



- (1) Reportable No
(2) Of interest to other Judges: No
(3) Revised

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS15/2022

In the matter between:

**SOUTHERN AFRICAN CLOTHING
AND TEXTILE WORKERS UNION**

First Applicant

MALULEKA, E & 170 OTHERS

Second to Further Applicants

and

GLENCAROL (PTY) LTD

Respondent

Heard: 17, 18 and 19 March 2025

Delivered: 28 August 2026

JUDGMENT

MAHOMED, AJ

Introduction

- [1] This is a claim by the first applicant, the Southern African Clothing and Textile Workers Union (“the union”), on behalf of the second to further applicants (171 individual employees), against the respondent, Glencarol (Pty) Ltd (“the company”), a manufacturer of socks for the retail and wholesale market. The individual applicants were dismissed by the company for operational requirements, the first batch with effect from 27 September 2021 and the remainder with effect from 1 October 2021, pursuant to a large-scale retrenchment exercise which began in May 2021.
- [2] The applicants do not seriously contest that the company followed a process of consultation. What is in dispute is the substantive fairness of the dismissals. The applicants contend that the company has failed to discharge the onus imposed upon it by section 192(2) of the Labour Relations Act¹ (“the LRA”), of proving that the dismissals were for a fair reason related to its operational requirements. They advance four broad grounds, any one of which, they submit, is sufficient to render the dismissals substantively unfair: first, that the company was itself unable to articulate a consistent operational rationale for the retrenchment; second, that it failed to prove any operational requirement through credible evidence; third, that it rejected, without proper justification, a range of viable alternatives which were available to it; and fourth, that the retrenchment was, in any event, grossly disproportionate to the operational requirement relied upon.
- [3] The company disputes each of these contentions. It says that it had a genuine and consistently held commercial rationale for the retrenchment, namely a substantial and demonstrable decline in its order book, compounded by an escalating cost burden arising from its obligation to pay employees leave and bonus benefits regulated by the Clothing Industry Bargaining Council (“the Bargaining Council” or “the CIBC”) notwithstanding that employees were working reduced hours. It says that it consulted extensively and in good faith over a period of some four months, that it made relevant financial information available to the union, that the union failed to take up the opportunity to

¹ Act 66 of 1995, as amended.

inspect that information or to compel its disclosure, and that the union itself obstructed at least one alternative, a proposal to accrue leave and bonus on a pro rata basis according to hours actually worked, which, on the company's version, would have avoided the retrenchment altogether. It submits that the court should not second-guess a rational commercial decision, and that the dismissals were both procedurally and substantively fair.

- [4] I heard oral evidence from the company's Chief Executive Officer, Mr Raj Shunmugam, and its Human Resources Manager, Mr Freddy Sethosa. The applicants called no witnesses, electing instead to test the company's case through cross-examination and to rely on the pleadings, the documentary record and argument. I deal later in this judgment with the significance, if any, of that election.
- [5] The following is common cause or was not seriously disputed. On 12 April 2021, an arbitrator of the Bargaining Council made an award against the company, holding it liable to pay employees their full leave and bonus benefits for 2020, notwithstanding that many employees had worked reduced hours during the COVID-19 lockdown. On 21 May 2021, the company launched an application to review and set aside that award. Three days later, on 24 May 2021, it issued a notice in terms of section 189(3) of the LRA, read with section 189A, initiating a large-scale retrenchment consultation process and inviting facilitation. Six facilitation meetings followed on 8 June, 17 June, 2 July, 19 July, 11 August and 6 September 2021. On 13 September 2021, the company issued the first notices of termination, effective 27 September 2021; a second batch followed, effective 1 October 2021. In total, 171 of the 252 employees initially identified as being at risk were ultimately retrenched. On 5 October 2021, a matter of days after the retrenchment, the company launched an urgent application to compel the Bargaining Council to issue it with a compliance certificate; that application was settled on 13 October 2021, and the certificate was issued shortly thereafter. The company recalled a number of the retrenched employees to employment from around November 2021, once new orders (including from a major customer, The Foschini Group) began to materialise. On 8 November 2021, the company applied to the Bargaining Council for, and was granted, an exemption permitting it to pay

2021 benefits on a staggered basis. On 7 December 2022, this court reviewed and set aside the 2020 arbitration award, relieving the company of the very liability said to lie at the heart of its operational difficulties.

