IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case number: CCT 275/17
LAC case no.: JA56/2016
Labour Court case numbers:
J 3159/12 and JS1177/2012

In the matter between

SACCAWU **First Applicant**

C MOENG AND OTHERS **Second and Further Applicants**

and

WOOLWORTHS (PTY) LIMITED **Respondent**

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This case involves 44 workers (the Second and Further Applicants) who were retrenched in November 2012 by Woolworths. They were long serving employees, most of them employed as store cashiers. Represented by their union, SACCAWU (First Applicant), they challenged the fairness of their retrenchments in the Labour Court.

2. The Applicants' pleadings challenged the dismissal as being unfair on three grounds[1]:

    - In respect of *substantive* unfairness, Woolworths has failed to prove that the dismissal was for a *fair reason* based on the employer's

[1] Substantive unfairness is dealt with in the Statement of Case (in Labour Court case number JS1177/12) vol. 3 p 214 – 235). In respect of the unprocedural unfairness, the Applicants invoked s 189A (13) of the LRA – Notice of Application and Founding Affidavit (in Labour Court case number J3159/12) vol 1 p 1 ff. A consent order was granted by the Labour Court on 23 July 2013 (vol 3 p 213) consolidating the two cases for hearing.

operational requirements as required by s 188 (1) (a) (ii) of the Labour Relations Act 66 of 1995 ("the LRA");

- In respect of *procedural* unfairness, Woolworths has failed to prove that the dismissal was effected in accordance with a *fair procedure* as required by s 188 (1) (b); and
- It was further pleaded by the Applicants, in the alternative, that the dismissals were *automatically unfair* in contravention of s 187 of the LRA.

3. The last challenge – that the dismissals were *automatically* unfair in terms of s 187 (1) (c) of the LRA[2] – was not argued before, or decided by, the Labour Court or the Labour Appeal Court. This was because of decisions of the Supreme Court of Appeal (*NUMSA and others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) per Mpati DP and Cameron JA, as they then were, writing for the full Court) and the Labour Appeal Court (*Fry's Metals (Pty) Ltd v NUMSA and others* [2002] ZALAC 25 per Zondo JP, as he then was, writing for the full Court). The Applicants' rights were reserved to pursue that challenge, if need be, in the Constitutional Court in due course. However, the challenge based on automatic unfairness will not be pursued in this case.

4. The Labour Court, per Nkutha-Nkontwana J, upheld the Applicants' other challenges – namely that the dismissals were both *substantively* unfair and *procedurally* unfair. Woolworths was ordered to reinstate the 44 dismissed workers retrospectively from date of their dismissal without pay. The Labour Court also ordered Woolworths to pay the Applicants' costs.[3]

5. With leave to appeal granted by the Labour Court[4], Woolworths appealed to the Labour Appeal Court ("the LAC"). In its judgment[5], the LAC upheld only part of the Labour Court's findings and orders. The LAC, per Tlaletsi DJP, Landman JA and Phatshoane AJA, confirmed the Labour Court's decision that

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2 Section 187 (1) (c) of the LRA was amended with effect 1 January 2015 (i.e. after the dismissals in this matter) by the 2014 amendments to the LRA.

3 Labour Court's main Judgment vol 15 from p 1454. The order appears at p 1481 – 1482 para 77.

4 Labour Court Judgment on Leave to Appeal vol 15 p 1492 - 1493

5 LAC Judgment vol 16 from p 1505

the dismissals were *substantively* unfair. However, the LAC changed the *remedy* from reinstatement to an award of compensation equal to twelve months remuneration. The LAC further set aside the Labour Court's relief in relation to the claim based on unfair *procedure*. It made no order as to the costs of the appeal.[6]

6. The Applicants now apply to the Constitutional Court for leave to appeal parts of the LAC decision.[7] They seek to challenge the LAC's substitution of the 12 months remuneration compensation award for reinstatement, and the LAC's dismissal of the claim for relief based on procedural unfairness. They further seek an order confirming the Labour Court and LAC's finding that the dismissals were substantively unfair, as well as the Labour Court's finding that the dismissals were procedurally unfair.[8] For reasons set out near the end of these heads of argument, it is submitted that the matter raises important constitutional issues (particularly the meaning and effect of important provisions of the LRA designed to give effect to the constitutional rights guaranteed by s 23 of the Constitution); that the Applicants' arguments have a substantial prospect of success; and that it is in the interests of justice for leave to appeal to be granted to the Applicants.

7. Woolworths has brought a conditional counter-application for leave to appeal to the Constitutional Court. Only if the Applicants were to succeed in their application for leave to appeal, Woolworths seeks leave to cross-appeal those parts of the LAC decision and orders which went against it.

THE FACTUAL IMPACT ON WORKERS OF MANAGEMENT'S CHANGES

8. The individual Applicants – and some hundreds of other Woolworths workers - had for years been working according to relatively favourable working arrangements applicable to four categories of so-called "full-time" workers. Woolworths required that they should now accept a change to the working arrangements applicable to the 16 400 so-called Flexi-40 workers – as well as

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[6] LAC Judgment vol 16 p 1530 para [56]
[7] Notice of Application for Leave to Appeal vol 16 from p 1532 and Founding Affidavit from p 1535.
[8] Notice of Application for Leave to Appeal vol 16 p 1533 prayers 1 to 3

accept major changes to their salaries and other benefits. Failing that, they would be dismissed on the basis of retrenchment.

9. Trading days and hours for Woolworths store operations were changed to suit changing customer demands – as with other retailers. As Woolworths took on new workers, some were taken on under the so-called flexible working arrangements. By 2002, all new employees were employed exclusively on that basis. But the group of whom the individual Applicants were part continued on the same – more favourable – arrangements, for the next decade.

10. When management eventually decided to eliminate this anomaly, it required the affected workers to convert to the so-called Flexi-40 arrangement. The practical reasons for wanting to remove this anomaly have been explained by Woolworths. They will be addressed in argument in a later section of these heads.

11. For a proper understanding of the reasons for the individual Applicants' resistance to management's efforts, and in order to test the fairness of management's approach - and ultimately the fairness of the dismissal - it is appropriate at this stage to summarize the main effects of the changes demanded by management on the individual workers. The impact of these changes would have been significant.

12. If the workers had accepted their conversion to the Flexi-40 system, the impact would have been felt in three forms:
    - Changes to the hours and days when they would be required to work;
    - Changes to their salaries – for almost all workers, this would involve major salary reductions; and
    - Changes to other benefits.

Changes to Working Hours and Days, and the Effect on Workers' Family Lives

13. Woolworths' offer conveyed in the voluntary process entailed not merely a substantial drop in wages and related benefits. It also entailed a major change in the shift arrangements in the sense of working hours and days, and accordingly the time that workers would be off duty, and therefore able to be with their families.

14. These workers had over many years – in most cases, decades - followed a working arrangement requiring them to work on weekdays with hours generally from 08h00 to 17h00. They would – in terms of ordinary working hours at ordinary salary rates - work a total of 45 hours per week. On some occasions they would also be required to work on Saturdays - but not the whole day, only until lunch time. They would receive pay for Saturday work at overtime rates. Typically, they would never work on Sundays.

15. In terms of the Flexi-40 model, the new arrangement would require working fewer hours – 40 hours per work. But the timing of those hours was far more onerous: it would involve working many weekdays until the early evening, typically around 19h00 (instead of knocking off from work, as they had previously, at 17h00). In addition they would have to work every single Saturday, and three out of four Sundays. None of this would be rewarded with overtime pay, for payment for these times and days (previously not usually worked or, where worked, rewarded with overtime pay) was now included in the reduced standard salary.

16. This would have a dramatic effect on not only the workers' daily and weekly routines, but also their lifestyles and families. It would mean that the workers would not have any real time to spend with their families over most *weekends*: they would work every Saturday and most Sundays (they would be off duty only one Sunday out of four). Those who would normally attend church services on Sundays would now be able to do so only one out of four weeks. On most *weekdays*, they would work until late, into the early evening, only travelling home thereafter. They would have very little time left to spend with

their children and partners. Whereas previously they would typically be home by normal dinner-time, now they would reach home much later.

17. In summary, workers would face a dramatic change to their working and family lives. They would lose considerable time with their families, which they had previously enjoyed – evenings on most weekdays, and almost every entire weekend.

Applicants' Willingness to Change to the More Onerous Working Hours and Days Arrangement

18. Significantly, SACCAWU and its members were prepared to accept the required change to these new shift arrangements - meaning that the workers accepted that they would have a far more onerous working week, leaving little time to spend with their families.

19. What they could not accept, however, was that despite these far more onerous working days and hours, they would now also face a major reduction in their salaries and related benefits. They sought to hold Woolworths to continue paying them at their current wage and other benefit levels, in terms of their existing contractual entitlements.

20. The first and only stated reason for the conversion given by Woolworths initially, in the original s 189 notice[9], was the operational need for flexibility, entailing the conversion of all workers to the flexible working hours and days. It was stated that the reason was that "*The company needs to be in a position to employ employees who are able to be used on a flexible basis*". That issue was resolved when SACCAWU and its members agreed to change to these arrangements.

21. However, it later emerged that Woolworths expected workers who converted to the Flexi-40 system would be subjected also to changes in their salaries and

[9] Invitation to Consult vol 1 p 62 lines 11 – 12 and p 63 lines 2 - 5

other benefits. Initially, SACCAWU demanded that if the workers were to change to the Flexi-40 system, they should receive the same monthly rate for 45 hours even though they would now actually work only 40 hours (distributed under the far more onerous arrangement of working hours and days). This would ensure that their monthly earnings would not be reduced as an aggregate sum. But later, SACCAWU changed its demand: its members agreed to change to the more onerous Flexi-40 working hours and days and be paid at the same hourly rate as before, in terms of their contractual entitlements, for the 40 hours to be worked, rather than the previous 45 hours per week.

Salary Reductions

22. It is common cause that almost all of the relevant workers affected by the proposed changes which ultimately led to their retrenchment – 38 of the 44 individual Applicants – would, in terms of what Woolworths required, suffer a *substantial reduction in wages.*

23. The details are apparent from a schedule in Volume 15 of the Appeal Record at p 1453E. These yield the following factual summary.

24. Most workers – 38 of the 44 - would suffer a reduction - in most cases a major reduction.

25. The most compelling example is Kate Moloi, employee assigned number 32 on the list. She would suffer a drop in wages of 54% - in other words, she would now earn *less than half* of her salary. Her net monthly salary was R7 200. This would go down to R3 276 per month.

26. Woolworths has referred to the fact that Ms Moloi was earning more than two colleagues at the Menlyn store who were her supervisors. That does not detract from the stark reality that Ms Moloi was now facing: losing more than half her salary under her contractual entitlement – in addition to having to face much more onerous working hours and days.

27. Many others would also suffer a significant wage reduction. Fourteen individuals - a third of the 44 individual Applicants - would face a reduction of between 39% and 52%.

28. Apart from Kate Moloi, the details of the 14 others facing a drop in this range – a reduction of between 39% and 52% (based on the same spreadsheet vol. 15 p 1453E) - are as follows:
    - Worker Number 11 on the list: Susan Mogabe: a reduction of 39%;
    - Number 14: Sibongile Tau: 42%;
    - Number 17: Margaret Mphahlele: 44%;
    - Number 18: Peter Nkoana: 43%;
    - Number 19: Boy Sindane: 52%;
    - Number 24: Patricia Makela: 48%;
    - Number 27: Annah Mampane: 50%;
    - Number 29: Elizabeth Mnguni: 42%;
    - Number 31: Lesiba Molekwa: 41;
    - Number 36: Esther Rihlampfu: 42%;
    - Number 37: Helen Seipati: 42%;
    - Number 38: Philemon Sepeng: 48%;
    - Number 45: Belinda Kurfen: 46%;
    - Number 48: Nonhlanhla Phili: 48%.

29. The average reduction would amount to 28%. This average is calculated as follows: one takes the total of the twelfth column of the table at p 1453E headed “Income less Deductions” before the conversion to the Flexi-40 rates - a total of R261 334 - and divides this by 51 workers (the table reflects 51 workers who were dismissed – of whom the 44 workers represented in this case by SACCAWU form part). This gives an average of R5 124 p m per worker before the change. The fourth last column headed “Difference” gives the figures for the change in each worker’s net pay. This produces an average reduction of R1 416 p m. The net income after deductions before the change is therefore reduced by R1 416 pm to give the reduced net figure on average of R3 708 p m.

30. This change - an average reduction of 28% - is plainly serious. As seen above, in some individual cases, the reduction is much higher, almost or even over 50% - meaning that each of these workers would now get roughly less than half of her or his former salary. They would further lose the premium to which they were contractually entitled in the form of overtime rates, which applied to them when they worked on Saturdays.

31. A few – six out of the 44 workers - would, after the conversion, receive a net *increase* in salary. But this does not detract from the serious effect on the vast majority. In some of the six cases, those increases are insignificant. One employee - number 7 on the list - Bongani Ndaba – would get a fairly substantial increase. But his situation is certainly not typical. And, as with everyone else, his working hours would have changed considerably – he would now have to work into the evening most weekdays, every Saturday and three out of four Sundays. The increases for a few employees do not change the negative effect on the vast majority.

32. Furthermore, *each individual* worker is entitled, under s 23 of the Constitution and under the LRA, to the fundamental right to fair labour practices and protection against unfair dismissal. The fact that a few might have been better off cannot remedy the substantial prejudice which each would suffer, ultimately leading to their dismissal, which we submit was unfair.

33. The same applies to the fact (referred to by Woolworths) that a number of other workers in the full-time categories *accepted* their conversion to the Flexi-40 model. Their circumstances may have been different (such as their ages and length of service). And SACCAWU's Deputy General Secretary Mr Mbongwe, who was the Applicants' witness, testified about their realistic fears of dismissal – and the prospect of unemployment, which was highly likely given their age profile.[10]

[10] Mbongwe's evidence vol 10 p 925 line 10 – p 926 line 12; p 956 line 17 – p 957 line 15; p 982 lines 2 - 5

34. Ultimately, the fact that other workers accepted their conversion – or alternatives such as early retirement - is irrelevant. It cannot affect the fact that the further Applicants are 44 individuals who were unwilling to accept the conversion – because their financial and family lives would be seriously prejudiced. The fact that others may – in the face of the stark realities of unemployment - have "accepted" what may have been regarded as Hobson's choice cannot remove the unfairness to these 44 individuals or the serious prejudice they would suffer.

35. It is obvious that such a major reduction in wages for most of the workers would be devastating to the workers and their families (many of which are headed by women as sole breadwinners and mothers).

36. The workers typically had budget commitments that they could not simply drop, such as home loans, school fees, vehicle and other loans. All of the workers had been employed by Woolworths over many years - between 12 and 32 years - on average 20 years. (The details are analysed below.) They had received regular increases over the years. These increases were given even during the last five years (before they were retrenched), when management was doing its own internal planning, which led ultimately to the retrenchments. Management did not disclose to them during that period what was being planned or the consequences for them. Instead it continued to increase their existing salaries – in other words, it continued, and increased, the extent of the anomaly (the disparity between their salary levels and those who were already working under the Flexi-40 system).

37. During this period – and for many years before - the workers were given no indication or warning that their salary levels would have to be reduced to the level of their colleagues already working under the Flexi-40 system. The workers accordingly had reasonable expectations which were reinforced over the years. They budgeted, took on financial commitments and planned for their retirements, based on their ages, expected working life and pension benefits. All of this was done on the basis of their current contractually determined salary levels and other benefits.

