CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 178/19

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA First Applicant

MEMBERS LISTED IN ANNEXURE A OF THE APPLICANTS' STATEMENT OF CASE Second to further Applicants

and

AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA (PTY) LIMITED) First Respondent

IMPERIAL LOGISTICS DEDICATED CONTRACTS (A DIVISION OF IMPERIAL GROUP LIMITED) Second Respondent

Neutral citation: *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel* (*a division of Aveng Africa (Pty) Ltd*) *and Another* 2020 ZACC 23

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Mathopo AJ: [1] to [105]
Majiedt J: [106] to [136]
Jafta J: [137] to [155]

Heard on: 5 March 2020

Decided on: 27 October 2020

Summary: Section 187(1)(c) of the Labour Relations Act 66 of 1995 — demand — automatically unfair dismissals — operational requirements — consultations — negotiations — causation test

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

MATHOPO AJ (Mogoeng CJ, Khampepe J, Madlanga J and Theron J concurring):

Introduction

[1] This case concerns the plight of 733 employees who were dismissed for what the employer described as operational requirements. The issues surface in this application for leave to appeal by the National Union of Metal Workers of South Africa (NUMSA) on behalf of its members, the second to further applicants, against the judgment and order of the Labour Appeal Court.[1] That Court confirmed the decision of the Labour Court which held that the dismissal of the second to further applicants – as employees

[1] *National Union of Metalworkers of SA v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd* [2019] ZALAC 36; (2019) 40 ILJ 2024 (LAC) (Labour Appeal Court judgment) at para 75.

– was not automatically unfair in terms of section 187(1)(c) of the Labour Relations Act[2] (LRA).[3] Section 187(1)(c) provides:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is—
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> . . .
>
> (c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer".[4]

[2] The core issues at the Labour Court, the Labour Appeal Court and this Court remain unchanged. The crux of the matter is whether the dismissal of the second to further applicants was automatically unfair in terms of section 187(1)(c) of the LRA, or whether it was based on the first respondent's operational requirements per sections 188 and 189 of the LRA, which dismissals are not automatically unfair. Key to this enquiry is whether the second to further applicants were dismissed for refusing to accept a demand in respect of a matter of mutual interest between them and the first respondent. The matter brings to the fore the proper interpretation of section 187(1)(c) of the LRA.

Parties

[3] The first applicant is NUMSA, a trade union registered in terms of section 96 of the LRA. The second to further applicants are former employees of the first respondent and members of NUMSA. NUMSA and the second to further applicants, will collectively be referred to as the applicants. The first respondent is Aveng Trident Steel (a division of Aveng Africa (Pty) Limited), a duly registered company that operates in

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[2] 66 of 1995.

[3] *National Union of Metalworkers of SA on behalf of Members v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd* (2018) 39 ILJ 1625 (LC) (Labour Court judgment).

[4] The language in section 187(1)(c) of the LRA above n 2, as it now stands, was brought about by section 31 of the Labour Relations Amendment Act 6 of 2014. Prior to its amendment, the provision read:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is—
>
> . . .
>
> (c) *to compel* the employee to accept a demand in respect of any matter of mutual interest between the employer and employee".

the metal industry as a steel manufacturer and supplier of a wide range of steel products (Aveng). The second respondent is Imperial Logistics Dedicated Contracts (a division of Imperial Group Limited), a duly registered company (Imperial).

Background facts

[4] The material facts have been fully set out in the judgments of the Labour Court and the Labour Appeal Court. They need not be repeated here. Only those facts that are germane to the purpose of this judgment will be restated.

[5] During April 2014, as a result of harsh economic conditions, Aveng experienced a decline in sales and profitability. To maintain its profitability, it had to reduce its increasing costs, especially in relation to labour, electricity and transport. The drop in the volume of sales meant that some of the machines were under-utilised. This necessitated the alignment of Aveng's workforce and production output with the market conditions. Aveng soon realised that it could no longer continue with its business model and resorted to restructuring its business in order to survive.

[6] On 15 May 2014, Aveng initiated the consultation process by filing a notice with the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 189(3) of the LRA. In the notice, Aveng indicated that about 400 jobs might be affected, and had hoped that some employees would agree to work in the redesigned positions to avoid the necessity of initiating retrenchment proceedings. At that stage, Aveng had a total workforce of 1784 permanent employees.

[7] On or about 29 August 2014, a consultation meeting was held, at which Aveng's management indicated that employees were invited to apply for voluntary severance packages (VSPs) or early retirement if they so wished, and that the opportunity to do so would remain open until 5 September 2014. NUMSA requested an assurance that no "forced retrenchments" would take place. In response, Aveng stated that while it was envisaged that no "forced retrenchments" would ensue, no guarantee could be provided in this regard. NUMSA then proposed, as an alternative to the redesigning of the job

descriptions, a five-grade structure. At that time, Aveng had a thirteen-grade structure in place. NUMSA's understanding was that the five-grade structure would allow for a redesigning of the job descriptions without interfering with Aveng's organisational structure and reduce costs beyond those provided for in a collective agreement; which Aveng was a party to and which was referred to as the main agreement of the Metal and Engineering Industries Bargaining Council (MEIBC).

[8] During September 2014, another consultation meeting was held where Aveng's Employee Relations Executive, Mr Komane, mentioned that, in order to avoid "forced retrenchments", employees who did not receive VSPs had to be placed in the redesigned positions. Furthermore, that there would not be any need for "forced retrenchments" if "grey areas" were addressed. The "grey areas" were identified as follows: (i) that Aveng would have a workforce with an adequate skill set for its business to operate effectively and successfully; (ii) finalisation of job descriptions; and (iii) selection and placement of existing employees in appropriate redesigned posts, after the VSPs and Limited Duration Contracts (LDCs), for those fixed term employees who had contracts for a duration of less than six months on average.

[9] It is common cause that further consultation meetings were held, which resulted in the termination of the services of 253 employees, of which 249 employees opted for VSPs and the remaining four were retrenched. Those who opted for VSPs were given notice of termination of employment which took effect on 10 October 2014. Termination of employment for those retrenched employees took effect on 7 November 2014.

[10] During October 2014, NUMSA and Aveng concluded an interim agreement in terms of which employees agreed to work in accordance with Aveng's redesigned job descriptions until the five-grade structure was finalised. It was contemplated that this would only be in March 2015. It was further agreed that the employees performing additional functions would be paid 60 cents per hour. The employees worked under the

proposed new structure for a period of six months. However, on 13 February 2015, NUMSA reneged on the interim agreement and sent an email to Aveng, informing it that its members would no longer perform the redesigned jobs. This, according to NUMSA, was because Aveng had not yet negotiated the five-grade structure that was supposed to be implemented from the beginning of March 2015.

[11] On 30 March, it became clear to Aveng that NUMSA had no desire to engage in a meaningful consensus-seeking consultation process to resolve the five-grade structure issue, but rather sought to use the consultations to demand wage increases. Aveng thus addressed a letter to NUMSA informing it, among other things, that after considering its proposals, it was unable to accommodate its demands any further and could not increase its costs. NUMSA was informed that the consultation process had been exhausted. Aveng would continue, however, to implement its new redesigned job descriptions structure to address its operational requirements, as the jobs that existed prior to the consultations had now become redundant. As employees of NUMSA had been performing the redesigned jobs, Aveng offered them an opportunity to remain in those jobs, but "should they reject it, they [would] unfortunately be retrenched".

[12] The parties tried to resolve their issues, but to no avail. On 31 March 2015, the parties met and Aveng refused to withdraw its letter dated 30 March 2015. The parties met again on 16 April 2015 where NUMSA expressed its confusion over Aveng's letter. NUMSA asserted that it was led to believe that the forced retrenchments had ended following the termination of the contracts of employees who had accepted the VSPs and those that were on LDCs. The parties were unable to resolve their differences and, on 17 April 2015, Aveng addressed a letter to NUMSA in the following terms:

> "*Given that your members and other employees have performed the duties as per the new job descriptions in terms of the interim arrangement agreed to between the parties, we shall afford them the opportunity to be engaged in the new positions at the rate prescribed by the main agreement of the MEIBC for performing work in such positions*. This reasonable offer of alternative employment is a further *bona fide* effort on our part

> to avoid the contemplated retrenchments. *Should they reject it, they will unfortunately be retrenched*."

[13] During April 2015, 71 employees accepted Aveng's offer. However, approximately 733 employees rejected the offer and their services were subsequently terminated on 24 April 2015 for reasons that Aveng advanced as retrenchments for its alleged operational requirements.

[14] Approximately a year after the dismissal of the second to further applicants, Aveng outsourced its fleet and transferred its transport business to Imperial, including 110 of its employees. The takeover relates to one of the claims pursued by NUMSA for the reinstatement of its members. Adjudication of this claim would require an examination of the potential and practicable reinstatement by Imperial of some 110 employees who form part of the second to further applicants.

Litigation history

Bargaining Council

[15] On 22 May 2015, NUMSA referred an unfair dismissal dispute to the Metal Engineering Industries Bargaining Council (MEIBC) for conciliation.[5] The dispute could not be resolved and a certificate of non-resolution was issued. Thereafter, NUMSA approached the Labour Court.

Labour Court

[16] Before the Labour Court, NUMSA argued that the dismissal of the second to further applicants was automatically unfair in terms of section 187(1)(c) of the LRA. In disputing this, Aveng argued that the dismissal of the second to further applicants was for operational requirements in terms of the LRA. It adduced the evidence of its

[5] This referral occurred after NUMSA's urgent application before the Labour Court, challenging the procedural fairness of the dismissal and praying for an order interdicting Aveng from dismissing any further employees which was dismissed by the Labour Court. See *Numsa Obo Members v Aveng Trident Steel (a division of Aveng Africa) (Pty) Ltd* (J864/15) [2015] ZALCJHB 155 (21 May 2015).

Chief Operating Officer, Mr Moodley. He testified about the challenges facing the steel industry and particularly the economic distress Aveng found itself in as a result thereof. According to him, it was necessary for Aveng to restructure its operations because of the decline in its profitability and sales volume. The head of the Human Resources Department, Ms Mofokeng, gave evidence on the consultative process between Aveng and NUMSA. In short, her evidence was that NUMSA did not negotiate in good faith as it continued to make unreasonable demands by soliciting wage increases for its members when the financial position of Aveng had been clearly disclosed to NUMSA. The last witness for Aveng was the Managing Director of Imperial, Mr Enslin. His evidence dealt with the impracticability of reinstatement. On the other hand, NUMSA closed its case without leading any evidence, despite propositions by counsel that witnesses would be called to lead countervailing evidence.

[17] The Labour Court held that the individual employees were not dismissed for refusing to accept any demand, but for operational requirements after rejecting the alternative to dismissal proposed by Aveng during the retrenchment consultation. It reasoned as follows:

> "A dismissal where the reason for it is the refusal to accept a demand is prohibited. However, a dismissal where the reason for it is the operational requirements is not to be precluded in the section. *To say so would render the provisions of section 188(1)(a)(ii) read with section 189 nugatory*."[6]

[18] The Labour Court held that NUMSA had a duty, first, to produce credible evidence to show that there was a demand followed by a refusal to accept such a demand that led to an automatically unfair dismissal in terms of section 187(1)(c). NUMSA failed to provide such evidence and therefore there was no demand.[7] Second, NUMSA failed to produce any evidence disputing the evidence of Mr Moodley and Ms Mofokeng with the result that this evidence remained unchallenged. The Labour

[6] Labour Court judgment above n 3 at para 36.

[7] Id at paras 61-5. For this, the Labour Court relied on *Kroukam v SA Airlink* (Pty) Ltd [2005] ZALAC 5; [2005] 26 ILJ 2153 (LAC) (*Kroukam*).

Court concluded that it had to be accepted that the old jobs performed by the second to further applicants were redundant and the retrenchments were thus substantively fair.[8] It relied on the judgment of the Labour Appeal Court in *Mazista Tiles* where it was held that:

> "The [employer] could still decide its business required that the employees' terms and conditions of service be changed in order to be more profitable and more competitive. If the employees rejected the proposal on changing terms and conditions, as it was the position in this matter, then the [employer] would be entitled to dismiss them for operational reasons under section 189."[9]

[19] The Labour Court reasoned that the dismissal of the employees was not automatically unfair.[10] It would not be reasonably practicable for Imperial to reinstate the dismissed employees.[11] Aggrieved by the outcome, NUMSA appealed to the Labour Appeal Court.

Labour Appeal Court

[20] On 13 June 2019, the Labour Appeal Court upheld the Labour Court judgment and agreed with Aveng that no demand was made as envisaged under section 187(1)(c).[12] It held that Aveng made a proposal to NUMSA, the primary purpose of which was to facilitate Aveng's restructuring for operational reasons, in order to ensure that it survived its economic distress.[13] It further held that NUMSA took advantage of the economic plight of Aveng and sought to convert the consultative processes into a collective bargaining opportunity for increased wages.[14] The failure of

[8] Id at para 71. At para 67, the Court found it unnecessary to decide on the procedural fairness of the dismissal as he deemed the matter to have been sufficiently resolved by Steenkamp J in the earlier Labour Court judgment.

