary he described the assessment as *"flawed in virtually every respect",* primarily because ABET unit standards were not a valid assessment of workplace competency or trainability.

123. McLean's evidence detailed a number of theoretical and policy considerations relevant to the correct assessment tools which an employer - confronted with the choices which the Respondent company faced - may have used. He then went on to attempt to apply the theory to the practicalities of the present case.

124. I do not intend traversing McLean's evidence in every detail - the record speaks for itself. I shall deal with the most salient aspects thereof and, in particular, the contextualization of the facts at hand.

125. McLean was subjected to a skilful and analytical cross-examination by Mr Gauntlett, the thrust of which was to demonstrate that the witness did not fully familiarize himself with the true conditions at shopfloor-level. In argument Mr Gauntlett contended that McLean was too doctrinaire and somewhat out of touch with the realities of the present case.

126. While McLean's approach was clearly grounded in principle, I hardly think that he could be described as the pedantic theorist which the company suggested. His *curriculum vitae* demonstrates a wealth of practical experience, *inter alia*, in the field of workplace training, the evaluation of training programmes and ABET generally. Of all the people who testified in the trial he stands alone as the only witness who was properly qualified in the ABET field and who was able, authoritatively, to address the nub of the problem in relation to the suitability of the choice of ABET as an entry level specification.

127. The bedrock of McLean's approach was that before an employer can rely on a particular test or tool of assessment to gauge the employability or trainability of a person, it must be demonstrated that the test has *"predictive validity"*. I understand this to mean that the question to be posed is: *"Does the assessment actually measure what it is aiming to measure?"* If it does not, said McLean, then the test is *"invalid"* and has no predictive validity.

128. The witness went on to say that an unfair test would perforce not be valid. However, the issue which must be determined here is whether a test that is *"invalid"* is necessarily unfair. I do not think that the answer is a simple yes or no. In my mind the potential *"invalidity"* must be carefully assessed in the context of the relevant facts and it is then for the Court to make a judgment call along the lines suggested in the **Woolworths** case, *supra*. In so doing, a Court will be mindful of the directions of the Constitutional Court in the matter of **NEHAWU v UCT**, *supra*, that fairness applies equally to employer and employee and the remark by Davis AJA in the **BMD Knitting Mills** case, *supra*, that fairness and not correctness is the test.

129. No South African authorities on the *"predictive validity"* point were referred to by either party in argument. Mr Kahanovitz relied strongly on the 1975 decision of the US Supreme Court in **Albemarle Paper Co v Moody**, 422 U.S. 405 (1975). One leg of that case involved an enquiry into what an employer had to show to establish that pre-employment tests (which were admittedly racially discriminatory in effect, though not in intent) were sufficiently *"job related"* to withstand challenge under the 1964 Civil Rights Act and the 1972 Equal Employment Opportunity Act. The Court's approach was equity based.

130. Delivering the decision of the majority of the Court, Mr Justice Stewart held, *inter alia*, that:

130.1. the fact that the employer had approached the case in a *bona fide* fashion did not preclude a Court from finding that the employees were entitled to the equitable relief which they sought;

130.2. employment tests should not be used without meaningful study of their relationship to performance ability;

130.3. such tests should measure *"the person for <u>the job</u> and not the person in the abstract"* (emphasis added);

130.4. the relevant statutory guidelines under consideration would only permit discriminatory testing if the employer showed, by methods which were professionally acceptable, that such tests were *"predictive of or significantly correlated with important elements of work behaviour which compromise or are relevant to the job on jobs for which candidates are being evaluated."*

131. I accept that the **<u>Albemarle Paper</u>** case was based on an entirely different legislative framework and factual scenario to the present matter. Nevertheless, I am satisfied that it is of sufficiently persuasive authority to merit consideration in this case. The decision certainly endorses, in broad terms, the approach advanced by McLean.

132. McLean said that ABET unit standards are generic in nature. They are intended to apply to a wide cross-section of situations and, accordingly, have been formulated at a general level. They do not necessarily accurately and adequately reflect workplace-specific language, literacy and numeracy requirements.

133. It is important to have regard as well to any on-the-job experience gained by an employee with low levels of literacy and to assess this in a work-

related context rather than in a written test. McLean said the following in this regard, under cross-examination:

"*It's fairly fundamental actually in the sense that firstly somebody who has had any amount of experience in any particular context, is likely to be familiar with the contextual cues that are available to aid interpretation or calculation respectively in relation to literacy or numeracy. So, the core thinking in both literacy and in mathematics is that ordinary people perform very complex calculations or read very complex tests, better in context than they do in a decontextualised piece of paper. So, if these people have got some - a fair amount of experience on the production lines ... (t)hey're not likely to be able to perform as successfully on a written test, a written test of schooling numeracies and schooling literacies as they are to perform on the basis of a test which tested <u>workplace</u> numeracies"* (emphasis added).

134. In addition:-

"... (A) written test is not a - a written test of schooling literacies and schooling numeracies is a very poor indicator of anybody's ability to read and interpret workplace instruction forms or do the calculations that are required in the workplace."

135. McLean pointed out that it would have been fairly straightforward for the company to have designed a test or assessment-tool to adequately measure the ability of its employees with lower levels of literacy and numeracy to be trained for, and perform in, the new structure.

<u>Importance of context in assessment of workplace numeracy and literacy</u>

136. McLean emphasised the importance of so-called *"context-embedded"* assessment of workplace numeracy and literacy. He said it was quite possible that somebody working in a brewery might be familiar with the

English vocabulary detailed in the work instruction forms and be able to fill in work instruction forms, yet fail a generic literacy placement test. This was because people in a workplace who fill in work instruction forms on a daily basis know what the purpose of it is, recognise the text type, recognise visual cues and interpret the meaning of it in that context.

137. He testified that the company's numeracy assessment was not an adequate assessment of existing workplace numeracy skills because it was *"disembedded"* or removed from workplace contexts and problems. Research demonstrated that numeracy skills are context-embedded. Because the calculations and measurements required in the company's numeracy test were context-disembedded, it would have been more difficult for candidates to demonstrate their actual numeracy abilities. A candidate might fail this assessment while being competent to do the mathematical analyses required in the workplace. McLean said that within the work context:

137.1. numeracy challenges might be three-dimensional, rather than two-dimensional as in the numeracy assessment used;

137.2. there would be visual or other cues to enable interpretation and support of the task;

137.3. there would be support mechanisms, including social support mechanisms (evidenced by the teamwork structure under BOP II) which meant that the individual did not have to process the task independently;

137.4. there would be a recurrency and routinisation of numeracy challenges/problems/tasks which may have enabled even a poorly numerate employee to be able to do the mathematical operation required, effectively.

