THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case nos: J 3159/12 & JS 1177/12

In the matter between:

SACCAWU **First Applicant**

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

and

WOOLWORTHS (PTY) LTD **Respondent**

Heard: **1 June 2015**

Delivered: **5 March 2016**

Summary: **Dismissal for operational requirements – dismissal of employees who had accepted its commercial reasons to work flexible hours – employer alleging pay inequity as a ground for operational requirements – it is incompetent for an employer to seek to address unfair pay differentiation through an operational requirements process and thereby circumventing its obligation under Chapter III of the EEA – dismissal not operationally justifiable.**

Dismissal for operational requirements – employer dismissing who had employees commercial and economic reasons in order to make profit – employer did not produce evidence on the costs associated with the employment of affected employees; total amount of targeted cost reduction and whether such a target had been achieved – it is not possible to decide if the employer's decision is a rational or reasonable one – dismissal not operationally justifiable.

Dismissal for operational requirements – Consultation – employer failed to consult with a derecognised trade union during voluntary phase – in the absence a recognised union or workplace forum, there is a duty to consult with a registered trade – dismissal procedurally unfair.

JUDGMENT

Nkutha-Nkontwana, AJ

Introduction

[1] The issue for determination in this matter is whether the dismissal of the second to further Applicants for operational reasons by the Respondent was automatically unfair, alternatively, that it was substantively and procedurally unfair. The dispute about the fairness of the procedure was duly brought by way of application in accordance with section 189A(13) of the Labour Relations Act 66 of 1995 ("LRA"). It is apparent from the pre-trial minute that the parties have agreed that the affidavits exchanged in the application may be admitted as evidence, unless the truth of their contents is challenged.

[2] Mention must be made that the Applicants have since conceded in their written submissions that this court is bound to give authority to past judgments of the superior courts, pertinently the *NUMSA and Others v Fry's Metals (Pty) Ltd*,[1] on

[1] (2005) 26 *ILJ* 69 (SCA).

the question of automatically unfair dismissal as pleaded. I believe the concession is rightfully made in the light of the doctrine of *stare decisis*. I also take notice that embedded in the Applicants' concession is a deferral of this issue to appeal as opposed to retraction.

Background facts

[3] The facts in this matter are substantially common cause. The second to further Applicants were employed as full-time employees but in different categories of contracts known as full-timers, part-timers, key-timers and rollers. For the purpose of this judgment, they are collectively referred to as "full-timers". They all worked within the Respondent's ("Woolworths") corporate stores nationally, a business operated within the retail sector.

[4] The second to further Applicants ("affected employees") are members of the first Applicant ("SACCAWU") which had 15% membership within the bargaining unit in 2012. Since it was not a majority trade union, it only enjoyed access and stop order organisational rights. By agreement between the parties, the list of the affected employees was amended and the number has since reduced to 44.[2]

[5] Woolworths ceased to employ full-timers sometime in 2002. All employees employed thereafter were flexi-time employees ("flexi-timers") who work flexible hours that correspond with the peak trading hours of its stores. By 2012, the Woolworths' workforce was comprised of about 16 400 flexi-timers and 590 full-timers, about 3.5% of the workforce, throughout its 200 corporate stores. The categories of full-time contracts were found to be inflexible and no longer suitable to meet Woolworths' operational requirements.

[6] In July 2012, Woolworths embarked upon a staff career paths project which culminated in the adoption and implementation of a formal grading and remuneration system, and plotting a career path for employees within corporate stores. The new grading system introduced five bands from CS1 to CS5 and a

[2] See page 36(a) of Bundle "A".

remuneration system with minimum being 25th percentile, median being 50th percentile and upper being 75th percentile.

[7] Correspondingly and as part of the career path project, Woolworths sought to convert the remaining 590 full-timers to flexi-timers to standardised terms and conditions of employment. Woolworths contended that the conversion of the full-timers was premised on three operational requirements drivers, that is, flexibility, cost efficiency, and equality. The Applicants, on the other hand, conceded the need for flexibility but disputed the other two drivers.

[8] On 4 August 2012, Woolworths commenced consultation sessions with the individual full-timers where its decision to convert them to flexi-timers was communicated. That process was termed "voluntary phase". On 20 August 2012, the full-timers were offered three options, on a voluntary basis, consequent to the said sessions and are as follows:

8.1 To convert to flexi contracts with remuneration at the 75th percentile of the hourly rate applicable to a particular grade in which the employee's job was slotted; the benefits aligned to those of the flexi-timers and R70 000.00 once off conversion payment.

8.2 Early retirement with severance pay calculated from 1 week to 2 weeks' pay for every completed year of service depending on an employee's length of service.