[9] *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* [2004] ZALAC 16; (2004) 25 ILJ 2156 (LAC) (*Mazista Tiles*) at para 57.

[10] Labour Court judgment above n 3 at para 66.

[11] Id at para 77.

[12] Labour Appeal Court judgment above n 1 at para 72.

[13] Id.

[14] Id at para 74.

the employees to accept the employer's proposal, based on dire operational requirements, contributed to their dismissal and was accordingly fair.[15] Consequently, it held that the second to further applicants were dismissed as a result of Aveng's operational needs, and not as a consequence of their refusal to accept a demand in respect of a matter of mutual interest.[16] It concluded that "[t]he employees' dismissals accordingly fell within the zone of permissible dismissals for operational requirements and did not fall foul of section 187(1)(c) of the LRA".[17]

[21] In reaching its conclusion, the Labour Appeal Court held that section 187(1)(c) does not preclude an employer from dismissing employees, provided that the dismissal is for operational reasons.[18] The question of whether the section is contravened does not depend on whether the dismissal is conditional or final, but on the true reason for the dismissal of the employees.[19] Thus, the true reason for the dismissal of the employees must be determined and, in that examination, the employer's operational requirements play a pivotal role.

[22] In determining whether the true reason for the dismissal was a refusal to accept the proposed changes to employment or whether it was based on operational requirements, the Labour Appeal Court applied the "true reason" or "dominant cause" test as laid down by the Labour Appeal Court in *Afrox*.[20] The Labour Appeal Court concluded that, on the facts, the dismissal would not have occurred without the refusal of alternative employment.[21] The true reason for the dismissal was the employer's operational requirements.[22]

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[15] Id.

[16] Id at para 75.

[17] Id.

[18] Id at para 64.

[19] Id at para 61.

[20] *SA Chemical Workers Union v Afrox Ltd* [1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC) (*Afrox*).

[21] Labour Appeal Court judgment above n 1 at para 71.

[22] Id at para 74.

[23] In dismissing the appeal, the Labour Appeal Court concluded that NUMSA's interpretation of the section would undermine the fundamental purpose of section 189 of the LRA. The section encourages engagement between employers and employees, facilitating the creation of alternatives to retrenchments, and to avoid scenarios where employers are shackled and rendered unable to propose changes to the terms and conditions of employment in terms of section 189 consultations.[23] Aggrieved by this outcome, NUMSA approached this Court for leave to appeal.

In this Court

Applicant's submissions

[24] Before us, NUMSA argues that the judgment of the Labour Appeal Court must be overturned and that the second to further applicants should be reinstated. It submits that if their reinstatement is not reasonably practicable, as contended by Imperial, then the employees should be appropriately compensated. NUMSA argues further that the Labour Court's interpretation, which was endorsed by the Labour Appeal Court, is inconsistent with the literal, purposive and contextual interpretation of section 187(1)(c). According to NUMSA, a plain reading of the provision contains three requirements: (i) a demand; (ii) that relates to a matter of mutual interest; and (iii) the dismissal of employees because they failed to accept such demand. It contended that on a plain reading of the section, a dismissal is automatically unfair even if employees are dismissed for rejecting a demand that arises from or as a result of the employer's operational requirements. In other words, it posited that there are no qualifications or exceptions in this regard. It further contended that section 187(1)(c) of the LRA does not expressly allow for an exception based on operational requirements for employers to dismiss employees as it does in relation to fair dismissals in accordance with section 188 or dismissals for operational reasons during a protected strike under section 67(5) of the LRA.

[23] Id at para 66.

[25] It alleges that the Labour Appeal Court erred in applying the true reason and dominant cause of the dismissal test, as enunciated in *Afrox*. It submits that the *Afrox* case is distinguishable from the facts in this matter and that the application of the test is not appropriate.

[26] NUMSA argues further that the Labour Appeal Court's interpretation of the provision limits the right to strike as set out in section 23(2)(c) of the Constitution, and urged this Court to adopt an interpretation that best promotes the constitutional right to strike.

[27] NUMSA contends that the Labour Appeal Court's assessment of facts is yet another reason why the appeal should succeed; and that, in truth, the offer was a demand as contemplated by section 187(1)(c) because it had a serious sting and consequences attached to it. It submits that the dismissal was consistent with the tenor of the letter which suggested that if employees failed to accept the offer, dismissal would ensue. It was urged upon us to accept that the employees were put on terms by the employer and this conduct was not akin to a proposal as suggested by Aveng. It was suggested in oral argument that the Labour Appeal Court overlooked the fact that this was a second notice, preceded by the first notice of 31 March 2015. The effect of the latter notice, according to NUMSA, rendered it a matter of mutual interest.

[28] NUMSA further contends that the parties were engaged in section 189 consultations and that the section requires that there should be proposals aimed at reaching consensus. It argued that an employer should negotiate with the trade union with an open mind and seek to find a viable solution. Aveng, by its letters, displayed its unwillingness to act accordingly in this process. NUMSA submits that, when the section 189 notice was issued, Aveng indicated that only 400 jobs would be affected and undertook not to retrench any of its employees, but nevertheless went on to dismiss 733 employees. According to NUMSA, taking into account the high number of dismissed employees, the reason for the dismissals could not have been operational requirements.

Respondents' submissions

[29] In opposing the application for leave to appeal, Aveng and Imperial support the reasoning of the Labour Appeal Court. They place particular emphasis on the purpose of the amendment to the section and stressed that the amendment sought to cure the anomaly that arose as a result of previous court decisions,[24] which sought to preclude employers from dismissing employees for operational reasons, only to re-hire some of them whenever circumstances permitted. They rely on the explanatory memorandum which they contended clearly articulated the purpose of the amendment. More about the explanatory memorandum later.

[30] Aveng argues that it was engaged in a continuous *bona fide* (good faith) retrenchment consultation process throughout. Realising the distressed financial position it faced, it suggested the restructuring of the company and the redesigning of the job descriptions as an alternative to retrenchment. The employees agreed and started working in terms of the new agreement. It was only in February 2015 that NUMSA inexplicably started demanding higher wages. Aveng was held to ransom, as it had retrenched some of its employees by that stage. It contended that the parties were not engaged in collective bargaining but that Mr Komane's statements were made during retrenchment consultations. Aveng submits that the interpretation of the section contended for by NUMSA undermines the right of employers to dismiss employees for operational reasons. Moreover, it undermines the right to fair labour practices in section 23(1) of the Constitution.

[31] Imperial confined its case to the reinstatement of the dismissed employees. As stated earlier, it aligned itself with Aveng in supporting the findings of the Labour Appeal Court. For its part, it contended that on the undisputed evidence of Mr Enslin, it would be impracticable to reinstate the employees. It submits that

[24] This will be discussed below at [60] – [68].

reinstatement would cripple Imperial by increasing its monthly costs and that this would result in the entire contract[25] failing with possible job losses of around 200 employees.

Leave to Appeal

[32] It is axiomatic that in order for leave to appeal to be granted, a matter must engage this Court's jurisdiction and it must be in the interests of justice to grant leave to appeal. A matter engages this Court's jurisdiction when it raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court.[26]

[33] This Court has held that matters which concern the interpretation and application of legislation enacted to give effect to the Bill of Rights do raise constitutional issues.[27] This matter clearly engages this Court's jurisdiction as it concerns the proper interpretation and application of section 187(1)(c) of the LRA which gives content to automatically unfair dismissals underpinned by the right to fair labour practices which are entrenched by section 23(1) of the Constitution. Thus, it raises a constitutional issue.

[34] Allied to this are other constitutional issues, which also engage this Court's jurisdiction. First, NUMSA's averment that the provision must be interpreted in a manner that best promotes the right to strike in section 23(2)(c) of the Constitution. Second, Aveng's rebuttal that NUMSA's construction of the provision undermines its right as an employer to dismiss for operational requirements which in turn undermines its right to fair labour practices provided for in section 23(1) of the Constitution.

[25] Imperial's role in this litigation is limited, given the context in which it took over a portion of Aveng's business. In brief, during April 2015, Aveng terminated the employment of approximately 733 employees on the grounds of operational requirements, and appointed replacements, either permanently or by way of labour brokers. One year later, Aveng outsourced the transport function in respect of its Trident Steel business to Imperial. A written contract governs the transaction.

[26] Section 167(3)(b)(i) and (ii) of the Constitution.

[27] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 14.

[35] Notwithstanding the engagement of its jurisdiction, this Court enjoys the discretion to determine whether it is in the interests of justice to grant leave to appeal. It considers a number of factors in this regard. In addition to reasonable prospects of success, which although not determinative, carries substantial weight, there is a string of other key factors to be considered.[28] These include the importance of, and the public interest in, the determination of the constitutional issues raised.[29] Retrenchments usually involve the loss of jobs and income by a number of employees through no fault of their own. They have a more significant "social and economic ill effect" than other forms of dismissals because they affect a "larger number of employees."[30] Such issues are of critical importance to the parties involved, the labour force and other future employment relationships. Therefore, reaching certainty and finality on when dismissals constitute retrenchments that are not automatically unfair in terms of section 187(1)(c) of the LRA, is in the public interest and warrants a determination by this Court.

[36] Also implicated is the robust debate concerning the impact of the amended section 187(1)(c) of the LRA. This Court is called upon to decide on how this provision is to be interpreted in the context of the LRA as a whole, taking into account its structural integrity as well as the jurisprudential force of prior case law. Importantly, this matter is not narrowly circumscribed to the parties in the present matter; it has a broad practical reach. Employers, employees and their representatives alike will benefit from clarity from this Court on this matter. The interests of justice thus warrant that leave to appeal be granted.

[28] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 36.

[29] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 53; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; and *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 15-6.

[30] Grogan *Workplace Law* 13 ed (Juta & Co Ltd, Cape Town 2017) at 267.

Issues for determination

[37] As stated earlier, the overarching issue that arises on the merits is whether, on a plain reading of section 187(1)(c) of the LRA, a dismissal is automatically unfair even if employees are dismissed for rejecting a demand that arises as a result of the employer's operational requirements. At the heart of this matter is the proper interpretation of section 187(1)(c) of the LRA.

[38] On my reasoning, it is not necessary to decide whether Aveng's letter of 17 April 2015 was a demand.

Analysis

Section 189 retrenchment consultations versus collective bargaining

[39] From the outset, there is a need to distinguish between the section 189 consultation process and collective bargaining.[31] This is so because dismissals that are truly for operational requirements would not trigger section 187(1)(c), and the fact that a demand is made in the context of retrenchment consultations is thus a significant factor in ascertaining whether the true reason for the dismissal was the employer's operational requirements.

[40] Retrenchments should not be resorted to until "certain procedural requirements intended to minimise the impact on employees" have been complied with.[32] When employers contemplate dismissing their employees for operational requirements, they are required to consult in terms of section 189(1) of the LRA. The nature of such a consultation process, including "its objective and agenda", is prescribed by

[31] While the LRA does not use these terms per se, "the LRA delineates between them in terms of the institutions and process that are available to the parties seeking to resolve the particular disputes. Broadly speaking, the Act divides disputes into those that may be referred to arbitration and adjudication – which is generally (but not always) the case with disputes of rights – and those that may form the subject matter of industrial action – which is generally (but not always) the case with disputes of interest." See Collier et al *Labour Law in South Africa: Context and Principles* (OUP, Cape Town 2018) at 95.

[32] Grogan (2017) above n 30 at 266.

section 189(2) of the LRA.[33] This consultation "requires engagement by all the consulting parties with the purpose of reaching consensus".[34] It is important to note that the approach to this consultation must not merely be a checklist approach – that is, it must not be purely formalistic.[35] There is both a procedural and substantive aspect to this consultation process. This has been clarified by the Labour Appeal Court in *Afrox* where the Court stated:

> "It is implicit in the terms of section 189(2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees."[36]

[41] On the other hand, collective bargaining is the process through which both employers and trade unions "seek to reconcile their conflicting interests and goals through mutual accommodation [in matters of mutual interest]. The dynamics of collective bargaining are demand and concession; the objective is agreement."[37] Thus, in contrast to a consultation process, collective bargaining entails negotiating "so as to arrive at some agreement on terms of give and take."[38]

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[33] Le Roux *Retrenchment Law in South Africa* (Lexis Nexis, Cape Town 2016) at 92. See also section 189(2)(a) of the LRA above n 2 which provides:

> "The employer and the other consulting parties must in the consultation . . . engage in a meaningful joint consensus-seeking process and 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."

[34] Id at 96.

[35] Id at 94.

[36] *Afrox* above n 20 at para 36.

[37] Grogan *Collective Labour Law* 2 ed (Juta & Co Ltd, Cape Town 2014) at 126.

[38] *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) (*MAWU*) at 493H.