138. McLean said under cross-examination that he would predict that individuals who failed the assessments might have passed if the numeracy and literacy challenges had been put in context and resembled things required in the workplace.

139. In response to a question by the Court, McLean indicated that the best form of assessment would be in an authentic workplace setting. Failing this, a simulated workplace scenario would be the next best form and only if this was not possible, something like a written test could be utilised, but then only one corresponding with the features of the simulated environment.

140. McLean also testified that the assessments used by the company were furthermore compromised by the fact that they were not, apparently, preceded by any process to *"foreground"* (or bring to the surface) a candidate's consciousness knowledge from prior learning which had become implicit.

The need for confidence in "high stakes" assessments

141. McLean highlighted a distinction, in assessment theory, policy and practice, between *"high-stakes"* and *"low-stakes"* assessments, the distinction being that the former have, and the latter do not have, major life implications for

candidates. A placement test is a *"low-stakes"* assessment. He said that placement tests are generally not very accurate but this should not present a problem to the employer because individuals can be re-placed at some stage during the process. Selecting someone for a job or a career path would be termed a *"high-stakes"* assessment. A *"high-stakes"* assessment, he testified, requires a high degree of confidence in the assessment decision, which must be demonstrated through:

141.1. research which proves the validity of the assessment instruments and the constructs they aim to measure; and

141.2. quality assurance of the assessment (through, for example, pre-assessment and post-assessment moderation of the results). In the absence of any evidence of moderation of the company's assessments, McLean expressed the view that, on this basis alone, the results should not be accepted. There should first be an audit of the instruments to determine their validity, reliability and practicability. Subsequently the results would have to be audited. When he was asked in cross-examination (with reference to the Alrode pilot) whether the degree of confidence in instruments would be influenced by the fact that a pilot project had been conducted, McLean answered that unless the pilot project resulted in the documentation of an assessment guide and a confirmation and endorsement of the validity of the assessment, the pilot project would make no difference.

The importance of experience in attainment of multi-skilling

142. Finally, McLean underscored the importance of workplace experience. Particularly where an employer is seeking multi-skilled employees – individuals *"who can pose and solve problems, who can think systematically, who can work effectively as a member of a team"* - someone with work experience would be more likely to have a sense of *"systems thinking"* and problem-solving in a particular environment than someone without it and such a person would do better on a context-embedded assessment than someone with schooling-type literacies only. If the company elected to employ people with a matric qualification rather than people with 20 years' work experience, they were less likely to get a successfully multi-skilled workforce than they would have done otherwise. He concluded that the tests used by the company did not in any case assess the types of competencies required for multi-skilling.

Conclusions on the ABET issue

143. I am satisfied that McLean's evidence establishes, on a balance of probabilities, that the use of ABET literacy and numeracy levels in the present case was not of sufficient *"predictive validity"* to establish whether existing employees should be considered for employment and/or training in the new structure at the level of BOP II operator.

144. While no *viva voce* evidence was led by the company in support of the Flagship report, I think that the following general observations in the document support McLean's evidence:

"*It became apparent, and this was reinforced in interviews, that literacy requirements are generally more critical with regard to training than to carrying out the work. People working their way up from the shop floor, with hands-on experience of the machinery, would not need the same level of communication skills to achieve competency, as would a person without trade-specific experience ... Many of the skills, as well as much of the vocabulary needed for the jobs discussed below are trade specific and will require training regardless of ABET levels achieved. While certain ABET levels are suggested as being appropriate for particular positions it should be noted that personnel without certification at these levels may have developed competency in such positions."* (Emphasis added.)

145. The evidence was that implementation of the BOP II structure at Newlands did not involve any change in machinery. Rather, it was the organization of work on the lines in question which was restructured. There was no evidence to suggest, for instance, that an existing employee who had many years of experience operating the empty bottle inspection machine would not also be able to handle the labelling machine and the bottle washing machine in the new set up. This seems to support the approach of both McLean and the passage in the Flagship report referred to above.

USE OF INVALID ASSESSMENT TOOL UNFAIR?

146. I proceed to examine whether, on a consideration of the case as a whole, the use of ABET as an entry level specification in respect of the category 2 applicants was fair. I limit the enquiry to this category since these applicants were precluded from re-applying for positions in the new structure because they were automatically excluded by the company's decision to make use of ABET entry levels. Unlike the category 3 applicants, who were admitted to further training programmes at the Westlake facility in the Cape

Peninsula, the category 2 applicants were summarily precluded from demonstrating to the company their potential to be trained and to work in the new structure.

147. As demonstrated above, many of the category 2 applicants were men who had served the company for long periods of time, were individuals who had grown up at a time when the only schooling option available to them was Bantu education, a discriminatory practice fundamental to the *apartheid* state, and - most importantly - were workers whose ability to perform in accordance with their existing job descriptions was not challenged.

148. When the company's Main Board made the decision to adopt BOP II in mid-1998 in advancement of its WCM strategy, it was alive to the fact that pursuance of an option which was highly automated and mechanised (as was the trend in breweries in Europe, America and the Far East), would impact severely on its workforce.

149. Michael Short, the company's erstwhile operations director for its Southern Region (and one who was privy to Main Board deliberations and decisions) testified that the company took its social responsibility function seriously and was careful not to compromise job security:

"So we tried to moderate the application of technology to the extent it was appropriate and not to drastically reduce the operations on the line, the people employed by the Brewery."

This exercise involved a careful balancing act between retaining its complete dominance in the local beer market (then at about 94%) on the one hand *("having our business*

strong"), while retaining employees, many of whom were perceived by the company to lack *"a higher level of intellect, a higher level of training, a higher level of background, a higher level of comprehension."*

150. Quite obviously, in a company the size of the Respondent, it cannot be contended (nor was it) that there were unaffordable financial implications in meeting the assessment methods suggested by McLean. I would think, too, that in the case of long-standing employees who stand to lose their tenure through a no-fault dismissal it would be reasonable to require of the employer that it satisfies itself, through the use of appropriately qualified specialists and/or consultants, that it is adopting the correct approach in relation to the assessment of those employees' ability to perform adequately in the new structure.