8.3 Voluntary retrenchment with severance pay calculated from 1 week to 2 weeks' pay for every completed year of service depending on an employee's length of service.

[9] The above offer was a revised final offer after Woolworths' first offer to convert with a remuneration that was less than 75th percentile and R60 000.00 conversion payment did not appeal to the full-timers.

[10] The letters containing voluntary offers were brought to the attention of SACCAWU which in turn challenged the offers as unilateral change to terms and conditions of employment as per its letter dated 23 August 2012. A

plethora of correspondence ensued between the parties which I shall deal with in due course, save to state that Woolworths was adamant in one of its responses that it had no intentions to dismiss any of its full-timers during the voluntary phase.

[11] At the conclusion on the voluntary phase on 4 September 2012, out of 590 full-timers, 413 accepted one of the voluntary options and 177 rejected the offers. Woolworths, accordingly, progressed to the second phase in accordance with section 189A of the LRA. This process was accordingly termed "section 189A phase". The 177 affected full-timers were issued with notices in terms of section 189(3) of the LRA. SACCAWU was also notified of the contemplated operational requirements dismissals since some of the affected full-timers were its members.

[12] During the section 189A phase, 85 out of 177 full-timers accepted one of the voluntary options. Ultimately, only of 92 full-timers were retrenched and 44 thereof are the affected employees.

[13] The section 189A phase was conducted under the auspices of the CCMA in terms of the section 189A(3) of the LRA and SACCAWU was representing 51 of its affected members. There were five facilitation meetings facilitated by the CCMA commissioner and were held on these dates; 21 September, 5 October, 26 October, 29 October, and 3 November 2012.

[14] What transpired during the facilitation meetings is largely common cause, save for the fourth meeting in respect of which there is a dispute about disclosure of information. Also, throughout the section 189A phase, Woolworths' stuck to its initial offer which, in essence, extended the three voluntary options it had offered during the voluntary phase. In response, the Applicants offered to convert to flexi-timer contracts without changes to their terms and conditions of employment.

[15] On 3 November 2012, section 189A phase was concluded without reaching consensus. On 4 November 2012, Woolworths went ahead and dismissed the 92 full-timers.

Legal principles on substantive fairness

[16] Section 189A(19), as was before the 2014 amendments, states that:

> "In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), 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 was operationally justifiable on rational grounds;
>
> (c) there was a proper consideration of alternatives; and
>
> (d) selection criteria were fair and objective."

[17] The legal representatives for both parties gave a detailed analysis of applicable case law in their written submissions which was of great assistance and I am, accordingly, indebted to them.

[18] In *BMD Knitting Mills (Pty) Ltd v SACTWU,*[3] the LAC as per Davies, AJA (as he was then) stated that:

> 'I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, "the reason for dismissal is a fair reason". The word "fair" introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, 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.

[3] [2001] 7 BLLR 705 (LAC) at para 19; see also *CWIU and Others v Algrorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) at paras 69 – 70.

> 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]

[19] The same sentiments expressed above were given a further context by Murphy, AJ (as he then was) in *SATAWU v Old Mutual Life Assurance Company South Africa Ltd and Another,*[4] where he stated that:

> 'The test formulated by the legislature in the 2002 amendments harkens back to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Such deference does not amount to an abdication and, as stated in *BMD Knitting Mills (Ply) Ltd* (*supra*), the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employee in the exercise of its managerial prerogative.' [Emphases added]

[20] In a nutshell, in determining the fairness on the dismissals for operational requirements, this court must interrogate, objectively, whether the three preconditions in terms section 189A(19) of the LRA were met.

[4] [2005] 4 BLLR 378 (LC) at para 85.

Application of legal principles on substantive fairness

[21] In the matter at hand, the issues that require determination on substantive fairness as articulated by the Applicants are as follows:

21.1 Whether the dismissal of the affected employees was for a fair reason or operationally justifiable on rational grounds, especially given the fact that they were willing to work flexible arrangements without loss of wages, benefits and other conditions of employment as proposed in accordance with Woolworths' first option proposal;

21.2 Whether the insistence by Woolworths to downgrade the affected employees' wages and benefits was rational, necessary or fair; and given the experience, length of service and age of the second to further Applicants;

21.3 Whether there was a financial necessity for Woolworths to reduce the affected employees' wages and benefits to the extent it had proposed;

21.4 Whether Woolworths' operational requirements could have been met through other reasonable options such as natural attrition and migrating employees to the flexi-timer arrangement upon similar or comparable wages and benefits as when they were full-timers;

21.5 Whether there were rational reasons for the timing of the dismissals and the urgency that accompanied the consultation process;

21.6 Whether the Woolworths' rejection of the SACCAWU's alternatives was rational or valid;

21.7 Whether the conversion of key-timer employees to flexi-40 employees was rational or fair; and

21.8 Whether there was proper consideration of alternatives.

Whether the dismissals were operationally justifiable?