[42] It is said that collective bargaining "supersedes, but does not replace negotiations" between the parties and that it results in agreements "which bind employers and individual employees and supersede individual contracts to the extent that they conflict".[39] Furthermore, it entails bargaining which "falls between the two extremes of dictation and submission".[40] What is abundantly clear is that there are two aspects to collective bargaining: *collective* and *bargaining* in the sense that it is a process which is aimed at reaching consensus and binding the parties.[41] Importantly, there must be a willingness to reach agreement, even by compromise.[42]

[43] It was noted in *MAWU* that there is a "distinct and substantial difference between consultation and [collective] bargaining".[43] The former, in anticipation of retrenchments, "calls for a joint problem solving approach so that the needs of all parties can be explored".[44] The latter seemingly "tends to close the mind [of the parties] to exploring in good faith all options for finding mutually acceptable solutions" and, in its very nature, sees the parties "wrangle with each other to secure the best deal for their respective constituencies, often by bluffing and trying to outwit or outmanoeuvre each other.".[45]

[44] This does not mean, however, that there should be a rigid or mechanical distinction between the two processes. In some instances, the processes may be inextricably linked to each other in such a way that the distinction may become difficult to discern. Collective bargaining can only yield changes to terms and conditions of employment if it culminates in an agreement.

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[39] Grogan (2014) above n 37 at 126.

[40] Id at 127.

[41] Id at 126-7.

[42] Id.

[43] *MAWU* above n 38 at para 493G.

[44] *Karachi v Porter Motor Group* (2000) 21 ILJ 2043 (LC) at para 37.

[45] Id at para 36.

[45] On the applicants' interpretation, if no agreement is reached in the context of retrenchment consultations, the employer is left with no means of addressing its operational requirements and may never resort to retrenchments without contravening section 187(1)(c). This construction is untenable. The facts of this case demonstrate that NUMSA was not inclined to agree to any changes unless they resulted in wage increases for its members. This was at odds with the purpose of the retrenchment consultation process which was geared at addressing Aveng's distressed financial position.[46] I will elaborate further on this later on.

Historical development of section 187(1)(c)

[46] Before considering the correctness of the Labour Appeal Court judgment, it is necessary to have regard to the legislative framework within which Aveng dismissed the employees and the history of the section at the core of this matter. Prior to its amendment, section 187(1)(c) read as follows:

> "(1) A dismissal is automatically unfair, if the employer, in dismissing the employee, acts contrary to section 5, *or if the reason for the dismissal is*—
>
> . . .
>
> (c) *to compel the employees to accept a demand in respect of any matter of mutual interest* between the employer and the employee."

[47] Before the amendment, section 187(1)(c) prohibited the dismissal of employees if the reason for the dismissal was to *compel* employees to accept a demand in respect of a matter of mutual interest between the employer and the employee. In terms of this

[46] See for example the explanation of this purpose by Ledwaba AJ, and endorsed by the majority judgment of Froneman J in *AMCU v Royal Bafokeng Platinum Ltd* [2020] ZACC 1; 2020 (3) SA 1 (CC); 2020 (4) BCLR 373 (CC) at paras 70-1:

> "[C]onsensus-seeking is neither collective bargaining nor negotiation. There is no duty on the consulting parties to reach consensus and the employer need not accept the employees' proposals. This is not to say that an employer can 'go through the motions' in the consulting process. Instead all that is required is a *bona fide* (good faith) attempt to reach consensus on the part of the employer. This determination, as seen throughout the law reports, is in many respects fact sensitive. Ultimately, the employer retains the discretion to press on with the proposed retrenchment or not.

section, an employer who wished to implement changes to the terms and conditions of employment could, if their proposals were refused, embark on a section 189 exercise with a view to retrenching those who were not prepared to work within its operational requirements, provided that the retrenchment was final and irrevocable. This clearly meant that the requirements of section 189 had to be complied with first. This line of reasoning was also endorsed in *ECCAWUSA*.[47] There, the Labour Court held:

> "[W]here the amendment to the terms and conditions is proffered by an employer as an alternative to dismissal during a *bona fide* retrenchment exercise and it is a reasonable alternative based on the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer".[48]

The aforegoing remarks found favour with the Labour Court judgment when it dismissed NUMSA's case.[49]

[48] Owing to the difficulties presented by the interpretation of this section, the Labour Court in *Fry's Metal*[50] was confronted with a similar problem, albeit in the realm of collective bargaining. That case involved an adjustment of shifts and the removal of a transport subsidy. The employer, Fry's Metal, wished to introduce operational changes that necessitated alterations to the employees' terms and conditions of employment. It sought to negotiate a collective agreement on the proposed changes and tried to convince the employees that the changes would ensure an increase in productivity, resulting in its continued viability and, consequently, would enhance job security. But no collective agreement was reached. Fry's Metal announced at a meeting with employee representatives that employees who were prepared to accept the intended changes would be retained in their positions while those who refused may be retrenched.

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[47] *Entertainment Catering Commercial & Allied Workers Union of SA v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 ILJ 1347 (LC) (*ECCAWUSA*) at para 27.

[48] Id at para 28.

[49] Labour Appeal Court judgment above n 1 at para 51.

[50] *National Union of Metalworkers of SA v Fry's Metal (Pty) Ltd* (2001) 22 ILJ 701 (LC) (*Fry's Metal* Labour Court judgment).

[49] The Labour Court, per Francis AJ, considered two questions in determining whether the dismissal constituted an automatically unfair dismissal. The first was whether the proposed changes constituted a matter of mutual interest as contemplated in section 187(1)(c).[51] The second was whether the employer, in insisting on a new shift system, sought to compel the employees to accept a demand in respect of a matter of mutual interest or, in the alternative, whether the employer could legitimately implement the new shift system for operational reasons.[52] The Labour Court held that the dispute involved the creation of new rights or the diminution of existing rights, as per the conception of disputes of mutual interest.[53] It further held that the employer had sought to avoid the path of conciliation and that there had been a subsequent lock-out to persuade the employees to accept its proposals.[54] It came to the rescue of the employees and held that the dismissal was not a legitimate instrument of coercion in the collective bargaining process. It further held that the definition of lock-out meant that tactical dismissals were precluded and section 187(1)(c) of the LRA rendered any dismissal to compel acceptance automatically unfair.[55]

[50] In essence, the Labour Court found that this sub-section deserved a wide reading, giving employees protection against both threats of dismissal and actual dismissal if the employer's object was to secure altered terms and conditions of employment. However, this decision was reversed on appeal by the Labour Appeal Court.[56] The Labour Appeal Court, per Zondo JP, held that a dismissal fell within the scope of section 187(1)(c) if it was conditional in the sense that the employer retained an intention to accept the employees back into its employ if they acceded to its demand. The Labour Appeal Court expressed itself in the following terms:

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[51] Id at para 19.

[52] Id at para 20.

[53] Id at para 28.

[54] Id at para 37.

[55] Id at para 38.

[56] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* [2002] ZALAC 25; (2003) 24 ILJ 133 (*Fry's Metal* Labour Appeal Court).

> "A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept a demand in respect of a matter of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two."[57]

[51] It further held:

> "[T]here is a distinction between a dismissal for a reason based on operational requirements and a dismissal the purpose of which is to compel an employee or employees to accept a demand in respect of a matter of mutual interest between employer and employee. The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions that meet the employer's requirements. An ordinary retrenchment, where the employees who are being retrenched will not be replaced, is, of course, also a dismissal for operational requirements."[58]

[52] In essence, the Labour Appeal Court emphasised the distinction between automatically unfair dismissals under section 187(1)(c) and ordinary dismissals under section 188, which include dismissals for reasons of the employer's operational requirements. The former are prohibited by the LRA, while the latter are not.

[53] The Labour Appeal Court's decision in *Fry's Metals* was followed by *Algorax*.[59] The latter case also concerned changes to the terms and conditions of employment in the form of new shifts. The salient difference was that the employer in *Algorax* offered its employees the option of accepting changes to terms and conditions and this offer remained open, even when the matter was before the Labour Court. The employees

[57] Id at para 26-8.

[58] Id at para 31.

[59] *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 ILJ 1917 (LAC) (*Algorax*).

refused to accept the new terms and conditions and were retrenched for refusing to accept these changes. The employer was unsuccessful in defending its actions, because the Labour Appeal Court held that, although there were indications that the employer had the intention to compel the employees to accept its demand as well as indications that the purpose was to get rid of the employees permanently, on a balance, the employer's purpose was to compel the employees to agree to the employer's demand.[60] Relying on the Labour Appeal Court decision in *Fry's Metals*, the Court held that for a dismissal not to be automatically unfair in terms of section 187(1)(c), it could not be subject to withdrawal upon the employee accepting a demand in a matter of mutual interest and therefore must not be temporary.[61] It also held that the dismissal of the employees was substantively unfair because there were alternatives, short of dismissal, that adequately could have solved the employer's operational requirements.[62]

[54] The *Fry's Metals* decision was taken on appeal to the Supreme Court of Appeal. That Court expressed itself as follows:

> "To deal with the apparently overlapping categories the LRA creates, [Thompson] suggested that the courts would have to determine on a case-by-case basis when an employer-employee dispute had permissibly 'migrated' from the bargaining domain (where matters of mutual interest cannot legitimately trigger dismissals) to the 'legal domain' (where the employer is permitted to dismiss for operational reasons). The core difficulty with this argument is that the dichotomy between matters of mutual interest and questions of 'right' do not, in our view, form the basis of the collective bargaining structure that the statute has adopted. The unavoidable complexities that arise from the supposed 'migration' of issues from matters of mutual interest to matters of 'right' demonstrate, in our view, that the dichotomy does not form the basis of the statutory structure, and section 187(1)(c) cannot, accordingly, be interpreted as if the legislation proceeds from that premise."[63]

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[60] Id at para 39.

[61] Id at para 38.

[62] Id at para 71.

[63] *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; 2005 (5) SA 433 (SCA) (*Fry's Metals* Supreme Court of Appeal judgment) at para 54.

[55] Thus, both the Labour Appeal Court and the Supreme Court of Appeal held that section 187(1)(c) means no more than that an employer may not resort to a temporary and tactical dismissal in order to coerce employees into accepting a particular employment outcome. What is apparent from the *Fry's Metals* and *Algorax* judgments is that section 187(1)(c) does not prevent employers from dismissing employees who do not accept proposals to amend the terms and conditions of employment on operational grounds.

[56] These judgments attracted a lot of academic interest. Their legal effect was summarised by academics, Coetzee and Beerman, as follows:

> "[I]n *Fry's Metals* the Labour Appeal Court and Supreme Court of Appeal together devised a reading of the section which construed it narrowly. It interpreted section 187(1)(c) to indeed only protect employees from being dismissed if the purpose of the dismissal was to compel them to accept a demand on a matter of mutual interest, and the dismissal was of a temporary nature. If the employer effected a permanent dismissal, because employees would not accept its demands, section 187(1)(c) could not come to the employees' protection."[64]

[57] As academics continued to grapple with these issues, much of the criticism centred around what they described as the anomaly in the interpretation of section 187(1)(c). Thompson[65] raised the possibility of an amendment to section 187(1)(c) to outlaw all dismissals in the context of economic disputes as follows:

> "It is suggested that such 'remedial' steps would not serve industrial society well. On reflection, if the intention was that section 187(1)(c) should outlaw all dismissals in the context of economic disputes, it was being asked to do too much heavy lifting. And in

[64] Coetzee and Beerman "Can an Employer Still Raise the Retrenchment Flag in Interest Negotiations? The *Fry's Metals* case under the Labour Relations Amendment Bill 2012" (2012) 2 *De Jure* 348 at 351.

[65] Thompson "Bargaining over Business Imperatives: the Music of the Spheres after *Fry's Metals*" (2006) 27 *Industrial Law Journal* 704.

> any event, to locate that kind of control measure in the 'automatically unfair' basket was simply too drastic. The contest between claims for business flexibility on the one hand and protection against labour exploitation on the other is too complex and too important to be addressed by blunt-nosed legislative injunctions. A wide interpretation of section 187(1)(c) had the potential to hamstring the adaptive capacity of business mightily, and so inflict a great game on the economy. The court could have tempered this again by a generous and overriding interpretation of the sweep of the operational dismissal provision (the 'employer's leeway'), section 188(1)(a)(ii), but the exercise would have been a tricky and uneasy one."[66]

[58] In *Fry's Metals* the Supreme Court of Appeal criticised Thompson's view on the identification of viability as a factor in illuminating the case for an operational requirements dismissal[67] and labelled it as an imprecise concept.[68]

[59] Some academics suggested that section 187(1)(c) offered little assistance on how best to reconcile the imperatives of collective bargaining and operational requirements. Employers who wished to implement changes to the terms and conditions of employment could, if their proposal were refused, embark on a section 189 exercise.[69] This uncertainty or confusion made it difficult for employers intent on embarking on retrenchments to initiate that process without flouting the law, with the result that employers were wary of offering any form of reinstatement or re-employment to employees retrenched in the context of restructuring, even if there was a valid

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[66] Id at 729-30.

[67] Thompson "Bargaining, Business Restructuring and the Operational Requirements Dismissal" (1999) 20 *Industrial Law Journal* 755.

