REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 602/14

In the matter between:

FRANCIS KANKU First applicant

RICHARD LINZIE Second applicant

MANUEL MATEUS Third applicant

and

GRINDROD FUELOGIC Respondent

Heard: 24-26 April 2017; 19 May 2017.

Delivered: 21 June 2017

SUMMARY: Foreign nationals dismissed because Eskom refused to allow them access to deliver fuel to Ankerlig power station. Only reason for dismissal is that Eskom refused foreigners. Dismissal automatically unfair In terms of LRA s 187(1)(f). Drivers reinstated. Costs ordered even though applicants represented *pro bono*.

JUDGMENT

STEENKAMP J

Introduction

[1] The three applicants are foreign nationals who were employed as drivers by the respondent, Grindrod Fuelogic. They delivered fuel to Ankerlig, an Eskom power station in Atlantis. Eskom informed Grindrod that it would no longer allow foreign drivers on site. Grindrod dismissed the employees for operational requirements. They say that it was automatically unfair. Grindrod says that they agreed to be retrenched and that there was no dismissal.

Background facts

[2] Francis Kanku is a refugee from the Democratic Republic of Congo (DRC). Richard Linzie is a Malawian national. Manuel Mateus is Angolan. All three of them have South African heavy vehicle driver's licenses. They were legally employed as drivers of fuel tankers, delivering Diesel to Eskom's Ankerlig power station in Atlantis pursuant to a contract between Grindrod Fuelogic and Eskom.

[3] Eskom received a contaminated load of diesel at Ankerlig. There is no evidence that any of the three applicants, or indeed any Grindrod employee, or any foreign national was responsible. Yet Eskom wrote to Grindrod, ostensibly as a result of the contaminated delivery, informing it that Ankerlig is a national key point and that it would no longer accept deliveries by foreign drivers at Ankerlig.

[4] Grindrod's regional manager, Bryan Church, flew to Cape Town from Johannesburg. He and Lourens Jacobs met Mateus– and subsequently, Kanku and Linzie -- in Grindrod's boardroom at its Paarden Eiland offices. They had a pre-prepared letter drafted by the human resources department with them. They told them about Eskom's new requirement; said that that they had "no choice" in the matter; and asked the employees to sign a retrenchment agreement prepared by the human resources department. All three did so. None of them received any severance pay.

The evidence

[5] Church and the shift manager at the time, Denzil Naicker, testified for Grindrod. Jacobs did not testify. The three employees testified on their own behalf. Linzie and Mateus were represented *pro bono* by Ms Tapiwa Ralehoko of Cheadle Thompson & Haysom. She had withdrawn as Kanku's representative and he represented himself. Grindrod was represented by Mr Pranav Jaggan.

[6] Although much of the background is common cause, there is a major conflict in the evidence on one aspect: Grindrod says there was a mutual "retrenchment agreement" and thus no dismissal; the drivers say they signed the agreement under duress and they were, in fact, dismissed without any consultation as contemplated by s 189 of the Labour Relations Act[1]. The only reason for their dismissal was their nationality; hence, it was automatically unfair as envisaged by s 187(1)(f).

[7] The evidence of the respective witnesses is summarised briefly insofar as it is relevant to the issues in dispute.

Bryan Church

[8] Church was the person responsible for liaison with Eskom. Grindrod Fuelogic was contracted to collect fuel in heavy motor vehicles (fuel tankers) from PetroSA's depot at Cape Town harbour and to deliver it to Eskom's Ankerlig power station in Atlantis.[2]

[9] A rival company, Bakers Transport, previously held the contract but lost it to Grindrod. Kanku was a driver for Bakers; Grindrod employed him to do the same job. The other two drivers had worked for Auto Carriers, another Grindrod division; they were transferred to Fuelogic as an alternative to retrenchment. They were permanently employed as bulk vehicle operators (i.e. fuel tanker drivers). Their employment was not linked to the Eskom contract. They were the only three foreigners; about 22 South African drivers did the same job.

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[1] Act 66 of 1995 (the LRA).

[2] Ironically, Eskom – the national power supplier – needed diesel fuel to power its power plant.

[10] An identified driver delivered 30 000 l of fuel contaminated with water to Ankerlig. The Eskom plant manager, Rodney Booth, sent Church an email informing him that no foreign drivers would henceforth be allowed on the Ankerlig premises. He claimed that it was an issue of national security.

[11] Church reasoned that Grindrod did not have a choice. If it refused to comply, it would lose the contract. Under cross-examination, he could not explain why he took no further steps to persuade Eskom otherwise; to point out that none of the three drivers had been remotely implicated in the contaminated fuel delivery; or that they had valid South African heavy duty drivers' licenses and work permits.

[12] He and Jacobs called the three drivers in (first Mateus, and a few days later, the other two). They signed the retrenchment agreements. The agreements had been prepared by the human resources department before they met the drivers. He denied any duress.