[22] It is common cause that the Applicants accepted that there was a need for Woolworths to adapt the full-timers' contracts in line with its current trading patterns and trends. Hence, they did not have any difficulties with the conversion to flexi-timer arrangement with the proviso that their wages and benefits would remain the same.

[23] The question that arises in this regard is whether the said acceptance of flexible contracts without reduction in wages and benefits would have met Woolworths' operational requirements and thereby obviate the dismissals.

[24] Ms Coleen Slabbert ("Slabbert"), Woolworths' employee relations manager, testified that the whole process of rationalisation of business operations was informed by three operational requirements drivers; i.e. the need for flexibility, equality in wage rates, and cost efficiency in relation to 16 000 flexi-time employees.

[25] In addressing the alleged inadequacy of SACCAWU's proposal to deal with equality, Slabbert states the following in paragraph 57 of Woolworths answering affidavit:

> 'It was made clear to the Applicant that to employ the full-timers on a flexi-timer basis, but on the same rates of remuneration and/or benefits as they enjoyed prior to their contemplated retrenchment, would create an anomaly within the Respondent's business. It would result in a group of flexi-timers enjoying remuneration and the benefits which far exceeded those of their colleagues. I must point out that at the time just prior to the retrenchments of the individual Applicants in this matter, the Respondent employed 16593 employees in its stores. Of these, 16000 were flexi-timers. There was no justifiable basis, in the circumstances to continue with full-timers categories and not to standardise its workforce.'[5]

[26] Slabbert testified further that the extent of the downgrading per Applicant was in direct proportion to the extent that she or he had been earning in excess of the 75th percentile applicable to his or her grade. She particularly referred to the case of Ms Kate Moloi ("Moloi"), Applicant number 32, whose salary would

[5] A 159-160.

have been reduced by a 54% of hourly rate (from R44.77 to R22.62). According to Slabbert, she had been earning 54% in excess in the 75th percentile applicable to her grade (CS2). Despite conceding under cross examination that, unlike the full-timers, the flexi-timers would have contracted to their terms and conditions of employment, she was adamant that terms and conditions of employment are subject to constant change and nothing was guaranteed.

[27] Slabbert further pointed out that the extent of the downgrading was also required in order to address the wage anomalies that gave rise to the concerns about equality. Using Moloi's instance again, she painted the following picture:

27.1 She was worked at the Menlyn store as grade CS2 employee and earning a wage rate in excess of all six of the fellow applicants who were graded as CS5 (supervisory positions);

27.2 She was earning R44.77 per hour, while two of the supervisors at the Menlyn store were Saul Moloisane and Louisa Kgobo, applicant number 22, who were earning an hourly rate of R38.02 and R39.20 respectively;

23.1 She was 55.02 years old and had 17.90 years' service, while Moloisane was 49.75 years old and had 28.81 years' service. Despite having more service (by 10 years) than Moloi and despite being three grades up from her and occupying a supervisory position, he was earning an hourly rate 15% less than her.

[28] Woolworths' counsel submitted that Woolworths was entitled to seek to address the issues of equality in order to anticipate the impending equal pay amendments at that time, which have since came into effect. Notably, section 198C(3) of the LRA, introduced in 2014; and section 6(4) of the EEA, introduced in 2013, enjoin the employers to deal with income differentials and pay discrimination. Since SACCAWU had 15% representation at that time, Woolworths could not have opted out of the EEA obligations through a collectively bargained option. As a result, Woolworths would have been

exposed to equal pay claims by the 85% of employees who were not union members, so it was argued further.

[29] It was also contended that SACCAWU's final proposal was utterly without merit and, as a result, little must be read into its rejection in the light of the following concessions made by the Applicants' witness, Mr Noel Mbongwe ("Mbongwe"), the deputy secretary of SACCAWU, under cross-examination:

29.1 That the Applicants proposal was inadequate as it failed to resolve the equality issue and did not address the cost efficiency issue;

29.2 That Woolworths had a problem in relation to equality and was entitled to address it; and

29.3 That there was nothing wrong with the company seeking to align itself with pending legislative amendments.

[30] Woolworths maintained that the changes resulted in cost-efficiency and, consequently, it managed to effect an annual saving of R24 million, which equated to a saving of 3.7% on its wage bill.