[68] *Fry's Metals* Supreme Court of Appeal judgment above n 63 at para 53.

[69] See for example the following criticism proffered by Newaj and van Eck "Automatically Unfair and Operational Requirements Dismissals: Making Sense of the 2014 Amendments" (2016) 19 *PER* at 16:

> "[T]he Supreme Court of Appeal was misdirected in finding no contradiction, or at least an eroding effect, between the statutory provisions which permit dismissal on the grounds of operational requirements and terminations by reason of compelling employees to accede to an employer's demand. We agree with Thompson that there are grey areas where operational requirement dismissals and strategic dismissals which form part of collective bargaining overlap. This is so, particularly where an employer has its proverbial back against the wall and is fighting for its financial survival. Rather than admitting that such a shadowy area exists, and assuming the responsibility of evaluating on a case-by-case basis where there are substantive reasons to endorse such dismissal, the Supreme Court of Appeal stuck to the structured divide between strategic and permanent dismissals."

requirement for the retrenchment. This was because some courts construed offers to take back workers as the true reason for the retrenchment. This resulted in dismissed employees being deprived of offers of re-employment.

The proper meaning of section 187(1)(c) as amended

[60] Section 187(1)(c) was amended with effect from 1 January 2015 in order to address and cure the anomaly.[70] The explanatory memorandum provides that the purpose of the amendment is to—

> "[A]mend section 187 of the Act to remove an anomaly arising from the interpretation of section 187(1)(c). In the case of *Fry's Metals (Pty) Ltd* (2005) 26, the [Supreme Court of Appeal] held that the clause had been intended to remedy the so-called 'lock-out' dismissal which was a feature of pre-1995 labour relations practice. The effect of this decision when read with the decision of *Algorax* is to discourage employers from offering reemployment to employees who have been retrenched after refusing to accept changes in working conditions.
>
> The proposed amendment seeks to give effect to the intention of the provision as enacted in 1995, which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the Act and is consistent with the purposes of the Act."[71]

[61] The explanatory memorandum shows that the amendment of the provision was not aimed at altering the existing law relating to the provision but simply to address the identified anomaly that came from an interpretation of the provision by the Supreme Court of Appeal and the Labour Appeal Court in *Fry's Metals* and in *Algorax*. This anomaly, as the unintended consequence of those decisions, resulted in employers being discouraged from offering re-employment to retrenched employees who had been retrenched after refusing to accept changes to working conditions. The amendment

[70] Section 187(1)(c) of the LRA above n 2 was amended by the Labour Relations Amendment Act 6 of 2014.

[71] Memorandum of Objects on Labour Relations Amendment Bill, 2012 available at https://static.pmg.org.za/bills/120522bill.pdf.

reinforces the fact that the LRA does not allow employers engaged in collective bargaining to dismiss employees for refusing to accept the employer's demands.[72] Evidently, it did not outlaw *Fry's Metal*s type dismissals altogether.

[62] The parties expressed the explanatory memorandum as follows: on the one hand, Aveng was of the view that the amendment resonated with the intention of the Legislature. NUMSA, on the other hand, argued that the explanatory memorandum is ambiguous and does not spell out the specific anomaly which the amendment was intended to cure. The centrepiece of NUMSA's argument is that the amendment of section 187(1)(c) has the effect that employers are no longer permitted to dismiss employees and replace them with others who are prepared to work in accordance with the terms and conditions that are operationally required. NUMSA further contended that the distinction between final and conditional dismissals has fallen away, as has the causation test, which determines whether the dominant reason for the dismissal was the employer's operational requirements or the refusal to accept a demand.

[63] One would have thought that with the amendment, the position would have been clarified. Regrettably, as the facts and differing views of the parties in this case demonstrate, uncertainty still abounds.

[64] In order to ascertain the proper meaning of section 187(1)(c) as amended, it is appropriate to illustrate how legislative instruments are to be interpreted. The meaning of the section must be garnered from the plain language of the text, its scope, location in the scheme of the LRA and its purpose.[73] In doing so, we must also heed the interpretative injunction that promotes the spirit, purport and objects of the Bill of Rights.[74] In *NEHAWU*, this Court held:

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[72] This, of course, does not mean that section 187(1)(c) may apply only in the context of collective bargaining. Likewise, it may also apply to any demand that has, as its trigger, an employer's desire to compel employees to accept a demand in respect of any matter of mutual interest between them and the employer.

[73] *SATAWU v Moloto* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at paras 19-20.

[74] Section 39(2) of the Constitution.

> "The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratisation of the workplace'. This is to be achieved by fulfilling its primary objects, which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution."[75] (Footnotes omitted)

[65] This Court, in *Bertie Van Zyl*, explained that "[t]he purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law".[76] The purpose of the section must therefore be contextualised within the right to fair labour practices pursuant to section 23 of the Constitution and the purpose of the LRA as a whole. More importantly, in the context of this case, the section must be read to create clear and properly circumscribed parameters which employers and employees engaging in retrenchment processes must understand and through which they must operate. The LRA makes provision for an employer to dismiss striking workers for conduct, in terms of section 67(5) or for operational requirements.

[66] A closer look at section 187(1)(c) reveals an inescapable need to determine the real reason for the dismissal. The provision sets out the salient requirements that need to be met before an automatically unfair dismissal can be triggered. The question that arises is whether section 187(1)(c) permits an employer to dismiss employees for rejecting a demand that arises as a result of the employer's operational requirements.

[67] A careful analysis of the wording of the section, alongside the explanatory memorandum, demonstrates that the interpretation contended for by NUMSA is incongruous with the section. What that contention boils down to is that an employer considering operational requirements may never resort to retrenchments without contravening the section. This, in my view, would undermine an employer's right to

[75] *NEHAWU* above n 27 at para 41.

[76] *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie van Zyl*) at para 21.

fair labour practices as entrenched in section 23(1) of the Constitution, since it would take away its right to resort to retrenchments where operational requirements render them necessary. The fallacy in NUMSA's submission can best be described in the following scenario: employers are allowed to retrench for operational requirements during a protected strike, including a lock-out, but not in a normal retrenchment situation where job-losses could be minimised or avoided. In my assessment, the purpose of amending the provision was to deal with the anomaly created by case law which had the detrimental effect of precluding employers from offering alternative positions, short of dismissal, to employees, or from offering any dismissed employee reinstatement on amended terms and conditions of employment following a restructuring process.

[68] NUMSA's submission is startling because it would perpetuate the anomaly that the amendment sought to cure. On that interpretation, employers engaged in section 189 consultations would be wary of proposing any changes to the terms and conditions of employment which may, if accepted, address their operational requirements and save jobs, for fear of facing automatically unfair dismissal claims if changes are rejected and retrenchments follow. NUMSA's construction would render such consultations nugatory and undermine the fundamental purpose of section 189, which is to encourage engagement regarding viable alternatives to retrenchments.

Determining the true reason for dismissal

[69] The sole enquiry under section 187(1)(c) is whether the reason for the dismissal is the refusal to accept the proposed changes to employment. A proper interpretation of the section requires a careful analysis. The wording of section 187(1)(c) does not suggest that simply because a proposed change is refused and a dismissal ensues thereafter, the reason for the dismissal is necessarily the refusal to accept the proposed change. On the contrary, the true reason for the dismissal, irrespective of whether a proposed change is rejected, stands to be determined.[77]

[77] Collier et al above n 31.

[70] Determining the reason for a dismissal is a question of fact and the enquiry into the reasons for the dismissal is an objective one.[78] One of the ways this can be done is to apply the test in *Afrox*.[79] There is no basis on which to exclude an employer's operational requirements from consideration as a possible reason for dismissal. The causation analysis espoused in *Afrox* was premised on the fact that section 187(1)(c) uses the phrase "if the reason for the dismissal is" and not the nature of the rights at play. While, admittedly, the provision itself does not place an injunction to utilise the *Afrox* test per se, I will demonstrate below that, in determining what the true reason for the dismissal is, the *Afrox* test is most useful.

[71] NUMSA sought to meet this argument by contending that even if employees are dismissed for rejecting a demand that arises as a result of the employer's operational requirements, the dismissal is automatically unfair. According to NUMSA's construction, an employer faced with operational requirements is precluded from dismissing employees under such circumstances. The Labour Appeal Court disagreed with NUMSA and held that the employees were dismissed as a result of Aveng's operational needs, rather than their refusal to accept a demand in respect of a matter of mutual interest. The material enquiry is whether the reason for the dismissal was the refusal to accept the proposed changes to the terms of employment in terms of the *Afrox* test for factual and legal causation. In my view, if the purpose of the amendment was to do away with the *Fry's Metals* type dismissals, this could have been clearly done in both the amendment as well as the explanatory memorandum.

[72] I agree with the Labour Appeal Court that, on a proper interpretation of the section, "[i]t no longer matters what the employer's intention or purpose might be" since

[78] Labour Court judgment above n 3 at para 30. See also *Afrox* above n 20 at para 32.

[79] While it is called a "causation" test, its essential utility is in determining the proximate or dominant factor in an event. This is borne out by the facts of each case, such as in the present one, when there may be multiple competing reasons for a dismissal. The determination by a court as to the "true" or "dominant" reason strikes the balance between outlawing all operational dismissals in the context of collective bargaining and allowing all dismissals provided, however, that an employer proves that they were for operational requirements.

there has been a shift in focus "from the employer's intention in effecting the dismissal to the refusal of the employees to accede."[80] It also correctly held that the "question whether section 187(1)(c) of the LRA has been contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal of the employees is."[81]

[73] To resolve the issues that arise from the facts of this matter, the Labour Appeal Court relied on the *Afrox* causation test to determine the true cause for the dismissal.[82] For those cases where it is not easy to determine what the true reason is, I agree that a useful analysis is found in the *Afrox* test.

[74] In *Afrox* the issue was whether the dismissal occurred as a result of the employees' participation or support (or intended participation or support) in a protected strike in terms of section 187(1)(a) or whether it was based on the employer's operational needs by virtue of sections 188(1) and 189.[83] The Court held:

> "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be utilised here".[84]

[80] Labour Appeal Court judgment above n 1 at para 61.

[81] Id at para 65.

[82] Id at paras 68-75.

[83] *Afrox* above n 20 at para 5.

[84] Id at para 32. The Court cites the *locus classicus* delictual causation cases including *Minister of Police v Skosana* 1977 (1) SA 31 (A) (*Skosana*) at 34. Many decades ago, a general and flexible test of legal causation was developed in *Skosana*. The test as developed was whether the factual cause of a particular consequence was reasonable or directly linked to it. If a reasonably close or direct relationship existed, the factual cause would also be the legal cause of that particular consequence. Such a reasonably close or direct relationship might exist either because the particular consequence or harmful result was reasonably foreseeable or because the consequence was directly related to the conduct. This approach has been followed in many cases. What this now boils down to is that in determining the true reason for the dismissal, the court must in view of all the circumstances of the case determine whether a reasonably close or direct relationship existed between the relevant factually related cause and consequence.

[75] And went on to state that:

> "The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? . . . [T]he next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation."[85]

[76] In such cases, the court would determine what the factual and legal causes of the dismissal were by first asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is in the affirmative, the dismissal does not amount to an automatically unfair dismissal. If the answer is in the negative, the second leg is necessary: is such refusal the main, dominant, proximate or most likely cause of the dismissal?[86] This means, as the Labour Appeal Court found, that the merits of the employer's decision in such circumstances must be examined.[87]

[77] The *Afrox* test has been endorsed and applied in various cases dealing with section 187(1) dismissals that are automatically unfair in contrast to section 189 dismissals for operational reasons that are not automatically unfair.[88] Admittedly, some of these cases, like *Afrox*, concerned section 187(1)(a) versus section 189; not section 187(1)(c). In my view, it is not controversial to apply the *Afrox* test with equal force in the context of section 187(1)(c). This is supported by the string of cases that reveals how the *Afrox* test has been accepted and applied by the Labour Appeal Court

[85] *Afrox* above n 20 at para 32.

[86] See Labour Appeal Court judgment above n 1 at para 68. Although the terms "main", "dominant", "proximate or most likely" are not included in the sections, they have become terms of art which assist the court in determing the true reason of the dismissal based on a probable inference.

[87] Id at para 69.

[88] See further *Simmadari v Absa Bank Ltd* (2018) 39 ILJ 1819 (LC) at para 50 in the context of section 187(1)(f); *Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC) at para 42, where it was found that the same principles would apply in terms of section 187(1)(e); and *Kaltwasser v Isambulela Group Administrator (Pty) Ltd* (2014) 35 ILJ 3436 (LC) at para 73.

in the context of other subsections of section 187(1).[89] In any event, the *Afrox* test is employed more generally when the courts are required to ascertain the true reason for dismissals.

[78] Turning to the specific text of section 187(1) of the LRA, the wording of that section provides that "[a] dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, *if* the reason for the dismissal *is*. . . ."[90] This requires courts to interrogate and determine, among various factors, what the cause of the dismissal is. In this matter, the key enquiry is whether it is the refusal by employees to accept the proposed changes to the terms of employment or Aveng's operational requirements.