- [6] It is against this factual matrix, largely undisputed as to its bare chronology, that the rival characterisations of the company's conduct, as either a genuine, if imperfect, exercise of a difficult commercial judgment, or as an opportunistic and poorly justified resort to retrenchment in circumstances where less drastic measures were readily at hand, must be assessed.

The Applicants' Case

- [7] The applicants' case has four components.
- [8] First, they say the company was unable to settle on a consistent rationale for the retrenchment. The section 189(3) notice itself advanced three overlapping reasons: reduced orders, the cost of Bargaining Council-regulated benefits, and general financial distress. Thereafter, the applicants submit, the company's representatives shifted between these and other formulations at different stages of the process and even during the trial, at times emphasising the order book, at times the 2020 benefits liability, at times the 2021 benefits liability, and at times the absence of a compliance certificate, without ever settling on, or substantiating, any one of them consistently. This vacillation, the applicants argue, is itself indicative of the absence of a genuine operational requirement, and, in any event, undermined the union's ability to engage meaningfully in consultation, since it could not know what it was truly required to address.
- [9] Second, the applicants say that whatever the true rationale, the company failed to prove it through admissible, credible evidence. It did not place its order book before the court. The only documentary evidence bearing on the order book was a summary table, contained in a letter dated 15 July 2021, reflecting aggregate percentage declines (41% in Rand value and 54% in pairs) without any underlying source data, and without any evidence as to whether the position had since improved. Nor did the company adduce its financial statements, audited or otherwise, in evidence. Mr Shunmugam's

explanation for this, that he had not been advised the order book would be required, is, on the applicants' submission, difficult to accept in circumstances where the company introduced other documentary material during the trial and where the order book was, self-evidently, central to its own case.

[10] Third, the applicants contend that there were at least five viable alternatives to retrenchment which the company either did not pursue, or pursued only belatedly and half-heartedly: (a) awaiting the outcome of the review application in respect of the 2020 arbitration award, which on the company's own evidence would have obviated the need to retrench altogether, and which in fact succeeded some fourteen months later; (b) applying to the Bargaining Council for an exemption to pay 2021 benefits on a pro rata basis, which the company did apply for, and obtain, but only after the retrenchment; (c) timeously applying to this court to compel the issue of a compliance certificate, an avenue the company knew of by 28 July 2021 (when the union declined to consent to the certificate's issue) but pursued only on 5 October 2021, days after the retrenchment, and which then resolved the matter within eight days; (d) participation in the COVID-19 Temporary Employer/Employee Relief Scheme ("TERS"); and (e) the Unemployment Insurance Fund's Reduced Working Time benefit ("the UIF scheme"). As to the last two, the applicants say the company's stated reasons for not implementing them, that they offered only short-term relief, and (at points) a mistaken belief that it was unlawful for employees to claim while still in employment, do not withstand scrutiny, not least because the company's own evidence was that it required only short-term relief to bridge the gap until the review application or the compliance certificate application was resolved.

[11] Fourth, the applicants say the retrenchment was, in any event, grossly disproportionate. The 2020 benefits liability which Mr Shunmugam identified as the root cause of the company's difficulties was calculated at approximately R1 million; spread over the 171 retrenched employees, this amounts to some R5 847,95 per employee, or R487,33 per employee per month, a saving which the applicants describe as incommensurate with the devastating impact of the loss of employment on the individual applicants and their dependants,

particularly where the company made no attempt to show that it could not simply have paid the amount.

- [12] On the strength of these submissions, the applicants seek an order that the dismissals were substantively unfair, that the individual applicants be retrospectively reinstated, and that the company pay costs, including the costs of counsel, on Scale C.