[13] Church conceded that the drivers were not paid any severance pay. At the time of the trial, they had still not been paid. They were only paid the balance of their salaries for May 2014. Grindrod did not furnish them with notices in terms of s 189(3) of the LRA before calling them to the meetings. Each meeting took about 30 minutes.

Denzil Naicker

[14] Naicker was a shift manager at the time of the termination. (He is now a business unit manager at the Auto Carriers division). He confirmed having been informed of Eskom's requirement. He was not at the meetings with Church and Jacobs. Grindrod lost the Eskom/PetroSA contract in March 2015. He was then transferred to Auto Carriers.

Richard Linzie

[15] Linzie worked for the Auto Carriers division of Grindrod from 2007 until February 2014, when he was transferred to the Fuelogic division. He was permanently employed and it was not linked to any contract.

[16] Early in May 2014[3] one Sage, a shift manager, phoned Linzie and told him to report at the Paarden Eiland office. He was not told why. When he got there, Kanku was already there. They were shown to the boardroom where Church and Jacobs were waiting.

[17] Linzie claimed that Church locked the door and put the key in his pocket. Church showed them the email from Eskom. He said that Grindrod ahd no choice but to retrench them. Linzie asked to be moved back to Auto Carriers. Church said there were no vacancies. He told them to sign the retrenchment agreement as there was no alternative: "I must take it back with me to Johannesburg". If they refused, Grindrod would lose the Eskom contract.

[18] Linzie testified that Kanku got up, saying that he wanted to go to Eskom to clarify the issue. Church also got up and blocked his way. An argument and a scuffle ensued. Church reiterated that he was leaving for Johannesburg that same day and he wouldn't do so without a signed agreement. Linzie persuaded Kanku that they would get into trouble if they got into a physical altercation; that they wouldn't be able to leave without signing; and so they signed the agreement and were allowed to leave.

[19] Linzie went straight home. He was not paid any severance pay. He was angry and upset. He did not sign the agreement voluntarily but under duress.

Manuel Mateus

[20] Mateus is Angolan. He was employed at Auto Carriers in July 2013 and transferred to Fuelogic in March 2014. He is legally in South Africa, has a work permit and a South African driver's license.

[21] On 4 May 2014 he was loading fuel at the harbour for delivery to Ankerlig. Naicker phoned him and told him to report at the Paarden Eiland office. When he got there, Jacobs told him that Grindrod couldn't continue employing him because of Eskom's demand concerning a national key point. He asked to see Church.

[3] It appears to be common cause that this was 9 May 2014.

[22] He returned the next day. He met Jacobs and Church in the boardroom. He was feeling distressed. They presented him with the agreement and told him to sign it; there was nothing they could do. He asked to be moved back to Auto Carriers. Church said there were no positions. He felt like he was in a corner and he was forced to sign the agreement. They were only in the boardroom for about 15 minutes. He felt intimidated by Church and Jacobs; he was there on his own, with no back-up or representation. There was no consultation; he was simply presented with the agreement and told to sign. He felt marginalised.

Kanku

[23] Francis Kanku is a refugee from DRC. He completed four years of an electrical engineering degree. He has been in South Africa for 20 years and he has been transporting fuel for 16 years. He took up employment with Grindrod when his previous employer, Bakers Transport, lost the Eskom contract in July 2013.

[24] On 9 May 2014 Sage called him and told him to go to the office. He met Linzie, Church and Jacobs there. They went into the boardroom. Church locked the door. He and Linzie were seated at the far end, away from the door; Church and Jacobs were seated near the door.

[25] Church showed them the Eskom email and told them they had no choice but to accept a retrenchment. Kanku wanted to go and see someone at Eskom to clarify the issue. Church refused and blocked his way. Church insisted he had to return to Johannesburg with the signed agreements that day.

[26] An altercation ensued. Church refused to let him go to Eskom. Linzie tried to keep the peace. He decided to listen to Linzie and to sign the agreement, otherwise they would not be allowed to leave. He did not read the agreement before signing it. Having signed it, Church told him and Linzie to leave the premises.

[27] Kanku found out afterwards that there were other foreign drivers still making deliveries to Ankerlig, such as one Eric from Zimbabwe.

Evaluation

[28] At the outset of the hearing, I dismissed three special please regarding jurisdiction; joinder; and *lis pendens*. I gave reasons then and will not repeat them here.

[29] As to the merits of this application, the Court first needs to consider if there was a dismissal. If so, it needs to establish whether it was automatically unfair in terms of s 187(1)(f) of the LRA; and if not, whether it was nevertheless substantively or procedurally unfair for want of compliance with s 189.

Was there a dismissal?