[31] The Applicants vehemently opposed Woolworths' equity claim as a justifiable ground for operational dismissals. Mbongwe testified that the issue of pay equity ought to have been dealt with in terms of EEA, alternatively, through collective bargaining. He was resolute that SACCAWU was not oblivious to the changes in trading patterns within the retail sector; hence it was willing to accept flexibility. Since it is organising the whole of the retail sector, it was aware that other stores have since adapted to the new flexible trading hours as Woolworths but kept their full-timers.

[32] SACCAWU further challenged the timing of the implementation of pay equity given the fact that pay disparity endured for over a decade owing to Woolworths' decision in 2002 to cease from employing full-timers and as such all employees subsequently engaged were flexi-timers. Therefore, there was no rationality in a decision that brought about the dismissal of highly

experienced long serving employees, especially, since Woolworths was in a financially sound position and undergoing a substantial growth phase.

[33] The Applicants further contented that there was no compelling financial need on the part of Woolworths to remove the pay disparity. In section 189(3) notice, Woolworths gave only one reason for the retrenchments that 'the company needs to be in a position to employ employees who are able to be used on a flexible basis'. Therefore, Woolworth's attempt to add further reasons (equity and costs efficiency) in order to justify the retrenchments must be rejected since it was clearly an afterthought and a cynical attempt by Woolworths to extricate itself from its self-created predicament.

Pay inequity operational requirement

[34] Before I deal with Woolworths' claim that it sought to deal with pay inequity, I wish to address the legal principles applicable. Whilst it is true that, at that time, there were proposed changes to both the LRA and EEA, which have since been implemented, aimed at eliminating discrimination based on equal pay for work of equal value, the very same issue was not novel in 2012. Conversely, this court had pronounced on the same issue on different occasions prior to the amendments. In *Mangena and Others v Fila South Africa (Pty) Ltd and Others,*[6] Van Niekerk, J stated the following:

> 'The first question that arises is whether pay claims equal, and in particular claims for equal pay for work of equal value, are contemplated by the EEA. Unlike equality legislation in many other jurisdictions, the EEA does not specifically regulate equal pay claims. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6 (1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. (See *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC) at 325A). 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing

[6] (2010) 31 *ILJ* 662 (LC); [2009] 12 BLLR 1224 (LC) at para 5.

the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature. In relation to claims where the differential that is asserted by the claimant is a difference in sex, the ILO Equal Remuneration Convention 1951 (No. 100) situates the comparison to be made at the level of the value of work, and obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value. To this extent, this court is required to interpret the EEA in compliance with South Africa's public international law obligations1. In the present instance, the differential asserted by the claimant is one of race rather than sex, but I see no reason why the principle of equal pay for work of equal value should not be extended beyond the listed ground of sex to other listed and analogous grounds and why, in principle, an equal value claim based on race should not be admitted. This would be consistent with the substantive conception of equality that the Constitution and the EEA adopt, and in particular, a recognition that since race historically played a role in the value attributed to particular jobs, a systemic approach to the elimination of what might often be structural inequality is necessary. Moreover, the principle that an equal value claim was competent under a general prohibition of unfair discrimination was recognised by this Court some years ago. In *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC), Landman, J said the following:

> "In other words, it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin." (at 196-F)'

[35] Therefore, it stands to reason that the amendments to both the LRA and EEA were just a mere codification of the principles articulated in *Mangena*. As such, any of the flexi-timers could have challenged Woolworths, even then, on

the same basis even though there were no specific provisions in both legislations.

[36] The issue that arises in this matter is whether Woolworths' decision to dismiss employees for operational requirements in order to eliminate discrimination based on pay inequity was operationally justifiable. Since I was referred to section 198C of the LRA, it will be more expedient to quote it in its entirety as I do hereunder:

> '**Section 198C Part-time employment of employees earning below earnings threshold**
>
> (1) For the purpose of this section—
>
> (a) a part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee; and
>
> (b) a comparable full-time employee —
>
> (i) is an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom and practice of the employer of that employee; and
>
> (ii) does not include a full-time employee whose hours of work are temporarily reduced for operational requirements as a result of an agreement.
>
> (2) This section does not apply—
>
> (a) to employees earning in excess of the threshold determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;
>
> (b) to an employer that employs less than 10 employees or that employs less than 50 employees and whose business has been in operation for less than two years, unless—

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution, for any reason, of an existing business;

(c) to an employee who ordinarily works less than 24 hours a month for an employer; and

(d) during an employee's first three months of continuous employment with an employer.

(3) Taking into account the working hours of a part-time employee, irrespective of when the part-time employee was employed, an employer must—

(a) treat a part-time employee on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for different treatment; and

(b) provide a part-time employee with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time employee.

(4) Subsection (3) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to part-time employees employed before the commencement of the Labour Relations Amendment Act, 2014.