[79] The Labour Appeal Court in *Department of Correctional Services v Police & Prisons Civil Rights Union*[91] held:

> "The reason contemplated and to be sought by the court is the objective reason in a *causative sense*. The court must enquire into the objective causative factors which brought about the dismissal, and should not restrict the enquiry to a subjective reason, in the sense of an explanation from one or other of the parties."[92]

[80] This requires the courts to determine the *probable cause* of the dismissal by examining the facts before them and assessing whether that cause is the main or dominant, or proximate, or most likely cause of the dismissal.[93] As a result, there is no logical reason why the *Afrox* test, which in essence seeks to distinguish automatically

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[89] See *TFD Network Africa (Pty) Ltd v Faris* [2018] ZALAC 30; (2019) 40 ILJ 326 (LAC) at para 26 – 7 in the context of section 187(1)(f); *Long v Prism Holdings* [2012] ZALAC 5; (2012) 33 ILJ 1402 (LAC) (*Long*) at paras 35-6 in the context of section 187(1)(g);and *State Information Technology Agency (Pty) Ltd v Sekgobela* [2012] ZALAC 16; (2012) 33 ILJ 2374 (LAC) at para 16 in the context of section 187(1)(h). It is worth mentioning that the *Afrox* test is invoked despite the fact that these sub-sections do not expressly state "causation" or require the *Afrox* test.

[90] Section 187(1) of the LRA above n 2.

[91] *Department of Correctional Services v Police & Prisons Civil Rights Union* [2011] ZALAC 21; (2011) 32 ILJ 2629 (LAC) (*POPCRU*).

[92] Id at para 34.

[93] *Long* above n 89 at para 35.

unfair dismissals from those that are not automatically unfair, cannot similarly be applied in the context of section 187(1)(c). This is further buttressed by the fact that the section itself uses the language "if the reason for the dismissal is", making it clear that establishing the true and dominant reason for the dismissal is paramount. In doing so, it clearly denotes that an examination of the reason, which can be ascertained through a causal analysis, must be established in order to determine whether or not the section has been contravened. Since the section itself implies a causation requirement, it is apposite to utilise the causation test as articulated in *Afrox*.

[81] I have had the benefit of reading the judgment penned by my brother, Majiedt J (second judgment), and that of my brother, Jafta J (third judgment). We arrive at the same conclusion that the appeal must fail. However, our differences lie in our approaches to the conclusion. To be clear, I accept that the point of departure is to consider the facts and evidence of a particular matter. Our labour law jurisprudence supports the *Afrox* test as a nifty mechanism to determine the true reason for the dismissal. The second judgment disagrees with this judgment on two fronts: first, whether on the proper interpretation of section 187(1)(c) causation is still a requirement. Second, whether the *Afrox* causation test is still relevant for determining the true reason in terms of section 187(1)(c).

[82] The second judgment adopts the approach in *Algorax* where the Labour Appeal Court, with Zondo JP writing for the majority, applied the conventional method of evaluating evidence for the resolution of irreconcilable versions.[94] Although Zondo JP did not expressly refer to *Stellenbosch Farmers' Winery*,[95] a reading of the judgment indicates that he adopted the principles laid down in that case.

[83] The third judgment endorses the second judgment, but goes further to find that the language of section 187(1) "is not capable, let alone being reasonably capable, of

[94] Second judgment [108] and [125].

[95] *Stellenbosch Farmers' Winery Group Ltd and v Martell Et Cie* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (*Stellenbosch Farmers' Winery*).

an interpretation that the provision requires the invocation of causation, whether factual or legal, for determining the reason for dismissal. At the level of interpretation, there can be no legal basis for imputing causation to the provision."[96] And that this interpretation "is text-defiant and as a result there is no legitimate legal basis that I can think of which grounds the application of causation to matters regulated by section 187(1)."[97]

[84] Before dealing with our differences, it is apposite to make the following observations and demonstrate how reliance on *Algorax* to the total exclusion of *Afrox* is misplaced: *Algorax* was a case of an automatically unfair dismissal in terms of section 187(1)(c) where Zondo JP did not discard the test in *Afrox*. Nor did he propagate for different tests being applied in the various subsections of section 187(1). The suggestion that there are two tests does not bear scrutiny.

[85] I interpose to say that the approaches, generally speaking, seem to represent two fundamentally opposed view points to the question of the determination of the reason for the dismissal in the context of section 187. The obvious danger of preferring one test and disregarding the other is apparent as I will demonstrate later in this judgment.

[86] I now turn to address the apparent dichotomous approaches in this and the second judgment. To properly contextualise this dichotomy, sight should not be lost of the fact that in its pre-amendment form, section 187(1)(c) provided that a dismissal is automatically unfair if the reason for the dismissal is "*to compel* the employee to accept a demand in respect of any matter of mutual interest between the employer and employee." Section 187(1)(c), before the amendment, therefore envisaged an investigation into the probable motive or purpose on the part of the employer which would amount to a prohibited reason for a dismissal. The other subsections of section 187(1), on the other hand, and which were interpreted in the *Afrox* case, contemplated a state of affairs or event rather than a motive that would constitute the

[96] Third judgment [145].

[97] Id [153].

reason for a dismissal, hence the causation test. Since the amendment in 2014, section 187(1)(c) provides that a dismissal is automatically unfair if the reason for the dismissal is "a refusal by the employees to accept a demand in respect of any matter of mutual interest between the employer and the employee". The language of section 187(1)(c) has thus been brought in line with the rest of section 187(1).

[87] It is unclear to me why section 187(1)(c) requires a different test to the one applied to the rest of the subsections in section 187(1). I find it difficult to accept that there should be a different interpretation. There is accordingly no basis for the finding that section 187(1)(c) is distinguishable or warrants a different treatment to the other provisions contained in section 187(1). I hasten to add that *Algorax* was decided on the basis of section 187(1)(c) in its pre-amended form and is no authority for the proposition that causation is not the appropriate enquiry when interpreting section 187(1)(c) in its current form. In any event, it is not apparent to me that Algorax does not, in fact, apply the causation requirement. There is no need to depart from the *Afrox* test in the context of section 187(1)(c).[98]

[88] Lastly, the second judgment concludes that the causation test as applied in the law of delict is fraught with difficulties and impracticable to apply. A reading of *Algorax* suggests otherwise. Even though Zondo JP did not specifically refer to the causation enquiry in the determination of the true reason or dominant cause of the dismissal, he conducted an evaluation of the facts. Essentially, he embarked on an enquiry into causation which sought to determine the dominant factor precipitating the dismissals. Factual causation, as I understand it, concerns a particular kind of link or connection between at least two facts or set of facts. As with all facts, factual causation is something that either exists or does not. The court usually determines the test on the

[98] The *Afrox* approach in this context has also been endorsed by academic writers such as Newaj and van Eck, above n 69 at 26, who state that:

> "It is in our view that the test which the [Labour Appeal Court] applied in [*Afrox*] in determining the true reason for the dismissal in the context of strikes and retrenchments is also the appropriate test to be applied in the intersection between automatically unfair and operational requirement dismissals."

basis of evidence and probabilities before it. The Labour Appeal Court rightly enquired into the circumstances that led to the dismissal. In doing so it relied on the knowledge of the facts as well as reliable evidence. This approach resonates neatly with the *Afrox* test.

[89] Zondo JP's silence regarding the *Afrox* test does not imply that the test has been departed from. It does not follow that because he adopted the common sense approach or conventional method of evaluating evidence, he discarded the *Afrox* test. Rather, the law reports are replete with various judgments of the Labour Appeal Court endorsing and applying the *Afrox* approach.[99] The clearest examples of this includes *POPCRU* and *Long* where the Court continued to rely on *Afrox* and stated that:

> " In order to determine whether section 197 applies, the question that has to be asked is whether the *probable cause* of the dismissal was the transfer of the business as a going concern or a reason related to such transfer."[100]

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[99] See n 89 above.

[100] The Labour Appeal Court in *Long* above n 89 at para 35 relied on paras 46-7 of *Afrox* above n 20 where it was held:

> "To determine whether the employees' participation or conduct in the protected strikes was the reason for their dismissal, and thus made the dismissal automatically unfair, one first has to ascertain whether such participation or conduct was a factual cause for the decision to dismiss. To do this one must ask whether the dismissal would have taken place had there been no participation in the strike (or had there been no strike). In my view the answer to this must be no. On the available evidence Afrox was quite happy with the modified staggered shift system which was in operation from the beginning of October 1996 until the strike started in January 1997. It does not seem probable that Afrox would have implemented a contracting out system when it was happy with the results of the modified staggered shift system. What must also, however, be kept in mind is that no dismissals would have occurred had there been no need to modify the old overtime system. This need was the original factual cause of all that followed.
>
> Once it is accepted that participation in the strike was also a factual cause for the dismissal of the employees, the next question is whether participation in the strike was, as a matter of probable inference from the facts, the only real or proximate cause of the dismissal (in other words, whether such participation was the legal cause of the dismissals). I do not think that the question must necessarily be answered positively. The need to change the old system predated the strike. The possibility of retrenchment was first mentioned in October 1996, before the strike; consultations about the implementation of the contracting out took place during the strike; and the union was warned that dismissal would follow on the lapse of these consultations. Although it is probably true to say that the continued participation in the strike contributed to, or accelerated the decision to dismiss, it seems to me that it cannot be said to be the main, or proximate, or dominant cause for the dismissal. The need to get the business going again on a permanent and more stable basis was as pressing a consideration, if not more so. Whether the timing of the dismissals was appropriate belongs more properly to the enquiry whether the dismissals were fair."

[90] In my view, stripped of all the conflicting textual interpretations in this judgment and that of my brother, Majiedt J, the factual determination of the true reason for the dismissal in both judgments remains the same. It is in any event questionable whether the Court in *Algorax* applied a test that is different from the *Afrox* test. The parties also did not require this Court to determine whether the two tests are incompatible. Thus, circumventing the *Afrox* test merely because it is cumbersome is unsustainable. *Algorax* does not provide compelling support for the view that factual causation is not the proper enquiry in interpreting section 187(1)(c), and any suggestion that *Afrox* is no longer good law is, thus, misplaced.

[91] Causation seeks the true *cause* for the dismissal and it does so by interrogating the reason for the dismissal. In this case the causation test seeks the ultimate cause of the dismissal – whether it is because of the refusal of a demand or due to operational requirements. The causation test accepts that in some scenarios there may be more than one possible outcome.

[92] Ultimately, this judgment and that of my brother, Majiedt J, reach the same conclusion in relation to the facts of this matter and there is no need to say which of the approaches adopted is better in law. What matters most is that we both hold that the dismissal in this case is not automatically unfair.[101]

Application of the facts

[93] As mentioned above, the central question is whether the true reason for dismissal is the refusal by the employees to accept the proposed changes to employment or

[101] See the judgment of Willis J where he interestingly held in *Kroukam* above n 7 at para 67 that:

> "Both Zondo JP and Davis AJA arrive, by somewhat different routes, at the same factual conclusion: that the appellant was dismissed primarily as a result of the activities undertaken by him on behalf of the union. . . . As long as we all arrive at the same destination on the questions of fact, I think it irrelevant for me to indicate which route I prefer. It will be of no assistance to anybody. . . . I cannot say that either of Zondo JP or Davis AJA is incorrect in following the route which he does. . . each journey will have its own charms. Questions of law are a different matter. On such questions the reasons of judges do matter, not only in the particular case but also for those that may come afterwards."

Aveng's operational requirements. On the facts, the approach in *Afrox* cannot be faulted. In terms of factual causation, it is undisputable that the second to further applicants would not have been dismissed if they had accepted the proposed changes to employment. However, the facts clearly reveal that the letter was intended to avoid or minimise job losses. It is difficult to conceive why after the employees had been working in terms of the interim agreement for a period of six months, they inexplicably changed tack and reneged on the agreement, and demanded more money. There is force in the submission that when parties are engaged in economic bargaining one of them should not lightly be allowed to threaten to pull the plug on the process resulting in the demise of the other if it does not get its way. This is exactly what NUMSA did.

[94] Aveng faced harsh economic conditions and needed to restructure in order to survive and avoid the wholesale loss of jobs of its entire workforce. It proposed to remedy this by restructuring and getting rid of redundant positions. It commenced consultations in this context and received a proposal to change from the thirteen-grade structure that was utilised under the main agreement, to the five-grade structure. While consulting on ways to change structures, the remaining employees performed redesigned job descriptions. Sight must not be lost of the fact that there were several employees that had been retrenched as part of the VSPs and LDC.

[95] This restructuring occurred in the context of retrenchment consultations and not collective bargaining over wages. The effectiveness of the new structure under the interim agreement was, however, disrupted when NUMSA reneged on the interim agreement before it had terminated by effluxion of time. The refusal to work within the new structure amounted to an "insurmountable operational requirements" problem for Aveng. The jobs that were performed before the redesigning of the job descriptions were no longer viable. If Aveng so wished, it could have terminated the services of its employees then. However, it did not. Instead, when this joint-consensus-seeking effort failed, it offered the second to further applicants reasonable alternative employment, on the same terms and with the same redesigned job descriptions according to which they

had previously been employed. When they refused to accept the offer, they were retrenched.