38. Particularly where Woolworths was going through a strong period of financial success, growth and expansion – making substantial profits and preparing to open 24 new stores - there was no reason for any of these workers to anticipate that such a drastic change in their fortunes was imminent. They could not realistically plan for such a dramatic change in their fortunes.

39. The fact that Woolworths had been paying them differently in comparison with more recently recruited workers - employed from the start under the Flexi-40 system - cannot affect this. This anomaly was due solely to Woolworths' business practices. It was no fault of these workers. They were granted the benefits over many years. They planned their lives on that basis. They were entitled to expect that they would – in the absence of a drastic adverse change in Woolworths' fortunes (which was not what happened, nor was it likely or contemplated) - continue to work, in the ordinary course, until they reached retirement. And they were entitled to assume they would do so at their current levels of salary and other benefits.

40. The average age of the 44 affected workers was 50 years. The majority were in the age categories from 45 to 59 years. The youngest, Bongani Ndaba, was 38 years old (number 7 on the list at vol 15 p 1453E, number 8 on the list at vol 1 p 36). The oldest was Helen Seipati, who was 59 at the time of retrenchment. The number of years of service ranged between the lowest of 12 years and the highest 32 years. More than half of the total of 44 had at least 20 years service.

41. The age distribution of the individual Applicants was roughly as follows: approximately a quarter were between 55 and 59 years; about one sixth were between 38 and 44 years; and the rest between 45 and 54 years.

42. Typically, workers in their fifties or even mid to late forties would be settled in their current employment and not be "job-hopping", as often happens in that sector. Job-hopping is typical of younger workers, not those who are of the senior ages relevant here. This is especially so where workers of an average of

50 years would struggle to find other work. They would instead ordinarily continue to work until they reach retirement age, which was, for many of the individual Applicants, not that far away. Their financial planning would have been made on that basis.

43. They had secured terms and conditions of employment, in the form of salaries and other benefits, that had been achieved and maintained – indeed, increased – over many years through contractual agreement. These entrenched contractual rights represent an important element in the consideration of fairness.

Other Benefits Impacted Negatively

44. In addition to the major reduction in salaries that the conversion exercise would bring about, there would be a change in other benefits - in particular:
    - retirement benefits (the calculation of which would be affected by a substantial drop in income);
    - medical benefits (now restricted to panel doctors);
    - maternity benefits (11 months reduced to 6 months);
    - ante-natal leave (previously one day per month until commencement of maternity leave – now abolished);
    - post-natal leave (3 days for 6 months - abolished);
    - compassionate leave (5 or 6 days per incident – abolished);
    - paternity leave (5 or 6 days per incident – abolished);
    - moving leave (one day per move – abolished); and
    - study leave (10 days per annum – abolished).[11]

45. In relation to the maternity and related benefits, Woolworths pointed out that most of the 44 individual Applicants were beyond child-bearing age. But this does not affect the fact that some women (albeit in the minority) in the group of 44 were still of child-bearing age. Nor does it affect the fact that some of

[11] Benefits Differentiation table: vol 1 p 79 – as furnished by management together with its letter at p77 para 14

the 44 were men. The individuals concerned faced potential prejudice. Each individual was entitled to fairness.

Concluding Submissions on Overall Adverse Effects of Conversion to the Flexi-40 System

46. Overall, taking into account the change in working hours/days, the impact on family life, the major drop in the salaries for most, and the adverse changes to a range of benefits, it is clear that there were major prejudicial effects for the individual Applicants.

The Conversion Package Did Not Overcome the Major Prejudicial Effects

47. Woolworths offered a "conversion package" to workers who were prepared to accept the new working arrangement. But this did not compensate fully - or even substantially - for the major losses that would be suffered, both in terms of financial losses and in terms of changes in working hours and days that would affect their family lives.

48. The lump sum offered was initially R60 000, later increased to R70 000, per worker. The individual Applicants' average net earnings at the time were R6 961 per month. For a worker earning this average, the conversion package would equate to approximately ten months earnings. That would soon be wiped out - long before the workers would typically reach retirement. In any event, this calculation does not take account of the reduction in other benefits or the disruptions in family life due to more onerous working hours and days.

SUBSTANTIVE UNFAIRNESS

Legal Principles on Substantive Fairness for Retrenchments

49. The legal principles applicable to the requirement of substantive fairness in relation to retrenchments have undergone considerable development over the past few decades. There are useful surveys of this development in *Du Toit: Labour Relations Law* 6 ed (2015) from p 475 – 481; *Grogan: Dismissal* 2 ed (2014) from p 420 and Prof du Toit's article "*Business Restructuring and*

Operational Requirements Dismissals: Algorax and Beyond" (2005) 26 ILJ 595.

50. Originally, there was a considerable degree of deference by the Courts to the decision of the employer. It was sufficient if the employer genuinely had a reason to dismiss, which did not depend on the employer showing that dismissal could not be avoided, or that the business might not otherwise survive, or that it was making losses. It merely had to show that it was genuine in wanting to make changes it considered suitable for operational efficiency and increasing profits.

51. The traditional approach was summarized by Du Toit et al as follows:
"Under the previous LRA the courts showed a marked reluctance to 'second-guess' an employer's decision to dismiss employees on operational grounds. The early decisions considered a bona fide and non-discriminatory decision by the employer to be sufficient and, once that was established, would enquire no further into the merits of the decision…. Allowing the courts to enquire into the merits of management decisions would constitute an intrusion into managerial prerogative by an institution ill qualified to do so."[12]

52. That original approach has changed considerably over the years. Even under the previous statute (the Labour Relations Act 28 of 1956), the Appellate Division (as it was then called) in *Atlantis Diesel Engines*[13] had held that "*(f)airness in this context goes further than a bona fide and commercial justification for the decision to retrench."*

53. An important landmark in the development of this principle is the LAC's judgment in *BMD Knitting Mills (Pty) Ltd v SACTWU*[14] ("*BMD Knitting*"). Davis AJA (as he then was) stated that the approach of showing deference to the employer – a concept borrowed from the law of judicial review of administrative action - was not applicable to a decision to retrench workers, in

12 *Du Toit et al supra* p 475
13 *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC)
14 [2001] 7 BLLR 705 (LAC) para 19

the light of the fundamental requirement in s 188 (1) (a) of the LRA that the reason for any dismissal (including a retrenchment) be a fair reason.

54. It was further stated by Davis AJA in *BMD Knitting*:

"*The word 'fair' introduces a* ***comparator****, that is a* ***reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched.*** *To this extent the court is entitled to enquire as to* ***whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated.*** *Viewed accordingly, the test becomes* ***less deferential*** *and* ***the court is entitled to examine the content of the reasons given by the employer****, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court.* ***Fairness, not correctness****, is the mandated test."* [emphasis added]

55. In *County Fair Foods (Pty) Ltd v OCGAWU*[15], it was held that an employer was required to show a fair reason to dismiss, which required it to show that *"the dismissal* ***could not be avoided****."* [emphasis added]

56. It is therefore the Court that must determine - on an objective basis and without simply deferring to the employer - whether there was a fair reason to dismiss, and whether it could have been avoided.

57. The next landmark was in *CWIU v Algorax (Pty) Ltd*[16] *("Algorax"),* in which Zondo JP (as he then was) stated:

"The question whether the dismissal was fair or not ***must be answered by the court. The court must not defer to the employer for the purpose of answering that question.*** *In other words it cannot say that the employer thinks that it is fair, and therefore, it is or should be fair …. Furthermore,* ***the court***

[15] [2003] 7 BLLR 647 (LAC) para 27

[16] [2000] 11 BLLR 1081 (LAC) paras 69 - 70

should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic*…. The respondent's problem required simple common sense and did not involve any complicated business transaction or decision. Accordingly* ***where, as in this case, the employer has chosen a solution that results in a dismissal or in dismissals of a number of employees when there is an obvious and clear way in which it could have addressed the problem without any employees losing their jobs or with fewer job losses, 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 that solution which preserves jobs rather than one which causes job losses. This is especially so because resort to dismissal, especially a so-called no-fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort….****"* [emphasis added]

And, further in the *Algorax* judgment, it is stated:

"*Section 189 implied that* ***the employer has an obligation, if at all possible, to avoid dismissals of employees for operational requirements altogether or to 'minimize the number of dismissals', if possible, and to consider other alternatives of addressing its problems without dismissing the employees*** *… It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer to* ***only resort to dismissing employees for operational requirements as a matter of last resort****. If that is correct,* ***the court is entitled to intervene where it is clear that certain measures could have been taken to address the problems without dismissals for operational reasons or where it is clear that dismissal was not resorted to as a measure of last resort****."* [emphasis added]

58. In *Enterprise Foods v Allen and others* [17], the LAC endorsed the point that where there are two rational options available - one which would preserve jobs and the other which would not - fairness requires that the employer should

[17] (2004) 25 ILJ 1251 (LAC) para 17

adopt the former. To similar effect is the judgment of Nicholson JA in *General Food Industries Ltd v FAWU*.[18]

59. In the present case, the fairness of the dismissal is to be assessed under s 189A (19) of the LRA. Section 189A was brought into force in August 2002 by the Amendment Act 12 of 2002. Section 189A (19) was later repealed with effect from 1 January 2015 by the 2014 amendments to the LRA. Because the dismissals in this place took place on 4 November 2012, s 189A (19) is applicable.

60. Prior to this litigation, two cases dealt with s 189A (19). The first, in the Labour Court, is the judgment of Murphy AJ (as he then was) in *SATAWU v Old Mutual Life Assurance Co SA Ltd* [2005] ZALC 50, [2005] 4 BLLR 378 (LC) ("*Old Mutual*"). The other, decided in the LAC, is *NUM and another v Black Mountain Mining (Pty) Ltd* [2014] ZALAC 78 ("*Black Mountain*").

61. In *Old Mutual*, para 85 of the judgment suggests that a strong measure of deference is to be shown to managerial prerogative. It is submitted, with respect, that this is inconsistent with the current state of the law, which rejects the strong deferential approach. It should accordingly not be followed.

62. The *Black Mountain* judgment of the LAC, per Francis AJA (with Waglay JP and Dlodlo AJA concurring), confirmed that the deferential approach is no longer part of our law and that retrenchment must be a measure of last resort or the only reasonable option under the circumstances.

63. It is submitted that these conclusions in *Black Mountain* are, with respect, fully warranted. They are in accordance with the earlier authorities we have cited above, as well as those cited in the *Black Mountain* judgment itself. Section 189A (19) cannot be interpreted in a vacuum and without reference to the general principles set out in the earlier case law. The legislature must be presumed to have been fully aware of that case law in enacting s 189A (19).

[18] (2004) 25 ILJ 1260 (LAC) para 55

64. We accept that an employer wishing to retrench does not have to show that its business survival is actually under threat. But that is not the point here: the question remains whether, in terms of the other LAC decisions analysed above – in particular *Algorax* and *Black Mountain* - there were other options that were available, were reasonable and could have avoided job losses. For if there were, the retrenchment was unfair. In particular, in accordance with the *Algorax* dicta we have quoted above, where the employer has an alternative course which is reasonable, and it will save jobs, fairness dictates that it must follow that option – and retrenchment would be unfair.

65. While the case law does not require an employer to show it is making losses before it can retrench, the point in each case remains - as held in *BMD Knitting Mills, Algorax, Enterprise Foods* and *Black Mountain* – that it is not sufficient for the Court to decide the matter simply on the basis that the employer genuinely wants to make changes to its business operations or make bigger profits.

66. Woolworths argued in the courts below – and presumably it will adopt the same stance here - that all that it needs to show is that there was business sense in changing its shift arrangements and salary levels.

67. If that were so, it would be open to any employer simply to say that it wishes to make greater profits by reducing its salary levels - even where it is making a healthy profit - and saying to any workers who decline that reduction that it is fair to dismiss them.

68. The logic of that argument is concerning. It is manifestly unfair and unsound - and flies in the face of the LAC's recognition in the cases discussed above - in particular *BMD Knitting Mills, Algorax, Enterprise Foods* and, most pertinently, *Black Mountain* - that the Court must always determine whether a dismissal is fair. That, in turn, depends on whether it was proportional and whether it could have been avoided. Prof Darcy du Toit has suggested, in the article cited earlier ["*Business Restructuring and Operational Requirements*

Dismissals: Algorax and Beyond" (2005) 26 ILJ 595 at 612], that: "*The decision in Algorax .... marks a shift from the position to one more akin to a 'fair employer' standard. It implies that the court will not only require the decision to be one of a 'reasonable' range but will expect the employer to show that it was, in effect, the only viable option remaining after all other possible means of achieving its objectives had been rejected on reasonable grounds or exhausted.*"

69. An employer cannot be at large to reduce wages and other terms and conditions - agreed to contractually and over decades - through a retrenchment exercise.

70. In *Forecourt Express (Pty) Ltd v SATAWU*[19] *("Forecourt"),* the majority of the LAC bench (Zondo JP, as he then was, with Davis AJA concurring) confirmed that the employer in that case was entitled to choose the manner in which it runs its business - "***provided that it did not change the terms*** *and conditions* ***of employment*** *of the employees* ***without their consent***". [emphasis added]

71. The same judgment confirmed the *Algorax* and *Enterprise Foods* principle that it is unfair for an employer, in selecting a solution to deal with problems in its business, to choose an option that entails job losses if there is another solution which can satisfactorily address its problems without any job losses.[20] This remains the applicable test, in accordance with what was decided in *Algorax* and *Black Mountain.*

72. In the present case, the proviso in the passage appearing in the judgment in the *Forecourt* case quoted above is clearly not met. Woolworths' decision to change its working shift arrangements accompanied by a major reduction in salaries and other benefits constituted a drastic change in the workers' terms and conditions of employment without their consent. They consented to the changes in working hours and days, but not the huge changes in salaries.

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[19] (2006) 27 ILJ 2537 (LAC) para 39
[20] *Forecourt supra* para 28

73. In *Goldfields Logistics Ltd v Smith*[21] the LAC dealt with the retrenchment of a worker who refused to perform standby duties assigned by his employer. The worker, a diesel mechanic, was lawfully and fairly moved to a different section and required to perform standby duties. It was found that this was already part of his original contractual duties, as was the fact that all diesel mechanics - both he and all of his colleagues - were not entitled to any overtime pay. He now insisted on overtime pay. The employer refused to accede to his demands. When he refused to perform standby duties, he was retrenched. This, it was held, was fair.

74. The *Goldfields Logistics* case is to be contrasted with the present matter. In that case, the mechanic was refusing to perform work which he was contractually obliged to do on the already existing terms and conditions (which had always required him to work standby shifts, for which he was not entitled to overtime pay). As stated in para 35 of the *Goldfields Logistics* judgment, "*the employee no longer seeks to be bound by the agreed terms".* In the present case, by contrast, the affected workers were willing to change to the new shift arrangements, but on the basis that they would continue with their existing contractually agreed terms and conditions such as wages. It was the employer, Woolworths, that was seeking to impose a new and substantially reduced wage scale.

75. *Goldfields Logistics* reinforces the point that an employer whose employee refuses to accept existing wages already agreed can dismiss that employee, whereas an employer such as Woolworths cannot simply reduce wages and then retrench employees who seek to enforce their existing rights. The Court must determine objectively whether this is fair, in terms of the principles discussed above.

76. Accordingly, under applicable case law, an employer does not survive scrutiny simply by showing that the option chosen was one of a range of reasonable

[21] *Goldfields Logistics (Pty) Ltd v Smith* [2010] ZALAC 33

options. As the LAC cases cited above stress, the employer must accept the option which is the least destructive of jobs.