(5) After the commencement of the Labour Relations Amendment Act, 2014, an employer must provide a part-time employee with the same access to opportunities to apply for vacancies as it provides to full-time employees.

(6) For the purposes of identifying a comparable full-time employee, regard must be had to a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work—

(a) in the same workplace as the part-time employee; or

(b) if there is no comparable full-time employee who works in the same workplace, a comparable full-time employee employed by the employer in any other workplace.' [Emphasis added]

[37] Clearly, in terms of subsection 3(a), employers could still maintain a different reward system for full-timers and part-timers if they have a justifiable reason for different treatment. This, then, takes me to section 6 of the EEA, which provides that:

'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to—

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.

(5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4).' [Emphasis added]

[38] Whilst both sections quoted above prohibit unfair discrimination in provision of terms and conditions of employment, including remuneration, there is an acknowledgement that a room exist for justification of any identified differentiation.

[39] Even though section 198C(3)(a) of the LRA does not define what is meant by "justifiable reasons", the answer is found in the EEA Regulations, as repealed by the Minister of Labour in a notice published under Government Notice number 378733 of 1 August 2014. Regulation 7 deals with factors justifying differentiation in provision of terms and conditions of employment and states that:

> '(1) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:
>
> (a) the individuals' respective seniority or length of service;
>
> (b) the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
>
> (c) the individuals' respective performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied;
>
> (d) where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;
>
> (e) where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different remuneration or enjoys different terms and conditions of employment;

(f) the existence of a shortage of relevant skill, or the market value in a particular job classification; and

(g) any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act." [Emphasis added]

[40] Coming back to the case in hand, it is common cause that all the full-timers had long length of service than the flexi-timers. In fact, according to the Applicants, the pay disparity challenge came about due to Woolworths' operational changes in 2002 when it decided not to employ full-timers and employees subsequently engaged were all flexi-timers on different terms and conditions of employment. Also, it is not disputed that, by accepting the flexi-timer contracts, the full-timers lost some benefits that were not linked to pay, such as working five hours on Saturdays, not working on Sundays, leave (maternity, family responsibility and study), etc.

[41] I accept Woolworths' Counsel's submission that Woolworths was entitled to seek to address the issues of equality in order to anticipate the impending equal pay amendments at that time, which have since came into effect. However, I am not certain as to what canons were applied to justify Woolworths' decision to use equity as one of its grounds for operational requirements. What is apparent now, with the benefit of having both the LRA and EEA amendments enforced, is that the foul that Woolworths hoped to anticipate was illusory.

[42] It is also patent that the pay inequity that arose as result of implementing flexitime contracts could have been easily justified in terms of Regulation 7(1)(a) since the full-timers had longer service period than the flexi-timers. Alternatively, Regulation 7(1)(d) could have been a perfect justification because as a result of the whole restructuring and grading system, the full-timers had to be demoted, so to say. In essence, this Regulation gives credence to SACCAWU's submissions that it was unfair to dismiss long serving employees when there were realistic alternatives in a form of natural attrition and/or a wage freeze for full-timers.

[43] It is also clear from the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value[7] that even if there are instances where differentiation is found not to be justifiable, employers would have to develop plans to address inequalities identified and, pertinently, without reducing the pay or remuneration of affected employees in order to bring about pay equity.[8]

[44] Section 27 of the EEA deals with income differentials and provides that:

> '(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational level of that employer's workforce.
>
> (2) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6 (4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4).'

[45] In a nutshell, the principles expounded in *Dudley v City of Cape Town and Another*[9] are also applicable in this instance. Indeed, whilst unfair discrimination disputes falling under chapter II of the EEA can be referred to the Labour Court for adjudication and this can be done by an individual, a "right to affirmative action" or "pay equity" in this instance, is not an individual right. Accordingly, it is incompetent for an employer to seek to protect an individual right not to be unfairly discriminated through an operational requirements process and thereby circumventing its obligation under Chapter III of the EEA to develop a plan to deal progressively with any unfair pay differentiation. Woolworths, as designated employer, ought to have dealt with pay inequity issues in accordance with chapter III of the EEA.

[7] Gazetted under notice No. 38837, issued on 1 June 2015 by the Minister of Labour in terms section 54(1) of the Employment Equity Act, 1998 (Act No 55 of 1998 as amended).
[8] See Item 8 of the Code of Good Practice on Equal Pay/ Remuneration for Work of Equal Value.
[9] [2008] 12 BLLR 1155 (LAC); (2008) 29 *ILJ* 2685 (LAC).