151. For the reasons set out above, I do not think that it was sufficient for the company to rely solely on the Flagship report since this did not address the core issue, *viz.* was the use of ABET levels a fair measure of assessment and competence? In my view, the Flagship report goes no further than proposing appropriate ABET levels, thereby implicitly accepting (without question) the suitability of ABET as the tool of measurement.

152. Where an employer realizes (as the company admittedly did in the present case) that its choice of a particular entry level specification in relation to restructured jobs is likely to lead to retrenchments, it is, in my view, incumbent on that employer to take reasonable steps to establish the fairness of its choice. This would be consonant with the principles laid down

in the **County Fair**, **Algorax** and **General Food** decisions referred to above which impose a duty on the employer to take reasonable steps to avoid dismissals where possible.

153. In all the circumstances, I am of the view that the choice of an invalid assessment tool in the present case was not fair. To the extent that it has only been demonstrated that the retrenchment of category 2 applicants is causally linked to this choice, it follows that it is only this category of applicants who are the subject of my finding of unfairness on this leg of the case.

FAILURE TO IMPROVE ABET LEVELS

154. During argument Mr Gauntlett stressed that employees with inadequate ABET levels had been given ample warning by the company of the necessity to improve their literacy and numeracy levels and, in addition, that the company had provided ABET classes to enable employees to do so. Mr Kahanovitz contended that this approach was tantamount to blaming the retrenched employees for their inadequate ABET levels, thereby introducing an element of fault into the dismissals.

155. It was common cause that the company knew by mid-1999 at the latest that the implementation of BOP II was to take place at the Newlands brewery and that certain predetermined ABET levels would be required for existing employees to be considered for continued employment, for example, as BOP operators.

156. At that stage ABET programmes had been offered by the company at the various breweries for a number of years: in the case of Newlands since 1995. While attendance of these ABET courses was voluntary and outside of normal working hours, it had been repeatedly pointed out by various of the company's representatives that change in the workplace was inevitable and that such change was likely to be accompanied by a greater demand for skills, literacy and numeracy. There was, therefore, a general warning to employees to prepare themselves for the consequences of change.

157. In my considered view, the facts of the present case required the employer to make its position clear to all affected employees at the earliest possible opportunity. After all, if the company wished to give all employees a fair chance to retain their employment in the restructured workplace, it was duty bound, in my view, to inform them in clear and unequivocal terms of the inadequacy of their qualifications and to provide reasonable means for those employees to obtain the requisite levels of competence.

158. While there was reference in the evidence to various forms of communication over the years by the company to its employees (whether directly or through the union) of the importance of improving skills levels and undertaking ABET courses to enhance literacy and numeracy levels, in my view there was nothing sufficiently concrete from the company to put the employees at Newlands affected by the 2001 restructuring on notice that they stood to lose their jobs if they did not improve their literacy and/or numeracy levels so as to achieve a prescribed level.

159. In attempting to bolster its case in this regard, the company relied, *inter alia*, on a memorandum issued on 31 December 1999 by the human resources manager at Newlands, Khaya Ngcwembe, in which certain individuals were advised to participate in ABET classes -

"*to help prepare ... [themselves] ... for the future requirements by (sic) the company. This is due to the fact that, over time, due to developments in the various fields, the entry requirements for specific jobs do change ...*".

Employees were then urged to avail themselves of *"this **last** opportunity for ABET that the company is making available ...".*

160. Given the fact that a decision had been taken at national level the previous year regarding the requisite ABET levels in the new BOP II structure, it is difficult to understand why the company did not convey precisely this information to each of the employees most likely to be affected by the introduction of that structure.

161. The earlier restructuring that took place at Newlands in 1999 and 2000 involved the new ABET levels, but due to the fact that there were no retrenchments on Line 1 and only a handful in engineering, the importance of those levels is unlikely to have been brought home to other employees in different departments. In any event, there was no evidence to suggest that employees other than those on Line 1 engineering were involved in the consultative process relevant to that restructuring, in which the company's business plan (which included the contemplated entry levels) was presented.

162. A further factor which warrants mention in this regard is the apparent limited availability of ABET at Newlands.

163. In cross-examination of certain of the company's witnesses Mr Kahanovitz suggested that the ABET centre at Newlands had closed down sometime in 1999. No direct evidence was adduced by the union to establish this fact and I must confess that the evidence on this issue is not clear. While Lynn Majiet, the ABET consultant contracted by the company at Newlands, was not called to testify, notwithstanding her availability, it does seem to me that there was at least some interruption of the ABET classes at Newlands in 1999 and 2000:

163.1. In September 1999 the company sent out an ABET questionnaire to establish the extent of interest in part-time ABET classes on the part of employees at Newlands.

163.2. At the beginning of 2000 Ngcwembe announced that an "ABET week" would be held at the end of January 2000. This document stated that -

"*The purpose of ABET levels is to focus the attention of all employees in Newlands on Adult Basic Education to relaunch ABET in Newlands."* (Emphasis added.)

163.3. Majiet prepared various documents which indicate a renewed endeavour to provide a comprehensive ABET intervention in 2000 which would be overseen by a joint committee made up of management and employee representatives.

163.4. The 2000 ABET classes would start once an assessment had been made of the number of employees involved. Significantly it was *"anticipated that only one class will be running in the first year (2000) on a pilot basis."* (Emphasis added.)

163.5. Majiet submitted extensive budget documents to the company to assess the cost of ABET courses at various levels of literacy to be run from 1 June 2000 to 30 June 2001. The total cost thereof was projected to be R594 600.00.

163.6. During April-May 2000 a screening process was undertaken to assess the number of potential candidates who would be interested in ABET at various levels.

163.7. A list of interested candidates was drawn up (they numbered 156 from levels 1 through to 4). Eventually, 67 persons were enrolled - only at ABET levels 3 and 4.

163.8. Candidates were required to conclude a written agreement with the company in which they were liable to repay the company the sum of R990 (the cost of materials) in the event that they dropped out of the ABET programme. Employees were afforded the opportunity of attending the courses (ranging from 280 - 336 hours) on a 50/50 basis, i.e. 50% on company time and 50% at their own expense. Classes were to run for two hours per session.