Applying the Legal Principles on Substantive Fairness to the Facts of this Case

77. In the *BMD Knitting Mills* case, Davis JA stressed that it is for the Court to determine whether the decision is reasonable and fair, not only when viewed from the perspective of – let alone deferring to - the employer, but also whether it is objectively reasonable and fair to the affected workers. This is of significance in the present context. The central criterion for adjudicating fairness is proportionality.

78. In *NEHAWU v Medicor (Pty) Ltd* [22], it was held that a Court's decision whether a dismissal was fair *"is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions."*

79. Tested against these criteria, we submit that the retrenchment was indeed unfair. The affected employees were loyal workers who had worked lengthy periods for Woolworths. (As seen earlier, the average period of service was 22 years. The lowest period of service was 12 years, while the longest was 32 years.) As held by the Labour Appeal Court, the purpose stated by Woolworths for the proposed retrenchment – the need to have all workers employed on a flexible basis in terms of hours and days – was achieved when the individual Applicants, represented by SACAWU, agreed to work the flexible hours and days required. There was no longer any need for retrenchments.

Flexibility in Shift Arrangements

80. We have dealt with this issue above. The need for flexibility in shift arrangements (working hours and days) was resolved when SACCAWU and the individual Applicants agreed to work according to the Flexi-40 model for working hours and days.

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[22] [2006] 1 BLLR 10 (LC) para 41

81. We noted earlier the significant point that there was only one reason for the proposed retrenchments given by Woolworths at the outset of the process: "*The company needs to be in a position to employ employees who are **able to be used on a flexible basis**."* [emphasis added]. This was the only reason furnished in Woolworths' section 189 (3) notice.[23]

82. That section requires the employer to give a truthful and comprehensive reason for the proposed retrenchment. An employer cannot add to or change those reasons later - for that would make a mockery of the consultation process. The position is comparable to the position under administrative law, which is based in this regard on considerations of fairness, as is labour law. An administrative functionary is bound by the reasons it furnishes at the time for the proposed or actual decision. It cannot rely on new reasons produced later[24], especially where it was required to give the affected party the opportunity to be heard on the proposed action and the reasons sought to justify it.

83. Yet that is what Woolworths has sought to do in this litigation. It has sought to add further reasons to seek to justify the retrenchments - the argument of equity (eliminating wage disparities between full-timers and flexi-timers) and cost efficiency. Accordingly, those additional reasons should be rejected on that basis alone. In the alternative, even if they were to be taken into consideration, they do not provide a tenable basis to justify the retrenchments, for the reasons we set out below.

Wage Inequality

84. During the trial, Woolworths sought to rely on the need to harmonize wage levels between the so-called full-time workers and the Flexi-40 workers.

85. That disparity was nothing new. Woolworths had been content to live with this disparity over a long period – for a full decade, at least since 2002. In that year

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[23] Vol 13 p 1300

[24] *National Lotteries Board v S A Education and Environment Project* 2012 (4) SA 504 (SCA) para 27

it decided not to employ any new workers on the old full-time model at the applicable wage levels. These levels were in any event not consistent - indeed, there were considerable disparities, as the schedule in vol 15 at p 1453E reflects.

86. Accordingly, these disparities had endured for over a decade. Why was it now necessary to remove the disparity? This is particularly so where it would seriously prejudice workers with existing contractual rights and long periods of service.

87. There is no rationality – or proportionality - in the decision which brought about the dismissal of highly experienced, long serving and loyal employees, who had been employed in terms of long established contractual terms over decades. As noted earlier, for the past decade they had continued to receive increases. They were never faced with the possibility of reductions to phase out the disparity, let alone warned of possible job losses. Their expectations of continuity were instead reinforced. They budgeted and planned their lives accordingly.

88. This is particularly so where Woolworths was not only doing very well financially, but it was undergoing a substantial growth phase. It was, on its own evidence, about to open 24 new stores, more than a 10% increase in the number of its stores, across the country.

89. Woolworths stated in evidence that this harmonization of shift arrangements had been in the planning stages for over five years. Yet, as noted earlier, it gave no warning of this to the full-time workers. Nor has it explained how it had waited over a decade while the disparity continued. Indeed, it reinforced the anomaly in the form of the disparity.

90. Woolworths has failed to give any credible or rational explanation as to why - where it had been content to continue with the disparity over the past ten years - it could not continue with that disparity until natural attrition, especially through retirement, achieved redress. This was especially so where the

individual Applicants were at a relatively senior age - on average 50 years, and some were close to retirement.

91. Further, there was no compelling financial need on the part of Woolworths to remove the pay disparity.

92. Nor was there any serious labour unrest compelling it to do so. At worst, on Woolworths' version, a few workers had grumbled about this during interviews. There was no pressing demand, let alone any threat of labour unrest or collective action such as a strike. No evidence to that effect was produced or even suggested. The evidence for SACCAWU that there was no serious problem in this regard [25] was not challenged with anything of substance. This is hardly surprising where the disparity had lasted for over a decade.

93. Further, the elimination of the disparity would not provide any material benefit to flexi-timers. It would simply reduce the earnings of full-timers, not increase those of flexi-timers.

94. The Labour Court, with respect, correctly found that there would be no violation of the Employment Equity legislation.

95. There was nothing to preclude Woolworths from continuing with the wage disparity because of the historical origin and justification. In any event, it could be phased out through measures other than dismissal.

Cost Efficiency

96. Woolworths has also argued that it was entitled to retrench because it would achieve financial benefits from removing the affected workers who were being paid more than those employed on the Flexi-40 basis. Again, this was not the purpose originally stated for the proposed retrenchments.

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[25] Mbongwe vol 10 p 926 line 18 – p 927 line 5

97. As discussed earlier, the mere fact that an employer may achieve cost efficiency is not decisive in the test to be applied by the Courts in assessing the fairness of the dismissal.

98. We have discussed earlier the fact that this was not a case where the employer was in dire straits – on the contrary, its business was growing in profitability and size.

99. Woolworths had not only survived, but it has prospered, despite the anomaly in the form of the wage disparity. The problem was lessening over time. The pool of full-time staff paid under the old regime was constantly diminishing over the past decade, as workers left for reasons such as retirement. There were only approximately 500 workers left under this regime – a minor number compared with the 16 400 employed under the Flexi-40 system. And only 44 remained in the pool who, while prepared to change to the Flexi-40 model entailing the new working hours/days, would not accept the reduced hourly rates.

100. Woolworths had been content to function with this disparity for over a decade. It has produced no evidence to justify why this should now suddenly want to achieve "cost efficiency" through this change or why the dismissal could in that light be justified as fair.

101. In any event, those factors did not constitute valid grounds to justify the fairness of the dismissal in the circumstances.

Availability of Alternatives to Dismissal

102. There were indeed realistic alternatives. These included *natural attrition* - the very model Woolworths had hitherto been following, allowing the phasing out of full-timers with only flexi-time arrangements to apply to new recruits over the past decade, since 2002. While they were being phased out through natural attrition, they could be – and were in fact – allowed to retain their current salaries and other benefits.

103. Further, even if there arguably had to be an adjustment of salaries (which we do not concede), there could be a financial phasing out approach, such as by not granting increases to full-timers while granting increases to flexi-timers. A plan could be adopted under the Employment Equity Act or otherwise.

104. None of this was attempted by Woolworths. No tenable reason has been advanced for its failure. Woolworths had the onus of showing that it exhausted all alternatives and that none was realistically available to it.

105. Both the Labour Appeal Court and the Labour Court were, we respectfully submit, correct in finding that Woolworths failed properly to consider and exhaust reasonable alternatives.

Concluding Submissions on Substantive Unfairness

106. In these circumstances, we submit that the decision to retrench was unnecessary, irrational and disproportional.

107. Particularly given their personal circumstances (ages, length of service, financial commitments etc.), it was highly prejudicial, disproportionate and grossly unfair to workers who had contractual rights to their salary rates, and who stood to suffer huge prejudice.

108. As seen earlier, the determination of whether the decision to retrench is not merely to be based on whether it is operationally justifiable - the element which was given great emphasis in Woolworths' approach to this litigation, at the expense of other considerations.

109. It is for the Court to determine the fairness of the decision - having regard not only to Woolworths' operational needs or desires, but also whether it is fair to the affected workers. This involves, ultimately, a moral judgment. And Woolworths bore the onus to show that the dismissals were for an objectively fair reason.

110. Accordingly, this Court should, we submit with respect, confirm the findings by the Labour Court, as well as the LAC, that Woolworths failed to discharge its onus to establish that there was a substantively fair reason for the dismissal.

111. If that is the conclusion of this Court, the question of the appropriate remedy then arises – to which we now turn.

REINSTATEMENT THE APPROPRIATE REMEDY FOR SUBSTANTIVELY UNFAIR DISMISSALS

112. As noted earlier, the Labour Court held, on the basis of its finding that the dismissals were substantively unfair, that "the primary statutory remedy" in the form of reinstatement (with retrospective effect) was the appropriate relief.[26]

113. The LAC reached a different conclusion - it upheld Woolworths' appeal in relation to the appropriate remedy, and substituted for reinstatement an award of compensation "*in an amount equal to twelve months of the remuneration due to each of the applicants*"[27].

114. The only reason given by the LAC for this variation of the relief was stated thus:

"*The usual remedy for substantive unfairness is an order of reinstatement. This is the remedy which the Court a quo ordered. In this case, as already alluded to, the full-time posts have become redundant and the respondents have conceded this. The result is that reinstatement is not feasible. This leaves compensation. We are of the opinion that compensation of an amount equal to 12 months of the remuneration due to each of the 44 full-timers should have been ordered.*"[28]

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[26] Labour Court Judgment vol 15 p 1481 para 75
[27] LAC Judgment vol 16 p 1529 – 1530 paras 53, 54 and 56 (order para 2.3)
[28] LAC Judgment vol 16 p 1529 para 53

115. The legal principle was, with respect, correctly recorded. This Court, in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[29] (per Nkabinde J, writing for the majority), said:
"*The ordinary meaning of the word 'reinstate' is to* ***put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy*** *in unfair dismissal disputes. It is aimed at* ***placing an employee in the position he or she would have been but for the unfair dismissal****. It safeguards workers' employment by* ***restoring the employment contract****. Differently put, if employees are reinstated they* ***resume employment on the same terms and conditions that prevailed at the time of their dismissal****…."* [emphasis added]

116. This was reaffirmed by this Court in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* [30] . Reinstatement is, however, not appropriate "*if circumstances surrounding the dismissal [were] such that a continued employment relationship would be intolerable'"* under s 193 (2) of the LRA, as observed in *South African Revenue Service v Commissioner for Conciliation, Mediation and Arbitration and others*[31].

117. The Supreme Court of Appeal in *Nel v Oudtshoorn Municipality*[32] quoted the dictum from *Equity Aviation* cited above and continued:
"*From the provisions of the LRA and the cases I have cited it is clear that by reinstating a dismissed employee the employer does not purport to conclude a fresh contract of employment. The employer must* ***restore the position to what it was before the dismissal****."*

118. The LAC in *Mediterranean Textile Mill v SACTWU and others*[33] stated:

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[29] [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) para 35
[30] [2010] ZACC 3; 2010 (5) BCLR 422 (CC); (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC) para para 26
[31] [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC) para 49
[32] [2013] ZASCA 37; (2013) 34 ILJ 1737 (SCA) paras 9 and 10
[33] [2011] ZALAC 23; [2012] 2 BLLR 142 (LAC); (2012) 33 ILJ 160 (LAC) para 26. See also *Myers v National Commissioner of the S A Police Service: Western Cape* [2014] ZALCCT 1; [2014] 5 BLLR 461 (LC) para 14

"*The term 'reinstatement' within the context of section 193 (1) (a) of the LRA entails placing a dismissed employee* ***back to his or her former position in employment as if he or she was never dismissed in the first place****. This is the essence of retrospective reinstatement as envisaged in section 193 (1)(a)….*" [emphasis added]

119. There was no real obstacle, in our respectful submission, to ordering reinstatement in this matter.

120. The only stated reason advanced by the LAC for refusal of reinstatement is that the full-time posts have become redundant and that this had been admitted by the present Applicants, and that accordingly reinstatement was not feasible.

121. These findings were (with respect) not warranted on the facts. There was no concession as suggested. The relevant positions such as cashiers in stores still exist. Woolworths' actions in dismissing the individual Applicants were (if our earlier submissions are accepted) without fair reason. Woolworths cannot now benefit from that unfairness. It can indeed be remedied by doing what the case law says reinstatement is aimed at doing – restoring the retrenched workers to their employment on the same terms and conditions as applied to them prior to their dismissal, to put them in the same position as if they had not been dismissed at all.

122. In relation to working hours and days they would, if reinstated, not revert to the old shift system. They (through SACCAWU) had already agreed that they would work according to the shift arrangements for hours and days according to the Flexi-40 model.

123. But there is no justifiable reason for refusing to restore their old salary hourly rates of remuneration calculated on the basis of the number of hours - 40 hours a week – to be worked, as well as their original benefits. This would accord with the principles recognized in the cases quoted above, which envisage restoring of the original salaries and related benefits.

124. To do otherwise would simply serve to allow Woolworths to benefit from its unfair conduct, and leave the retrenched workers without a fair and appropriate remedy. In *Billiton Aluminium*[34], Froneman J remarked that on the facts of that case, where it had been conceded that the action relied on did not provide a fair reason for dismissal: "*If it did not justify dismissal I find it difficult to understand why, at the same time, it could nevertheless provide a ground to prevent reinstatement. In short, on the facts on record before the commissioner there was simply no reason for him to deviate from the statutory default remedy of reinstatement from the date of dismissal…."* It is submitted that a similar approach is appropriate here.

125. If this Court upholds our submissions in relation to the dismissals being substantively unfair and retrospective reinstatement being justified, it would be unnecessary to address the remaining issue of procedural unfairness. However, in the event that our earlier submissions to that effect are not upheld, we now turn to deal with the procedural aspect,

PROCEDURAL FAIRNESS

Legal Principles on Procedural Fairness

126. The LRA requires in s 189 (2) that the employer and the other consulting parties (the union and its members) must, in the requisite consultation process, "*engage in a meaningful joint consensus-seeking process and attempt to reach consensus"* on the topics specified in s 189 (2) (a) to (c). The topic identified in s 189 (2) (a) is "*appropriate measures to avoid the dismissals; ... to minimize the number of dismissals;… to change the timing of the dismissals; and … to mitigate the adverse effects of the dismissals."*

127. The ultimate purpose underlying all the formal procedural steps specified in s 189 is to "*achieve a joint consensus-seeking process"*.[35] This, in turn, must be seen against the requirement identified in the context of substantive fairness - discussed in the earlier section of these heads in which we analysed the

[34] Referred to above, at para 29 of the judgment

[35] LRA s 189 (2); *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) para 27

relevant case law - to ensure that if there are reasonable means of avoiding dismissals, this should be achieved as far as possible.

128. The onus remains on the employer to follow a fair procedure as far as possible and arrive at a fair decision.[36] This requires an employer to initiate and engage in meaningful consultation as soon as it contemplates dismissal for reasons based on operational requirements.[37] Thereafter, the consultation process must be meaningful, and genuinely aimed at seeking consensus to avoid dismissals.

129. It also requires the employer to disclose relevant information, and provide meaningful cogent reasons for rejecting the union's representations or proposals.

Applying the Legal Principles on Procedural Fairness to the Facts

130. The process followed by Woolworths in this case was, we submit, in violation of those requirements, and accordingly procedurally unfair.