[96] No fault can be found in the way Aveng pursued and responded to the process of negotiations and consultations. It conducted itself in a transparent, honest and *bona fide* manner. During the negotiations, there were continuing grounds for it to argue that it had a fair reason to terminate the services of its employees on the basis of its operational requirements, but it elected not to do so. It continued to engage with NUMSA to avoid job losses.

[97] Although it is probably true to say that the refusal to accept the proposed changes to employment accelerated the decision to dismiss, it seems to me that it cannot be said to be the main, proximate, or dominant cause for the dismissal. The need to ensure that the business was economically viable and remained sustainable was the most pressing consideration. Aveng could no longer compromise in light of its circumstances. Importantly, it was not in a position to bind itself any further to more than it could offer. As the Labour Appeal Court noted:

> "Aveng's viability was at stake, proceedings with a bargaining power play . . . was not a realistic option in the circumstances. The primary purpose of Aveng in making the proposal was not to grasp an advantage in the wage bargain, it was rather to restructure for operational reasons to ensure Aveng's long term survival. . . . The bargaining pressure thus brought to bear exacerbated the operational requirements problem. The proposal having been negotiated to impasse, the imperative or dynamic to dismiss for operational reasons transcended tactical positioning to become fair reason. The failure of the employees to accept the proposals engendered an insurmountable operational requirements problem that constituted a fair reason for dismissal."[102]

[98] I agree with the Labour Appeal Court that "[t]he proposals were the only reasonable and sensible means of avoiding dismissals and entailed no adverse financial

[102] Labour Appeal Court judgment above n 1 at para 74.

consequences for the employees".[103] Therefore, the dismissal of the employees for operational reasons was the main or dominant cause for the dismissals, and constituted a fair reason for the dismissals.

Conclusion

[99] In an ever-changing economic climate characterised by increasing global competition, operational reasons not only relate to the downsizing of the workforce, but also to restructuring the manner in which an existing workforce carries out its work. Restructuring entails a number of possibilities, including shift system duties; adjusted remuneration; and merging of jobs or duties. Generally, businesses that adapt quickly will survive and prosper. Those that do not will decline and fail. Realising its predicament, Aveng engaged with its employees through NUMSA regarding a re-organisational plan through a structured consultative process. NUMSA's intransigence played a major role in making it impossible to save jobs. To prohibit Aveng from invoking the provisions of the section and dismissing employees under these circumstances would undermine the LRA's objectives in ensuring the viability and vitality of businesses.

[100] It is in the best interests of society that an employer remains economically viable. The owners and managers of the business are best placed to run the businesses. Sight should not be lost of one of the primary purposes of the LRA – to advance economic development.[104] Aveng took NUMSA into its confidence, by disclosing its financial position as early as April 2014. At no stage did NUMSA argue that it was misled. On the contrary, the evidence demonstrates that NUMSA reneged on the interim agreement and failed to act in good faith, placing Aveng in a precarious position.

[101] Nothing in the section, read in the context of the LRA as a whole, precludes employers from dismissing employees for operational requirements. This is subject to

[103] Id at para 73.

[104] Section 1 of the LRA above n 2 provides that "the purpose of [the LRA] is to advance economic development, social justice, labour peace and the democratisation of the workplace. . . ."

the requirements that the dismissal is substantively fair (for *bona fide* operational requirements) and procedurally fair (after a satisfactory consultation process).

[102] On a plain reading of section 187(1)(c), it cannot be suggested that the section should not be interpreted in a manner that permits dismissal for operational requirements. That said, it does not mean that employers have *carte blanche* (complete freedom to act as one wishes) to dismiss employees. Courts must guard against disguised retrenchments that take place where collective bargaining prevails. Courts can police opportunistic or disingenuous employers by determining the true reason for the dismissals. As I have said above, one of the ways this can be done is by applying the *Afrox* test, to unmask the true reason for the dismissals. As Zondo JP stated in *Algorax*:

> "The court must not defer to the employer for the purpose of answering that question. It cannot say that the employer thinks it is fair, and therefore, it is or should be fair. Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge, but simply common sense. Where an employer has chosen a solution that results in the dismissal of a number of employees when there is an obvious and clear way in which it could have addressed the problem without any or fewer employees losing their jobs, and the court is satisfied, after hearing the employer on such a solution, that it can work, the court should not hesitate to deal with the matter on the basis of the employer using a solution that preserves jobs, rather than one that causes job losses."[105]

[103] I am satisfied that, on the facts of this case, the applicants were not dismissed for rejecting a demand in respect of a matter of mutual interest. The dominant or true reason for their dismissal was the employer's operational requirements. It follows that the dismissal of the second to further applicants was not automatically unfair in terms of section 187(1)(c) of the LRA.

[105] *Algorax* above n 59 at paras 69-70.

[104] In light of the finding that Aveng was justified in dismissing the employees for its operational reasons, it is not necessary to make a determination on whether it is reasonably practicable to order Imperial to reinstate the second to further applicants.

Order

[105] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

MAJIEDT J (Jafta J, Mhlantla J, Tshiqi J, and Victor AJ concurring):

[106] I have read the comprehensive, strongly reasoned judgment of my brother, Mathopo AJ (first judgment). I concur with the outcome and, save in one respect, with the sound reasons advanced for that outcome. My point of disagreement concerns the first judgment's approach in determining the true reason for the employees' dismissal. In answering that question, the first judgment interprets section 187(1)(c) of the LRA as importing the application of the causation test propounded in *Afrox*.[106] For the reasons that follow, I do not subscribe to that approach.

[107] The facts have been fully recounted in the first judgment and I will accordingly confine this judgment to a discussion of the law. Section 187 of the LRA in relevant parts reads:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is—
> . . .

[106] *Afrox* above n 20.

(c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer."[107]

[108] To my knowledge, this is the first time that this Court is required to fully consider section 187(1)(c). As indicated in the first judgment, *Afrox* has been followed by a number of other cases, but none of those cases concerned the correct interpretation of section 187(1)(c).[108] Instead, they concerned sections 187(1)(a), (d), (e) and (f), respectively. I unhesitatingly accept, though, that the enquiry remains the same: what is the true reason for the dismissal? A more detailed analysis of these cases will be undertaken shortly. On the other hand, *Algorax* specifically dealt with section 187(1)(c) and the approach adopted there commends itself to me. In *Algorax*, which I will discuss in more detail, the majority judgment, penned by Zondo JP, adopts the conventional method applied by courts in the evaluation of evidence in respect of a dispute of fact with two conflicting versions, in order to determine the true reason for the dismissal of employees.

[109] In the present instance we are faced with two conflicting reasons for dismissal: one proffered by the employer, Aveng, and the other advanced by NUMSA. We are required here to determine the true reason for the dismissal in the context of interpreting section 187(1)(c). In doing so, we must, if possible, prefer one of these conflicting versions above the other and furnish reasons for that preference. This judgment will demonstrate why, in the context of interpreting section 187(1)(c), the causation test, traditionally employed in delict and criminal cases, is not suitable for making that determination and why the conventional method, as applied in *Algorax*, is to be preferred.

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[107] As the first judgment explicates above n 4, this section was amended by section 31 of the Labour Relations Amendment Act 6 of 2014, but the amendment plays no role in the present discussion.

[108] See cases cited above n 88-9.

[110] The two-staged causation test is well-established in delict cases. In *Afrox*, Froneman DJP cited *Mokgethi*[109] and *Skosana*[110] as examples of this two-staged approach. In preferring this test to determine the true reason for dismissal, Froneman DJP reasoned:

> "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilised here (compare *Mokgethi* at 39D-41A; *Skosana* at 34). The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a *sine qua non* (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation. I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue. Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of section 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further."[111]

[111] It is unclear from *Afrox* as to whether the causation test was to be followed in all enquiries relating to the reason for dismissal in the context of automatically unfair

[109] *S v Mokgethi* [1989] ZASCA 105; 1990 (1) SA 32 (A) (*Mokgethi*).

[110] *Skosana* above n 84.

[111] *Afrox* above n 20 at para 32.

dismissals. In my view, *Afrox* did not set a precedent that the causation test must be followed in every section 187 dismissal. It is important to avoid uncritically supplanting the causation test that is typically utilised in the delict and criminal contexts, for the purpose of evaluating disputed facts. Furthermore, there is neither ambiguity in the section nor is any aspect of it unclear; there are no exceptional circumstances to import the concept of causation when interpreting section 187(1)(c).

[112] Causation as a legal concept has its genesis in Roman-Dutch law. In terms of Roman-Dutch law, for delictual liability to be imputed to a defendant, a causal nexus between the defendant's wrongful conduct and the harm suffered by the plaintiff has to be established.[112] Without a causal nexus having been established between the wrongful conduct and the harm suffered, there could be no delict. The test for causation in delict was authoritatively laid down by this Court in *Lee*,[113] and further explicated in *Mashongwa*.[114] In *Lee*, the primary enquiry concerned the test traditionally utilised for the first leg of the enquiry, factual causation, the *condictio sine qua non* (an indispensable condition) determined by the 'but-for' test. The majority held that "[o]ur existing law does not require, as an inflexible rule, the use of the substitution of notional, hypothetical lawful conduct for unlawful conduct in the application of the 'but-for' test for factual causation".[115] It observed that it is not necessary for this traditional 'but-for' test to be developed in the circumstances of that case.[116] This was confirmed in *Mashongwa*, where this Court explicated:

> "[*Lee*] adopted an approach to causation premised on the flexibility that has always been recognised in the traditional approach. It is particularly apt where the harm that has ensued is closely connected to an omission of a defendant that carries the duty to prevent the harm. Regard being had to all the facts, the question is whether the harm

[112] Van der Walt and Midgley *Principles of Delict* 3 ed (LexisNexis, Durban 2005) at 196-7.

[113] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC).

[114] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC).

[115] *Lee* above n 113 at para 50.

[116] Id at para 72.

> would nevertheless have ensued, even if the omission had not occurred. However, where the traditional 'but-for' test is adequate to establish a causal link it may not be necessary, as in the present case, to resort to the *Lee* test."[117]

[113] According to Neethling et al, the 'but-for' test is a natural way of determining a causal link, which has found favour from the courts because it is the simplest and most intelligible way to construe or identify the causal link.[118] This test is based on the premise that every event is the result of many conditions, which are jointly sufficient to produce it.[119] It therefore postulates that the defendant's wrongful conduct can be considered as the cause-in-fact of the harm only if it was a necessary condition for the occurrence and existence of a particular consequence.[120] This entails a process of reasoning, which differs depending on whether the defendant's wrongful conduct is a positive act or an omission.[121] Where the defendant's wrongful conduct is positive, a process of mental elimination of the defendant's wrongful conduct is applied from the conditions that lead to harm to determine whether the harm would still have occurred. If the answer is no, then the defendant's wrongful conduct was the cause of the harm. In the case of an omission, the omission would be substituted with a lawful course of conduct and, if after the substitution the harm could have been prevented from occurring, then the omission is the necessary causal link.[122]

[114] In *Bentley*, Corbett CJ set out the well-established test for factual causation:

> "The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental

[117] *Mashongwa* above n 114 at para 65.

[118] Neethling et al *Law of Delict* 7 ed (LexisNexis, Durban 2015) at 185.

[119] See Van der Walt and Midgley above n 112 at 198.

[120] Id.

[121] Loubser et al *The Law of Delict in South Africa* 2 ed (OUP, Cape Town 2012) at 72.

[122] Id.

> elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability."[123]

[115] The second leg of the causation enquiry entails a determination whether the wrongful act is linked sufficiently closely to the loss for legal liability to ensue or, put differently, the loss is too remote to impose legal liability. Legal causation is in essence a juridical problem where considerations of public policy play a role.[124] There are various criteria gleaned from judicial decisions and legal literature for the determination of legal causation, such as the absence of a *novus actus interveniens* (intervening cause), proximate cause, direct cause, foreseeability and sufficient causation.[125]

[116] In delict, therefore, causation entails asking whether there is a sufficiently close causal connection between the act or omission in question and the harm caused.[126] But, on a plain reading of section 187(1)(c), there is nothing which suggests, either directly or impliedly, even on a remote basis, the application of a causation enquiry in interpreting the section. Imposing a causation test unduly strains the language of the section and misconstrues the rationale for causation as a legal requirement. The recognition of causation as a legal requirement emerges particularly from the problem of interruption in the chain of causation. To this end, the Appellate Division in *Regal* referred to the American Restatement of the Law of Torts, where the learned authors state:

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[123] *International Shipping Co (Pty) Ltd v Bentley* [1989] ZASCA 138; 1990 (1) SA 680 (A) (*Bentley*) at 700E-H.

[124] *Lee* above n 113 at para 38.

[125] *Bentley* above n 123 at 701C-F and *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914F-G.

[126] *Lee* above n 113 at para 38.