[30] Mr *Jaggan* argued that, quite simply, the three drivers were not dismissed. When Church explained Eskom's requirements to them, they signed voluntary retrenchment agreements. Their employment was terminated by agreement. Ms *Ralehoko* argued that they signed the agreements under duress.

[31] In order to form a view as to what actually transpired in the boardroom, the Court has to assess the probabilities at the hand of the well-known test articulated by Nienaber JA in *Stellenbosch Farmers' Winery*:[4]

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

[4] *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* [2002] ZASCA 98 par 5.

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

[32] Church was the only witness for Grindrod who was in the boardroom. On the whole, he struck me as a credible witness. He readily conceded that he did not issue a s 189(3) notice; that he accepted Eskom's demand; and that he presented the three drivers with an agreement that had already been drawn up by his human resources division. I accept that he was a reliable witness. He denied having locked the door. But Jacobs was not called as a witness to corroborate this evidence. It stands alone.

[33] Kanku and Linzie testified that Church locked the door on the 9th May. Mateus did not make the same allegation as regards the 5th May.

[34] Despite the fact that Church's evidence is not corroborated, I find it highly improbable that he would have locked the door, as alleged by Kanku and Linzie. Both of them testified that Kanku got up in order to go and see someone at Eskom and that Church blocked his way. How was Kanku going to leave the room if the door was locked? And why would it be necessary for Church to block him if the door was locked anyway?

[35] On this aspect, I find Church's evidence more credible and reliable than that of Kanku and Linzie. On the probabilities, I do not accept that Kanku and Linzie were physically locked in the boardroom. But that is not the end of the manner. The question remains whether they and Mateus signed the agreements voluntarily.

[36] Duress need not entail a physical threat, such as locking the employees into a room and physically forcing them to sing an agreement. Our courts have dealt with a number of more nuanced examples.

[37] For example, in *Roberts v W C Water Comforts (Pty) Ltd*[5] the employees had signed a retrenchment agreement which, the employer argued, estopped them from claiming unfair dismissal. Although that matter was decided by way of motion and without the benefit of oral evidence, the following remarks of Revelas J are apposite:

> "In effect, what is argued by the respondent is that by accepting the monies, the applicants have waived their right to challenge the fairness of their dismissal. For the reasons set out hereinbefore I do not believe that the Court could come to a finding that the applicants have waived such rights on the papers before it. Each case will have to depend on its own facts but on the evidence and in the circumstances now before me, I decline to make such an order.
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> I was referred to the matter of *GOLIN t/a GOLIN ENGINEERING v CLOETE* (1996) 17 *ILJ* 930 (L.C.N.) by the applicant's counsel. In this matter, O'LYNN, J, found as follows:
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> 'When a party claims that there has been full and final settlement, the Court should recognise the settlement as a termination of the issues on the merits, once the Court has, upon investigation of the settlement issue, been satisfied that there indeed was a settlement and that the settlement was voluntary, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues. The onus is on the party who relies on the settlement to prove that the alleged settlement complies with these requirements ...'"

[38] Did the employees in this case sign the agreements "voluntarily, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues"?

[39] On the facts and on the evidence before me, and on the probabilities, I am not persuaded that Grindrod has discharged that onus. All three drivers were called in out of the blue, with no prior warning and without the benefit

[5] [1998] ZALC 58 par 13-14 (my underlining).

of a notice that is required by law in s 189(3) of the LRA. They were presented with a *fait accompli*: This is Eskom's requirement; there is nothing we (Grindrod) can do about it; if you refuse, we lose the contract (and put all the South African drivers at risk); you have no choice but to sign. Mateus was on his own, confronted by his two superiors in their boardroom. Neither he, nor the other two, were given the opportunity to obtain union or legal representation. On the probabilities, I do accept that Kanku was not given the opportunity to ascertain for himself what Eskom's position was, even though I find it improbable that the door was locked. And the consistent evidence of all three drivers that Church insisted on leaving for Johannesburg with the signed agreements is also more probable than not. Under those circumstances, I do not think it can be said that Grindrod has shown that the employees accepted the agreement voluntarily, unequivocally and with full knowledge of its terms and implications.

[40] The employees in this case had even less opportunity to consult anyone about the "retrenchment agreement" that was presented to them out of the blue than was the case of the employee at *Adelkloof Drankwinkel.*[6] In that case, the employee was also called into a meeting and presented with a "voluntary retrenchment agreement". She telephoned her mother and then signed it. The Court commented:

> "I am unconvinced that there was any attempt to comply with the obligations placed upon an employer by section 189 of the Act. The applicant was told that her services had to be terminated on 15 December 2000. She heard about this for the first time on that day. Yet the document setting out her package is dated 11 December 2000, four days previously, and is titled "Kennisgewing van aflegging". She received no such notice, and she was taken to Mr Viljoen unprepared and unrepresented."
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> …
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> "The respondent argued in a special plea that the termination of the applicant's services was consensual, as she had signed the agreement in question. Any shortcomings in the process, which was conceded by the

[6] *Corns v Adelkloof Drankwinkel cc t/a Cellars Drankwinkel* (2002) 23 *ILJ* 2047 (LC) paras 8, 13-16.

respondent's advocate or counsel for the respondent, that preceded the agreement was cured by the voluntary retrenchment package agreement.