131. In relation to the ***lack of meaningful consultation***, it is important to analyse the steps undertaken by Woolworths and what each step involved, in the sense of what was up for discussion and who was invited or allowed to consult.

132. Woolworths undertook first what it has referred to as the "voluntary" phase. In that voluntary phase, Woolworths was insistent that SACCAWU, the workers' union, should not be involved at all. It was not even notified of the process to be undertaken or allowed to represent its members in discussions with management.

133. Management wrote to each individual worker personally[38] and not to the union. SACCAWU objected to this, and engaged in correspondence with

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36 Du Toit et al supra p 483
37 LRA s 189 (1)
38 Letter of 20 August 2012 vol 2 from p 179

management[39]. Management insisted that there would be no unilateral changes to terms and conditions of employment and that no retrenchments were contemplated at that time. It refused to engage with the union in any discussions for those reasons.

134. During the voluntary phase, there were no negotiations or consultations about the options that were offered. Workers were given various options already determined unilaterally by management. These options were simply advanced on a "take it or leave it" basis.

135. No doubt management did this because it wanted to ensure that it could ultimately argue that this was truly a voluntary engagement without the need to negotiate or consult with the union - it was a unilateral offer by management. If workers accepted this offer, this was purely voluntary.

136. When a substantial number of workers refused to accept any of those options, management moved to the consultation phase under s 189 of the LRA.

137. A fundamental problem with Woolworths' approach is that when it entered the consultation phase, ***management was not genuinely open to meaningful consensus-seeking***. For what was up for discussion, according to management, was a simple choice between two options: either workers should "offer" to take the options previously offered in the voluntary phase or they would lose their jobs.

138. The contents of the options still available were not up for discussion. As the minutes and the evidence make clear, ***management was not amenable to engage*** on this at all.

139. The ***options offered previously***, in the voluntary phase, ***could not be changed***, according to management, because it would cause problems for those employees who had already accepted one or other of those options during the

[39] Vol 1 p 52, 55 - 59

voluntary phase. No credible attempt has been made to justify why this could not have been managed - for example, by extending any improvements agreed to during the consultation phase to workers who had already accepted those options. That is what typically happens in strike situations.

140. In any event, what is crucial for present purposes is the fact that the content of the options and their benefits was not something management was prepared to deal with in the consultation process.

141. This was a fundamental problem - for the issue of avoiding retrenchments was inextricably tied up with what was contained in the options. One example - the most obvious - related to the issue of wage levels. If wage levels were to be reduced for those who accepted the option to convert from full-time to the flexi-time model, this could – and ultimately did - result in many workers refusing to accept the option.

142. This was hardly surprising where workers would face devastating changes to their financial positions if they were to accept that option. The other options were not suitable or applicable to many of the workers due to their ages etc.

143. As discussed earlier, management has ultimately sought to justify the retrenchments on a three-pronged basis: flexibility in shifts; equity and cost-efficiency (though only the first featured as the reason given for the proposed retrenchments).

144. If one assumes in its favour that all three of those "drivers" were genuinely reasons for retrenchment, it was crucial that they be up for debate and an attempt to seek consensus in the consultation process. Yet they were not.

145. In part, the reason for this was the very fact that ***Woolworths had already determined that the only option available*** to avoid retrenchment ***was to accept conversion*** to the flexi-time model - at the reduced wages already decided unilaterally by management.

146. Woolworths has repeatedly criticized SACCAWU for not presenting alternatives during the consultation process. But this is frankly a cynical criticism. SACCAWU did attempt to engage in consultation about the crucial issue - whether workers should suffer such a radical reduction in earnings when they converted to flexi-time shifts (which they were prepared to do).

147. SACCAWU in fact proposed that wages should not be reduced from the hourly rate currently applicable. That proposal would in fact have still resulted in a reduction in overall earnings as the workers would, after conversion, work fewer hours each week.

148. That was rejected by Woolworths - not after careful consideration and debate - but outright, as if SACCAWU's proposal were some impertinent approach, not amounting to any alternative.

149. The reason for its immediate rejection of the proposal out of hand was this: it was impossible, so management said, because other workers had already accepted the reduction in the voluntary phase. It was simply not up for discussion.

150. That rendered the consultation process a farce. It cannot conceivably be regarded as a true consultation in which the employer was engaging genuinely in an attempt to seek consensus to avoid retrenchments.

151. A further problem concerns the ***failure to engage in consultation when retrenchments were first contemplated***.

152. Woolworths' assertion that it genuinely did not contemplate dismissals during the voluntary phase is far-fetched and unrealistic, and falls to be rejected – as found (correctly, we submit, with respect) by the LAC. Ms Slabbert's assertion in evidence that she and her colleagues believed that every single one of the employees would definitely accept one of the voluntary options is frankly far-fetched.

153. This is particularly so where substantial numbers of workers faced a drastic reduction in wages and other benefits. There was, self-evidently, a serious risk that some of them would not accept the options. This is borne out by the fact that behind the scenes, management was hard at work, efficiently producing various documents - policy guidelines and instructions to management, as well as detailed notices to workers, including step by step processes to be followed for the consultation process as it would unfold. All of this was done well in advance. This would not have been done if – as Ms Slabbert contends – management genuinely believed there was no risk at all of rejection.

154. Serious doubt is also cast on management's version by the fact that a notice of retrenchment was issued prematurely to one of the workers, Mr Madikela, and another notice was issued in the form of an agreement "in full and final settlement"[40].

155. The explanation offered by Ms Slabbert was that the former was an error, a manager's frolic of his own[41]. But there is no explanation as to where the text of that letter might have come from, if not from head office. This is particularly so where the whole process was centralized at head office, which issued regular instructions, documents and the like. Why a manager would act independent of that, and oblivious to head office's process, is a mystery and highly improbable. The manager was never called to testify to provide an explanation.

156. The probabilities strongly favour a finding that the ***retrenchments were in fact contemplated from the outset - before the voluntary process was started***. That again rendered the consultation process for compulsory retrenchments a farce.

157. In relation to the ***disclosure of information***, the items that were not disclosed are identified in the Pre-Trial Minute vol 3 p 270 para 68.4.

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40 Vol 2 p 121 and 122 - 123

41 Transcript vol 8 p 805 lines 1 - 3

158. It is common cause that no information was disclosed on natural attrition rates or average ages of employees[42]. This was crucial to establish whether natural attrition was a suitable alternative. SACCAWU, in a letter dated 7 September 2012, requested information on attrition relating to full-timers specifically[43]. This was a relatively small group of workers. It was not furnished.

159. In relation to the pay scales of other workers, all that was provided were certain charts, which showed the broad range of salaries in the stores section. Nothing was provided for other sections. This information was important for purposes of considering the equity argument raised (at a belated stage) by management.

160. The failure to disclose this information provides a further instance of material unfairness in the procedure followed.

161. In relation to the dispute about what occurred at the fourth facilitation meeting on 29 October 2012, and the accuracy of the minutes, we submit that the probabilities favour SACCAWU's version.

162. SACCAWU at no stage waived any right or settled the issue of disclosure. It had repeatedly asked for the information beforehand. Management persistently failed to furnish it. Immediately after the meeting SACCAWU repeated its request for outstanding information. Accordingly it cannot be found that there was any waiver on the part of the union - particularly where the legal requirements for waiver are so stringent.

163. At best for Woolworths, it might be argued that there was a misunderstanding (which we do not concede). But even that would not absolve Woolworths of its failure to disclose information that was indeed relevant and necessary for purposes of a meaning consultation process.

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42 Pretrial Minute vol 3 p 262 paras 25 and 26

43 Vol 1 p 72 para 10.5

164. A further instance of material deficiencies in the procedure followed relates to the ***lack of meaningful reasons provided by Woolworths for its rejection of SACCAWU's representations***.

165. In truth, Woolworths did not seriously consider those representations. As submitted earlier, it was not even amenable to considering the issues.

166. Woolworths clearly pre-determined the outcome of the process. It went through the motions of the consultation process. This too renders the dismissals procedurally unfair.

JUSTIFICATION FOR THE GRANT OF LEAVE TO APPEAL

167. To determine whether leave to appeal should be granted, it is necessary to determine whether the matter raises a constitutional issue, and whether it is in the interests of justice for this Court to hear the merits of the case. Prospects of success are also relevant, though not a determinative criterion.[44]

168. This matter raises important issues of interpretation and application of sections of the LRA which give content to the right to labour practices guaranteed by s 23 (1) of the Constitution. They accordingly raise constitutional issues. Of particular concern are the issues relating to the basis on which the Courts should determine the substantive fairness of a retrenchment; the effect of s 189A (19) of the LRA; and the basis on which reinstatement should be granted, and the circumstances in which this may be refused.

169. These issues are of considerable importance: first, to the parties themselves; and second, to the development of jurisprudence for the benefit of, and in the interest of, stakeholders in labour relations generally. It is desirable that greater certainty on the relevant principles be achieved.

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[44] See for example *Equity Aviation*, *supra*, para 29 – 30.

170. It is therefore submitted that it is in the interests of justice for leave to appeal to be granted. Further, from the analysis of the various issues and arguments set out, it is submitted that the Applicants have substantial prospects of success.

CONCLUSION:

171. Based on what is set out above, we submit that this Court should grant the following order:

1. Leave to appeal is granted to the parties.
2. The Applicants' appeal is upheld.
3. The Respondent's conditional cross-appeal is dismissed.
4. The order of the Labour Appeal Court is set aside and amended to read:

" *(a) The appeal by the Appellant, Woolworths, is dismissed.*

(b)The orders of the Labour Court – including the decision that the dismissals were substantively and procedurally unfair - are confirmed, as is the award of reinstatement with retrospective effect from the date of the dismissal, without loss of pay.

(c) Woolworths is to pay the Respondents' costs of the appeal, including the costs of the application for leave to appeal to the Labour Appeal Court."

4. Woolworths shall pay the costs of the appeal and the cross-appeal, including the costs of the application for leave to appeal to the Constitutional Court.

PAUL KENNEDY SC
Applicants' Counsel

The Bridge Group of Advocates
Chambers
Johannesburg
2 April 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 275/17

In the matter between:

SACCAWU First Applicant

C MOENG AND OTHERS Second and Further Applicants

and

WOOLWORTHS (PTY) LTD Respondent

RESPONDENT'S HEADS OF ARGUMENT

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(1) INTRODUCTION

1. This case is about the substantive and procedural fairness of the dismissal of the 44 individual applicants by the company for operational requirements, and the issue of what relief ought to be granted to them (in the event of a finding of unfairness). This in the context of a large-scale retrenchment regulated by section 189A of the LRA,[1] and the statutory test for substantive fairness in the now repealed section 189A(19).

2. The individual applicants were retrenched after they refused – as an alternative to retrenchment – to convert from full-timers to flexi-timers on the (reduced) terms and conditions of employment applicable to 16 400 flexi-timers.

[1] Labour Relations Act 66 of 1995. Unless otherwise stated, all references to sections are to the LRA.

3. The retrenchment occurred in November 2012, at a time when section 189A(19) applied.[2] The section provided that, in a dispute about the substantive fairness of a large-scale retrenchment, the Labour Court "*must find that the employee was dismissed for a fair reason if*"-

> "(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
>
> (b) the dismissal is operationally justifiable on rational grounds;
>
> (c) there was a proper consideration of alternatives; and
>
> (d) selection criteria were fair and objective." (Own emphasis.)

4. The applicants first brought an application in terms of section 189A(13) challenging the procedural fairness of their retrenchment, and later referred a dispute challenging the substantive fairness thereof in terms of section 191.[3] The application and referral were consolidated and heard together by the Labour Court.

5. The Labour Court found the dismissal substantively and procedurally unfair, and ordered the retrospective reinstatement of the individual applicants.[4]

6. The company then appealed to the LAC.[5] It upheld the Labour Court's finding that the dismissal was substantively unfair (but on the narrow basis that there had not been a proper consideration of alternatives under section 189A(19)(c)); found that the Labour Court ought to have dismissed the section 189A(13) application in circumstances where relief was granted for substantive

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[2] It was introduced into the LRA in 2002 and was deleted by way of the 2014 amendments.

[3] The applicants also challenged the retrenchment as being automatically unfair in terms of section 187(1)(c), but this is not persisted with.

[4] LC judgment: vol 15, pp 1454-1483.

[5] LAC judgment: vol 16, pp 1505-1531.

unfairness; and found that the Labour Court ought to have awarded compensation instead of reinstatement (because the full-timer positions are redundant). The appeal was thus upheld in part and dismissed in part.

7. The union now appeals against the LAC's judgment, with the company cross-appealing. As the applicants have done in their heads, the applications are dealt with together below.

8. For reasons dealt with at the end of these heads, it is submitted that leave to appeal and cross-appeal ought to be granted. The matter raises a constitutional issue and involves arguable points of law of general public importance which ought to be considered by this Court.

9. In summary, the company submits as follows:

9.1 In relation to substantive fairness, there are two main issues: firstly, whether the dismissal was operationally justifiable on rational grounds in terms of section 189A(19)(b); and secondly, whether there was a proper consideration of alternatives in terms of section 189A(19)(c). If these issues are determined in favour of the company, then in terms of section 189A(19), the dismissal "*must*" be found to have been for a fair reason.

9.2 In its judgment, the LAC found (implicitly) that the dismissal was operationally justifiable on rational grounds. This finding cannot be faulted, in circumstances where the offer made to the individual applicants to convert to flexi-timers on terms and conditions applicable to 16 400 flexi-timers (together with a compensatory payment of R70 000) was patently operationally justifiable on rational grounds. Not only did the

conversion result in a saving of R23-million per annum (3.7% of the company's wage bill), but it served to achieve equality in terms and conditions of employment amongst employees who were doing the same work – this in the context of a career path plan that the company was implementing.

9.3 Turning to the issue of a proper consideration of alternatives, the LAC found against the company on this score (and thus that the dismissal was substantively unfair) on two grounds: firstly, that the company had erred in failing to consider a last-minute proposal tabled by the union; and secondly, that the company ought to have considered ring-fencing the wage rates of the individual applicants. Both of these findings are wrong. The company did consider the union's last-minute proposal, but misunderstood it – this in circumstances where the union refused to clarify or explain it. In any event, the proposal did not adequately address the company's operational requirements. And as for the issue of ring-fencing, this was not raised by the union during the consultation process or trial; nor was there any evidence to establish that it was workable (which it was not).

9.4 In relation to procedural fairness, the issue is only (really) relevant insofar as this Court finds that the dismissal of the individual applicants was not substantively unfair. This is so because where there is a finding of substantive unfairness and an award of maximum compensation (as ordered by the LAC) or reinstatement (as ordered by the Labour Court), additional relief for procedural unfairness cannot be ordered.

9.5 In any event, insofar as procedural fairness is an issue, although it did not do so in definitive terms, it is apparent that the LAC was not persuaded by any of the findings made by the Labour Court – and correctly so.

9.6 Finally, in relation to the relief granted by the LAC, which would only arise if this court upholds the LAC's finding of substantive unfairness, the LAC was correct not to order that the individual applicants be reinstated. This is so because in circumstances where the full-timer position no longer exists (it being redundant), reinstatement was not reasonably practicable in terms of section 193(2)(c).

9.7 In the result, the company seeks an order to the effect that the dismissal of the individual applicants was substantively and procedurally fair; alternatively, an order dismissing the applicants' appeal.

