THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1687 / 15

JS 620 / 15

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

PERSONS LISTED IN ANNEXURE "A" **Second to Further Applicants**

and

WBHO CONSTRUCTION (PTY) LTD **Respondent**

Heard: **June 2017**

Delivered: **13 December 2017**

Summary: Operational requirements – rationale for retrenchment – evidence considered – proper rationale for retrenchment shown

Operational requirements – bumping of employees between operating divisions – principles pertaining to bumping considered – proper cause for differentiating between divisions – proper cause for not applying bumping across all divisions – approach of employer fair

Operational requirements – selection criteria – retention of TES employees on specific contracts – approach justified – employer did not act unfairly

Operational requirements – issue of alternatives to retrenchment considered – alternatives properly explored – lay off policy considered – no suitable alternatives available

Operational requirements – selection criteria considered – fair and objective basis for selecting employees for retrenchment – selection of employees not unfair

Re-employment – alleged failure by employer to re-employ in terms of undertaking – constitutes an issue of an unfair labour practice in terms of Section 186(2)(c) of the LRA – no such case referred to conciliation – cannot be raised now

Dismissal – operational requirements – dismissal substantively fair

Operational requirements – procedural fairness – Section 189A(8) considered – no requirement to first refer matter to conciliation before retrenchment – absence of referral does not render dismissal procedurally unfair – issue is about time limits – time limits complied with

Operational requirements – procedural fairness – even if Section 189A(8) not complied with – insufficient basis to per se establish procedural unfairness.

Operational requirements – procedural fairness – procedural unfairness can only be challenged in the case where Section 189A applies by way of application in terms of Section 189A(13) – procedural challenge thus only be decided on the basis of procedural fairness set out in that application – no issue raised that labourers not properly notified of retrenchment or properly consulted – cannot be considered

Dismissal – operational requirements – procedural fairness – dismissals procedurally fair

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The first applicant, NUM, brings this case on behalf of all its members that has been retrenched by the respondent. This is therefore a case of unfair dismissal based on operational requirements, in which both the substantive and procedural fairness of the dismissal are challenged. It was common cause that Section 189A of the LRA[1] applied to the dismissals in this case.

[2] The applicants have brought this case by way of a statement of claim filed on 16 September 2015, as well as a separate application in terms of Section 189A(13) also filed on 16 September 2015 to challenge procedural fairness, considering the provisions of Section 189A(17).[2] The respondent has opposed both these processes, on the basis that the retrenchment of the employees concerned was in all respects fair, by way of an answering statement dated 16 October 2015 and an answering affidavit also filed on the same date.

[3] The matter came before me on trial from 12 to 15 June 2017. Closing argument was presented by both parties on 15 June 2017, but I also afforded both parties the opportunity to file further written argument by 30 June 2017. The applicants and the respondent indeed filed written argument on 26 and 27 June 2017, respectively.

[4] Before the matter commenced on actual trial, a number of preliminary issues were first dealt with. Firstly, the applicants' Section 189A(13) application was filed out of time, and condonation in this regard was applied for by the applicants. This application was unopposed, and in my view the applicants had submitted a proper explanation for the delay. I granted condonation for the late filing of the Section 189A(13) application.

[5] The issue of which of the individual applicants were still party to these proceedings and properly before Court was then dealt with. The matters concerned three divisions of the respondent, being the Civils Division ('Civils'), Building North Division ('Building North'), and the Plumbing Division

[1] Labour Relations Act 66 of 1995.

[2] Reads*a)* An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the *employee's* services or, if notice is not given, the date on which the *employees* are dismissed . See

('Plumbing'). It was agreed between the parties that all the individual applicants retrenched in Civils was contained in the final list found at pages 120 – 122 of the pleadings bundle, amounting to 98 individual applicants. It was also agreed that the list of individual employees retrenched in Plumbing was the list found at page 117 of the pleadings bundle, and amounted to a further 12 individual applicants. In the end, the applicants could not establish the existence of any individual applicants retrenched in Building North that were a party to these proceedings. This means that the only individual applicants that are a party to this case are those from Civils and Plumbing, constituting a total of 110 individual applicants.