[46] I align myself with the sentiments expressed in *NUM and Another v Black Mountain Mining (Pty) Ltd*[10] where the LAC, as per Francis, AJA, held that:

> 'It does not follow that just because an employer dismisses an employee due to its "economical, technological, structural or similar need" that the [Section 189A(i)] precondition has been met. An employer must first establish on a balance of probabilities that the dismissal of the employee contributed in a meaningful way to the realisation of that need. In my view, dismissals for operational requirements must be a measure of last resort, or at least fair under all of the circumstances. A dismissal can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons. The selection of an employee for retrenchment can only be fair if regard is had to the employee's personal circumstances and the effect that the dismissal will have on him or her compared to the benefit to the employer. This takes into account the principles that dismissal for an employee constitutes the proverbial "death sentence".' [Emphasis added]

[47] Interestingly, Woolworths' section 189(3) of the LRA notice states only one reason for the retrenchments being that 'the company needs to be in a position to employ employees who are able to be used on a flexible basis'. In this regard, it was contented on behalf of the Applicants that Woolworths, as an afterthought, cynically sought to add further reasons of equity and costs efficiency in order to justify the retrenchments. I am inclined to accept this submission given the fact that the affected employees readily accepted Woolworths' business rational and were willing to move to flexitime contracts, of course without loss of benefits.

Cost efficiency operational requirement

[48] Whilst it is given that Woolworths might have made huge savings consequent to the implementation of flexitime contracts, those savings are inextricable linked to the drastic reduction of full-timers' pay and changes to their conditions of employment. As such, since it is clear that pay equity ground was untenable, the cost saving ground must also suffer the same demise.

[10] (CA22/2012) [2014] ZALAC 78 (10 December 2014) at para 37.

[49] Even if cost efficiency was a standalone operational requirement, Woolworths did not produce any evidence pertaining to the costs associated with the employment of full-timers, total amount of targeted cost reduction and whether such a target had been met. Slabbert only dealt with the ultimate saving that had been made without any reference to the actual costs before restructuring or a set target for reduction. Accordingly, I could not agree more with the court's findings in *Ndhlela v SITA Information Networking Computing BV (Incorporated in the Netherlands)*[11] to the effect that 'in the absence of this information, it is not possible for a court to decide if the decision is not arbitrary or capricious. Nor is it possible to decide if the decision is a rational or reasonable one, based on the information which was available to an employer at the time it decided to embark on a restructuring exercise'.

Proper consideration of alternatives

[50] As stated above, the Applicants' claim, in this regard, is that Woolworths did not properly consider rejected realistic alternatives to retrenchments; such as natural attrition and/or a wage freeze for full-timers. Slabbert conceded that Woolworths did not consider these two alternatives but was adamant that natural attrition could not have addressed the issue of pay equity and anomalies since it occurred at a rate of 6-8% per annum.

[51] Nothing turns on Mbongwe's concession that the issue of natural attrition was never raised again after SACCAWU's letter of 7 September 2012. The onus is on Woolworths to prove that it had adequately considered all alternatives to retrenchment, a question that should arise not only at the commencement of the consultation but continually throughout the process as considerations will naturally change as the process plays itself out.[12] A caveat is that employers are prohibited from presuming the outcome of a consultation; lest the dismissals be rendered a *fait accompli*.[13]

[11] (2014) 35 *ILJ* 2236 (LC) at para 44.
[12] *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC). *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 *ILJ* 129 (LAC) at paras 42 to 45. See also *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 *ILJ* 1247 (A).
[13] *NUM and Another v Black Mountain Mining (Pty) Ltd* above n 9 at para 28.

[52] In *SACTWU and Others v Discreto – A Division of Trump and Springbok Holdings,*[14] dealing with the question on whether the dismissals were the only reasonable option under the circumstances, the court held that:

> 'The function of a court scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision… but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham… 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…'

[53] It was contended on behalf of the Applicants that the average age of the affected employees was 50 years, with majority being between 45 and 59. They had been in Woolworths' employ for 20 years on average, ranging between 12 and 32 years. Their benefits were concluded over many years and received regular increase over the years. For most of the Applicants were about to reach the retirement age and the prospects of finding other jobs were almost non-existent, it would seem that natural attrition would have been the best alternative to retrenchments, especially, in the light of my finding that any differentiation in pay or conditions of employment could have been justified in terms of EEA and/or LRA alternatively dealt with in terms of the Chapter III of the EEA.

[54] In the premises, it is my view that Woolworths failed to prove, on a balance probabilities, that the dismissal of affected employees was operationally justifiable. By the same token, Woolworths failed to appropriately consider the alternatives to dismissal.

Procedural Fairness

[55] The issues for determination on the fairness of the procedure can be summarised as follows:

[14] (1998) 19 *ILJ* 1451 (LAC) at para 8.