163.9. The minutes of a meeting on 14 July 2000 of the ABET committee at

Newlands reflect that Majiet raised the issue of budgetary constraints regarding ABET training -

"*Lynn reported that a meeting was held with ...* [Boesenberg] ... *re* [ABET] *levels 1 and 2 ...* [Boesenberg] *... indicated that unfortunately we do not have the finances to run a level 1 and 2 class. Reality is that the currently* (sic) *ABET budget is insufficient for running the current level 3 and 4 classes."*

163.10. In September 2000 an attempt was made to commence with the enrollment of level 1 and 2 ABET candidates. In an e-mail dated 6 September 2000 Majiet told Boesenberg and Ngcwembe -

"If we do not start these classes soon these learners will not be able to write the June examination next year."

164. Given the amount involved, the complaint in June 2000 of budgetary constraints is startling to say the least. Indeed, Mr Gauntlett made it clear on a number of occasions during the case that affordability on the part of the company (in relation to a variety of issues) was never an issue. That, too, would have been surprising had it been raised by a company of this size.

165. After commencement of the consultative process at Newlands brewery early in 2001, the company offered a series of fast-track ABET courses aimed at giving affected employees a last-minute opportunity to improve their entry level qualifications. This belated attempt came at an advanced stage of the consultative process and does not appear to have offered

those employees a realistic opportunity to improve their positions adequately.

166. Upon consideration of all the relevant facts I am left with the distinct impression that the company did not wish to (nor did it) go out of its way to timeously highlight the pitfalls of inadequate ABET levels in the BOP II structure at Newlands. A minute of a meeting of the Main Board in early November 2000 reflects that the company anticipated a reduction in employee numbers of 25% due to the implementation of BOP II. This may account for the fact that the company did not press home with its employees the importance of improving their ABET levels so as to potentially avoid retrenchment. It may explain, too, the sporadic nature of the ABET programmes at Newlands and the apparent reluctance to assist the most vulnerable of employees - those at ABET levels 1 and 2.

167. There is ample evidence to show that the company knew from 1999 that its Newlands employees would require certain ABET levels to be admitted to training in the BOP II structure. It does not appear to me that the company took adequate steps to assist these employees in obtaining (or having access to) the necessary ABET interventions. In my considered view the company failed to show that *"all viable steps"* to avoid retrenchment had been considered and taken in respect of this group of employees and I am driven to conclude that the retrenchment of the category 2 applicants was substantively unfair.

CATEGORY 1 APPLICANTS

168. As regards the category 1 applicants, there is no evidence before me to explain why they did not apply for positions in the new structure. While it may well be that they relied on the company's intention to set minimum entry levels and that they did not think they met same, this does appear to be somewhat speculative in the circumstances. They do not fall into the same position as the category 2 applicants and I am of the view that there is sufficient evidence before me to show that their dismissals were substantively unfair.

CATEGORY 3 APPLICANTS

169. The category 3 applicants were afforded an opportunity to enter into the training phase of the BOP II implementation and they were evaluated thereafter. There is no evidence to show that their subsequent retrenchment was not reasonably based on their failure to meet the criteria set down in that evaluation process. Indeed, the company has fairly demonstrated the necessity to retrench the category 3 applicants whose dismissals were accordingly substantively fair.

CATEGORY 4 APPLICANTS

170. Six employees of many years service (ranging between 11 and 19 years) were targeted for retrenchment by the company due to what was termed *"outsourcing of non-core Business Activities"*.

171. Under cross-examination Boesenberg, when asked what the dismissal of

these workers had to do with WCM, remarked quite frankly *"arguably, not a lot".*

172. On 18 January 2001 the company presented its business case to the union and employees at Newlands by way of some 60 slides through a computerised programme known as *"Power Point"*. The business case was intended by the company to constitute compliance with its obligations under section 189(3) of the LRA. This presentation encompassed four distinct categories described as *"Proposal 1 - 4"*.

173. "*Proposal 4"* was described in the business plan as relating to *"other"*. In slide 6 thereof the company recorded its *"preliminary thinking"* in relation to this category of restructuring. This was cryptically worded as being *"Productivity opportunities in Warehouse, Risk Management and Production General".*

174. The only other slide which deals with *"Proposal 4"* is no. 51 which records the following in telegram style:

"Outsourcing of Non-Core Business Activities:

- *Warehouse:*
    - *Outsourcing of cleaning*
    - *Impact of 3 heads*
- *Risk Management:*
    - *Reduction of SAB Security supervision*
    - *Outsourcing of Laundry/O + G store*
    - *Integration of Shop Assistant and Receptionist positions*

- *Impact of 5 heads*

- *Production General:*

- *Outsourcing of cleaning*

- *Proposed timing : June 2001."*

175. No substantive reasons were advanced in the business case as to why it was necessary to jeopardise the job security of long-standing employees and make use of outsourced labour in the abovementioned positions. Nor was there any *viva voce* evidence adduced at the trial in this regard by the company.

176. When the trial recommenced in mid-December 2003, the parties sought to limit the introduction of further *viva voce* evidence and agreed on the admission of various written statements, both from witnesses on behalf of the company and from certain of the applicants. I queried the status of these documents in the absence of any cross-examination by the opposing party and was assured by both parties that the evidence contained in them would form part of the record as if it were *viva voce* evidence.

177. In a document termed *"Evidence of Ingmar Boesenberg in Rebuttal",* the company sought to provide an explanation for the dismissal of the category 4 applicants or so-called *"other"* employees. The focus of the document was on the evidence given by the only lay witness who testified on behalf of the union (and of himself as a co-applicant), David Mantangana.

178. The material parts of Boesenberg's statement read as follows:

"*4. The outsourcing of non-core activities, including the laundry* [where Mantangana was employed], *was based on an economic rationale and formed part of the organizational design principles and new work practices underlying the restructuring to a world class manufacturing organization. As stated in the business case, the focus was, inter alia, on quality, speed, productivity, cost and morale.*

5. Economies of scale dictated that non-core business activities such as the laundry department required to be consolidated in a larger service portfolio.

6. This resulted in the laundry department position occupied by Mr Mantangana, and other positions such as security, as they were performed in the past, becoming redundant within the organization."

179. It will be noted that, in contradistinction to his *viva voce* evidence, Boesenberg sought, at the very end of the proceedings, to justify the *"other"* retrenchments under the rubric of WCM. This was, of course, never the company's case in the business plan. There was no evidence adduced in support of the *"economies of scale"* allegation and I am not in a position to evaluate the bald assertion made by Boesenberg in this regard.