> "In some cases the physical condition is not, of itself, harmful, but becomes so upon the intervention of some other force – the act of another person, or force of nature. In such cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause."[127]

[117] The language of section 187(1)(c) does not envisage an interruption in the chain of causation. The issue for determination is simple – either an employee was dismissed for a refusal to accept a demand in respect of a matter of mutual interest or for some other reason(s). Ultimately, for the purposes of this matter, there are two possible reasons for the dismissal of the employees: the first being a reason relating to the employer's operational requirements and the second being a refusal to accept a demand in respect of a matter of mutual interest.

[118] To determine whether a dismissal is automatically unfair, a court is required to enquire into the actual reason for the dismissal – that is, whether the dismissal is based on a prohibited ground. It seems to me wholly inappropriate to apply the approach espoused in the first judgment, namely "where it is not easy to determine what the true reason [for the dismissal] is . . . a useful analysis is found in the *Afrox* test"[128] and that:

> "In such cases, the court would determine what the factual and legal causes of the dismissal were by first asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is in the affirmative, the dismissal does not amount to an automatically unfair dismissal. If the answer is in the negative, the second leg is necessary: is such refusal the main, dominant, proximate or most likely cause of the dismissal."[129]

By endorsing the *Afrox* test, the first judgment loses sight of the rationale underlying causation as a legal requirement. There is no need for a court to conduct a factual and

[127] *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 116A-B.

[128] First judgment at [73].

[129] Id at [76].

legal causation enquiry, which effectively entails a process of elimination in a quest to link the wrongful conduct to the ensuing harm, and which in the context of labour law has the potential to yield an incorrect outcome.

[119] As I see it, the language of section 187(1)(c) is plain and unambiguous. The section simply requires a determination of whether the reason for the dismissal is a refusal by employees to accept a demand in respect of a matter of mutual interest between them and their employer. A dismissal is effected for a reason. Instead, it results from a decision of the employer to dismiss. And the employer advances the reason to justify the decision to dismiss. In that context, the ensuing issue is whether the reason proffered by the employer sufficiently supports that decision. The determination of the true reason for the dismissal appears to me to be simply a matter of fact, which is established in accordance with the rules applicable to the evaluation of evidence. Where an employee proffers a contrary version regarding the true reason for the dismissal, a court must resolve the dispute of fact by evaluating the evidence and by making a finding as to which of the two versions is to be preferred on a preponderance of probabilities, and why. Where there are two conflicting, irreconcilable versions before it, a court must apply the well-established approach laid down in *Stellenbosch Farmers' Winery*:

> "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the

> factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."[130]

[120] The different approaches to determining the true reason for the dismissal are starkly evident in the judgments of the Labour Court and of the Labour Appeal Court in this matter. The Labour Court made extensive reference to the evidence before it and placed emphasis on NUMSA's failure to adduce any evidence to controvert the evidence adduced by Aveng.[131] That Court referred to *Bakulu*, in which the Labour Court held:

> "[I]n order to establish a basis for his case of automatically unfair dismissal, Bakulu needed to adduce some evidence that would tend to suggest that the real reason for his dismissal was not incapacity, which was the reason given by Isilumko, but was possibly race.
>
> …
>
> It may well be that he has an arguable case that his dismissal for incapacity was nonetheless unfair, but he has brought his case to this court on the basis that the real reason was because of his race and he needed at least to provide sufficient evidence to raise a credible possibility that his dismissal in question fell within the scope of section 187(1)(f)."[132]

[130] *Stellenbosch Farmers' Winery* above n 95 at para 5.

[131] Labour Court judgment above n 3 at paras 59-64.

[132] *Bakulu v Isilumko Staffing (Pty) Ltd* (2018) 39 ILJ 597 (LC) at paras 9 and 15.

The Labour Court also relied on *Kroukam*,[133] as authority that "the employee must produce credible evidence that shows that an automatically unfair dismissal has occurred. . . . Should an applicant fail to cross this hurdle such an applicant must, to my mind, fail".[134]

[121] The Labour Appeal Court, on the other hand, adopted a completely different approach in its judgment. It did not refer to the evidence at all, but simply followed *Afrox*:

> "[T]he essential enquiry under section 187(1)(c) of the LRA is whether the *reason* for the dismissal is the refusal to accept the proposed changes to employment. The test for determining the true reason is that laid down in *Afrox*. The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal."[135]

After considering all the facts, that Court concluded:

> "The dominant reason or proximate cause for the dismissal of the employees, therefore, was Aveng's operational requirements, which underpinned the entire process throughout 2014 and 2015 and informed all the consultations regarding the changes to the terms and conditions of employment."[136]

[122] What follows next is a brief discussion of the cases cited in the first judgment that advocates for a causation enquiry for determining the true reason for a dismissal. In *Afrox* the issue was whether the reason for the employees' dismissal was their

[133] *Kroukam* above n 7.

[134] Labour Court judgment above n 3 at para 65.

[135] Labour Appeal Court judgment above n 1 at para 68.

[136] Id at para 75.

participation or support (or intended participation or support) of a protected strike, and not for operational requirements. If it was the former, the dismissal would have been automatically unfair in terms of section 187(1)(a). As stated earlier, the Labour Appeal Court embarked on a causation enquiry as set out in the passage cited above. *Simmadari* concerned an alleged unfair dismissal under section 187(1)(f).[137] In *Heath*, the Labour Court was seized with a section 187(1)(e) dispute.[138] In *Kaltwasser*, the Labour Court had to adjudicate an alleged automatically unfair dismissal claim under section 187(1)(d).[139] The last three cases are Labour Court decisions and, as they were required to do in accordance with the doctrine of precedent, followed *Afrox*, a decision of the Labour Appeal Court. As I will demonstrate, the Labour Appeal Court cases, which subsequently applied *Afrox*, did so uncritically and without a proper engagement of what the plain language of the section meant and without any regard to *Algorax* and *Kroukam*.

[123] It bears emphasis that, barring *Afrox*, none of the decisions cited by the first judgment construed and applied section 187(1)(c). Therefore, they do not support the proposition that the section requires a determination of factual causation. The factual causation test is not consistent with the plain language of section 187(1)(c). Not surprisingly, the first judgment does not refer to any words in the section that sustain the interpretation that includes factual causation. On the contrary, the section merely states that a dismissal is automatically unfair if the reason for it was a refusal by employees to accept a demand by the employer in respect of a matter of mutual interest.

[124] *Algorax*, on the other hand, is a decision of the Labour Appeal Court, decided after *Afrox*. As is the case here, the dismissed employees also relied on section 187(1)(c) for their automatically unfair dismissal claim on the basis that it was based on a refusal to accede to the employer's demand in a matter of mutual interest. While the majority judgment dealt at length with the *Fry's Metals* decision of that same

[137] *Simmadari* above n 88.

[138] *Heath* above n 88.

[139] *Kaltwasser* above n 88.

court (an aspect that also features prominently in the first judgment here), its approach to determining the true reason for the dismissal is instructive. *Algorax* concerned a dispute regarding the employer's proposed introduction of a rotating shift system for a more cost-effective operation to ensure profitability. When the employees rejected the employer's proposal, they were dismissed. At issue was whether the dismissal was by reason of the employer's operational requirements or the employees' refusal to accede to the employer's demand concerning a matter of mutual interest. The Labour Appeal Court found for the appellant trade union and its members, upheld the appeal and ordered the reinstatement of the dismissed employees.[140]

[125] Writing for the majority, Zondo JP, after summarising the evidence, extensively analysed it and found that "on balance the appellants' contention that the purpose of the dismissal was to compel the individual appellants to agree to the respondent's demand must prevail".[141] The learned Judge stated that there were a number of areas in the evidence that in his view supported that finding.[142] He then undertook a meticulous evaluation of the evidence of the various witnesses to assess the cogency of that evidence in order to reach an ultimate finding on the probabilities.[143] That careful analysis included several verbatim quotes from the record. Ultimately, Zondo JP concluded on the evidence that, on a balance of probabilities, the dismissal was automatically unfair in terms of section 187(1)(c) as "the dismissal was effected for the purpose of compelling the individual appellants to agree to the respondent's demand that they work the rotating shift".[144]

[126] I find the approach adopted by the majority in *Algorax* enlightening and persuasive. In order to ascertain the true reason for the employees' dismissal, Zondo JP did not follow the approach adopted in the earlier decision of that same court in *Afrox*,

[140] It must of course be borne in mind that *Algorax* above n 59 was decided before the decision of the *Fry's Metal* Supreme Court of Appeal judgment above n 63, that ultimately led to the amendment of section 187(1)(c).

[141] *Algorax* above n 59 at para 39.

[142] Id.

[143] Id at paras 40-54.

[144] Id at para 55.

by embarking upon a causation enquiry. Instead, he followed the conventional method of evaluating evidence to determine, on a preponderance of probabilities, what the true reason for dismissal was, in the face of two conflicting versions. His evaluation of the evidence featured a full narration of the testimony of the various witnesses, a punctilious analysis thereof and fully reasoned findings on its cogency and reliability. Ultimately, comprehensive reasons were furnished for the acceptance of one version above the other. That is the approach required in this case – the one followed by the Labour Court. It bears repetition that a dismissal follows upon a decision of an employer. The reason or reasons advanced by the employer for that decision to dismiss, must be subjected to the evaluation usually undertaken to assess evidence, as Zondo JP did in *Algorax*. And, where there are two conflicting, irreconcilable versions before a court, the tried and tested method enunciated in *Stellenbosch Farmers' Winery* must be utilised.

[127] A similar approach was adopted in both the majority and minority judgments in *Kroukam*. In that matter, the Labour Appeal Court had to determine whether the reason advanced by the employer, Airlink, or the reason advanced by the employee, Captain Kroukam, was the true reason for the latter's dismissal by Airlink. Both Davis AJA, writing for the majority, and Zondo JP, writing for the minority, undertook a wide-ranging, thorough analysis of the evidence. In the latter instance, Zondo JP, after a comprehensive narration and evaluation of the evidence, concluded:

> "In the light of all of the evidence I find that the principal or dominant reason for the appellant's dismissal was that the respondent was not happy with the role that he was playing in seeking to represent the interests of the union and its members in his or the union's dealings with the respondent as well as with the role that he played in bringing the interdict application and the contempt of court application on behalf of the union in March 2001."[145]

As can be seen, there was no mention at all by Zondo JP of applying a causation test; it is simply an application of the traditional factual enquiry. And when Zondo JP said that

[145] *Kroukam* above n 7 at para 90.

"I am of the view that, when all the circumstances are taken into account, the principal or dominant reason for the appellant's dismissal is the one I have given above",[146] he simply meant, as he set out immediately thereafter, that where there may be several reasons for a dismissal, a court must ascertain the dominant (or principal or main) reason to determine whether that reason renders the dismissal automatically unfair.

[128] Davis AJA adopted the same approach – he recounted the evidence and, mindful of the divergences, set out to determine which of the two versions was to be preferred in ascertaining the true reason for the dismissal. Thus he said"[i]n argument before this court, the key issues were the determination of the onus of proof, and the inferences which could legitimately be drawn from the evidence".[147] And later he continued—

> "[i]n my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in section 187 for constituting an automatically unfair dismissal."[148]

Inasmuch as Davis AJA, after quoting *Afrox*,[149] seemingly with approval, suggested that this is a causation test (although he does not directly say so) he was, with respect, wrong. This was, in fact, the classic approach applied in the evaluation of evidence. My view is buttressed by his reference to Lord Justice Griffiths' dictum in *Maund*:

> "[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt

[146] Id at para 91.

[147] Id at para 25.

[148] Id at para 28.

[149] Id at para 26.

> about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal."[150]

[129] On a number of occasions, this Court has emphasised that when interpreting legislation through a contextual or purposive approach, a court should "remain faithful to the actual wording of the statute".[151] By proposing the application of the causation test as applied by the Labour Appeal Court in *Afrox*, the first judgment overlooks the actual wording of section 187(1)(c). This is, with respect, incorrect. A statutory provision cannot be assigned a meaning that is not borne out by its language. Nor can the language be strained unduly in order to arrive at a particular meaning. It is not surprising that in *Algorax* the Labour Appeal Court itself did not follow *Afrox*. And, as I have sought to demonstrate, in *Kroukam*, the judgments penned by Zondo JP and by Davis AJA, in effect also applied the traditional evaluation of evidence approach. Inasmuch as *Afrox* has been followed by other judgments of that Court, as alluded to in the first judgment, for the reasons set out here, they have been wrongly decided. Those judgments did not undertake a proper analysis of the language in section 187(1) and merely followed *Afrox* without a close analysis of its reasoning. Furthermore, they did not have any regard to the different, fact-evaluation approach adopted in *Algorax* and *Kroukam*.

[130] The concept of causation in the discourse of law is technical and depends on a myriad of variables, some requiring public policy decisions when coming to conclusions. Complexity also arises when there are a multiplicity of factors causing the harm (in the present instance, dismissals). There may be concurrent causes such as where two actors' negligent acts combine to produce one set of damages, where but for

[150] *Maund v Penwith District Council* [1984] ICR 143 at 149, cited in the majority judgment in *Kroukam* above n 7 at para 27.