55.1 Whether Woolworths failed to commence the consultation process when it first contemplated retrenchments, i.e. during the voluntary phase;

55.2 Whether Woolworths failed to consult meaningfully about the terms and conditions that would have applied to the converting full-timers, and instead reiterated its offer made before the formal consultation process began and pushed through the retrenchment of the applicants in the minimum period of time (60 days);

55.3 Whether Woolworths failed to provide reasons, or cogent reasons, for rejecting representations or proposals made by the union, a contravention of sections 189A(6)(a) and (b) and indicative of the company's refusal or failure to engage in meaningful consultations;

55.4 Whether, in contravention of section 189 read with section 16, the Woolworths refused or failed to disclose information relevant to determining:

55.4.1 the appropriate and fair terms and conditions of employment of convertors, which included: (i) the pay scales (including hourly rates) of all flexi-timer workers; (ii) the pay scales of all non-flexi-time workers; (iii) the pay scales of the applicants before and after conversion; and (iv) the medical aid and retirement fund benefits that would change as a result of the conversion; and

55.4.2 whether natural attrition would have been an appropriate and fair alternative to retrenchment, which included details about the rate of natural attrition of full-time and key-time employees.

<u>Commencement of consultation process during the voluntary phase</u>

[56] The Applicants took issue with Woolworths; assertion that it genuinely believed that all the full-timers would accept one of the voluntary options hence it did not anticipate retrenchments. Mbongwe testified that given the drastic reduction in wages and other benefits, retrenchments were

conceivable and as such SACCAWU ought to have been involved even during the voluntary phase, in particular on 20 August 2012, when its affected members were presented voluntary options to consider.

[57] Slabbert was resolute in her evidence that Woolworths did not contemplate dismissing anyone before 4 September 2012 even after the union's letter challenging the voluntary phase. I have a serious difficulty with this version, especially, given the fact that some of the full-timers were members of SACCAWU and ordinarily unions would always try to get better deals for their members. Therefore, it is my view that Woolworths ought to have foreseen a possibility of retrenchments at least as early as 20 August 2012.

[58] However, be that as it may, the crisp issue that arises in this regard is whether Woolworths approached both the voluntary and compulsory phases in a constructive spirit and invited relevant proposals to resolve its operational requirements.[15]

[59] It is trite that any contemplated dismissals for reasons based on the employer's operational requirements must be preceded by a consultation process. In terms of section 189 of the LRA, the employer is enjoined to consult:

> '(a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation:
>
> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (c) If there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are

[15] *SASBO v Standard Bank of South Africa* (2011) *ILJ* 1236 (LC) at para 32.

employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) If there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

[60] Clearly, section 189(1) of the LRA places a duty on any employer to consult any person that it is required to consult in terms of a Collective Agreement or other structures, including a registered trade union, where there is no Collective Agreement.

[61] It is common cause that on 5 August 2012, Woolworths commenced with "voluntary phase" consultation sessions with the individual full-timers, including SACCAWU members, where it communicated its decision to convert them to flexi-timers. Despite the fact that SACCAWU is a registered union and the fact that there was no recognised union nor did a Collective Agreement on retrenchment exist, Woolworths did not deem it necessary to consult with SACCAWU during the voluntary phase.

[62] As stated above, on 20 August 2012, the full-timers were offered the following three options, on a voluntary basis:

62.1 To covert to flexi contracts with remuneration at the 75th percentile of the hourly rate applicable to a particular grade in which the employee's job was slotted; the benefits aligned to those of the flexi-timers and R70 000.00 once off conversion payment;

62.2 Early retirement with severance pay calculated from 1 week to 2 weeks' pay for every completed year of service depending on an employee's length of service; and

62.3 Voluntary retrenchment with severance pay calculated from 1 week to 2 weeks' pay for every completed year of service depending on an employee's length of service.

[63] The above options were obviously ranked in a manner that if employees were to refuse the first options, which is conversion to flexitime with reduction of benefits, dismissal would be inevitable. Therefore, Woolworths' assertion that it did not contemplate dismissing any of the full-timers is without merit. Clearly, its voluntary proposals were never meant to avoid dismissals.

[64] Similarly, Woolworths' Counsel submission that even if I find that Woolworths ought to have foreseen the possibility of a retrenchment as at 20 August 2012, it would not necessarily mean that it offended section 189(1), stand to be rejected. Woolworths was adamant that it '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'. It is clear in this regard that the whole consultation processes began way before Woolworths issued the section 189(3) notice and even then dismissal of affected employees was not a mere possibility but reality.

[65] In my view, in the absence of any Collective Agreement regulating retrenchment process, Woolworths was obliged to consult with SACCAWU even during the voluntary phase.[16]

Did Woolworths consult meaningfully during the second phase?