[6] Next, by way of opening address and with reference to the Practice Notes filed as well as the pre-trial minute, the parties sought to finally narrow the issues that needed to be decided, where it came to the grounds on which the applicants' case of substantive and procedural unfairness were based. It must be said that the applicants never placed the general rationale for the restructuring and retrenchments in dispute. As to what was in dispute, and what need to be decided, the essence of which is summarised as follows:

6.1 The respondent should have applied bumping of employees across certain divisions, being Building North, Civils and Plumbing. The point that the applicants sought to make was that the retrenched employees in Civils and Plumbing could have been accommodated in comparable positions occupied by other employees in Building North with much shorter service.

6.2 According to the applicants, there were vacancies available in Building North which could have been offered to retrenched employees as an alternative, which meant they could simply be transferred into Building North without the need to retrench them

6.3 The respondent should have terminated the services of all the labour broker (TES) employees employed in Building North and made those positions available to the employees sought to be retrenched in Plumbing and Civils.

6.4 Instead of retrenchment, the respondent had the option available of applying a lay-off policy, which had been agreed to between the respondent and the first applicant sometime earlier. Because this lay-off policy was a collective agreement, the respondent was obliged to apply it.

6.5 The respondent failed to comply with its own undertaking to re-employ retrenched employees, when vacancies arose after the retrenchment process had been completed.

6.6 Finally, and as to procedural unfairness, there were only two issues raised. The first issue is that because Section 189A applied, the respondent was supposed to have referred the matter to the CCMA for conciliation before retrenching employees in Civils and Plumbing, and the failure to do this rendered the dismissal procedurally unfair. Secondly, the respondent, where it came to Civils, failed to properly notify the labourers that they could be affected by the retrenchment and did not properly consult with them, rendering their dismissal procedurally unfair.

[7] As to consequential relief in the case of a finding of unfair dismissal, the applicants seek fully retrospective reinstatement of all the retrenched individual applicants, with full back pay to date of their dismissal. In the case of a finding only of procedural unfairness, the applicants seek compensation equivalent to 6(six) months' salary.

[8] Having now set out all the issues to be decided, I will commence with first setting out the relevant background facts. I may add that in the end, much of the factual matrix in this matter, as well as the documentary evidence, was either undisputed or common cause.

Background facts

[9] The respondent in essence had five different operating divisions, being Civils, Building North, Road and Earthworks ('Roadworks'), Plumbing and Plant.

[10] On face value, these different operating divisions were entire separate from one another. They in effect operated in different market segments, had different clients, and did different kinds of work. Each division also had its own management and administration, management accounts, and financial statements. According to the respondent, each division may as well be considered to be a distinct and separate business.

[11] Civils did what can be generally classified as heavy concrete work. Building North principally constructed buildings such as high rises and office blocks. Earthworks did large earthworks, earth platforms, and roads. The name 'Plumbing' speaks for itself as to what is conducted in this division.

[12] Civils conducted business is a regulated working environment, and would often use specialised subcontractors. Civils mostly did work for the various mines. This meant that all employees working at the mines had to go through an extensive period of induction and had to be cleared before being allowed to work on a mining site, which affected the mobility of the workforce.

[13] The specialised positions in Civils were that of shutter hands, concrete hands and construction hands. A shutter hand would be tasked to put together the formwork for the concrete, and the concrete hand would do the actual concrete work. The construction hand would assist either the shutter hand, or concrete hand. The respondent sought to distinguish these positions from the similar named positions in Building North. It was explained that shutter hands in Building North do not do the kind of formwork done by their namesakes in Civils, and also Building North shutter hands only do partial formwork for parts of structures. Building North does not have concrete hands, and that all concrete work is done by construction hands. Again, this concrete work is not the kind of specialized concrete work done in Civils, and is of a general construction nature.