180. There was evidence to show that Mantangana had been severely injured in a motor vehicle accident some many years previously and his attendance record and functioning was affected thereby. I should say that Mantangana's dismissal certainly has the sound of incapacity to it, but - be that as it may - I am not satisfied that the company has adduced sufficient persuasive evidence to discharge the onus of proving that the dismissal of Mantangana and the *"other"* applicants who resort under category 4 was for a fair reason nor that it had taken *"all viable steps"* to avoid the retrenchment of this group of employees.

181. I am inclined to agree with Mr Kahanovitz's remark in regard to this category that *"Everything under the sun, so it would seem, is a component part of this pliable and elastic business philosophy"* (i.e. WCM).

182. While there is evidently a global trend towards the casualization of labour (a situation which is obviously anathema to the entrenchment of job security), there was no compelling reason advanced by the company to explain why the decision to outsource in respect of this category of applicants was necessary to advance the interests of WCM.

183. It follows, therefore, that the dismissal of the category 4 employees was also substantively unfair.

CATEGORY 5 APPLICANTS

184. Under the old structure the company employed two deaf mute men. Japan Ndongeni (applicant no. 74) had been with the company for 12 years and worked as an attendant on packaging Line 2. Ephraim Mandindi (applicant no. 42), who was a qualified forklift driver, worked as an attendant in the raw materials department. He had more than 15 years experience and also deputised as a relief forklift driver on occasion.

185. Smith emphasised in her evidence the importance of *"verbal interaction"* in the team structure envisaged under WCM. She considered that deaf people would therefore be unable to operate effectively in the new system.

186. Pinto confirmed, in questions from the Court, that both these applicants were dismissed because of their disability and their inability to

"communicate in the new structure".

187. The union fairly questioned how these two employees had managed to successfully discharge their duties under the old system for extensive periods of time notwithstanding their disabilities.

188. The company's documentation, which summarises the status of the various applicants, their known ABET and/or educational levels and the company's reasons for dismissal, reflects that the two deaf mute applicants did not apply for positions in the new structure.

189. Once again, there is certainly the possibility that these applicants were dismissed for the reasons given by Pinto (and I express no view on whether this was discriminatory or not), but there is no evidence from either of them as to their reasons for not applying. In the absence of such an explanation (and there was no evidence that they were not available to testify), I am unable to find that their dismissals were substantively unfair.

PROCEDURAL FAIRNESS

190. The principles relating to procedural fairness have been laid down by the Labour Appeal Court in numerous decisions, including **Johnson & Johnson (Pty) Ltd v CWIU** (1999) 20 ILJ 89 (LAC); **Imperial Transport Services (Pty) Ltd v Stirling** [1999] 3 BLLR 201 (LAC); **Kotze v Rebel Discounting Liquor Group (Pty) Ltd** [2000] 2 BLLR 138 (LAC) and, more recently, **Enterprise Foods (Pty) Ltd v Allen**, *supra*, and **General Food Industries Ltd v FAWU**, *supra.*

191. These cases suggest that once the employer contemplates a restructuring exercise which may lead to dismissals, it is required to initiate the consultative process contemplated under section 189 of the LRA. When it does so, the employer is obliged to approach the matter with an open mind and should be receptive to counter-proposals from the employees and/or the union. While it does not have to cow-tow to the union's demands, the employer should make a genuine attempt to reach consensus on the issues prescribed by section 189(2) of the LRA, including matters such as the choice of selection criteria to be used to determine candidates for retrenchment, the timing and avoidance of dismissals where possible and the payment of severance packages. Most importantly, it has been repeatedly said that the employer must not confront the employees with a *fait accompli.*

192. In the instant case, the company appreciated in at least 1998 that pursuit of a WCM strategy could lead to job losses. To this end it attempted to negotiate the Workplace Change Agreement with the union nationally. These negotiations (which were clearly a legitimate attempt to avoid going through a section 189 exercise) faltered when the union demanded job security and a moratorium on dismissals.

193. The company then decided to abandon negotiation at a national level and to follow the prescripts of section 189 in respect of each restructuring at each brewery. So, for instance, at Newlands, there were different consultative processes for the implementation of WCM in Line 1 packaging (1999), the engineering department (2000) and Lines 2, 3 and 4 packaging

(2001).

194. In relation to the restructuring in the Lines 2, 3 and 4 packaging department at Newlands (the subject of this case), the company relied on the business case referred to above as its compliance with section 189. However, Mr Gauntlett said sight should not be lost of what had gone on before: the union knew that WCM could lead to retrenchments and it should have been alerted to the consequences at a relatively early stage of proceedings.

195. In my view, that fore-warning could only have been of a general nature. The Alrode Line 12 pilot (a *"green-field"* site) did not lead to retrenchments, nor did the Newlands Line 1 restructuring, while the engineering restructuring at Newlands was a very limited intervention as far as job losses were concerned.

196. In any event, it is not for the union or the employees to anticipate the designs of the company, which is, after all, in control of its enterprise and knows when and how it intends implementing its proposals and/or new working models.

197. Mr Kahanovitz argued that the company knew as far back as mid-1998 that WCM would be introduced at Newlands packaging and that the duty to commence consultation arose then. Not so, countered Mr Gauntlett, who said that there was nothing to consult about at that stage since there was no business plan yet drawn up for Newlands packaging. It was argued that the company decided around October/November 2000 that Newlands packaging Lines 2, 3 and 4 should be restructured, that the business plan

was prepared and presented within a reasonable time frame thereafter.

198. As is so often the case in matters of this nature, I think the answer lies somewhere in between. It would be fair to say that there was nothing concrete to put on the negotiating table in mid-1998 as far as Newlands packaging was concerned. Nevertheless, the company knew that WCM was eventually going to be implemented throughout its various structures nationwide and that it would certainly affect all the packaging lines at Newlands. (That, after all, was the purpose of the Alrode Line 12 pilot.)

199. The company knew, too, that it intended to fix minimum entry level requirements for the new positions and that a good number of its workforce would be affected thereby, to the extent that retrenchments would be the most likely options.

200. In my view, it would have been fairer for the company to have given earlier notice to the union, particularly in order that affected employees could have had the opportunity to improve their ABET levels or otherwise demonstrate their competencies in the new structure.

201. The evidence shows that the company wanted to first put all its ducks in a row (perhaps quarts would be a more appropriate metaphor). Having carefully planned its strategy at the Change Planning Workshop in November 2000 it commenced the consultation process on relatively short notice to the union and then sought to lock it into a rigid timeframe.