[66] The meaningfulness of the second phase consultation is inextricably tied to the voluntary phase. Woolworths commenced the second phase with 85% of the affected employees having accepted one of the voluntary options. In essence, those who had accepted the new conditions of employment were already employed as such; and those who had accepted termination of the employment, either through an early retirement or voluntary retrenchment options were already dismissed.

[67] In fact, one of the reasons provided by Woolworths for rejecting SACCAWU's proposal as an alternative to retrenchments, was that '… 510 Full-timers of 593 have accepted one of the voluntary offers made available during August and simple assessment must indicate that the offers have provided a reasonable alternative to

[16] *Aunde South Africa (Pty) Ltd and Others v NUMSA* [2011] 10 BLLR 945 (LAC) at para 38.

previous employment type. To accede to the alternative proposal as proposed creates a complex consideration in respect of those arrangements as already implemented.'[17]

[68] Clearly, Woolworths believed that the three options that it had offered during the voluntary phase were reasonable, hence it could not budge. Instead, it urged SACCAWU to convince its members to accept one of those options as they were beneficial to them than the statutory severance pay.[18] This was the attitude displayed by Woolworths throughout the consultation sessions. As a result, Woolworths never bothered to interrogate the last alternative proposal by SACCAWU as contained in its letter dated 30 October 2012. Slabbert conceded that Woolworths misunderstood same.

[69] It is my view, that Woolworth's misunderstanding is very serious in the whole scheme of events in that a thorough scrutiny of SACCAWU's offer would have assisted in obviating dismissal of the six employees (Bongani Ndaba - Applicant 7, Pamela Visagie - Applicant 13, Irene Malemela - Applicant 20, Saul Moloisane - Applicant 33; Elizabeth Nkgapele - Applicant 34, and Sharon Adams - Applicant 39) who clearly stood to benefit from converting to flexi-timer contract.[19]

[70] Accordingly, I accept the Applicants' assertion that the termination of the affected employees was a *fiat accompli* and Woolworths' conduct during the section 189A phase was consistent with it decision.

[71] Whilst I accept Slabbert's evidence that the urgency in the process was informed by the festive season that was soon approaching, I still believe the consultation ought to be have been approached with more sincerity, sensitivity and amenableness. I also find it very insensitive of Woolworths to totally release the affected employees from work even though nothing much turns on it.

[72] On the letter of termination that was sent to Madikela before the conclusion of the facilitation process, I am not persuaded that it was an error. Woolworths

[17] See Woolworths letter dated 3 October 2012 at page 122 of Bundle "A".
[18] *Ibid*.
[19] See breakdown of pay and benefits pre and post conversion at page 339 of Bundle "A".

made it clear in its letter dated 31 October 2012 that it was not willing to proceed with the consultation meeting scheduled for 3 November 2012 but would rather make interim arrangements in the event 4 November 2012 becomes the termination date. Indeed, Woolworths went ahead and made those arrangements and hence the termination letter sent to Madikala on 2 November 2012. Therefore, there is merit in SACCAWU's submission that by the time the parties met on 3 November 2012, Woolworths had already made up its mind to terminate the affected employees.

[73] The last issue raised on the fairness of the procedure is whether Woolworths failed to disclose information that was relevant to the process of determining appropriate and fair terms and conditions of employment for the effected employees. Slabbert has testified that her approach to disclosure of information was informed by the advice that she had received from Commissioner who was the CCMA facilitator and since deceased. I am willing to excuse Macgregor's misdirection in this regard. However, it is apparent to me that, especially having had the benefit of the schedule of benefits pre and post conversion, had SACCAWU had access to same, it would have been able to meaningfully engage with Woolworths and advise its members accordingly.

[74] In the premises, I am persuaded that that Woolworths failed to meaningfully consult with SACCAWU and, accordingly, the dismissal of second to further applicants was procedurally unfair.

Relief

[75] The Applicants seek reinstatement with effect from the date of dismissal without loss of pay. In the absence of any evidence by Woolworths to indicate that Applicant's reinstatement would not be reasonably practicable, I am inclined to order reinstatement since it is the primary statutory remedy in unfair dismissal disputes.[20] Even though there was a delay in the persecution of this matter, none of the parties claimed prejudice or sought redress.

[20] Section 193(a) and (b) of the LRA.

Costs

[76] There is no reason why costs should not follow the result. In Woolworths' own version, SACCAWU is no longer a recognised trade union. As such, there is no persisting Collective Bargaining relationship between the parties.

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

1. The dismissal of the second to further Applicants was substantively and procedurally unfair.

2. Woolworths is ordered to reinstate the second to further Applicants retrospectively from date of their dismissal without loss of pay.

3. Woolworths is ordered to pay costs.

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Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

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