The Respondent's Case

- [13] The company's case, in short, is that it had a genuine, rational commercial reason for the retrenchment, a substantial decline in its order book, compounded by an escalating and, on its account, involuntary cost burden, and that this court should be slow to second-guess that judgment provided it was rationally and honestly arrived at. It relies on the well-established line of authority, including *Kotze v Rebel Discount Liquor Group (Pty) Ltd*² and *Telkom SA SOC Ltd v Van Staden*,³ to the effect that the function of the court is not to decide whether the employer made the best decision, but whether the decision was a genuine, rational commercial one, properly informed by what emerged in consultation.
- [14] The company disputes that it vacillated in any legally significant sense. It says that the underlying rationale was, at all times, the diminished order book, and that references to the Bargaining Council-regulated benefits went to a related but distinct cost pressure rather than a different reason altogether. It cautions against a "checklist" approach to section 189, relying on *SACU and CWU v Telkom SA SOC Ltd*⁴ and *Tetley v Caterplus (Pty) Ltd*,⁵ and submits that the correct enquiry is a holistic one.
- [15] As proof of the operational requirement, the company says that it did in fact disclose relevant financial information, including, by letter of 15 July 2021, a comparative breakdown showing declines of 41% in Rand value and 54% in

² *Kotze v Rebel Discount Liquor Group (Pty) Limited* [1999] ZALAC 41; [2000] 2 BLLR 138 (LAC); (2000) 21 ILJ 129 (LAC).

³ *Telkom SA SOC Limited v van Staden and Others* [2020] ZALAC 52; (2021) 42 ILJ 869 (LAC).

⁴ *South African Communication Union and Another v Telkom SA SOC Ltd* [2020] ZALCJHB 56; (2020) 41 ILJ 1425 (LC).

⁵ *Tetley v Caterplus (Pty) Ltd* [2010] ZALC 166.

units sold, together with wage and salary summaries and projections. It further says that from 4 August 2021, it made its full financial statements available for the union to inspect at its premises, subject only to a restriction on copying without consent, and that the union, notwithstanding being on the company's premises on other occasions during this period, never took up that invitation, never brought an application to compel disclosure under section 16 of the LRA, and never sought an order under section 189A(13) to suspend the process pending disclosure. In these circumstances, the company submits that it is not open to the applicants to complain, after the fact, of an evidentiary deficiency they made no effort to cure when the opportunity existed, and the court should draw an adverse inference from the union's own passivity.

[16] The company places particular emphasis on a chronology it says demonstrates that the true cause of the retrenchment was the union's own conduct. It points out that, on 8 June 2021, at the very first facilitation meeting, it proposed that leave and bonus be accrued on a pro rata basis according to hours actually worked, rather than in full notwithstanding short time, a proposal it repeated on 14 July 2021, and that, had the union agreed, the retrenchment could have been avoided in its entirety. It says the union instead pressed for the TERS and UIF alternatives while declining to consent to the company's own proposal, and that this, together with the union's refusal on 28 July 2021 to consent to the issuing of a compliance certificate (notwithstanding that the Bargaining Council itself was willing to issue one), was the proximate cause of the impasse that led to retrenchment. It invokes *Viljoen v JSE Ltd*⁶ for the proposition that a party who refuses a reasonable alternative to dismissal cannot complain of unfairness.

[17] On the TERS and UIF alternatives specifically, the company says it did not reject either proposal outright. It says it agreed, in principle, to the TERS scheme, subject to it not entailing an additional cost burden, and points to Mr Sethosa's evidence that, years later, the company remains on short time with no turnaround strategy in place, a prerequisite for the scheme, such that it could not, in truth, have qualified. As to the UIF scheme, the company says it

⁶ *Viljoen v Johannesburg Stock Exchange Ltd* [2016] ZALCJHB 361; (2017) 38 ILJ 671 (LC).

was the individual employees, not the company, who were reluctant to make use of it, out of concern that doing so would deplete their personal unemployment insurance credits, and that this reluctance cannot fairly be laid at the company's door.

- [18] Finally, the company submits that the applicants led no evidence of their own, relying solely on cross-examination, and that the court should draw a negative inference from their failure to call witnesses to explain, among other things, why the union did not pursue disclosure through the mechanisms available to it, or why it declined to consent to the compliance certificate or the company's pro rata proposal. On this basis, it submits that the dismissals were both procedurally and substantively fair, and that the claim should be dismissed.