In my view, and for the reasons set out above, the respondent did not discharge its onus of proving that the dismissal was for a valid reason. The procedure was entirely unfair, high-handed and flawed. In *Bekker v Nationwide Airlines (Pty) Ltd* 1998 2 BLLR 139 (LC) Landman J held that where an agreement of this nature is reached as a form of settling a retrenchment, the agreement must be preceded by consultation. In this matter, the consultation process was so flawed that it amounted to no consultation at all. The applicant was taken to a building where she was confronted by a perfect stranger with the news that she had to be retrenched. Mr Viljoen had a standardised agreement ready at hand. Even if she declined the postponement of the meeting, Mr Viljoen says he offered, it was clear that she would eventually be retrenched whether, at this meeting or the next meeting. The circumstances in which her signature was procured were oppressive. She was in shock, needed advice, followed her mother's advice over the telephone in circumstances where no one had her interests at heart.

The main objective of that meeting was to procure the applicant's signature on the agreement, and to circumvent the requirements of section 189 of the Act. The decision to dismiss was taken four days ago.

From the respondent's point of view there was really nothing to discuss, and Mr Viljoen did nothing to discuss, other than the amounts set out in the retrenchment package. In the end he conceded, when asked about the minutes, the only notes he made were in relation to the amounts to be paid. All that was discussed was the package.

In my view, an agreement obtained in such unfair circumstances amounts to a nullity. I therefore find that the dismissal was both procedurally and substantively unfair. The applicant should be reinstated."

[41] The same sentiments apply to the circumstances of this case. There was no consultation in the sense of a joint problem-solving exercise contemplated by s 189. The three drivers were presented with a *fait accompli*. They signed the "agreement" in circumstances where Church made it clear to them that there was nothing to discuss and that they had no other option.

[42] The facts of this case also bear a similarity to those in *May v Demag*,[7] where the employee signed a retrenchment agreement prepared in advance. The Court did not accept the employer's argument that she had waived her right to challenge a dismissal:

> "7. Clearly, there was no consultation whatsoever as envisaged by section 189 of the Labour Relations Act 66 of 1995 ("the Act"). None of the sections were complied with. The applicant was faced with a *fait accompli*. The respondent contends that the dismissal was not procedurally unfair since the agreement which was signed, justified the absence of the process envisaged by Section 189 of the act.
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> 8. Mrs Christoph testified that the applicant knew full well what she was signing. The applicant said that she was coerced into signing the agreement. This Mrs Christoph disputes. What is however common cause, is that the applicant was at best induced into signing the agreement by virtue of the fact that she would receive the ex gratia payment of R1 000,00 referred to in paragraph 2.1.4 of the agreement, if she signed the agreement which purports to be voluntary retrenchment agreement. Mrs Christoph confirmed that had she not signed the agreement and a normal retrenchment process would have followed, she would have not received this amount.
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> 9. The question I thus have to decide is whether the agreement justifies the absence of a procedure in terms of section 189 of the Act and whether the dismissal, despite the agreement, was nonetheless unfair, procedurally.
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> 10.Insofar as the facts of this matter is concerned, it is important to note that the applicant is not conversant with the labour law. Neither was Mrs Christoph, if regard is had to the manner in which she dealt with the matter.
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> 11.In my view it was unfair to present the applicant with a fait accompli and such an agreement. It is also questionable, whether an employee who is unrepresented at a meeting, could be required to sign away-so to speak his or her rights conferred by the Labour Relations Act.
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> 12. In *Baudach v United Tobacco Company* 2000 (4) SA 436 (A) this point was illustrated. The appellant in that matter was informed that his post as manager had become redundant. He was offered a settlement package

[7] (2001) 22 *ILJ* 2019 (LC) paras 7-13.

and told that should he not accept it the usual retrenchment procedures will apply. As the package was financially more attractive than retrenchment, the appellant accepted it. He subsequently brought an application in the Industrial Court alleging that the dismissal was both substantively and procedurally unfair. The respondent contended that the matter had been settled by agreement between the parties and the appellant was thereby barred from bringing the application. It was common cause that the appellant's position had not become redundant and had been filled by others after his employment had been terminated. The Supreme Court of Appeals found that the respondent could not raise the settlement agreement as a defence. The court accepted the appellant's submission that he had accepted an offer of settlement on the respondent's intentional misrepresentation that the post had become redundant. This entitled him to resile from the agreement, and to have the amount he had already received taken into account in the calculation of compensation. It was held that the respondent's intentional misrepresentation clearly induced the applicant to accept the settlement offer and was per se an unfair labour practice. The appellant thus succeeded in his appeal and the respondent was ordered to pay compensation.