(2) FACTUAL OVERVIEW

10. The individual applicants were all so-called full-time employees, which comprised these types of employees: full-timers; part-timers; key-timers; and rollers. They worked fixed hours typically totalling 45 hours per week – this within the company's chain of corporate stores.[6]

11. In 2002, the company stopped employing full-time employees, and from then onwards only employed flexi-time employees.[7] Flexi-time employees work flexible hours which correspond with the peak trading hours of stores, which

[6] LAC judgment: para 2.
[7] The individual applicants were thus all employed before 2002.

flexibility is not provided (to differing degrees) by the four types of full-time contracts. Typically, they work 40 hours per week.[8]

12. As at mid-2012, the company employed some 16 400 flexi-timers and 590 full-timers throughout its some 200 corporate stores. The pay rates (and benefits) applicable to the full-timers (comprising 3.5% of the workforce) were substantially higher than those applicable to flexi-timers. Full-time employees and flexi-timers did the same work.[9]

13. In July 2012, the company embarked upon a staff career paths project. The project involved implementing a formal grading and remuneration system, and plotting a career path for employees within corporate stores. This was done with a view to improving the so-called EVP[10] – the aim being to retain staff and address the high rate of attrition. Amongst the problems that gave rise to the initiative were complaints by flexi-timers that full-timers – who were doing the same work as them – were being paid more.[11] Ultimately, a grading system (CS1 – CS5) and a remuneration system (the minimum, median and upper rates being set at the 25th, 50th and 75th percentile, respectively) were implemented.[12]

14. In parallel with the career paths project, and, in effect, as part of it, the company also embarked upon a project aimed at converting the remaining 590 full-timers to flexi-timers on standardised terms and conditions of employment ("the conversion project"). The conversion project was based (according to the company) on three drivers – the operational requirements of (1) flexibility,

[8] LC judgment: para 5. LAC judgment para 2.
[9] LC judgment: para 5. LAC judgment: para 3.
[10] Employee value proposition.
[11] Slabbert: vol 4, p 314, lines 20-25; p 317, lines 19-20; p 319, line 15 – p 320, line 15.
[12] Bundle D: vol 15, pp 1438-1444. LC judgment: para 6.

(2) cost efficiency, and (3) equality.[13] This is borne out by the briefing materials prepared by the Yoda task team,[14] the minutes of the first conciliation meeting,[15] and the terms upon which the company rejected the union's proposal made at the first CCMA facilitation meeting that remuneration and benefits remain unchanged.[16]

15. The conversion project was split into two phases: firstly, a voluntary phase (during which full-timers were offered a number of options – conversion, voluntary severance, early retirement, etc) which ran from 20 August to 3 September 2012; and, secondly, a section 189A phase, which ran from 4 September to 4 November 2012.[17]

16. For present purposes, the final offer made by the company during the voluntary phase in an endeavour to encourage employees to convert to flexi-time contracts warrants mention. The offer was modelled on the terms and conditions of employment applicable to the 16 400 flexi-timers (comprising 96.5% of the company's hourly-paid workforce). Convertors would be remunerated at the 75th percentile of the hourly-rate applicable to the grade in which the employee's job fell; granted the same benefits as applied to flexi-timers;[18] and paid a conversion payment of R70 000.[19] The fact that convertors were paid at the 75th percentile meant (in statistical terms) that they earned an hourly-rate that was higher than 75% of the flexi-timers in their grade.

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[13] Slabbert: vol 4, p 312, lines 18-25. LC judgment: paras 7 and 24. LAC judgment: paras 27(b) and 39.
[14] Bundle D: vol 13, p 1292, 2nd para.
[15] Bundle D: vol 14, pp 1355-1356.
[16] FA, annexure FA16: vol 1, p 84, paras 1 and 2.
[17] Slabbert: vol 3, p 310, lines 8-13. LAC judgment: paras 4-5.
[18] FA, annexure FA13: vol 1, p 79. Bundle D: vol 15, pp 1451-1452.
[19] Bundle D: vol 13, p 1284, para C. LC judgment: para 8.

17. During the voluntary phase, some 413 employees (70%) accepted one of the voluntary options, leaving a balance of 177 employees (30%). During the section 189A phase, another 85 employees (48% of the 177) accepted a voluntary option at their initiative, leaving a balance of 92 employees (16% of the original 590), who were ultimately retrenched.[20] The 44 individual applicants were amongst the forced retrenchments.[21]

18. At the time, the union had 15% membership at the workplace. This equated to about 2500 members – the split being 173 full-timers[22] (which equated to 29% representation within this category) and some 2300 flexi-timers (which equated to some 14% representation within this category). Of the union's 173 members in the full-time category, only 44 of them (25%) did not take up a voluntary option – they are the individual applicants herein.

19. The company did not involve the union in the voluntary phase – this in circumstances where the union had not secured collective bargaining rights and had only managed to secure basic organisational rights (access and stop orders).[23]

20. As it had 51 members affected by the contemplated retrenchment,[24] the company consulted with the union during the section 189A phase.[25] During this phase, the section 189A(3) facilitation route was followed, with the phase enduring for the 60-day period provided for in section 189A(7) – commencing

[20] Bundle D: vol 15, p 1431.
[21] LC judgment: paras 11-12. LAC judgment: paras 4-6.
[22] Bundle D: vol 15, p 1420.
[23] Bundle D: vol 13, pp 1237-1243.
[24] FA, annexure FA1: vol 1, p 36.
[25] LC judgment: para 13. LAC judgment: para 5.

with the issuing of section 189(3) notices on 4 September 2012[26] and concluding with the issuing of notices of termination on or about 4 November 2012.[27] A total of five facilitation meetings were held under the auspices of the CCMA, namely on 21 September, 5 October, 26 October, 29 October, and 3 November 2012.[28]

21. The events of the facilitation meetings are by and large common cause, save for the fourth meeting, in respect of which there is a dispute about whether the parties agreed that only one item of information remained outstanding[29] – it being the company's case that such an agreement was reached, which the union disputes.

22. During the section 189A phase, the union conceded that the company's operational requirements dictate that the individual applicants should be employed on flexi-time contracts.[30] An attempt was then made to reach consensus on the terms and conditions of employment applicable to convertors – this as an alternative to retrenchment.

23. In this regard, during the course of the section 189A phase, the company was prepared to allow employees to come forward and accept one of the voluntary options of their own accord.[31] The relevant correspondence and minutes reflect

[26] Bundle D: vol 13, pp 1300-1303.
[27] FA, annexure FA30: vol 2, pp 122-125.
[28] Bundle D: vol 14, pp 1355-1362. There is a dispute about the accuracy of the minutes of the fourth and fifth facilitation meetings.
[29] LC judgment: para 14.
[30] This occurred as early as the first facilitation meeting on 21 September 2012 – see bundle D: vol 14, p 1356, 2nd para. LC judgment: para 14. LAC judgment: para 6.
[31] Bundle D: vol 14, pp 1308-1309, para 4.

that the company is on record as having urged the union to persuade its members to take up one or other of the voluntary options.[32]

24. From the outset of the consultation process which was initiated on 4 September 2012 right up until 30 October 2012 – a period of almost two months – the union adopted the position that no loss of remuneration or benefits would be entertained.[33] The effect of this was that the individual applicants were prepared to convert to flexi-time hours (40 hours), but still wanted to be paid for 45 hours at their existing (hourly) wage rates and benefits.

25. But on 30 October 2012 – a few days before the elapse of the 60-day period – the union proposed the following:[34]

> "A. Conversion of key-time employees to flexi-28 contracts at their current monthly salary as a minimum, with additional hours paid at their new hourly rate, with no loss of additional benefits;
>
> B. Conversion of full-time employees to flexi-40 contracts at their current hourly rates with no loss of other benefits;
>
> C. Any employee who experiences any downward variation as a result of proposal A and / or B should be paid a conversion allowance of R40 000." (Own emphasis.)

26. Although the company misinterpreted it at the time, the underlined sentence reflects that the individual applicants were now prepared to be paid for 40 hours worked (as opposed to 45 hours), but still without any reduction in their

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[32] Bundle D: vol 14, p 1356, 5th last para. FA, annexure FA16: vol 1, p 84, last para. FA, annexure FA22: vol 1, p 98, last para.
[33] LC judgment: para 14. LAC judgment: para 6.
[34] FA, annexure FA27: vol 2, p 118, para 20. LAC judgment: para 6.

wage rates and benefits. In effect, this equated to an 11% reduction in remuneration.[35]

27. Ultimately consensus could not be reached, and retrenchments ensued – the individual applicants having been retrenched on or about 4 November 2012.[36]

28. Through the process of conversion, the company effected a saving of R24-million per annum on an ongoing basis (i.e. year-on-year).[37] This equated to 3.7% of the company's wage bill.[38]

29. The company no longer has any employees on full-time contracts; all employees are on flexi-time contracts.[39]

(3) FOCUSING ON THE PARTIES' PROPOSALS

30. Given that a key issue in this matter is, in effect, whether the proposal made by the company – as an alternative to retrenchment – was "*operationally justifiable on rational grounds*" (this being the section 189A(19)(b) test), the issue is focused on below.

31. From the company's perspective, its proposal met this test in the light of the following facts:

[35] LAC judgment: para 6.
[36] LC judgment: para 15.
[37] Slabbert: vol 4, p 341, lines 11-17. LAC judgment: para 27(e).
[38] Slabbert: vol 9, p 824, lines 1-4. LC judgment: para 30.
[39] Slabbert: vol 3, p 303, line 24 – p 304, line 2. LAC judgment: para 53.

31.1 The company's proposal followed upon a comprehensive process of consultation undertaken on an individual basis with employees at store level – feedback having been received, and the offer having been increased accordingly.[40]

31.2 The company's proposal was modelled on the remuneration and benefits applicable to 16 400 flexi-timers in its employ. This had been benchmarked within the retail industry.[41]

31.3 The individual applicants were offered an hourly wage-rate on the 75th percentile applicable to their grade, which was the upper quartile on the remuneration system.[42] The majority of the individual applicants held CS2 positions. In that grade, 84% of flexi-timers were paid below the 75th percentile.[43]

31.4 The extent of the downgrading per individual applicant was in direct proportion to the extent that he / she had been earning in excess of the 75th percentile applicable to his / her grade.[44] So, for example, while Ms Moloi would receive a 54% reduction in her hourly rate (from R44.77 to R22.62), she had been earning 54% in excess of the 75th percentile applicable to her grade (CS2).[45]

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[40] Bundle D: vol 13, pp 1283-1285.
[41] Slabbert: vol 4, p 366, lines 13-19.
[42] Bundle D: vol 15, p 1442.
[43] Bundle D: vol 15, p 1434.
[44] Slabbert: vol 9, p 818, lines 19-25.
[45] Bundle D: vol 15, p 1453E.

31.5 The extent of the downgrading was also required in order to address the wage anomalies that gave rise to the concerns about inequality. Again, to use Ms Moloi as an example (she having worked at the Menlyn store):[46]

31.5.1 As a grade CS2 employee, she was earning a wage rate in excess of all six of the individual applicants who were graded as CS5 (supervisory positions).

31.5.2 She was earning R44.77 per hour, while two of the supervisors at the Menlyn store were earning an hourly rate of R38.02 (Mr Moloisane[47]) and R39.20 (Ms Kgobo), respectively.

31.5.3 Ms Moloi was 55.02 years old and had 17.90 years' service, while Mr Moloisane was 49.75 years old and had 28.81 years' service. Despite having more service (by ten years) than Ms Moloi and despite being three grades up from her and occupying a supervisory position, he was earning an hourly rate 15% less than her.[48] The downgrading addressed this.

31.6 The extent of the downgrading was also required in order to bring the wage rates within each grade into sync. So, for example, using the individual applicants' rates as a basis, the (old) range in respect of grade SC2 varied from R25.79 per hour to R47.45 per hour – this being a (huge) 45% differential.[49]

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[46] Bundle D: vol 15, p 1453E. Slabbert: vol 9, p 819, line 5 – p 820, line 2.
[47] He withdrew as an individual applicant.
[48] Mbongwe: vol 12, p 1136, line 18 – p 1137, line 11.
[49] Bundle D: vol 15, p 1453E. Slabbert: vol 9, p 820, lines 3-14.

31.7 The average (old) salary of the individual applicants was R5 124, which dropped to a (new) salary of R3 708 – a drop of R1 416, equating to 28%.[50] (But given that the union was prepared to agree to an 11% reduction, the average reduction was 17% more than what was proposed by it.) The R70 000 conversion payment would have funded the (average) drop of R1 416 for 49 months (subject to taxation on the conversion payment).[51]

31.8 The salaries of eight of the individual applicants went up, and six of them would have received a decrease of 15% or less (bearing in mind that the union's proposal equated to a reduction of 11%[52]).[53] This is more than a third of the individual applicants.

31.9 The average age of the individual applicants was 50,[54] with eight of them being 55 or older.[55] For those individual applicants who were approaching retirement (at 60), the conversion payment became increasingly more attractive. Put differently, they were not that badly off.[56] (A prime example of this is Ms Seipati, who was only ten months away from retirement.[57])

[50] Mbongwe: vol 9, p 837, lines 18-23.
[51] R70 000 divided by R1416 = 49.4.
[52] Mbongwe: vol 10, p 1001, lines 5-7.
[53] Bundle D: vol 15, p 1453E.
[54] Mbongwe: vol 9, p 835, line 17.
[55] FA, annexure FA1: vol 1, p 36 (original list).
[56] Mbongwe: vol 10, p 1005, lines 2-5.
[57] Mbongwe: vol 10, p 1001, line 12 – p 1002, line 16.

31.10 The main concerns advanced by the union regarding benefits related to maternity leave, pension benefits and medical aid benefits. The concern about the reduction in maternity benefits must be assessed in the light of the average age of the individual applicants (50). The effect on pension benefits (and those tied to them) was that they would be reduced *pro rata.*[58] And the only real difference (and complaint) in relation to the medical aid is that Discovery has a panel of medical practitioners (with no issue having been made of this during the cross-examination of Mrs Slabbert).[59]

31.11 As stated above, from a cost efficiency point of view, the company effected an annual saving of R24-million, which equated to a saving of 3.7% on its wage bill. This was a year-on-year saving.

32. Turning now to the union's proposal (see para 25 above), it was, in submission, wholly inadequate. This much appears from the following evidence given by Mr Mbongwe (of the union) under cross-examination:

32.1 He conceded that the company had a problem in relation to wage inequality and was entitled to address it, and that the company was entitled to engage in the conversion project with a view to maximising cost efficiency.[60]

[58] Mbongwe: vol 12, p 1162, lines 8-20.
[59] Slabbert: vol 5, p 453, lines 2-4. Mbongwe: vol 12, p 1161, line 25 – p 1162, line 1; p 1170, lines 6-18.
[60] Mbongwe: vol 12, p 1130, lines 14-20; p 1132, lines 2-5.

32.2 He went on to concede that, in designing its final proposal, the union disregarded these legitimate issues.[61]

32.3 He also conceded that the union's final proposal did not resolve the wage inequality issue, and did not address at all the cost inefficiency issue.[62]

32.4 He also conceded that the final proposal made by the union (using Ms Moloi as an example) did nothing to address the wage anomalies that were present.[63]

32.5 With the benefit of hindsight, he conceded that the final proposal made by the union was inadequate.[64]

32.6 By way of contrast, he accepted that the company's voluntary offer addressed the anomalies in the wage rates.[65]

32.7 Having been invited to put forward a revised alternative proposal to the court, he stood by the union's final proposal, despite the concessions that he had made.[66]

32.8 He confirmed that the union had an in-principle objection to any reduction in salaries and benefits, but stated that the final proposal could have led to reductions.[67]

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[61] Mbongwe: vol 12, p 1131, line 5 – p 1132, line 5.
[62] Mbongwe: vol 12, p 1139, line 24 – p 1140, line 5.
[63] Mbongwe: vol 12, p 1139, lines 10-16.
[64] Mbongwe: vol 12, p 1140, lines 17-24.
[65] Mbongwe: vol 12, p 1141, lines 5-9.
[66] Mbongwe: vol 12, p 1144, lines 16-20.
[67] Mbongwe: vol 12, p 1144, lines 4-9.