202. Pieter Keyter was transferred by the company to Newlands on 1 December

2000 from Durban. He held an appointment as a human resources consultant and was responsible for overseeing the implementation of the restructuring of the Lines 2, 3 and 4 packaging department at Newlands. He denied a suggestion under cross-examination that he had been specially transferred to Newlands because of his prior experience in handling the WCM implementation at Durban's Prospecton brewery. Nevertheless, he clearly had plenty of experience in the area of restructuring-related consultations and was a participant in the Change Planning Workshop held at Newlands prior to him taking up his new position.

203. It is clear that the company went about the Newlands Lines 2, 3 and 4 packaging restructuring exercise in a considered, detailed and thorough manner. The Change Planning Workshop was an exercise to equip various levels of management with the expertise and tools to handle the difficult and unenviable task that lay ahead. Management knew that it was dealing with a tough union that would employ the traditional delaying tactics and stratagems that are part and parcel of such an exercise. As noted earlier in this judgment, management wanted to retain the moral high ground throughout the process.

204. At the first consultative meeting on 18 January 2001 (the date having been shifted from 10 January 2001 to accommodate the union), the union received the company's business case in the form of the Power Point presentation referred to above. I have reviewed the slides in their printed form and would say that it is a comprehensive and detailed document which would take some time to digest (even for one familiar with the basic

concepts set out therein). The union requested an opportunity to consider the company's business plan and asked that the company afford them a month to study the document and formulate a response.

205. The company refused the union's request for a month and said that weekly meetings would follow at which the union was expected to be present and to respond. In an e-mail on 18 January 2001 to his superior, Alan Cumming, Keyter made some particularly relevant observations:

205.1. In relation to the union's request for time he remarked:

"... in a nutshell, they want us to suspend the consultation process for a month to allow them time to study the document and come up with alternative proposals. While this does not appear to be an unreasonable request at face value, we were unable to agree to it, based on the fact that we simply don't have a month to spare i.t.o. our implementation timeline. In fact, we told them that we'd like to be in a position to make a decision on whether to implement in its current form or with other alternatives in +/- a month from today".

205.2. In an endeavour to understand the company's consultative obligations, he asked:

"What is the implication of their expected proposal - if they come up with a proposal that is completely different to our's - how do we handle this? Are we obliged to consult with them on their proposal, or will it be OK to reject it early on, obviously stating our reasons why?"

205.3. Finally, in attempting to understand the term *"fait accompli"* he asked whether it meant:

"(a) we'll do it our way and ignore all other input;

(b) we'll listen to other input and include it in our proposal, if viable, but our implementation date is cast in stone (operational requirement);

(c) same as (b), but we'll even consider changing the implementation date."

Keyter then formulated his own interpretation as follows:

"Clearly, I want it to mean (b) above, because if the timeline gets extended there will be financial implications for the business."

Quite what those *"financial implications"* were, was never really explored in cross-examination of the witness.

206. Cumming replied to these issues as follows:

206.1. "We are bound to a minimum of 4 months. Our guideline is that the Contemplation phase should take ± 1 month. 1 month's suspension of consultations to consult outsiders seems excessive/ Why not max 1 / 2 weeks."

206.2. "We have to consider ANY proposal and accept or reject it. If it can be rejected outright, that's OK as long as we have seriously considered it in writing."

206.3. "Fait Accompli" means (a) only. I think time lines are not a big issue re fait accompli as the business obviously has to stick to timelines and this will change only by agreement or if an interdict is obtained - that is our agreement."

207. The company produced Keyter's handwritten notes of the meeting of 18 January 2001. These afford an interesting insight into the thinking of the

management team at that meeting. When confronted with the import of his notes, Keyter sought to explain them away as simply his personal ideas and stated that he was playing *"a little bit of devil's advocate".*

208. Under cross-examination, Pinto accepted that aspects of Keyter's e-mail reflected the thinking of the management negotiating team. She did not object to the contents of the e-mail when it was forwarded to her in January 2001.

209. I should point out that in the agreed retrenchment procedure ("Annexure F") provision is made for 4 months in which to conclude a retrenchment exercise. The union took the point that each phase of the process was a 4 month period - thereby extending the length of the process. (This issue was taken to arbitration during the process and the arbitrator dismissed the union's argument.)

210. The union, in an admitted tactical manouvre, did not attend any meetings for the requested month. (I understood that it wanted to behave consistently with the stance adopted on the *'4 month'* dispute.) Nevertheless, the company persisted in holding the weekly consultative meetings and, in an exercise of complete futility (but presumably to maintain the moral high ground) recorded minutes of those meetings at which it alone was present.

211. I consider that the abovementioned notes and exchange of e-mails confirm the inflexibility on the part of the company's lead negotiator at Newlands. The matter was put beyond the pale, however, when - under cross-examination - Keyter stated the following:

"Mr Keyter, I'm going to argue at the end of the case, the e-mail speaks for itself, the reason that you couldn't agree was the one which you state in the e-mail which you sent to Mr Cummings (sic) at the time, and that is simply this, to use your own words, we simply don't have a month to spare in terms of our implementation time line. Can't you just admit that that is exactly what happened --- M'Lord, we wanted to implement the proposal as is, there is no doubt about that."

212. The witness did go on to assert his belief in the consultative process, but I am of the opinion that the union's complaint that the company approached the consultations with a firm and pre-conceived view is sustainable. This is adequately demonstrated by the fact that the company set about implementing its proposal before the union presented its counter-proposal, and then purported to consult with the union in circumstances where a reversal of the situation was virtually impossible.

213. A further fact which demonstrates that the company had made up its mind irreversibly relates to the decision to introduce WCM *per se*. While this had been a topic of debate between the company and the union nationally in 1998, no consensus had been reached at that level due to the union's demand for a moratorium on retrenchments. I do not believe that the choice of WCM or not was ever open for serious debate at Newlands in January 2001. Implementation thereof was already far advanced at Newlands and had taken place at other breweries. Quite clearly the company had decided at the highest level that this was the model of restructuring that it favoured and it was hardly open to Boesenberg and his team at Newlands to come up with a different model.

214. Finally, on this score, the choice of entry level specifications had been fixed

at national level after the input from Flagship and there was no realistic likelihood of any other criterion being agreed upon at Newlands.

215. Allied to this is the complete disregard by the company of the agreed selection criteria in annexure, *viz.* LIFO with retention of special skills. That deviation from a generally accepted set of criteria was similarly not seriously up for debate.