[14] Civils did not employ most of its general labourers or general workers on a permanent basis. It obtained most of this kind of labour only on specific projects and then also only on limited duration (fixed term) contracts linked to that project. There were a limited amount of general labourers still employed in Civils when the retrenchment process giving rise to this matter arose. It was

also explained that it was often a requirement by a client that general labour must come from the local community where the project is situated.

[15] Building North and Civils served an entirely different client base. Building North principally did private contract work, for private company clients. This is a far less regulated working environment. Also, on these kind of projects, Building North is not the only contractor working on the project, but would work with other specialized contractors as well.

[16] It was undeniable that Civils, by 2014, was going through tough times. In effect, the work was drying up and there were no reasonable prospects of any further work in at least the short term. A number of contracts were coming to an end and the mines (as the principal clients of Civils) had drastically curbed spending. Also, the parastatals for which Civils did work were not allocating work. The respondent had prepared a list of all the contracts in Civils as at August 2014, with an indication as to when this work would end. This list was presented to the first applicant in the consultations to follow. It was clear from this list that by the middle of 2015, all the contracts, save for two smaller contracts, would end. This list also showed the number of foremen teams on each contract. A foreman would head up a team of the specialized employees referred to above. According to the list, 17 senior foremen teams, 29 foremen teams, and 27 junior foremen teams would be directly impacted when the contracts came to an end.

[17] By October 2014, Civils was looking at downsizing a total of 17 foremen teams, involving a total 225 employees. This was, at the time, the envisaged worst case scenario for Civils. Civils however did anything it could to avoid retrenchments. These measures included seconding teams to work on Roadworks projects to do civils kind of work, expanding the scope of tenders to smaller projects, and changing the tender model. Another given example was that Civils, on the Bloemfontein stadium project, even took to funding the project out of its own cash flow to keep it going until payment was received from the client.

[18] Civils, as part of its proposed restructuring, also envisaged doing away with all general labourer positions as permanent employment positions. If and where such labour would be required, they would engage labourers only on the basis

as required by a specific project and then only on fixed term contracts linked to that project.

[19] On 15 July 2014, Civils issued a notice as contemplated by Section 189(3) of the LRA to all relevant parties, including the first applicant, of its intention to restructure. The reason for restructuring given in this notice was based on what has been summarized above.

[20] A first consultation took place on 11 August 2014. It was more of an introductory consultation, in which the rationale for the restructuring and possible retrenchments was explained. The consultation was attended by representatives of the first applicant, who submitted a request to be provided with the number of employees likely to be affected, the specific occupation and sites of these employees, as well as the total number of employees in Civils. Civils undertook to provide that information.

[21] On 26 August 2014, the information requested by the first applicant was provided, in the form of lists. These lists showed the categories of employees, being section leaders, concrete hands, shutter hands and construction hands, with their starting date of employment and specific positions. It was common cause that general labourers were not listed.

[22] The next consultation took place on 4 September 2014. In this consultation, the parties discussed alternatives to retrenchment. One of these was that Civils would leave foremen teams at the Kusile projects without invoicing the joint venture for longer than normal. It was also discussed that Civils managed to get one new small contract that could accommodate one foreman team. The possible seconding of teams to Building North was considered, but this was not possible, on the basis that this had been tried in the past, but was not workable. The reasons for this have been set out above, but an additional consideration was that the two divisions even operated under different bargaining councils.

[23] A third consultation took place on 23 October 2014. In this consultation, a summary of the rationale for the restructuring and the measures taken to try and avoid retrenchment was presented. These measures included what has been set out above, but also included terminating all limited duration contracts.

No issue was taken with this presentation, by the first applicant. The first applicant however did raise certain specific issues in this consultation. It was requested that the retrenchment process in Civils be consolidated with that in Building North, and that bumping be applied across Civils and Building North. The first applicant further requested that the date of retrenchment be postponed to December 2014, and a possible increase in the severance package be considered.