13. In this matter there was no evidence of intentional misrepresentation on the part of the respondent. However, there was a factor which had induced the applicant to sign in circumstances where she would not have signed otherwise. In this regard it is also important to refer to the matter of *Becker v Nationwide Airlines (Pty) Ltd* [1998] 2 139, where Landman J held that where an agreement such as the one *in casu* is reached as a form of settling a retrenchment, the agreement must be preceded by consultation. In this matter, there was no consultation during which the parties participated in a process which could have resulted in a final agreement. In this regard there is also the useful article "Out of Court Settlement of Labour Disputes" by Adolph Landman and Sandro Milo. *Contemporary Labour Law*, Volume 10, No 6 (January 2001) which deals fully with the law on such agreements.

14.What also further distinguishes this matter from the *Baudach* matter, is the fact that the applicant was presented with a *fait accompli*. Mrs Christoph said quite clearly that further consultations as envisaged by the Act (Section 189) would not have made any difference as a decision had already been taken.

15.In such circumstances one can accept that the applicant was induced into signing the agreement against her better judgment and that the dismissal was therefore procedurally unfair."

[43] The LAC has confirmed that the onus rests on the employer:[8]

"As the appellant has pleaded that the termination of the respondents' employment was effected in terms of an agreement, it bore the onus to prove not only the parties' common intention to enter into the agreement but also its specific terms. In *Cotler v Variety Travel Goods (Pty) Ltd and Others* 1974 (3) SA 621 (A), the defendant had, in defending a claim for damages arising out of a wrongful dismissal, pleaded that the plaintiff's employment had been terminated in terms of an oral agreement concluded by the parties. In deciding where the incidence of onus lay for establishing the existence of the oral agreement, Wessels JA stated at 628H – 629C:

'Variety's defence was thus, on the pleadings that the plaintiff had contracted out his right to insist on three months' notice of termination of his employment. In substance, though not in form, Variety's case is that plaintiff by his oral agreement waived his contractual right to require three months' notice of termination of his employment. Proof of the conclusion of the oral agreement relied upon would have been the complete answer to plaintiff's claim against Variety. … The averment that plaintiff had contracted out of his right to three months' notice of termination of his employment, forms an essential part of Variety's case that plaintiff's employment was lawfully terminated. No other form of lawful termination is relied upon. In my opinion, therefore, the incidence of onus in relation to the defence pleaded by Variety is governed by the second principle referred to by Davis AJA in *Pillay v Krishna and Another*, supra at 951. The oral agreement relied upon is in effect a special plea, and the onus of proof quad that defence would rest on Variety'."

[44] In this case, the onus was on Grindrod to prove that the agreements were entered into voluntarily. On the facts set out above, it has not discharged the onus on the probabilities. It is more akin to the position outlined by the LAC in *Manhattan Motors v Abdulla:*[9]

[8] *Springbok Trading (Pty) Ltd v Zondani* (2004) 25 *ILJ* 1681 (LAC) par 46 [Jafta AJA].

[9] (2002) 23 *ILJ* 1544 (LAC) par 14 [per Comrie, Nicholson and Mogoeng JJA].

> "My conclusion on all the evidence is that there is a marked and substantial preponderance of probabilities in favour of the respondent's version that he was dismissed. That balance is sufficient to persuade me that the appellant's version - the resignation - is false."

[45] On balance, I am not persuaded that the drivers entered into the agreements voluntarily. They were induced to do so in circumstances where they were presented with a *fait accompli*, there was no prior notice and no consultation as prescribed by s 189, and they had little choice but to sign the pre-prepared "agreements" with which they were confronted. They were dismissed.

Dismissal automatically unfair?

[46] Having found that the drivers were dismissed, the next question is whether the dismissals were automatically unfair, or alternatively in any event substantively and procedurally unfair.

[47] The drivers say that their dismissals were automatically unfair in terms of s 187(1)(f) of the LRA:

> "(1) A dismissal is automatically unfair if … the reason for the dismissal is –
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> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to … ethnic or social origin."

[48] The only reason for the drivers' dismissal was their nationality. Church conceded that, but for the fact that they were not South African citizens, they would not have faced retrenchment. His reasoning was that Grindrod had no choice but to accede to Eskom's requirement that foreign drivers would not be allowed at Ankerlig.

[49] This case is remarkably similar to that in *Chuma Security.*[10] In that case, Chuma dismissed a number of female security guards, ostensibly for operational requirements. The reason was that Chuma's client, Metrorail, requested it to employ fewer women and more men as security guards. The Court found that their dismissal was automatically unfair in terms of s

[10] *Numsa and Others v High Goal Investments CC t/a Chuma Security Services* (C844/15) [2016] ZALCCT 34 (18 October 2016).