Legal Framework

- [19] Section 188(1)(a)(ii) of the LRA requires a dismissal for operational requirements to be for a fair reason; section 189 sets out the consultation obligations applicable where an employer contemplates such a dismissal, including the duty to disclose relevant information and to consult over measures to avoid, minimise or delay the dismissals, and over their timing and the selection criteria to be applied. Section 192(2) places the onus on the employer to prove that the dismissal was fair.
- [20] The test to be applied is well settled. In *BMD Knitting Mills (Pty) Ltd v SACTWU*,⁷ the Labour Appeal Court held that the enquiry is not confined to whether a proper consultation process was followed, but extends to whether the ultimate decision is "*operationally and commercially justifiable on rational grounds*", assessed in a manner that is fair to the affected employees as well as the employer: "*the word 'fair' introduces a comparator, that is a reason which must be fair to both parties.*" The court is entitled to examine the content of the reasons given, not merely to defer to the employer's ipse dixit, although the enquiry remains one of fairness and not of correctness.

⁷ *BMD Knitting Mills (Pty) Limited v South African Clothing & Textile Workers Union (SACTWU)* [2001] ZALAC 19; [2001] 7 BLLR 705 (LAC); (2001) 22 ILJ 2264 (LAC).

- [21] This is to be read together with the caution, expressed in *Kotze v Rebel Discount Liquor Group (Pty) Ltd*⁸ and reiterated in *Telkom SA SOC Ltd v Van Staden*,⁹ that a court's function is not to second-guess the commercial or business efficacy of a rational decision, but to determine whether it was genuine and not a sham. These two lines of authority are not in tension: a court neither substitutes its own commercial judgment for the employers, nor abdicates its duty, recognised in *CWIU v Algorax (Pty) Ltd*,¹⁰ to determine the fairness of the dismissal objectively, without deferring to the employer on that question.
- [22] Both of these enquiries, genuineness on the one hand, and proof on the other, depend on evidence. As was explained in *Ndhlela v Sita Information Networking Computing BV (Incorporated in the Netherlands)*,¹¹ an employer who relies on a reduction in operating costs, or a decline in orders, must ordinarily go further than assert the fact; it must, at least, “*put forward evidence showing the actual operating costs which it sought to reduce ... by producing financial information which demonstrates the relevant operating costs,*” since “*any sensible employer wishing to reduce costs must first know what costs are to be reduced.*” This accords with *BMD Knitting Mills*, relied on by both parties, in which “clear figures were presented to the court to prove the claim of downturn in production,” permitting the court to draw the necessary connection between the operational justification and the decision to dismiss.
- [23] As to consultation, I accept, as the company submits, that section 189 does not impose a rigid, sequential checklist,¹² and that an employer is entitled to approach consultation with a predisposition towards a particular outcome provided it remains genuinely open to persuasion.¹³ I also accept that

⁸ *Kotze v Rebel Discount Liquor Group (Pty) Limited* [1999] ZALAC 41; [2000] 2 BLLR 138 (LAC); (2000) 21 ILJ 129 (LAC).

⁹ *Telkom SA SOC Ltd v Van Staden supra*.

¹⁰ *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

¹¹ *Ndhlela v SITA Information Networking Computing BV (Incorporated in the Netherlands)* [2014] ZALCJHB 64; (2014) 35 ILJ 2236 (LC).

¹² See *SACU and CWU v Telkom SA SOC Ltd supra*, see also *Tetley v Caterplus (Pty) Ltd*.

¹³ See *National Education Health and Allied Workers' Union and Others v University of Pretoria* [2005] ZALAC 7; [2006] 5 BLLR 437 (LAC); (2006) 27 ILJ 117 (LAC).

consultation is a two-way process,¹⁴ that a union may not adopt an entirely passive stance and then complain of a checklist-style failure by the employer, and that a party who declines a genuinely reasonable alternative that would have avoided dismissal cannot ordinarily be heard to complain of unfairness.¹⁵

- [24] Where the substantive fairness of a retrenchment is impugned on the grounds that the employer failed to explore or properly consider alternatives, the enquiry, as this court explained in *Shushu v Distell Ltd (Springs)*,¹⁶ is essentially one of proportionality: “a determination of the extent to which the parties’ respective interests have been realised, with a view to comparing the degrees of proportional fulfilment.” The Constitutional Court’s judgment in *SACCAWU obo Members v Woolworths (Pty) Ltd*¹⁷ confirms both that a genuine failure to consider alternatives renders a retrenchment substantively unfair, and that reinstatement is the primary remedy for a substantively unfair dismissal, from which a court will depart only in limited circumstances, the onus for which rests on the employer.
- [25] It is against this framework, genuineness of reason, proof of the operational requirement by evidence, proper consideration of alternatives measured proportionately, and the employer’s onus throughout, that I turn to evaluate the rival cases.