216. In the **Johnson & Johnson** case, *supra*, Froneman DJP warned against the mechanical use of a checklist of items of procedural regularity in cases of retrenchment. I believe that I have highlighted above what I consider to be a number of material procedural shortcomings on the part of the company. Indeed, there may be more.

217. When the facts are considered holistically I am left with the overwhelming impression that the company did not behave fairly in relation to the procedure it adopted and subsequently employed in the 2001 exercise at the Newlands brewery. In saying so I am mindful of the passage in the judgment of Willis JA in the **Woolworths** case, *supra*, and - in particular - the tactics employed by the union both at national and local levels. Bearing in mind where the balance of power lies in a retrenchment exercise (it is ultimately the company's prerogative to put forward its proposals and to attempt to convince the union to agree, but disensus is not fatal to its case), I do not regard the union's stance in the present case as being anything out of the ordinary. It was certainly not a position which in any way serves to legitimize or ameliorate the company's unreasonableness.

218. In all the circumstances I am persuaded that the dismissal of all the applicants was procedurally unfair.

COMPENSATION

219. Section 193 of the LRA provides for the various remedies available in the case of a finding of unfair dismissal. In terms of section 193(2)(d) of the LRA reinstatement is not permitted in the case of procedural unfairness. In such event, the court may only order the payment of compensation by the employer.

220. While the *"merits"* of this case have been determined in accordance with the statute as it stood before the 2002 amendments to the LRA, I am of the view that the issue of compensation is to be determined in accordance with the wide discretion introduced into section 194(1) by the 2002 amendment. (See **Fouldien and Others v House of Trucks (Pty) Ltd** [2002] 12 BLLR 1176 (LC) at 1182, para 17.)

221. That discretion is to be exercised in such a manner that the award is *"just and equitable in all the circumstances, but may not be more than 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."*

Procedural Unfairness

222. An award for compensation under the amended section 194(1) still encompasses the *solatium* occasioned by a procedural defect

(see **Fouldien's** case, *supra*, at p.1182, para 18). That *solatium* was described by Conradie JA in **Lorentzen v Sanachem (Pty) Ltd** [2000] 7 BLLR 763 (LAC) at 766, as requiring an evaluation of the magnitude of the employer's transgression together with the anxiety and *"hurt"* suffered by the affected employee.

223. In my view, the procedural unfairness of the company in the present case was serious. I am of the view that, procedurally, there was very little open for debate with the union at the beginning of 2001 at Newlands. The model of restructuring and the entry level specifications for the new jobs had been fixed nationally by the company in a unilateral fashion at a very early stage of the WCM exercise.

224. Importantly, the selection criteria for retrenchment contained in the collective agreement between the parties was completely ignored by the company. The effect was that some of the company's most loyal and longest serving employees were dismissed. Many of those were people who had helped the company attain its dominance in the local beer market and to build up the extraordinary wealth with which it has been able to aggressively pursue its international acquisitions. They would rightfully have reason to be aggrieved by their treatment.

225. On the other hand the retrenchment packages stipulated in the collective agreement are not insignificant and exceed the minimum stipulated in the LRA quite handsomely. In addition, the company put Project Noah in place at a relatively early stage of its retrenchment initiative and has attempted

thereby to soften the blow of the dismissals and to provide some sort of safety net.

226. In the circumstances, I consider that compensation of 9 month's remuneration would be fair and reasonable in relation to the applicants whose dismissals have been found to be procedurally unfair.

Substantive Fairness

227. The primary remedy for a dismissal which is found to be substantively unfair in re-instatement. Section 193(2) of the LRA obliges a court to reinstate an applicant in the event of substantive unfairness unless -

227.1. the employee does not wish to be reinstated. In the instant case two applicants indicated this, but since they are not category 2 employees, it is not necessary to consider compensation in lieu of reinstatement in their cases;

227.2. the circumstances relating to the dismissal make continued employment intolerable. This does not arise in the present case;

227.3. "*it is not reasonably practicable for the employer to reinstate"*.

228. I was informed that five of the applicants have died since their dismissals. Of this number two: (Victor Nazo - applicant no. 71 - and Israel Mcebisi Silcweza - applicant no. 95) are category 2 employees.

229. The company adduced the evidence of Boesenberg to avoid reinstatement

on the basis of reasonable impracticability. He stated that the introduction of WCM produced a sea-change in the work structure at Newlands, that efficiency had been greatly enhanced and that reinstatement would cause intractable problems for the company.

230. On the other hand, there was ample evidence to show that a vast number of retrenched employees have subsequently been re-employed by the company in terms of service agreements with labour brokers. The irony of this situation is that dismissed employees' services are still required by the company during periods of higher production demand, notwithstanding their apparent lack of training and/or insufficient ABET levels.

231. I was told that these employees (colloquially known under the LRA as TES's - temporary employment service employees - in terms of section 198) are utilised by the company on non-WCM lines and that they perform precisely the same work as before their retrenchment. The evidence was also that many of the TES's had worked for protracted periods of time - between 6 and 9 months in many instances.

232. In such circumstances I am of the view that the company has not established, on a balance of probabilities, that the primary remedy is *"not reasonably practicable"*. Accordingly, I am satisfied that the category 2 applicants, with the exception of those who are deceased, are entitled to reinstatement.

233. As far as the deceased category 2 applicants are concerned, it seems to me that compensation in the maximum amount of 12 months would be

appropriate. In terms of a mid-trial conference minute the parties agreed that any sums payable to deceased applicants would be paid to the union which would receive same on behalf of the executors and/or beneficiaries of such deceased persons.

COSTS

234. The parties were both of the view that this was an appropriate case for the award of costs. The union and the individual applicants have been substantially successful and are accordingly entitled to their party and party costs, including the qualifying expenses of their expert, McLean, and the costs of two counsel where employed.

235. Costs orders in relation to interlocutory proceedings stood over for determination at the conclusion of the matter.

236. On 26 November 2002 this matter was set down on short notice to the parties for hearing on 10 January 2003, i.e. during Court recess. The Applicants indicated that the date did not suit them while the Respondent said it was ready to run. The Registrar of this Court was not amenable to removing the matter from the roll and directed that an application for postponement should be brought if necessary.

237. The Applicants duly lodged an application for postponement which was vigorously opposed by the Respondent. After several reams of paper had been exchanged, Rogers AJ granted a postponement on 19 December 2002. He reserved the question of costs, to be determined in the light of

"events which occur in terms of preparation or at the trial which will cast light on the positions the parties adopted" before him.