187(1)(f). But for their gender, the employees would not have been dismissed. And the employer had not shown any justification for the direct discrimination against them.

[50] The Court in *Chuma* also considered the circumstances where, as here, the operational requirements relied upon by the employer were the demands of a contractor – PRASA in that case, Eskom in this case. That did not constitute a fair reason for its discriminatory behaviour.

[51] Dealing with dismissal at the behest of a third party, the Court referred to *East Rand Proprietary Mines Ltd v United People's Union of SA*[11], a case where the employer dismissed Zulu speaking employees who were the target of ethnic hostility from the other employees and whose safety the employer could not guarantee. The employer argued that the dismissal was for operational reasons and as such, the decision to dismiss lay within the managerial prerogative. The Labour Appeal Court commented as follows:

> ""The argument regarding the scope of managerial responsibility to direct and reshape an enterprise in response to operational necessities cannot be faulted. That 'the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management', where operational reasons for dismissal in fact exist, has been authoritatively established. See *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* 1995 (3) SA 22 (A) at 28I; (1994) 15 *ILJ* 1247 (A) at 1253H-I.
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> These dismissals were not, however, as in *Atlantis Diesel Engines*, the product of operational reasons arising from serious financial difficulties in consequence of a declining market-share. Nor were they retrenchments arising from 'outsourcing' of a portion of the enterprise's business. Nor, again, were they the product of reorganization or technological developments or electronic supercession of previous employee functions. There was in fact work for these workers to do. It was urgent that they should return to it. The company could, at least in the foreseeable short term, pay them to do it. They were not dismissed because their jobs disappeared. They were dismissed because the company was unable to

[11] (1996) 17 ILJ 1134 (LAC) at 1149 H [per Cameron J].

guarantee their safety at its premises because of ethnic hostility in the workplace.

The Industrial Court judgment proceeds on the assumption that the applicable principle was that management was entitled to decide regarding an operational reasons termination, but that it did so prematurely. The argument of both parties proceeded upon the same premise. But, in my view, the case sits uneasily within the operational reasons framework. It is necessary to be very clear on what occurred here. At the causal root of the dismissal of these workers was ethnic hostility to them. …

The court continued:

"But the court, in examining what is fair in the circumstances, must draw a distinction between management's motives (which were not impure) and the actuating causes which formed the background to its action. The court must distinguish between the forces of the market and the advances of electronics or technology (which may render a decision to dismiss within the competence and responsibility of management), and operational reasons which have their roots in opprobrious social conflict. There can be no doubt that, for management itself to dismiss a worker merely because he is Zulu, or because she is Jewish, or because he or she has HIV, would be reprehensible. For management to dismiss not directly for that reason, but because the rest of its workforce hold that reason, places management only at one remove from the opprobrious consideration. That remove is of course not without significance. It means that management will ultimately, when it truly has no alternative, be permitted to dismiss when it cannot guarantee the safety of employees whom the rest of its workforce, for reprehensible reasons of ethnic hostility, threaten with injury or death. But it also means, in my view, that management truly must have no alternative, and that no discretionary 'band of reasonableness' can be granted it.

Where a dismissal is actuated by operational reasons which arise from ethnic or racial hostility, the court will in my view countenance the dismissal only where it is satisfied that management not only acted reasonably, but that it had no alternative to the dismissal."

[52] In this case, Grindrod dismissed the drivers merely because they are foreigners. For it to have done so because Eskom demanded it, does not make it fair. It is still for a discriminatory reason.

[53] The Court in *Chuma*[12] also noted that, commenting on the *East Rand Proprietary Mines* decision, the LAC in *Lebowa Platinum Mines Ltd v Hill* [13] stated that in *East Rand Proprietary Mines* the court favoured the strict test of necessity where a demand by a third party leads to the dismissal of an employee in circumstances where the dismissal amounts to discrimination. The court went further and stated that such an approach would have to be examined to ascertain whether it is in harmony with the equality and discrimination jurisprudence of the Constitutional Court.

[54] There can be no doubt that nationality as a reason for dismissal is discriminatory. It is, at the very least, analogous to the listed ground of "ethnic or social origin", if not encompassed by that concept. The same phrase is used in s9(3) of the Constitution, as a listed ground barring discrimination in the Bill of Rights. Currie & De Waal[14] note that the International Convention on the Elimination of All Forms of Racial Discrimination defines 'racial discrimination' as unfair differentiation based on 'race, colour, descent, or national or ethnic origin'. And Du Toit et al[15] note that foreign citizenship has also been accepted as an unlisted but analogous ground of discrimination under the Employment Equity Act.[16]

[55] Had it not been for their nationality, they would not have been dismissed. There were no other operational requirements. They had valid drivers' licenses and work permits. Their performance was exemplary. The only reason for their dismissal was a discriminatory one. It was automatically unfair.