(4) THE *RATIO* OF THE LAC'S JUDGMENT

(a) Procedural fairness

33. The LAC made these main findings on procedural fairness:

33.1 While it rejected the notion that the company had contemplated that every full-timer would accept the voluntary offers put to them (thus excluding a contemplation of retrenchment), it found that this had not rendered the facilitated consultation process unfair. This in circumstances where that process took at least 60 days and there was no prejudice to the individual applicants.[68]

33.2 It found that whereas the Labour Court had construed the company's misunderstanding of the union's final proposal (which the LAC described as "*very serious*") as an issue pertaining to procedural fairness, it was probably an issue related to substantive fairness.[69]

33.3 It referred to the Labour Court's finding that the company had failed to disclose information relevant to the process of determining appropriate and fair terms and conditions of employment for the individual applicants, but does not appear to have made a finding regarding the correctness or otherwise of that finding. Instead, the LAC remarked, in general terms (but not with reference to the matter at hand), that "*[w]here one*

[68] LAC judgment: para 19.
[69] LAC judgment: paras 20-23.

consulting party is kept in the dark about matters relevant to the issue at hand it will be procedurally unfair".[70]

33.4 It appears not to have considered the fact that Mr Madikela was issued with his termination letter one day early to have given rise to procedural unfairness (this different to the Labour Court's finding).[71]

33.5 Ultimately, it held:

> "When a judgment is granted in respect of the substantive fairness of the s189A retrenchment an order granting relief for procedural fairness is no longer competent. The fact that the parties may have agreed to try both issues simultaneously and the Labour Court sanctioned it is of no legal consequence."[72]

34. The LAC thus does not appear to have made definitive findings, in the body of the judgment, on the question of procedural fairness which was ventilated in the appeal. The findings referred to in paras 33.1, 33.2 and 33.4 above suggest that the LAC did not consider the individual applicants' retrenchments to be procedurally unfair, while the finding referred to in para 33.3 above appears ambivalent.

35. With reference to the finding referred to in para 33.5 above, it appears that the LAC ultimately concluded that the question of procedural fairness was moot as no relief could flow from a definitive finding on the issue.

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[70] LAC judgment: para 25.
[71] LAC judgment: para 24.
[72] LAC judgment: para 26.

(b) Substantive fairness

36. The LAC made these main findings on substantive fairness:

36.1 It held that the test for substantive fairness in a case where section 189A applies, is grounded in section 189A(19). It is worded in "*peremptory terms*", providing that the Labour Court "*must find*" that the employee was dismissed for a fair reason if the four listed factors are present.[73]

36.2 The LAC did not uphold the Labour Court's finding that the dismissal was not "*operationally justifiable on rational grounds*", and implicitly found that it was.[74]

36.3 The only factor which the LAC appears to have found to have been absent was that pertaining to "*a proper consideration of alternatives*". The LAC held:[75]

> "SACCAWU approached the consultation on retrenchment on the basis that its members who were full-time workers of Woolworths would convert to flexi-time work, but maintained, initially, that the remuneration and benefits should remain the same. Its proposal mutated to one in which the full-time workers would accept an 11% reduction in remuneration while working flexi-time. SACCAWU pursued the consultation on a collective basis but the problem lied [sic], as far as the wage component of remuneration is concerned, only with those who would earn a lesser wage.
>
> Woolworths did not understand that SACCAWU's last alternative proposal, set out in its letter of 30 October 2012, differed from its previous proposal regarding an alternative to avoid dismissal. When a proposal is misunderstood and therefore not explored it means that the employer has not shown that this alternative had been properly considered."

[73] LAC judgment: para 35.
[74] LAC judgment: paras 40, 41 and 52.
[75] LAC judgment: paras 44-45.

36.4 The LAC went on to hold:[76]

> "An alternative proposal that could have been considered would have been to have ring fenced the wages of the full-timers and to the extent that the law allowed this, to forgo wage increases until the corresponding flexi-time wage had risen, by sectoral determination increases or amendments and otherwise, to the level of the ring- fenced wage.
>
> There could be many permutations of such an alternative and ways of funding it. For instance, the R70 000 could have remained or have been exchanged for the ring fenced option. Consideration could have been to accelerate the meeting of a ring fenced wage and an increasing flex-time wage, by gradually reducing the ring fenced wage. There is no way of knowing what the ring fenced alternative or inducement would have turned out had it been pursued but it is sufficient for purposes of this appeal to find that it was a reasonable alternative that was not considered."

37. The LAC thus deliberately refrained from taking a view regarding the viability or otherwise of ring-fencing (and could not do so in circumstances where there was no evidence to indicate that this was a viable alternative to retrenchment).

38. The LAC accordingly essentially found that the absence of a consideration of these alternatives (namely the union's final proposal, and the ring-fencing of wages) rendered the dismissals of the individual applicants substantively unfair (this with reference to section 189A(19)(c)).

(c) Relief granted

39. In relation to relief, the LAC declined to order reinstatement (ordered by the Labour Court) on the basis that "*the full-time posts have become redundant*",

[76] LAC judgment: paras 49-50.

with the result that "*reinstatement is not feasible*". Maximum compensation (for substantive unfairness) of 12 months' remuneration was awarded instead.[77]

40. The LAC thus upheld the appeal in part and dismissed it in part, and substituted the Labour Court's order with an order to the effect that the section 189A(13) application was dismissed, that the dismissal of the individual applicants was substantively unfair, and that they are awarded 12 months' remuneration as compensation.[78]

(5) SUBSTANTIVELY UNFAIR DISMISSAL CLAIM: JURISPRUDENCE

(a) The section 189A(19) test

41. Section 189A was introduced into the LRA by way of the 2002 amendments to the Act (with sub-section (19) having been deleted by way of the 2014 amendments). It regulates large-scale retrenchments and introduced several innovations, prime amongst them being the right to strike.

42. Section 189A(19) was a political compromise – the employer claw-back to balance out the right to strike. Writing in *Current Labour Law 2002*, Thompson said this about section 189A(19):[79]

> "The approach that the courts must take on the merits has been clarified. The employer claw-back under the amendments takes the form of a provision instructing the Labour Court – if approached for relief – to find a dismissal substantively fair if certain factors are established. Chief amongst these (from an employer comfort perspective) is that a dismissal will be fair if it 'was operationally justifiable on rational grounds'. This is a fairly narrow and

[77] LAC judgment: para 53.
[78] LAC judgment: para 56.
[79] Thompson in Cheadle *et al*, *Current Labour Law 2002* ("Thompson") at 29.

> employer-friendly conception of fairness, affording employers a clearer and probably better margin of appreciation than they had before." (Own emphasis.)

43. To the same effect, Thompson and Benjamin *South African Labour Law* say this about the negotiating history:[80]

> "The negotiating history of the provision suggests that it was a political trade-off. Against the logic of the rights-interests dichotomy that characterises the statute, and in the wake of a very public campaign, the unions were given latitude to use industrial muscle to challenge retrenchments. In return, though, employers secured a claw-back of some of their eroded managerial prerogatives. If the contest was to be more robust when restructuring was the issue, then (in at least some respects) fewer rules would apply all round. Unions could henceforth overpower employers if they had the wherewithal, but if they fell back on the law they would find themselves arguing off diminished premises." (Own emphasis.)

44. Thompson goes on to state that "*the origins of the wording*"[81] of section 189A(19) are contained in the LAC's judgment in *Discreto.*[82] In that judgment, Froneman DJP[83] found:[84]

> "As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not … . For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation

[80] Thompson and Benjamin *South Africa Labour Law* vol 1 ("Thompson and Benjamin") at AA1-496 (RS 48, 2006). The text has been removed by way of updates.
[81] Thompson at 29, fn 8.
[82] *SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC) ("*Discreto*").
[83] As he then was.
[84] *Discreto* at para 8.

process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process." (Own emphasis.)

45. Regarding the operation of section 189A(19), Thompson and Benjamin say this with reference to *Discreto*:[85]

> "Section 189A(19) is effectively a deeming clause. It modifies s 188(1)(a)(ii), which sets the general rule that only a fair reason will validate an operational requirements dismissal, taking it beyond legal reproach. Now, in the context of larger-scale retrenchments, the Labour Court is directed to equate fairness with rationality (assuming further that the dismissal under scrutiny is indeed an operational requirement one, that alternatives have been considered, and that selection criteria pass muster).
>
> This is undoubtedly a slimmed-down version of fairness, one stripped of its comparator and proportionality layers. The employer still bears the onus of adducing evidence to sustain its action, but now it will suffice if the evidence shows no more than that the dismissal decision is grounded in a rational business case, due regard being had to the operational environment. The test in *Discreto*, overtaken by *Afrox*[86] and the cases that followed, has been given a second wind. Indeed, the new provision echoes the language of that case pretty much in terms: 'The manner in which the court adjudges the latter issue is to enquire … whether the ultimate decision arrived at by the employer is operationally and

[85] Thompson and Benjamin at AA1-496 (RS 48, 2006).
[86] *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).

> commercially justifiable on rational grounds.' Gone are the *Afrox* and *BMD Knitting Mills*[87] riders, and still more the notion expressed in *Algorax*[88] that an operational-requirements dismissal should be a measure of last resort." (Own emphasis.)

46. Another significant commentary on section 189A(19) is that of Roskam in his DPRU working paper.[89] He refers to section 189A(19) as being "*the Discreto test*" and goes on to state:[90]

> "If the union refers a dispute about the substantive fairness of the retrenchments to the Labour Court, the test for substantive fairness is limited to the test set out in the *Discreto* case."
>
> "The trade off, which is presently reflected in section 189A, is that if workers do not exercise their right to strike over operational decisions that give rise to dismissals and refer a rights dispute to the Labour Court, then a non-interventionist approach akin to the *Discreto* test is appropriate. In other words, workers obtain the right to strike about operational decisions, but if they exercise their right to adjudicate the substantive fairness of the retrenchments, the test is limited to the *Discreto* test." (Own emphasis.)

47. In *Old Mutual*, Murphy AJ[91] interpreted and applied section 189A(19) as per the *Discreto* test.[92]

48. In the present matter, the LAC correctly accepted that the origin of section 189A(19)(b) is *Discreto*.[93] It went on to find that "*[p]arliament is deemed to know the law so that when it uses words that have been employed by a court*

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[87] *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 *ILJ* 2264 (LAC).
[88] *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) ("*Algorax*").
[89] Roskam "*An Exploratory Look into Labour Market Regulation*" Development Policy Research Unit (DPRU) working paper 07/116, January 2007 ("Roskam").
[90] Roskam and 19-20.
[91] As he then was.
[92] *SATAWU v Old Mutual Life Assurance Company South Africa Ltd* [2005] 4 BLLR 378 (LC) at para 85.
[93] LAC judgment: para 40.

this is generally an indication that the legislature intends to give it the same meaning".[94] In short, section 189A(19)(b) is a codification of the *Discreto* test for the substantive fairness of a retrenchment.

49. As the LAC herein also found, the section 189A(19)(b) test differs from that applicable to retrenchments to which section 189A does not apply.[95] The essential difference is that whereas *Discreto* / section 189A(19)(b) is a deferential (non-interventionist) test requiring no more than that the decision to dismiss was operationally justifiable on rational grounds, our courts have increasingly moved away (after *Discreto*) from such a deferential approach[96] – this to the point of finding that, in order to be substantively fair, a retrenchment must be a measure of last resort.[97]

50. But these judgments – which are tracked in the applicants' heads of argument and relied on heavily by them – dealt with ordinary (and not large-scale) retrenchments where there exists no prescribed statutory formula for the determination of substantive fairness.[98] The judgments involved the passing of a moral judgment into fairness in the ordinary course, whereas, in the case of large-scale retrenchments, this "*has been supplanted by what is in effect a deeming provision*", i.e. section 189A(19).[99] Seen thus, the judgments relied upon by the applicants have no (real) bearing on section 189A(19)(b), which stands to be interpreted and applied as per *Discreto.* (With reference to

[94] LAC judgment: para 41.
[95] LAC judgment: para 35.
[96] See generally, Thompson & Benjamin at AA1-474 – AA1-481 (RS 69, 2017).
[97] *Algorax* at para 70.
[98] And where employees were not armed with the right to strike.
[99] LAC judgment: para 36.

judgments relied upon by the applicants, Thompson and Benjamin make this very point in the quotation in para 45 above.)

51. The erroneous overlaying of jurisprudence appears from the LAC's judgment in *Black Mountain Mining* (the only judgment of the LAC before the present case dealing with section 189A(19)).[100] In that judgment, the LAC held that "*a dismissal can only be operationally justifiable on rationale grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons*".[101] But the court then went on to find that "*the deferential approach is no longer part of our law*" and that retrenchment "*must be a measure of last resort*" or *"the only reasonable option under the circumstances*".[102] In submission, this: (i) is based on case law that does not deal with section 189A(19)(b); (ii) does not accord with the plain language of the section; and (iii) is also at odds with the origins of the wording of the section, i.e. *Discreto*.

52. Although the LAC herein found it unnecessary to revisit *Black Mountain Mining*, it did find that "*[t]here is something to be said for the proposition that the court … possibly intruded more on the jurisprudence concerning other retrenchments into the sphere of section 189A than it should have done*".[103] And as the LAC went on to find -

> "the passing of a moral judgment [which is what the aforesaid jurisprudence dealt with] has been supplanted by what is in effect a deeming provision. If the

[100] *NUM and Another v Black Mountain Mining (Pty) Ltd* [2014] ZALAC 78 ("*Black Mountain Mining*").
[101] *Black Mountain Mining* at para 37.
[102] *Black Mountain Mining* at paras 33-39.
[103] LAC judgment: para 36.

> Labour Court finds that the elements listed in section 189A(19) … are satisfied, it follows that the employee was dismissed for a fair reason."[104]

53. Turning now to section 189A(19)(c), in submission, the requirement that "*there was a proper consideration of alternatives*" is essentially a procedural one, but with a substantive purpose, i.e. to ensure that the ultimate decision to retrench "*was operationally justifiable on rational grounds*" (as per section 189A19(b)).[105] Alternatives may be rejected provided this test is met.

54. Importantly, as *Discreto* makes clear, the focus of the inquiry into alternatives is into those which emerged during the consultative process.[106]

(b) Case law in comparative situations

55. There are a number of judgments in which employers have retrenched employees who fail to agree to a change in terms and conditions of employment dictated by the employer's operational requirements.[107]

56. As a point of departure, the following *dictum* of the LAC in *Algorax* contains an important statement of principle:[108]

> "Such an employer [i.e. one facing a refusal to change terms and conditions] may then dismiss the employees for operational requirements in order to get rid of them permanently and employ a new workforce that will be prepared to work in accordance with the needs of his business. In such a case the employer will be dismissing the old workforce because the contracts of employment he has with

[104] LAC judgment: para 36.
[105] See the quotation from *Discreto* in para 44 above.
[106] See the quotation from *Discreto* in para 44 above. That said, the determination of substantive fairness is based on the evidence before court, and not on the evidence produced during the consultative process: *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC) at para 25.
[107] Typically, these cases involve an alleged automatically unfair dismissal in terms of section 187(1)(c), with a substantively unfair retrenchment claim being brought in the alternative. For present purposes, only the jurisprudence in relation to the latter is of relevance.
[108] *Algorax* at para 37.

them can no longer properly serve his operational requirements." (Own emphasis.)