[24] Where it came to the issue of selection, the parties were *ad idem* that LIFO be used, in specific job categories. Initially Civils wanted to include absenteeism and disciplinary records in the selection process, but the first applicant was opposed to this, and it was then agreed to drop this. It was however also agreed that senior foremen core teams would be excluded from selection, because of their particular speciality.

[25] The fourth and final consultation convened on 4 November 2014. In this consultation, the rationale for retrenchment was not challenged. But what the first applicant certainly took issue with was the issue of selection. The first applicant insisted that one process should be conducted for both Civils and Building North jointly, and that the agreed selection criteria be applied across both these divisions and that bumping be applied. The first applicant did not accept the explanation that the divisions were separate and why they were separate. As a result, the first applicant refused to participate in the consultation further, and left. The consultation continued with the other participants, and the manner of application of LIFO as primary selection criteria was discussed. Voluntary retrenchments were also made available.

[26] Civils then proceeded to draw up lists of employees to be selected for retrenchment, applying LIFO by occupational category. These lists were sorted by way of starting date of employment per occupational category, of all employees in these categories, and the selected names were indicated in yellow. These lists were then circulated to all parties concerned, including the first applicant. No comment was received to the same. In the end, 137 employees would face retrenchment.

[27] On 8 December 2014, all affected employees in Civils were then given notices of retrenchment, in terms of which their employment was terminated with

effect from 11 December 2014 on one months' notice, paid in lieu of notice. The retrenchment notice recorded that in the event of future vacancies arising within a period of six months from date of the notice, for which an employee may be suitable, the employee will be notified and may be offered employment.

[28] Turning then to Plumbing, it is a small division in the respondent which principally only does specialized plumbing work on other contracts of the respondent. However, Plumbing is not guaranteed such work, and actually tenders for such work against other third party service providers. Thus, Plumbing is not even guaranteed work on contracts of the respondent in other divisions. Plumbing mainly did work for Building North.

[29] Plumbing employed skilled and semi-skilled plumbers, as well as what was called plumbers' assistants. It does not employ general workers on a permanent basis, and would from time to time employ general labourers on a fixed term contract basis where a project required it. An example would be where the work requires the digging of a trench. This limited duration labour would be provided by labour brokers. Plumbing however only permanently employs a core group of skilled employees, with employees working in teams consisting of a skilled and semi-skilled plumber, with an assistant.

[30] After the 2010 World Cup Soccer tournament, the work of Plumbing started to diminish. There was a downward trend in volumes of work, as well as in the margins for the work. Similar to Civils, in 2014, it was apparent that work in Plumbing was drying up and there were no new contracts in the pipeline. In simple terms, Plumbing simply had too many employees for the amount of work available. Plumbing was actually in danger of being closed.

[31] Similar to the other divisions, Plumbing is also an entirely independent operation, with its own management and financial records. It is also clear that the nature of the work it performs is entirely different to that of the other divisions.

[32] On 23 October 2014, Plumbing issued its own notice as contemplated by Section 189(3) of the LRA with regard to its intended restructuring, to all

relevant parties, including the first applicant. In this notice, it is specifically stated that Plumbing has insufficient work to sustain the current workforce.

[33] A first consultation was held on 30 October 2014, and was attended by the first applicant. In this consultation, the rationale for the restructuring was discussed. The first applicant requested information about the number of employees that would be affected and their positions, as well as the various contracts they were working on. The requested information was provided on 3 November 2014, which included a list of contracts and employees working on those contracts, as well as the complement of staff that would be required going forward. It was envisaged that 20 employees would be affected.

[34] A second consultation was held on 10 November 2014. The first applicant took no issue with any of the information provided. Similarly, the selection criteria of LIFO per occupational category was not taken issue with. The first applicant raised no issue about bumping being applied where it came to Plumbing employees. In this consultation, it was apparent that retrenchments were unavoidable and the parties then discussed termination benefits. In the end, 19 employees were selected to be retrenched, with 12 of these employees being members of the first applicant.