238. Mr Gauntlett accepted during argument that these costs should be costs in the cause. I agree with this submission. I should add that I had considered making a punitive costs order against the Respondent because of the opportunistic manner in which it approached the unusual set down of the matter and forced the parties to incur costs which could easily have been avoided had a more accommodating approach been taken. I have, however, decided against such an order.

239. At the commencement of the trial before me, Mr Kahanovitz moved an amendment to the Applicants' statement of claim, part of which was opposed by the Respondent. In view of the opposition, the Applicants did not proceed with the contested part of the application.

240. When the matter became partly heard before me at the end of July 2003, it was postponed for further hearing until the end of September 2003. Not unexpectedly, the Applicants renewed their application to amend the objectionable parts of their statement of claim.

241. Several further reams of paper were exchanged and a special sitting of the Court was convened early in September 2003 to deal with the opposed amendment. The fiery opposition at that stage frizzled out like a damp squib. I consider that the conduct of the Respondent in this interlocutory application is worthy of censure. It involved an extensive opposed application which could have been avoided had sense prevailed and had

tactical stratagems been put to one side. The Respondent complained about the lateness of the amendment and the severe prejudice it would suffer if it had to call witnesses from the four corners of the globe. Yet all these protestations were in vain and the prejudice came to naught. Litigants in this Court are to be dissuaded from flexing their financial muscle in attempts to embarrass their opponents.

CONCLUSIONS

242. In the light of the aforegoing I make the following order:

A. The dismissal of the category 2 applicants (whose names are set out in annexure "A" hereto) is declared to have been substantively unfair;

B. The dismissal of the category 5 applicants (whose names re set out in annexure "B" hereto) is declared to have been substantively unfair;

C. The dismissal of all the individual applicants is declared to have been procedurally unfair;

D. The applicants whose names appear in annexures "A" and "B" hereto are to be reinstated with retrospective effect on the same terms and conditions that pertained prior to the dates of their dismissal;

E. In the event that any of the applicants who are to be reinstated have been employed since dismissal in the Respondent's business in terms of temporary employment service contracts as contemplated in section 198 of the Labour Relations Act, the Respondent shall be entitled to set off all amounts actually received by such

employees from their employer(s) under the aforementioned section 198, against any amounts which may be due to them by way of arrear remuneration;

F. The Applicants, excluding those whose names appear in annexures “A” and “B” hereto, are awarded compensation of 9 months’ remuneration calculated at each employee’s rate of remuneration on the date of dismissal;

G. All amounts due by the Respondent in terms of this order to any applicants who are deceased, are to be paid to the applicants’ attorneys of record who are requested to deal with any such monies in terms of the relevant provisions of the Administration of Estates Act;

H. The Respondent is ordered to pay the Applicants’ costs of suit herein, such costs to include the costs of two counsel where employed, the qualifying expenses of Daryl McLean, as well as the costs of the application for postponement heard in December 2002 and the application to amend heard in September 2003;

I. All costs are to be on the party and party scale, save for the costs in relation to the latter-mentioned application to amend which shall be on the scale as between attorney and client;

J. In the event that either annexures “A” or “B” hereto incorrectly reflect the names of the applicants concerned, the parties are requested to approach the Court within 10 days for a correction of this order in terms of Rule 16A.

P.A.L. GAMBLE
Acting Judge of the Labour Court

Legal Representatives:

For the Applicants:

Advocates C.S. KAHANOVITZ and M.L. NORTON
instructed by Chennels Albertyn, Cape Town\

For the Respondent:

Advocates J.J. GAUNTLETT and L.F. FICHARDT
instructed by Bowman Gilfillan, Cape Town

ADDENDUM :

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN **Case No: C1008/2001**

In the matter between:

FOOD AND ALLIED WORKERS UNION First Applicant

CLINT ABRAHAMS AND 113 OTHERS Further Applicants

and

SOUTH AFRICAN BREWERIES LIMITED Respondent

ORDER IN TERMS OF RULE 16A(1)(a)(ii) MADE ON 16 SEPTEMBER 2004

Gamble, AJ

1. The judgment in this matter was handed down on 3 September 2004.

2. The Respondent has now filed an application for leave to appeal against that order.

3. In paragraphs 2 and 3 of the Notice of Appeal the Respondent has raised certain grounds of appeal which, in my view, highlight two obvious errors in the judgment.

4. In the first place, it is suggested that I erred in finding, at paragraph 168 of the judgment, that there was sufficient evidence to show that the dismissal of the category 1 applicants was substantively unfair. I have re-read the judgment and have observed a typographical error in that paragraph, namely that the word “sufficient” should read **“insufficient”**. I believe that the construction of the paragraph in question otherwise supports the corrected version. The fact that no order in relation to the substantive unfairness of the dismissals of the category 1 applicants was made is consistent with the corrected version.

5. Secondly, it is alleged that the order in paragraph 242.B of the judgment declaring the dismissal of the category 5 applicants to be substantively unfair is inconsistent with my finding in paragraph 189 of the judgment in which I held that I was unable to find the dismissals of that category of employees to be substantively unfair.

6. Once again there is a typographical error in this portion of the judgment. The reference in paragraph 242.B to category **5** applicants should, of course, be to category **4** applicants. This error is confirmed by the list of

names set forth in Annexure “B” to the judgment, which records the six “other” applicants who resorted under category 4 (as opposed to the two deaf mute applicants who were described in the judgment as category 5 applicants).

7. These patent errors may be corrected in terms of Rule 16A(1)(a)(ii) of the Rules of the Labour Court which provide that I am empowered to vary my order or judgment of my own motion. In the present circumstances I do not consider it necessary to hear the parties on these points since the errors are patently of a typographical nature. It is appropriate, too, that these corrections be made before the application for leave to appeal is heard in order that the parties may consider their respective positions and if necessary amend their documents.

8. I shall accordingly exercise my powers under the Rule *mero motu* and vary the judgment and order accordingly. The parties are, of course, free to exercise their rights under the same Rule should they so wish.

9. In the circumstances, I make the following order under Rule 16A(1)(a)(ii):

   9.1. Paragraph 168 of the judgment in this matter is varied by the deletion of the word “sufficient” in the penultimate line thereof and the substitution of the word **“insufficient”** therefor;

   9.2. The order contained in paragraph 242.B of the judgment in this matter is varied by the deletion of the phrase “category 5 applicants” and the substitution of the phrase **“category 4 applicants”** therefor.

P.A.L. GAMBLE
Acting Judge of the Labour Court