57. Along similar lines, the LAC held as follows in *Mazista Tiles*:[109]

> "An employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. It may so happen, as it was the position in the case, that the employees refuse to enter into any agreement relating to the alteration of their terms and conditions because the new terms are less attractive or beneficial to them. While it is impermissible for such employer to dismiss his employees in order to compel them to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue their implementation, he has the right to invoke the provisions of section 189 and dismiss the employees provided the necessary requirements of that section are met." (Own emphasis.)

58. The first reported judgment directly in point is *OK Krugersdorp*.[110] In finding that the retrenchment was substantively fair, Basson J held:

> "In other words, where the amendment to terms and conditions of employment is proffered by an employer as an alternative to dismissal during a *bona fide* retrenchment exercise and it is a reasonable alternative based upon the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer." (Own emphasis.)

59. In *General Food Industries*, in upholding the substantive fairness of the retrenchment, the LAC held:[111]

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[109] *Mazista Tiles (Pty) Ltd v NUM & others* [2005] 3 BLLR 219 (LAC) at para 48.

[110] *Entertainment Catering Commercial & Allied Workers Union of SA & others v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 *ILJ* 1347 (LC) at para 28. The employees were retrenched after they refused to agree to work a new flexible shift pattern.

> "I am of the judgment that a natural consequence of the *Fry's Metals* judgment [of the LAC[112]] is that, all things being equal, a company is entitled to insist by economic restructuring that a profitable centre becomes even more profitable. It is also clear from the evidence that the appellant required flexibility on the part of the employees' terms and conditions of employment in order to be competitive. The respondent did not offer such flexibility. In my view that need of the appellant also provided a fair reason to dismiss the employees when they were not able or prepared to offer such flexibility to the appellant. Accordingly, I am of the view that the dismissal of the employees concerned was substantively fair." (Own emphasis.)

60. In *Mazista Tiles*, in again upholding the substantive fairness of the retrenchment, the LAC held: [113]

> "In a case where a dismissal for operational requirements is directly linked to the employees' rejection of the proposals to changing terms and conditions of service, the continuing existence of the employees' jobs is irrelevant to the determination of whether or not there was a fair reason for the dismissal because such dismissal would have been necessary by virtue of changing business requirements and not that the jobs themselves were redundant. As it was stated in *Algorax*, an employer who requires to effect changes to terms and conditions of service due to operational needs of the business may dismiss the employees who reject such terms and replace them with new employees who are prepared to work in accordance with the needs of the business provided the requirements of section 189 are met."

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[111] *General Food Industries Ltd v FAWU* [2004] 7 BLLR 667 (LAC) at para 62. The employees were retrenched after the company decided to outsource a milling operation to save costs – the union having refused an offer by the new contractor to employ the employees at reduced rates.

[112] *Fry's Metals (Pty) Ltd v NUMSA & others* [2003] 2 BLLR 140 (LAC) (upheld on appeal to the SCA in *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 *ILJ* 689 (SCA)). The LAC found at para 33: "*This is so because all that the Act refers to, and recognises, in this regard is an employer's right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit. Neither Thompson in his article, nor counsel in his argument, has pointed to any provision in the Act that can be relied upon to make this distinction.*"

[113] *Mazista Tiles* at para 54. The employees were retrenched after they refused to become independent contractors, which obviously involved a very significant change to their terms and conditions of employment.

> "The fact that during the period leading up to and at the time of the retrenchment the appellant made some profits does not mean that it was precluded from retrenching the employees. The appellant could still decide that 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 its proposal on changing the terms and conditions, as it was the position in this matter, then the appellant would be entitled to dismiss them for operational requirements under section 189. In *Fry's Metals* Zondo JP rejected an argument that a dismissal for the purpose of making more profit is not a dismissal for operational requirements."[114] (Own emphasis.)

61. In *Anglo American Research*,[115] the retrenchment was also found to be substantively fair. This in circumstances where Lagrange J held as follows:[116]

> "The company was clearly mindful of the decision in the *Fry's Metals* case … in which the SCA held that where an employee refuses to agree to conditions of employment, the employer is entitled to retrench the employee provided it does not intend to use the threat of dismissal to compel the employee to accept the conditions of employment, but proceeds with the retrenchment process so that it can replace the employee with someone who is willing to accept the terms offered." (Own emphasis.)

62. The next relevant judgment is *Federal Mogal*,[117] it being the only matter where section 189A(19) applied. In upholding the fairness of the dismissal, Lallie J found:[118]

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[114] *Mazista Tiles* at para 57.

[115] *Tlou v Anglo American Research (a division of Anglo Operations Ltd)* (unreported LC judgment, case no. JS1163/09, 29/10/2012, per Lagrange J) ("*Anglo American Research*"). A laboratory chemist / analyst was retrenched after she refused to work shifts unless she was paid an allowance in excess of the going rate (10.5% instead of 8.6%).

[116] *Anglo American Research* at para 18.

[117] *National Union of Metalworkers of South Africa (NUMSA) on behalf of Campher & 75 others v Federal Mogal of South Africa (Pty) Ltd* (unreported LC judgment, case no. PS22/13, 31/8/2016, per Lallie J) ("*Federal Mogal*"). The employees were retrenched after they refused to agree to a 30% reduction in remuneration, which equated to a saving of R4-million by the company (which was nonetheless profitable) and served to eradicate wage disparities.

[118] *Federal Mogal* at para 14.

> "The respondent proved the rational connection between the reduction of the applicants' remuneration and its intention to assist the Port Elizabeth facility reach the set profitability target. The alternative of reducing the applicants' remuneration and benefits falls within the range of reasonable options. The reasonableness of the option is supported by the fact that the reduced remuneration rates and benefits are consistent with those prescribed in the main agreement. The applicants therefore are in the same financial position as their contemporaries in the industry. In addition, it is common cause that the respondent was required by legislation to pay employees doing the same work or work of equal value, the same remuneration. It is common cause that when Englis joined the Port Elizabeth facility in 2009, it experienced problems of pay disparity and anomalies. The problem had to be dealt with. As the respondent was performing below its profitability target, it could not, in attempting to comply with legislation use the rate of the highest paid employees to peg its remuneration rates. Using the MIBCO rates was reasonable in the circumstances." (Own emphasis.)

63. This brings us to the most recent judgment in point, *Aveng*.[119] Having cited para 57 of *Mazista Tiles* (quoted in para 60 above), Moshoana J found the dismissal substantively fair, *inter alia*, on this basis:[120]

> "… the first respondent was faced with difficulties and the only viable answer to that conundrum was to restructure and redesign the jobs. I am satisfied that the first respondent did everything possible to save the jobs. Had the second applicants continued with the redesigned jobs, without a financial dent as it was the situation, they would still be in employment. Put differently, their jobs would have been saved."

64. In summary, albeit that only one of them dealt with section 189A(19), in all of the six cases addressed in paras 58-63 above, the retrenchment of employees who refused to agree to a change to their terms and conditions of employment

[119] *National Union of Metalworkers of South Africa obo members v Aveng Trident Steel (a division of Aveng Africa) (Pty) Ltd & another* (unreported LC judgment, case no. JS596/15, 13/12/2017, per Moshoana J) ("*Aveng*"). The employees were retrenched after they refused to take up redefined and consolidated jobs, which required them to perform more functions.

[120] *Aveng* at para 68.

(in different respects) was found to be substantively fair. The present matter is comparable to them.

(6) SUBSTANTIVELY UNFAIR DISMISSAL CLAIM: ANSWER TO APPLICANTS' ARGUMENT

(a) The applicants' rendition of legal principles

65. For the reasons stated above, we take issue with the applicants' rendition of the "*legal principles on substantive fairness for retrenchments*" set out in paras 49-76 of their heads. The bulk of the case law relied on by the applicants is not relevant to the interpretation / application of section 189A(19), and *Black Mountain Mining* (which is in point) was clearly incorrectly decided.

66. Particular mention should be made of *Forecourt*[121] and *Goldfields Logistics*,[122] because of the emphasis which the applicants place on them (in paras 70-75 of their heads). Properly construed, nether judgment assists them.

67. The quotation from *Forecourt* relied upon by the applicants (in para 70 of their heads) cannot be interpreted as meaning that the LAC found that an employer cannot retrench employees who do not agree to a change to their terms and conditions of employment. Such an interpretation would be at odds with the quotations from the LAC's judgments in *Algorax* and *Mazista Tiles* set out in paras 56-57 above. In both of those judgments, it was found that – if employees do not consent to the required changes – the employer may effect their retrenchment (provided that it does so fairly).

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[121] *Forecourt Express (Pty) Ltd v SA Transport & Allied Workers Union & another* (2006) 27 *ILJ* 2537 (LAC).
[122] *Goldfields Logistics (Pty) Ltd v Smith* [2010] ZALAC 33.

68. Given that *Goldfields Logistics* is the inverse of the present case (the employee sought to negotiate a change to his terms and conditions of employment), its value for present purposes is questionable. But what is of relevance is that the LAC quoted para 48 of *Mazista Tiles* (see para 57 above) with approval[123] and went on to find:[124]

> "The general rule is that employers conclude contracts of employment with employees on certain terms and conditions because its business requires the employees to work on these terms and conditions in order to satisfy its business' operational needs. When that contract no longer suits the operational requirements or the employee no longer seeks to be bound by the agreed terms which are necessary for the employer's business that may be a valid reason for the employer to terminate that contract of employment." (Own emphasis.)

69. What is conspicuous by its absence from the applicants' heads is any mention of *Discreto* and the negotiating history behind section 189A(19), and any (direct) attack on the findings by the LAC to the effect that section 189A(19) equates to a deeming provision.

70. In submission, on the basis of the analysis of the law undertaken above and in the circumstances of this case, if it is found that the dismissal was "*operationally justifiable on rational grounds*" and that "*there was a proper consideration of alternatives*" (as per section 189A(19)), then the dismissal is deemed to be substantively fair, and the court "*must*" make such a finding. Inherent in the former inquiry (which is linked to the latter) is a deferential

[123] *Goldfields Logistics* at para 30.
[124] *Goldfields Logistics* at para 35.

approach, where the court does "*not have to defend the wide perimeter of fairness, only the inner ring of rationality*".[125]

(b) The applicants' application of the legal principles to the facts

71. As stated above, the decision to retrench was based on three operational requirements – (1) flexibility, (2) equality, and (3) cost efficiency.

(i) *Flexibility in shift arrangements*

72. While it is accepted that the union conceded the issue of flexibility during the consultative process, there is no merit in the applicants' contention that this is the end of the matter because the second and third grounds for the retrenchment were not mentioned in the section 189(3) notices.[126] Having considered this contention by the applicants, the LAC (correctly) found against them on its interpretation of the notices.[127] And the fact that there were always three legs to the company's operational requirements is borne out by the contents of the documents dealt with in para 14 above.

(ii) *Wage inequality*

73. The LAC found that the company was justified in seeking to convert the individual applicants from full-timers to flexi-timers in order to address, *inter alia*, these goals:[128]

[125] Thompson and Benjamin at AA1-497 (RS 48, 2006).
[126] Applicants' heads: paras 79-83.
[127] LAC judgment: para 39.
[128] LAC judgment: para 27(b).

"(ii) the equity considerations (equal pay for equal work and work of equal value) being the fact that most of the full-time workers were earning more than their flexi-time comparators;

(iii) a uniform pay grade consisting of five bands".

74. Although they do not refer to this finding, the applicants take issue with the company's reliance on wage inequality as a basis for the retrenchment in paras 84-95 of their heads.

75. In submission, there is no merit in the applicants' contentions – this for the following reasons:

75.1 While it is so that the company had lived with the anomaly in wage rates and benefits ("*considerable disparities*", as the applicants put it[129]) for a lengthy period of time, and had contributed to it, this did not mean that it was prohibited from addressing the issue. This is particularly so given the context in which it did so (addressed immediately below).

75.2 The conversion project (undertaken in July 2012) was part of a greater career paths project, which involved the implementation (for the first time) of a formal grading and remuneration system. As recorded in para 13 above, this was done with a view to improving the so-called EVP – the aim being to retain staff and address the high rate of attrition. Amongst the problems that gave rise to the initiative were complaints by flexi-timers that full-timers – who were doing the same work as them – were being paid more.[130]

[129] Applicants' heads: para 85.
[130] Slabbert: vol 4, p 314, lines 20-25; p 317, lines 19-20; p 319, line 15 – p 320, line 15.

75.3 The inequality would necessarily have to be addressed in the process of designing and implementing the grading and remuneration system. Indeed, this showed just how much of an inequality problem the company had.

75.4 The career paths project was undertaken at a time when amendments to both the LRA[131] and the EEA[132] having a bearing on equal pay were in the pipeline. It is understandable that the company would have been concerned about future legislative amendments. And an employer is perfectly entitled to respond to contemplated legislative amendments by reorganising its business.[133]

75.5 As recorded in para 32.1 above, Mr Mbongwe conceded that the company had a problem in relation to wage inequality and was entitled to address it.[134]

75.6 In the context of the challenges facing the company under this head (industrial relations and potential legislative changes), it could not simply let natural attrition (through retirement) run its course, as contended by the applicants. The average age of the individual applicants was 50, [135] while the retirement age was 60 and the rate of natural attrition between

[131] As it turned out, the 2014 amendments to the LRA included section 198C, which effectively provides (in sub-section 3) for wage equality between part-time and full-time employees.

[132] Employment Equity Act 55 of 1998. As it turned out, the 2013 amendments to the EEA included important amendments to section 6. Amongst other things, sub-section (1) was amended to extend the prohibited grounds of discrimination to include "*any other arbitrary ground*", and sub-section (4) was added specifically regulating wage discrimination.

[133] Indeed, even in the absence of legislative amendments, the company was vulnerable to an unfair labour practice claim in relation to benefits by flexi-timers in terms of section 186(2)(a). See regarding the wide interpretation of "*benefits*", *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* 1120 (LAC).

[134] Mbongwe: vol 12, p 1130, lines 14-16.

[135] LC judgment: para 53, 1st sentence.

6-8% per annum.[136] It is instructive that the LAC itself did not find that natural attrition was an alternative to retrenchment.

75.7 There was also no viable means of phasing out the disparity – this in circumstances where, for example, Ms Moloi (a CS2 cashier) was earning substantially more than the supervisors at her store (CS5 positions). (See further below the discussion about the ring-fencing alternative raised by the LAC.)

75.8 The above notwithstanding, the fundamental problem with the applicants' argument is that it runs headlong into the fact that all that the company has to establish under section 189A(19) is that the decision to retrench – and correspondingly, its decision not to perpetuate the considerable disparities in question – was rational and justifiable. In effect, the LAC found that it was, which, in submission, cannot be faulted.

(iii) *Cost efficiency*

76. The LAC found that the company was justified in seeking to convert the individual applicants from full-timers to flexi-timers in order to address, *inter alia*, the goal of "*saving of costs on [its] labour bill*".[137] It is common cause that the saving effected by the conversion project was R24-millon year-on-year,[138] which equated to 3.7% of the company's wage bill.