[35] On 13 November 2014, all affected employees in Plumbing were then given notices of retrenchment, in terms of which their employment was terminated with effect from 10 December 2014 on one months' notice, paid in lieu of notice. The notice equally recorded that in the event of future vacancies arising within a period of six months from date of the notice, for which an employee may be suitable, the employee will be notified and may be offered employment.

[36] It is the termination of employment of the first applicant's members in Civils and Plumbing that has led to the current proceedings, with the fairness of such dismissal being challenged on the basis as summarized above. I will now commence deciding the fairness of such dismissals, starting with the issue of substantive fairness.

<u>Was the dismissal substantively fair?</u>

[37] The issue of whether a dismissal for operational requirements is substantively fair is decided by way of answering what is called a general question and a specific question. As said in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*[3]:

> 'Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place.'

[38] In seeking to answer the general question first, as touched on above, the rationale for retrenchment was in reality not challenged. The applicants never took issue with the respondent's decision to restructure both in Civils and in Plumbing, as well as the operational considerations underlying such decision. It was certainly a course of action the respondent was justified to pursue and made general and proper business sense. As said *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[4]:

> '…What we have to do is to decide whether the respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry even if it might not have been the best under the circumstances. …'

Equally, the applicants have never contended that the respondent's decision to restructure in Civils and Plumbing, which led to the ultimate retrenchments, was not genuine or was in reality a sham.[5] There is accordingly no case or basis to interfere with this decision, and I shall deal with it no further.

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[3] (2006) 27 ILJ 292 (LAC) at para 55.
[4] (2000) 21 ILJ 129 (LAC) at para 36.
[5] See *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings* (1998) 19 ILJ 1451 (LAC) at para 8; *Kotze* (*supra*) at para 39.

[39] But where it comes to answering the general question, there are three issues that must be considered. The first is the issue of the lay-off policy, which the applicants contend would have removed the very need to retrench employees if it was applied. The second issue is that if the TES employees were let go, this equally would have removed the need to retrench the individual applicants. And finally, the third issue is that retrenched employees could have been transferred to existing vacancies in Building North, thereby also removing the need to retrench such employees.

[40] Turning then to the specific question, this is in essence the core of the applicants' substantive unfairness challenge. The applicants' complaint that bumping should have applied across both Civils and Building North in the respondent, is squarely an issue of selection.[6] In short, the applicants are saying that the wrong persons, being the individual applicants, were selected for retrenchment, in that other employees in Building North with shorter service should have been selected.

[41] I will now proceed to consider the issues relating to both the general question and the specific question, under separate headings, hereunder, starting with the general question.

Evaluation: the general question

[42] Dealing firstly with the lay-off policy ('the policy'), it is contained in a collective agreement concluded between the respondent and the first applicant on 29 September 2010. It is stipulated in the policy that the building and construction industry is cyclical, with 'gaps' (for the want of a better description) between when one project starts and another begins. It is in fact provided in clause 1 that 'Due to anticipation of future work/projects lay-offs are preferred over retrenchment as a short term retention of skills'. Further, clause 5 of the policy specifically provides that the policy will be implemented on a divisional basis and within a division, where there is no longer work on a

[6] See *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC) at para 16; *General Food Industries Ltd t/a Blue Ribbon Bakeries v Food and Allied Workers Union and Others* (2004) 25 ILJ 1655 (LAC) at para 25.

specific site. As lay off benefit, employees receive 50% of salary for a maximum of 6 (six) weeks.

[43] The case of the applicants was that the application of the policy could have avoided retrenchments. I cannot agree. Lambert Johannes Smit ('Smit'), the first witness for the respondent, and the managing director of Civils for the last 7 (seven) years, explained that the lay-off policy was not applied in Civils. Instead, Civils utilizes an industry collective agreement in the Bargaining Council for the Civil Engineering Industry ("BCCEI') which provides for short time in such events, and which is more beneficial to employees. In terms of this BCCEI agreement, employees that are not placed on site for work are paid 30 hours per week, instead of the normal 45 hours, for as long as they are not working. According to Smit, there was never any issue raised by the employees or the first applicant about this whenever it was applied, because it was more beneficial to employees. Significantly, this evidence of Smit emerged undamaged from cross-examination. It would thus seem that where it came to Civils, the policy had been overtaken by subsequent industry provisions.