Evaluation

Consistency and genuineness of the stated reason

- [26] I do not consider the shifting emphasis on the company’s explanations, taken alone, to be decisive. Mr Shunmugam’s evidence, read as a whole, does disclose an underlying, if inelegantly and inconsistently expressed, narrative: that the company’s order book had weakened, that it was simultaneously burdened by the obligation (as it then stood) to pay full 2020 and 2021

¹⁴ See *Association of Mineworkers & Construction Union & Others v Tanker Services (Pty) Ltd* (2018) 39 ILJ 2265 (LC).

¹⁵ See *Viljoen v Johannesburg Stock Exchange Ltd* (2017) 38 ILJ 671 (LC).

¹⁶ *Shushu and Others v Distell Ltd (Springs)* [2024] ZALCJHB 527; (2025) 46 ILJ 1000 (LC).

¹⁷ *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44; (2019) 40 ILJ 87 (CC); 2019 (3) BCLR 412 (CC); [2019] 4 BLLR 323 (CC); 2019 (3) SA 362 (CC).

benefits regardless of short time, and that these two pressures were, on the company's own telling, interlinked, in that the absence of a compliance certificate (itself a consequence of the benefits dispute) inhibited its ability to secure new orders from customers such as TFG who required proof of compliance. I accept the company's submission that section 189 is not to be approached as a rigid checklist, and I am not persuaded that the re-formulation of a single underlying commercial narrative, in response to different questions at different times, is by itself fatal.

- [27] What is more troubling, however, is the inconsistency as to which of these interlinked pressures was said to be decisive, and in particular the company's own evidence, elicited in cross-examination, that it would not have needed to retrench at all had it been relieved of either the 2020 liability (through the review application), or the 2021 liability (through the exemption it later, in fact, obtained), or the compliance certificate impasse (through the application it later, in fact, brought successfully). Each of these was, on the company's own account at different points, independently sufficient to obviate the need to retrench. That evidence bears less on the genuineness of the underlying commercial pressure, which I am prepared to accept was real, than on the second and third enquiries to which I now turn: whether the company proved that pressure by evidence, and whether it properly explored the alternatives which, on its own version, would have resolved it.

Proof of the operational requirement

- [28] Here, I am satisfied that the company's case falls short. The only order book evidence before the Court is the aggregated percentage summary contained in the 15 July 2021 letter. I accept that this letter was disclosed to the union during the consultation process, and I return below to what significance that has for the company's compliance with its consultation obligations. But the question presently under consideration is a different one: whether the company proved its operational requirement in evidence at trial? A bare, aggregated percentage decline, unaccompanied by the underlying order data, unaudited, and untested by reference to source documents, is precisely the kind of evidence which *Ndhlela* holds to be insufficient. Mr Shunmugam was

unable, in cross-examination, to offer any satisfactory explanation for the company's failure to place the order book itself before the court, particularly where it went to the trouble of introducing other documentary material (including material relating to the urgent compliance certificate application) during the trial. Nor was any audited financial statement, or indeed any financial statement at all, placed in evidence to substantiate the company's alternative or additional reliance on general financial distress.

[29] The company's answer, that the union had every opportunity to inspect the financial statements during consultation, and failed to do so, does not, in my view, meet the point. The union's conduct during consultation may be relevant to whether the consultation process was procedurally fair. It does not relieve the company of its independent, and separate, onus at trial to prove the operational requirement upon which it relies. An employer cannot convert an opposing party's failure to inspect information voluntarily tendered during consultation into a substitute for its own obligation to adduce, at trial, the evidence necessary to discharge the onus imposed by section 192(2). If the underlying order book and financial statements existed and supported the company's case, as Mr Sethosa's evidence that he had personally seen them suggests, there was no apparent obstacle, once litigation had commenced, to their production before this court, whatever difficulties may have attended their production for inspection by the union some years earlier.