[136] LC judgment: para 50, last line.
[137] LAC judgment: para 27(b)(iv).
[138] LAC judgment: para 27(e).

77. Although they do not refer to this finding, the applicants take issue with the company's reliance on cost efficiency as a basis for the retrenchment in paras 96-101 of their heads.

78. In submission, there is no merit in the applicants' contentions – this for the following reasons:

78.1 As a point of departure, an employer is entitled to retrench in order to increase profits or otherwise become more competitive. The authorities dealt with above make this abundantly clear. The fact that the company was not in dire straits and was instead profitable, is thus not determinative.

78.2 The same applies to the fact that the company delayed effecting the cost saving (which delay benefitted the individual applicants).

78.3 The saving effected by the conversion project was significant in the context of the highly competitive retail (grocery) industry – R24-millon year-on-year,[139] which equated to 3.7% of the company's wage bill.

78.4 The above notwithstanding, again, the fundamental problem with the applicants' argument is that it runs headlong into the fact that all that the company has to establish under section 189A(19) is that the decision to retrench based (in part) on the aforesaid cost saving, was rational and justifiable. In effect, the LAC found that it was, which, in submission, cannot be faulted.

[139] LAC judgment: para 27(e).

(iv) *Availability of alternatives to dismissal*

79. The applicants contend (in paras 102-105 of their heads) that there were two alternatives to retrenchment – natural attrition (as found by the Labour Court) and ring-fencing (as found by the LAC).

80. As we have already submitted, natural attrition was not a workable alternative, and was (correctly) disregarded by the LAC.

81. In relation to ring-fencing, the following submissions are made:

81.1 The LAC's finding that ring-fencing was "*a reasonable alternative*" (albeit that there was "*no way of knowing*" if it would have worked) [140] is devoid of any evidentiary basis (and is contradictory).

81.2 The LAC came up with the alternative of ring-fencing[141] – it not having been raised by the applicants during the trial in the Labour Court. In these circumstances, and in the absence of the company having been afforded the opportunity of leading evidence or otherwise addressing the issue, it was, in submission, irregular for the LAC to have up ended the company on this basis.

81.3 The above notwithstanding, given the considerable disparities in wage rates, ring-fencing was patently not a reasonable alternative. By way of example, the position of Ms Moloi in relation to her supervisors at the Menlyn store makes this abundantly clear. No amount of ring-fencing would have solved that problem.

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[140] LAC judgment: para 50.

[141] The Labour Court made no such finding.

81.4 While it is accepted that the fact that the union did not propose ring-fencing during the consultative process is not determinative, its failure to do so is indicative of the fact that this was not a viable alternative in the eyes of either party.

81.5 Ring-fencing would not have addressed the company's wage inequality concerns. It is not something that could have been dealt with by way of a plan in terms of section 27 of the EEA, because the disparities were not based on a listed ground of discrimination.[142] The industrial relations problem would in any event have remained.

81.6 Ring-fencing would also not have addressed the company's cost inefficiency concerns. To the contrary, it would have perpetuated them.

81.7 Lost from sight by the LAC – in relation to both the issue of inequality and cost efficiency – is that there was also a considerable disparity in benefits (and not just wages) in respect of the two groups of employees. Ring-fencing would not address this.

81.8 If there had been an evidentiary basis to find that ring-fencing was a reasonable alternative, then the LAC would have been at liberty to find that section 189A(19)(c) was not complied with. But in the absence of this, no such finding could permissibly be made. The LAC thus erred in finding against the company on this score.[143]

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[142] Section 27 of the EEA (contained in the chapter dealing with affirmative action) only applies, in submission, to wage differentials based on the grounds listed in section 6(1) of the EEA (i.e. prohibited grounds of discrimination) and does not impose a general obligation to develop the plan in question.
[143] LAC judgment: para 52.

82. It is noteworthy that, in their heads, the applicants do not necessarily advance the LAC's finding that the dismissal was substantively unfair because the company did not properly consider the union's 11th hour proposal made on 30 October 2012.[144] The facts and circumstances relating to this issue are set out in the company's founding affidavit in support of its application for leave to appeal at vol 16: pp 1571-1574, paras 40-44, and are not repeated herein so as to avoid prolixity.[145]

83. In short, there can be no finding of substantive unfairness where an innocent error of this sort occurs (this in circumstances where the proposal was unclear[146] and the differences between it and the union's stance throughout not easily discernible); where the union fails to cooperate in correcting it; and where, in any event, the rejection of the alternative is operationally justifiable on rational grounds (as per section 189A(19)(b)). (See in particular, para 32 above.)

(v) *Conclusion on substantive fairness*

84. In conclusion and summary, the LAC was correct in finding that the company had complied with section 189A(19)(b), but was wrong in finding that the dismissal was substantively unfair singularly because there was not a proper consideration of alternatives under section 189A(19)(c). The LAC ought to

[144] LAC judgment: para 45.

[145] The letters of 30 and 31 October 2012 appear at vol 2: pp 116-120. Regarding the relevant events of the final facilitation meeting, see Slabbert: vol 5 p 443, lines 10-19, p 446, lines 9-24; Mbongwe: vol 11, p 1042, line 22 – p 1047, line 16. In submission, Mr Mbongwe's evidence was poor on this issue. In the circumstances, there can be little doubt that Mrs Slabbert's version stands to be accepted.

[146] This is borne out by the cross-examination of Mr Mbongwe at vol 11, p 1032, line 23 – p 1037, line 19; pp 1062-1065.

have concluded that the retrenchment of the individual applicants was substantively fair.

(7) REINSTATEMENT WAS NOT REASONABLY PRACTICABLE

85. The issue of whether the LAC was correct not to reinstate the individual applicants only arises in the event of this Court upholding the LAC's finding that their dismissal was substantively unfair.

86. One of the exceptions to reinstatement is where "*it is not reasonably practicable for the employer to reinstate or re-employ the employee*" (section 193(2)(c)). Where the exception applies, it is not competent for the Labour Court to order reinstatement or re-employment.[147]

87. Where the position previously held by the employee has been abolished (and is thus redundant), it has been found that reinstatement is not practicable.[148] As found by the LAC herein, it is common cause that the full-timer position is redundant within the company, and that it only employs flexi-timers.[149]

88. If the individual applicants were reinstated, this would imply that their contracts of employment (applicable to full-timers) would be restored / revived on the same terms and conditions of employment applicable before their retrenchment.[150] But contracts of employment of this nature – and terms and

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[147] *Maepe v Commission for Conciliation, Mediation & Arbitration & another* (2008) 29 *ILJ* 2189 (LAC) at para 16; *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 *ILJ* 313 (CC) at para 134.

[148] *Gijima AST (Pty) Ltd v Hopley* (2014) 35 *ILJ* 2115 (LAC) at para 45; *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (2016) 37 *ILJ* 2313 (LAC) at para 11.

[149] LAC judgment: para 53.

[150] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 2507 (CC) at para 36.

conditions applicable thereto – no longer exist within the company. Reinstatement is thus not practicable.

89. This does not amount to the company benefiting from its unfair conduct or to it attempting to use misconduct that was not deserving of dismissal as a basis to ward off reinstatement, as occurred in *Billiton Aluminium,*[151] which the applicants rely on.[152] Instead, the reality of the situation is that full-timer contracts of employment no longer exist.

90. In the result, the LAC was, in submission, correct in refusing reinstatement.

(8) PROCEDURALLY UNFAIR DISMISSAL CLAIM

(a) Is it competent to grant relief?

91. The issue of procedural fairness only arises in the event of this Court finding that the dismissal of the individual applicants was substantively fair.[153]

92. But even then, in the light of the LAC's recent judgment in *Edcon,*[154] it would not have been competent for the Labour Court (and thus this Court) to grant the applicants compensation as relief in their section 189A(13) application at a trial commencing in November 2014, when the retrenchment took place in November 2012. That is not the purpose of section 189A(13) applications and

[151] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 *ILJ* 273 (CC) at para 29.
[152] Applicants' heads: para 124.
[153] This is so because, if it is found that their dismissal was substantively unfair, a consequential award of retrospective reinstatement (made by the Labour Court) or 12 months' remuneration in compensation (as made by the LAC) precludes any additional relief being granted for procedural unfairness.
[154] *Edcon Ltd v Steenkamp and others* [2018] 3 BLLR 230 (LAC).

compensation is not a self-standing remedy under that section.[155] (In any event, the dismissal of the individual applicants was not procedurally unfair for the reasons that follow.)

(b) The Labour Court's findings were wrong

93. What the applicants want is for this Court to uphold the Labour Court's finding that the dismissal was procedurally unfair[156] – this in circumstances where the LAC made no definitive finding in this regard.

94. The Labour Court found against the company on four main grounds, namely that: (i) the company ought to have consulted with the union during the voluntary phase;[157] (ii) the company's conduct in not interrogating the union's alternative proposal of 30 October 2012 demonstrated that the retrenchment was a *fait accompli*;[158] (iii) the same applied to the company having issued a letter of termination to a single employee (Mr Madikela) before the final facilitation meeting;[159] and (iv) the company acted unfairly in not providing the union with information reflecting the applicable rates / benefits before and after the conversion.[160] In the premises, the Labour Court concluded that the company had failed to consult meaningfully, and thus that the retrenchment was procedurally unfair.[161] In submission, each of the four main findings made by the Labour Court leading to its conclusion were wrong.

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[155] *Edcon* at para 46.2.
[156] Applicants' heads: para 6.
[157] LC judgment: paras 57 and 64.
[158] LC judgment: paras 68-70.
[159] LC judgment: para 72.
[160] LC judgment: para 73, last sentence.
[161] LC judgment: para 74.

(i) *Consultation during voluntary phase*

95. In submission, the Labour Court (and the LAC) erred in finding that the company ought to have "*foreseen a possibility*" of a retrenchment at the outset of the voluntary phase (on 20 August 2012), and ought thus to have consulted with the union at that stage (and not waited until 4 September 2012 to do so).

96. On the company's version, it did not contemplate dismissing anyone before 4 September 2012. There are a number of factors that support the company's case, including the following:

96.1 the internal slide presentation in July 2012 on the conversion project, which records that "*[t]here is no contemplation at this stage of operational dismissals*", and that "*[t]he company hopes that all employees would take up one of the options*";[162]

96.2 the working paper submitted to EXCO around 28 August 2012, which reflects an assumption that 70% of employees would convert,[163] with it having been anticipated that the others would opt for another option;[164]

96.3 the fact that the company had undertaken a large-scale internal consultation process, received feedback from employees, and made a substantially increased offer to affected employees, with the deadline for acceptance having been 13h00 on 3 September 2012;[165] and

[162] Bundle D: vol 13, p 1255.
[163] Bundle D: vol 13, p 1289.
[164] Mbongwe: vol 11, p 1018, lines 10-21.
[165] Bundle D: vol 13, pp 1283-1284; vol 14, p 1373.

96.4 the fact that ultimately, 85% of employees did accept one of the voluntary options, which demonstrates that the company's optimism was not unfounded.

97. But even if the Labour Court was correct in finding that, objectively, the company ought to have foreseen the possibility of a retrenchment as at 20 August 2012, this, in submission, does not mean that it fell foul of section 189(1),[166] as implicitly found by the Labour Court. This appears clearly from the following passage from *Labour Relations Law*:[167]

> "For practical purposes issue of this notice [i.e. the section 189(3) notice] will thus mark the beginning of the consultation process. One specified topic is 'the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives' (s 189(3)(b)). This delineates scope for the employer to apply its mind to the *possibility* of dismissal prior to consultation." (Original emphasis.)

98. In short, in terms of this passage, the possibility of a retrenchment flowing from the voluntary phase did not, in itself, trigger the obligation to consult in terms of section 189(1).

99. In the further alternative, even if the company started consulting late, this did not render the facilitated consultation process (which endured for 60 days) unfair and there was no prejudice to the individual applicants – this as found by the LAC.[168]

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[166] Which provides that an employer must commence consultations when it "*contemplates dismissing*" one or more employees.
[167] Du Toit *et al*, *Labour Relations Law* (6th ed) at 485.
[168] LAC judgment: para 19.

(ii) *The union's alternative proposal*

100. The facts relating to the issue have been dealt with above. In submission, the LAC correctly found that the issue goes to substantive (and not procedural) fairness in terms of section 189A(19)(c).[169] But if it goes to procedural fairness, no unfairness could have resulted from the company's *bona fide* error, in the circumstances in which it transpired.

(iii) *The letter issued to Mr Madikela*

101. In submission, the Labour Court again erred. There was nothing wrong with the company having prepared letters of termination by 2 November 2012, bearing in mind that the 60-day consultation period expired on 4 November 2012. While it is regrettable that Mr Madikela was given this letter[170] on 2 November 2012 (before the final facilitation meeting on Saturday, 3 November 2012), there is nothing of substance to gainsay Mrs Slabbert's evidence that no instruction was issued to the store manager for the letter to be issued. It was simply a mistake.[171]

102. Insofar as the LAC found in favour of the company on this score[172] (which it appears to have done), it did so correctly.

(iv) *Non-disclosure of schedule of benefits*

103. Mrs Slabbert's evidence was that the issue of disclosure of information was resolved at the fourth facilitation meeting (attended by commissioner

[169] LAC judgment: paras 20-23.
[170] FA, annexure FA29: vol 2, p 121.
[171] Slabbert: vol 8, p 805, lines 1-3. Mbongwe: vol 11, p 1059, line 23 – p 1062, line 4.
[172] LAC judgment: para 24.

Macgregor) held on 29 October 2012, with the company having undertaken to provide one outstanding document ("*values subject to change*"), which it subsequently did.[173] The union, on the other hand, contends that the company undertook at this meeting to disclose all the outstanding information listed in the union's letter of 26 October 2012.[174]

104. The Labour Court appears to have accepted Mrs Slabbert's version, but, nevertheless, found that the company had acted inappropriately in not providing the union with "*the schedule of benefits pre and post conversion*".[175] Although unclear, it appears that what the Labour Court was referring to is the information contained in the schedule at vol 15: p 1432, which sets out the old and new pay scales.

105. Not only is the Labour Court's finding contradictory (because the issue of disclosure was resolved), but, in any event, the information in question was in the possession of the union / individual applicants. Indeed, Mr Mbongwe conceded that the union had some of this information – and enough to formulate its alternative proposal.[176] In the result, the Labour Court's finding was erroneous, with the LAC not having made any finding on the issue.

106. In the premises, the dismissal of the individual applicants was, in submission, procedurally fair.

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[173] Bundle D: vol 14, p 1361.
[174] FA, annexure FA21: pp 93-94.
[175] LC judgment: para 73.
[176] Mbongwe: vol 13, p 1205, line 21 – p 1206, line 17.

(9) LEAVE TO APPEAL AND CROSS-APPEAL

107. The company concurs with the applicants' submissions that leave to appeal should be granted,[177] and confines its opposition to the merits of the appeal. In submission, leave to cross-appeal should similarly be granted. Reference is made in this regard to the submissions made in the company's founding affidavit in support of its application for leave to cross-appeal.[178]

(10) CONCLUSION

108. In all the circumstances, the company seeks an order upholding the cross-appeal and substituting the order of the LAC with an order that the dismissal of the individual applicants was substantively and procedurally fair; alternatively, an order dismissing the appeal. Given the nature of the proceedings, no order as to costs is sought.

ANTON MYBURGH SC

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Respondent's counsel

10 April 2018

[177] Applicants' heads: paras 167-170.
[178] FA (application to cross-appeal): vol 16: pp 1559-1561, paras 10-15; p 1576, para 47.