[12] Above par 40.

[13] (1998) 19 *ILJ* 1112 (LAC).

[14] Ian Currie & Johan de Waal *The Bill of Rights Handbook* (6 ed 213) at 227.

[15] Du Toit et al, Labour Relations Law: A Comprehensive Guide (LexisNexis 6 ed 2015) at 681 and 698, citing *Larbi-Odam v MEC: Education (Northwest Province)* 1997 (12) BCLR 1655 (CC). See also Dupper et al, *Essential Employment Discrimination Law* (2004) at 61.

[16] Act 55 of 1998 [EEA].

Relief sought

[56] The applicants seek retrospective reinstatement. Even though the Cape Town division of Fuelogic has closed down following the loss of the PetroSA / Eskom contract, it still exists in other provinces. The employees are willing to relocate.

[57] In her heads of argument, Ms *Ralehoko* also set out a claim for compensation for unfair discrimination in terms of the Employment Equity Act. That claim was included in the statement of claim.

[58] In *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[17] the LAC accepted that an employee can claim compensation for both an automatically unfair dismissal under the LRA and discrimination under the EEA. But Waglay JP set out the following principles:

> "Where claims are made both in terms of the LRA and the EEA and the court is satisfied that the dismissal was based on unfair discrimination as provided for in the LRA and that the employee was unfairly discriminated in terms of the EEA, the court must ensure that the employer is not penalised twice for the same wrong. In seeking to determine compensation under the LRA and the EEA, the court must not consider awarding separate amounts as compensation but consider what is just and equitable compensation that the employer should be ordered to pay the employee for the humiliation he/she suffered in having his/her dignity impaired. The employee's automatically unfair dismissal is so labelled because it is based on a violation of his constitutional right (in this case not to be discriminated on the basis of his age) and his claim under the EEA is for exactly the same wrong that of being discriminated on the basis of his age.
>
> …
>
> Where there is a single action with claims under the LRA and the EEA based on the employee being discriminated against and the court is satisfied that there has been an automatically unfair dismissal and that the employer's action also constitutes a violation of the EEA, it must determine what is a just and equitable amount that the employer should be ordered to pay as compensation. In arriving at this determination, the court should not consider separate compensation under the LRA and the EEA but what is

[17] [2015] 11 BLLR 1081 (LAC); (2015) *36* ILJ 2989 (LAC) par 30 – 33.

> just and equitable for the indignity the employee has suffered. In doing this, it may take various factors into account inter alia, as set out in *Tshishonga*, additionally, including but not limited to the position held by the employee within the employer's establishment, the remuneration he earned, how reprehensible and offensive was the employer's conduct, how if at all did it affect the employee and what motivated the wrongful conduct by the employer to act as it did etc. If the claim is under the LRA only, the court must, if the amount determined by the court to be just and equitable exceeds the threshold set in s194(3) of the LRA, reduce the amount of compensation to bring it within the limitation provided in s194(3). The amount will not have to be reduced though if, like in this matter, the claim is brought under both the LRA and the EEA because there is no limit prescribed to the amount of compensation that can be awarded under the EEA. The importance of this is that the employee's right to claim under both the EEA and the LRA is recognised and given effect to while at the same time the employer is not being penalised twice for the same wrong as a single determination is made as to what is just and equitable compensation for the single wrongful conduct."

[59] In this case, the employees seek reinstatement. That is the primary remedy envisaged by s 193 of the LRA. The exclusions in s 193(2) do not apply. They must be reinstated. But I am not persuaded that I should make a further order of compensation as envisaged by s 193(3). The employees must be paid retrospectively to the date of their dismissal. To order the employer to pay them compensation over and above that, would be to penalise it twice.

Conclusion

[60] The dismissal of the applicants was automatically unfair in terms of s 187(1)(f) of the LRA. They must be reinstated retrospectively. That need not be in the Western Cape; it may be in another division, provided it is on the same terms and conditions of employment.

Costs

[61] Ms *Ralehoko* had withdrawn as the first applicant's attorney. He continued to represent himself. He did not incur any legal costs. He is not entitled to costs in law or fairness.

[62] The second and third applicants are in an unusual position. They were successful; the reason for their dismissal is discriminatory; and they should, in law and fairness, ordinarily be reimbursed. But Ms *Ralehoko*, to her credit, represented them *pro bono.* She nevertheless asked for costs.