[151] *Bertie van Zyl* above n 76 at para 22. Reiterated in the minority judgment in *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) at para 59 and *Provincial Minister for Local Government, Western Cape v Oudtshoorn Municipal Council* [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC) at para 13.

either of their negligent acts, no harm would have occurred at all.[152] This may require an apportionment enquiry.

[131] Another difficulty in analysing and testing the nature of a dispute through the lens of causation is when assessing liability for damages in delict and contract, a counterfactual question must be asked which is a hypothesis, or other belief that is contrary to the facts. One would have to consider what the factual cause is as well as the counterfactual. This line of reasoning is neither appropriate nor helpful in an enquiry that is essentially an evaluation of disputed facts.[153]

[132] The difficulties with the causation enquiry are amply demonstrated by the wide-ranging discussion in *Lee*. Writing for the majority, Nkabinde J aptly described its challenges by stating that "[l]ike other jurisdictions our courts have also struggled to come to terms with the difficulties of causation".[154] So, for example, the substitution exercise in the application of the 'but-for' test for factual causation was regarded by the majority in *Lee* as particularly troublesome because it was considered to be too inflexible.[155] And, more importantly for present purposes, the danger of introducing social and policy considerations into the evaluation of facts, was emphasised by Nkabinde J in *Lee*:

> "The substitution exercise of determining hypothetical lawful conduct involves an evaluation of normative considerations. *The determination of a question of fact,*

[152] Bavli "Counterfactual Causation" (2019) 51 *Arizona State Law Journal* 879 at 881.

[153] Applying this reasoning to the facts of this case, various examples illustrating the difficulties with regard to the cause of the problem include: if the steel industry did not go into a global slump, would Aveng still have been required to change job descriptions and embark on retrenchment? Must the 'but-for' test in the causation analysis be embarked upon – is the steel slump the essential cause of the steps Aveng took? Is it bad management by the company that led to the harm in this case? The further question that arises is what was the proximate cause that is not too remote? Was the demand justified (if there was one)? Another question is: but for the ulterior motive of a demand for a higher wage on the part of NUMSA, would there have been a problem at all? Thus the enquiry can continue and multiple questions keep escalating.

[154] *Lee* above n 113 at para 45.

[155] Id.

although it is also an evaluative exercise, cannot depend on social and policy considerations."[156]

[133] The second leg of the causation enquiry, legal causation, is not bereft of difficulty either. In *De Klerk*, this Court alluded to the challenges in applying the criteria traditionally utilised in determining legal causation.[157] It pointed out that public policy plays a role and that considerations of public policy should be infused with constitutional values.[158]

[134] The causation test does not seem to be practical in the context of section 187(1)(c). When considering section 187(1)(c), we are not concerned with multiple conditions that may confuse a court to a point that it has to consider which one of the various conditions was the reason for the dismissal. The dismissal of the employees followed upon a decision by Aveng to restructure its business by redesigning posts. Aveng furnished reasons for its dismissal of the employees, based on operational requirements, but NUMSA disputed those reasons. NUMSA contended that the dismissal was automatically unfair, as it was as a result of NUMSA's refusal to accede to Aveng's demand, concerning restructured posts, a matter of mutual interest. The tried and tested method of evaluating evidence to assess its cogency and reliability and to ultimately prefer one version above the other, with full reasons for doing so, is how the determination should be made.

[135] Adopting this approach leads one to the same conclusion as the one reached in the first judgment. NUMSA led no evidence controverting that adduced by Aveng. While the first judgment does not engage in an evaluation of the evidence, since it adopts the *Afrox* approach, I do not understand it to be critical of the evidence adduced on behalf of Aveng. That evidence presented a clear, coherent picture of continued good faith negotiations and consultations to achieve consensus on Aveng's proposed

[156] Id at para 51 and fn 103.

[157] *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) at para 29.

[158] Id at para 30.

restructuring. It demonstrated Aveng's persistent and consistent attempts at saving the jobs of the workers who remained in its employ after the voluntary severance package and limited duration contract terminations processes had been concluded. There is no reason not to accept that evidence, particularly since there was no evidence to contradict it. On that accepted evidence, the true reason for the dismissal was Aveng's restructuring for operational requirements. The employees' refusal to agree to the restructuring presented Aveng with an insurmountable operational requirements conundrum, leaving it with no choice other than to dismiss the employees.

[136] In summary, the tried and tested method of evaluating evidence to assess its cogency and reliability and to ultimately prefer one version above the other, with full reasons for doing so, is how the true reason for the dismissal should be determined for the purpose of section 187(1)(c). There is no jurisprudential or procedural basis for introducing the complex concept of causation in order to evaluate disputed evidence in the present dispute. NUMSA's reliance on section 187(1)(c) must therefore fail as the dismissal was fair. For the balance of the reasons comprehensively enunciated in the first judgment, I agree with the order set out there.

JAFTA J (Majiedt J, Mhlantla J, Tshiqi J and Victor AJ concurring)

[137] I have had the benefit of reading the judgment of my colleague Mathopo AJ (first judgment) and the judgment of my colleague Majiedt J (second judgment). Like the second judgment, I agree with the first judgment, except with regard to its interpretation of section 187(1)(c) of the LRA and its approval of the Labour Appeal Court's decision in *Afrox* which advocated for the invocation of factual and legal causation in determining whether a dismissal of employees by an employer is automatically unfair.[159]

[159] *Afrox* above n 20 at para 32.

[138] I embrace the reasoning in the second judgment but I write separately to address the interpretation of section 187(1)(c) and illustrate that on its proper interpretation the section does not incorporate causation as a requirement for determining whether a particular dismissal of employees by the employer constitute an automatically unfair dismissal contemplated in that section. The question whether the dismissal is automatically unfair may be answered only with reference to the language employed in that provision. It is either the text of the section requires both factual and legal causation or it does not.

[139] But before I commence the interpretation, it is necessary to remind ourselves of what interpretation of statutes entails. It is a well-established principle of our law that statutory interpretation involves nothing else but the exercise of giving meaning to each and every word used by the law-giver in the provision under construction.[160]

[140] The allied principle is that the language chosen by the law-giver must be respected.[161] Departing from the actual wording of a statutory provision takes the interpreter outside the ambit of interpretation. In *Zuma* this Court observed:

> "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[162]

[141] Yet another relevant principle is that respect to be accorded to the language employed in a statute forbids distortion of that language. Proper interpretation is limited

[160] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 57; and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[161] *Bertie Van Zyl* above n 76 at para 22 and *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[162] *Zuma* id at para 18.

to what the words used are reasonably capable of meaning[163]. A strained meaning too may not be assigned to the wording of a statute.

[142] With these principles in mind, I proceed to consider the relevant provision. Section 187(1) provides:

> "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 549 or, if the reason for the dismissal is–
>
> (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
> (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
> (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
> (d) that the employee took action, or indicated an intention to take action, against the employer by–
> (i) exercising any right conferred by this Act; or
> (ii) participating in any proceedings in terms of this Act;
> (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
> (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or

[163] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA (CC); 2000 (1) BCLR 39 (CC) at para 24.

> (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act."

[143] The language of the section is plainly unambiguous. It sets out circumstances under which a dismissal becomes automatically unfair. The section lists no less than nine instances in which a dismissal by the employer becomes automatically unfair. If the employer acts in breach of section 5 of the LRA when dismissing employees, the dismissal is taken to be automatically unfair. The majority of the other instances relates to what may have been done by an employee, like if the reason for dismissal is that the employee participated in a protected strike or that the employee refused to do, in addition to her own work, the work normally done by a co-worker who at the relevant time is taking part in a protected strike.

[144] Pertaining to section 187(1)(c) the dismissal becomes automatically unfair if the reason for the employer to dismiss the employees was "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer". This language is unquestionably clear. For that reason to come into existence, there must first be a demand by the employer directed at the employees on a matter of mutual interest. And the employees must have refused to accept the employer's demand. The employer must have dismissed them for refusing to accept the demand.

[145] The language of section 187(1)(c) does not suggest that the dismissal in question must have been caused by the employees' refusal. To hold otherwise constitutes a distortion of that language. That language is not capable, let alone being reasonably capable, of an interpretation that the provision requires the invocation of causation, whether factual or legal, for determining the reason for dismissal. At the level of interpretation, there can be no legal basis for imputing causation to the provision.

[146] Causation, as the second judgment lucidly illustrates, relates to conduct capable of producing consequences, like causative conduct that produces harm to a claimant for

delictual compensation. In that instance, liability of the wrongdoer does not stem from his reasons for committing the wrongful conduct but from the conduct that caused the harm hence the need to establish a causal link between the conduct concerned and the ensuing harm. That wrongful conduct cannot, by any stretch, be described as a reason for the harm. What motivated the conduct is distinct from the conduct itself.

[147] One example will sufficiently demonstrate the point. If A has a motive to kill B and decides to achieve his goal by shooting B multiple times with a gun. If B dies as a result of the injuries inflicted by A, his conduct in shooting B will be the cause of the latter's death. Notably, the reason or motive for the killing cannot be the cause of death. But if B despite being shot by A dies as a result of diabetes, the shooting of him by A cannot be taken as having caused B's death. And yet even in that instance A would still have had the reason to kill B. In this example, the reason can never be a causative conduct for A's death because it is not capable of producing death.

[148] When that reasoning is applied here, the question is whether the employees' refusal is capable of producing dismissal, as a consequence. Applying causation to section 187(1) of the LRA is inappropriate for a number of reasons. First, it defies the language of the text, particularly section 187(1)(c). Second, it leads to an absurdity that could never have been envisaged by Parliament. It would mean that by their refusal, the employees had caused their own dismissal. Otherwise there would be no causal link between the refusal and the dismissal. This could never have been what Parliament sought to achieve through the provision. Causation renders the provision senseless and upends the scheme of section 187 which is to render dismissals by an employer under certain defined circumstances automatically unfair.

[149] An automatically unfair dismissal relieves employees who are challenging it from establishing that the dismissal was unfair. All that they need to show by way of facts is that they were dismissed for refusing to accept the employer's demand. If they establish this fact, section 187(1) tells us that the dismissal must automatically be taken

to be unfair. Therefore, the section creates a presumption of unfairness once certain facts are established.

[150] A dismissal, if there were to be one, which has been caused by the employees' conduct cannot be unfair from the employees' point of view. They cannot by their own conduct cause unfairness to themselves. This is illogical. Yet this is what causation would lead to. How for example, can causation apply to the dismissal by the employer which violates section 5 of the LRA? What would be the causative conduct in that case? The employer's violation of the Act or his decision to terminate employment? Applying causation to section 187(1) is like fitting a square peg in a round hole.

[151] The first judgment does not address these absurdities. Instead, it readily endorses what was said by the Labour Appeal Court in *Afrox*. In that matter the Labour Appeal Court did not give any reasons for the conclusion that causation applies. It merely stated:

> "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilised here."

[152] It is apparent from the Labour Appeal Court's judgment in *Afrox* that the Court proceeded from an incorrect premise. That Court did not base its conclusion on the language of section 187(1). Instead, the Court asked itself whether there were reasons against the invocation of causation. And when it could conceive of none, the Court simply held that causation applied. Having noted that the test appropriate to a section 187(1) inquiry was an objective one, the Labour Appeal Court mistakenly held that "the employer's motive for the dismissal will be one of a number of factors to be considered". It is difficult to appreciate how a motive or reason for a dismissal becomes one of the factors to be taken into account in determining the reason for a dismissal which is the only fact to be ascertained in the inquiry.

[153] The judgment concludes that the reason for dismissal "is essentially one of causation" without substantiation. As shown earlier, this is text-defiant and as a result there is no legitimate legal basis that I can think of which grounds the application of causation to matters regulated by section 187(1). The error in *Afrox* is compounded by the fact that it also calls for the application of a legal causation. This too is inappropriate to section 187(1). Legal causation, as the second judgment shows, is applied to determine liability in a case where there is doubt that the wrongdoer should be held responsible for the harm suffered by a claimant[164].

[154] There is simply no need to apply legal causation to the section 187(1) scenario. If a dismissal of employees is unfair, regardless of whether it is automatically unfair or has been proved to be unfair, a claim in which the dismissal is challenged must succeed. For as long as it was the employer who dismissed the employees, the claim must be successful. The employees need not prove that the reason or motive for the dismissal was too remote or sufficiently close to the dismissal for purposes of imposing liability on the employer. Terms like "main", "dominant", "proximate" and "most likely" are not relevant to an inquiry for determining the reason for a dismissal. These terms suggest that a refusal may be one of the reasons but if it is not the main, dominant, proximate or most likely reason, then the presumption that the dismissal is automatically unfair is not activated. This is what the Labour Appeal Court concluded here. It is incorrect, for this conclusion is not grounded in section 187(1).

[155] For these additional reasons to those contained in the second judgment, I hold that causation does not apply to reasons for dismissal listed in section 187(1) of the LRA.

[164] Second judgment at [116].

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