[30] I accordingly find that the company has not proved, by credible evidence, the existence of the operational requirement on which it says it relied. That finding is, on its own, sufficient to dispose of the substantive fairness enquiry in the applicants' favour. I nonetheless deal, for completeness and because the point was fully argued, with the parties' submissions on alternatives and proportionality.

Alternatives to retrenchment

[31] I accept that an employer approaching retrenchment is not required to await the outcome of every conceivable legal remedy before acting, and that a degree of latitude must be afforded to a commercial party managing genuine

uncertainty. I do not, for that reason, find it inherently unreasonable that the company proceeded with retrenchment while the review application was still pending, rather than waiting an indefinite period for its outcome.

- [32] What is more difficult to reconcile with a genuine last-resort approach to retrenchment is the timeline concerning the compliance certificate. On the company's own chronology, by 28 July 2021 it knew that the Bargaining Council was prepared to issue a compliance certificate, and that the only obstacle was the absence of the union's consent, which had by then been refused. It knew, in other words, by the end of July, substantially what this Court would in due course be asked, and would be prepared, to order, as is demonstrated by the fact that when the company did bring the urgent application, on 5 October 2021, the matter settled within eight days on terms consistent with what the company had proposed as early as 8 June 2021. No satisfactory explanation was offered, either by Mr Shunmugam or Mr Sethosa, for the delay of some nine weeks between the union's refusal of consent and the launch of that application, a delay which spanned, and outlasted, the first batch of dismissals. Where an alternative is not merely available but is in fact pursued, successfully, within days once finally invoked, an employer's failure to invoke it before, rather than after, retrenching calls for explanation. None was forthcoming.
- [33] As to the company's own proposal, pro rata accrual of leave and bonus based on hours worked, I do not accept that the union's refusal to agree to it can be characterised, as the company would have it, as obstructive conduct falling within the mischief identified in *Viljoen v JSE Ltd*.¹⁸ The benefits in question were not a matter of the company's largesse; they had, by the time of the 8 June 2021 proposal, already been the subject of an adverse arbitration award holding the company liable to pay them in full for 2020, an award the company was in the process of challenging on review. A union cannot fairly be criticised for declining, mid-litigation, to agree by consensus to a departure from Bargaining Council-regulated entitlements which were themselves the subject of a pending review, particularly where, as events transpired, that

¹⁸ *Viljoen v JSE Ltd supra*.

review vindicated the company's underlying commercial position without requiring any sacrifice of the entitlement in question. The proper avenue for relief from that liability was the one the company was already pursuing, and, in respect of 2021, the exemption application it did eventually bring, successfully, after, rather than before, the retrenchment.

[34] I turn to TERS and the UIF scheme. The company's own evidence is that it "*did not reject the proposals made*". If that is correct, then the question is not why the company rejected them, but why, having not rejected them, it did not implement either as an interim measure. The explanations offered, a conditional agreement to TERS subject to there being no additional cost burden, and the suggestion, raised by reference to matters some years after the retrenchment, that the company could not have satisfied a turnaround-strategy requirement, sit uneasily with the contemporaneous record, which shows the schemes being resisted, during consultation, principally on the basis that they offered only short-term relief. That objection is difficult to sustain in circumstances where the company's own evidence is that its underlying difficulties were, on its version, capable of complete resolution through processes (the review application, the exemption application, the compliance certificate application) each of which was, in the event, resolved within periods ranging from days to some seventeen months, precisely the kind of interval which short-term bridging relief exists to cover. As to the UIF scheme, I accept that individual employees may have held reservations about depleting their own unemployment insurance credits; but a legitimate concern raised during consultation is not, without more, a rejection, and the record, including the union's follow-up correspondence maintaining the proposal as viable, does not establish that the scheme was definitively taken off the table by the workforce, still less that the company itself gave the proposal the serious, good-faith consideration which last-resort status demands.

[35] Taking these alternatives together, I am satisfied that at least the compliance certificate application, and arguably the bridging relief available through TERS and the UIF scheme, were viable measures which could have avoided or at least materially deferred the retrenchment, and which the company did not pursue, or pursue timeously, without adequate explanation. This constitutes an

independent basis on which the retrenchment falls to be found substantively unfair.