[63] That is not an unprecedented request. This Court has, in *Zeman v Quickelberge*[18], granted a similar prayer for costs. The Court embarked on a lengthy discussion of the question whether costs can be awarded in cases where litigants are represented *pro bono*.[19]

[64] I shall not repeat all of those arguments here. I stand by my view that is allowed, and in cases such as this one, should be awarded. I will only reiterate some of the principles and precedents cited in *Zeman.*

[65] In a previous unreported judgment in this Court, Cele J held in *Lorna Naude v BioScience Brands Ltd* [20] held:

"The applicant was represented on a pro bono basis. The considerations of law and fairness of this matter suggest that a costs order should issue against the respondent. There is no specific provision in the rules of this court for the awarding of costs in these circumstances. Rule 40 of the High Court provides for a costs order for a successful litigant *in forma pauperis*."

[66] As was noted in *Zeman*, the notion of awarding costs to a litigant who is being represented free of charge, is not alien in our law, and in fact express provision has been made in both legislation and the rules of court in order to level the playing field.

[67] Jurisprudence in the United States has also developed to the point where pro bono awards are routinely made in favour of *pro bono* litigants, even where there is no fee arrangement between attorney and client.[21]

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[18] (2011) 32 *ILJ* 453 (LC).

[19] At paras 55-77.

[20] C 842/08, 11 March 2010, unreported at paragraph 89.

[68] I still maintain the position in *Zeman* that, if a losing litigant pays the legal costs occasioned by the lawsuit, it may make it easier for attorneys to take on more pro bono matters, and indeed encourages them to do so.

[69] In my view, access to justice to indigent clients should be encouraged, especially in a court of equity such as this one. Should a successful *pro bono* litigant be awarded costs, the unsuccessful party is no worse off than would otherwise be the case. The obverse is also true: A *pro bono* litigant still runs the risk of an adverse costs order against him or her. The knowledge that a losing party – usually the employer – would never run the risk of an adverse costs order, would have a chilling effect on the willingness of legal practitioners to provide their services *pro bono*.

[70] The legislature deals with free legal services in the new Legal Practice Act.[22] Erica Emdon[23] notes that s 29 of the LPA makes no explicit reference to *pro bono* legal services. But it can be read into the "community service" provisions of that section. However, it still does not address the question of costs directly.

[71] *Zeman* was cited with approval by this Court in *Martin & Hauptfleisch Civils cc*[24] and in *Abrahams v Drake & Scull Facilties Management (SA) (Pty) Ltd.*[25] As far as I am aware, none of these three judgments has been overturned on appeal. Wallis J also referred to *Zeman* in *Thusi v Minister of Home Affairs* [26]. He remarked:

> "I have found no authority on whether the indemnity principle is subject to an exception that enables an attorney to provide legal assistance to an indigent litigant on the basis that an order for costs will be sought and if obtained will provide the source from which the attorney will be remunerated. Nor is there any decisive authority against such an exception. Cautious though I am as a single judge in a lower court in recognising a

[21] See the cases cited in *Zeman* above.

[22] Act 28 of 2014. [LPA].

[23] Erica Emdon, "More clarity on *pro bono* under the Legal Practice Act" *De Rebus* February 2017 p 26.

[24] [2011] ZALCCT 37 (18 October 2011)

[25] [2012] 5 BLLR 434 (LC); (2012) 33 *ILJ* 1093 (LC).

[26] 2011 (2) SA 561 (KZP) par 109.

> new exception to the indemnity principle in my view there is much to be said in favour of it where the litigant would otherwise have no means of securing access to the legal assistance necessary to pursue a claim. To permit it would not be unduly prejudicial to the respondents. Litigants bringing similar proceedings who have the means to pay their legal representatives are entitled to obtain orders for costs and to tax them against the Department. Such litigants could agree with their attorney that the latter would wait for the outcome of the case before rendering a bill. Essentially that is what the applicants seek. To deny them the benefit of an exception to the general principle would deny justice to some who are amongst the poorest in our society and least able, as I said at the outset, to deal with an inefficient and heartless bureaucracy. It would place them at a disadvantage in relation to people of means. It would also provide those who are at fault with a fortuitous benefit because of the willingness of the attorneys to undertake these cases at their own risk. In my view that is contrary to the spirit, purport and objects of the Bill of Rights."

[72] The Supreme Court of Appeal has also accepted that costs can be awarded *pro bono*. In *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*[27]*,* where the Minister of Justice and Constitutional Development failed to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, and acted inconsistently with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, the SCA ruled that the applicant (an NGO) "is entitled to the costs of the application on a *pro bono* basis."

Order

[73] I therefore make the following order:

73.1 The dismissal of the applicants by the respondent was automatically unfair in terms of s 187(1)(f) of the Labour Relations Act.

[27] 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA).

73.2 The respondent is ordered to reinstate the applicants retrospectively to the date of their dismissal, on the same terms and conditions, except that they may be employed elsewhere in South Africa and not necessarily in the Western Cape.

73.3 The respondent is ordered to pay the second and third applicants' costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

SECOND AND THIRD APPLICANTS:	Tapiwa Ralehoko of Cheadle Thompson & Haysom.
RESPONDENT:	Pravan Jaggan (attorney).