The request for a negative inference against the applicants

- [36] I do not consider it appropriate to draw a negative inference against the applicants from their decision not to call witnesses. The onus, throughout, rests on the employer. An applicant is entitled to test an employer's case by cross-examination and legal argument alone, and is not obliged to lead evidence in order to avoid an adverse inference where it is the respondent, not the applicant, who bears the onus of proof on the central issue. Nor do I consider that the union's acceptance of an informal invitation to inspect documents on the company's premises, rather than pursuit of a formal application under section 16 or section 189A(13), bears materially on the company's own, separate failure to prove its case at trial, for the reasons already given.

Proportionality

- [37] The evidence, such as it is, indicates that the liability said to underlie the retrenchment, the 2020 benefits award, amounted to some R1 million, a sum ultimately spread, on Mr Shunmugam's own reckoning, across the 171 individual applicants at a rate in the order of R5 847,95 per employee per annum, or roughly R487,33 per employee per month. The company led no evidence that it could not have afforded to meet this liability pending the outcome of its review application, nor evidence of its overall financial position from which such an inference might otherwise be drawn. Weighed against the severe and often irreversible consequences of retrenchment for the individual applicants and their dependants, and bearing in mind that the liability was, within some seventeen months, set aside on review in any event, I am satisfied that the retrenchment was disproportionate to the operational requirement relied upon, and that this constitutes a further, independent basis for a finding of substantive unfairness.

Selection criteria

[38] The applicants did not, in argument, press the fairness of the selection criteria applied as an independent ground of challenge, and I say no more about it save that nothing in the record suggests that the criteria applied were unfair, or that this issue affects the outcome.

Conclusion

[39] For the reasons set out above, I am satisfied that the company has failed to discharge the onus, imposed on it by section 192(2) of the LRA, of proving that the dismissal of the individual applicants for operational requirements was substantively fair. That failure is established, independently, on three bases: the company did not prove, through credible evidence, the operational requirement on which it relied; it did not properly pursue, or timeously pursue, alternatives which were, on its own version, available and capable of avoiding or materially deferring the retrenchment; and the retrenchment was, in any event, disproportionate to the operational requirement relied upon. Any one of these findings would suffice to dispose of the matter in the applicants' favour.

Relief

[40] Reinstatement is the primary remedy for a substantively unfair dismissal, and a court will depart from it only in the limited circumstances contemplated by section 193(2) of the LRA, the onus for which rests on the employer (*SACCAWU obo Members v Woolworths (Pty) Ltd*). The company led no evidence, and made no submission, directed at establishing that reinstatement would be inappropriate. I am not persuaded that the fact that a number of the individual applicants were subsequently re-employed provides any basis to withhold reinstatement, since re-employment on new terms, without continuity of service or backpay, is not equivalent to the restoration of the original employment relationship which reinstatement affords. There is no basis, on the record before me, to depart from the primary remedy.

[41] I therefore order that the individual applicants be retrospectively reinstated into the employment of the respondent, on the terms and conditions of employment applicable to them immediately prior to their dismissal, with effect from the date of their respective dismissals.

Costs

[42] Costs in this court do not follow the result automatically, and regard must be had to the requirements of the law and fairness, and to considerations including the relative resources and conduct of the parties. Having regard to the fact that this was a large-scale retrenchment affecting 171 individual employees, that the company's own failure to adduce readily available evidence lies at the heart of the outcome, and to the ongoing relationship between the parties, I consider it fair that costs follow the result, on Scale C, including the costs of counsel.

Order

[43] In the circumstances, I make the following order:

1. The dismissal of the second to further applicants for operational requirements is declared to have been substantively unfair.
2. The respondent is ordered to reinstate the second to further applicants retrospectively, with effect from the dates of their respective dismissals, on the terms and conditions of employment applicable to them immediately prior to their dismissal.
3. The respondent is ordered to pay the applicants' costs, including the costs of counsel, on Scale C.

N. Mahomed
Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: R. Itzkin, instructed by Cheadle Thompson & Haysom Inc.

For the Respondent: Mr PHH Loyson Service and Manufacturing Industries
Employers' Organisation

LABOUR COURT