[44] Be that as it may, even if the provisions of the policy are considered, it cannot assist the applicants. I am also mindful of the fact that the policy was never raised by the first applicant in the course of the consultations as an alternative to retrenchment, which seems to indicate that it was in reality not a viable option. But it is the terms of the policy itself which convinces me that it is no alternative at all. As stated above, the policy had an objective. That objective was to provide for the hiatus between one project ending and another one starting. Its application was always premised on the continued availability of work. Considering that the application of the policy takes place in individual divisions and not across divisions, it did not provide for the scenario that existed in Civils, being that the availability of work was actually drying up. Work was ending, with no prospects of further work.

[45] In my view, the application of the policy had no point. As stated, lay-off contemplates that work would become available in the short term, being an issue stipulated in the policy itself. On the undisputed evidence, in the end, no such work was available, with no short term prospects of further or new work.

In short, with no prospect of available work to move into, there is nothing pending which could be covered by lay-off. Accordingly, the lay-off policy cannot assist the applicants were it comes their case of substantive unfairness of the dismissal.

[46] Next, I will deal with the issue of the respondent retaining the services of temporary employment service ('TES') employees in Building North, instead of terminating the services of such employees and the applying the vacancies so created to the individual applicants that faced retrenchment in Civils, or in Plumbing. It must be mentioned that employment of all the fixed term contract employees, or temporary employees provided by third parties, in Civils itself, were terminated first during the restructuring process in Civils. When the individual applicants in Civils were retrenched, there were no TES employees remaining. No TES employees were also employed in Civils after the retrenchments.

[47] The applicants placed some reliance on a list of TES employees provided by Colven group as part of process by the applicants to compel disclosure of information from the respondent. It was clear from this list that none of these employees were provided to Civils. They were all working on Building North contracts / projects. It is also clear that these were virtually all general labourers / workers positions. According to the applicants, if all these TES employees engaged as at December 2014 were let go, all the individual applicants could be accommodated in such positions.

[48] In this context, Smit in fact explained that where it came to general workers and unskilled labour, it was often subject to specific client requirements to use local labour, and that this kind of labour was quite contract specific. He explained that as a matter of business decision, this kind of labour would only be procured on a temporary basis linked to specific contracts / projects. It would never be part of the permanent workforce.

[49] But according to the applicants, the explanation provided by Smit is as a matter of principle unacceptable. As far as the applicants were concerned, it would always be *per se* unfair, should the respondent seek to retrench its own employees, but then still retain the services of TES employees. In short, and

as far as the applicants were concerned, all TES employees must always go first, no matter what.

[50] I simply cannot ascribe to this approach propagated by the applicants. In my view, it simply cannot be said that as a matter of principle, an employer must always be required to first dispense with TES employees in order to ensure that the retrenchment of its own employees would be considered to be fair. There may well be circumstances where it would be operationally justified for an employer to retain TES employees even when it seeks to retrench its own employees. This would of course depend on what the employer's genuine operational imperatives are, and whether these imperatives actually justify such an approach.

[51] The Court in *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union and Another*[7] dealt with the situation where employees were offered alternative positions with a temporary employment service in circumstances where the employer, due to its business methodology, decided to declare those positions internally within the employer itself redundant. This is clearly similar to a situation where an employer wishes to retain TES employees but retrenches permanent employees. The Court firstly held:[8]

> '… the appellant was entitled to choose the manner in which it would run its business provided that it did not change the terms and conditions of employment of the employees without their consent, and provided that, if it contemplated the dismissal of the employees, it complied with its obligations provided for in s 189 of the Act.'

Having established this principle, the Court then said, with specific reference to the operational circumstances of the employer:[9]

> '… Du Plessis had testified that, due to peaks and valleys, it made more sense to use labour brokers because the appellant paid only for cars actually moved whereas, if the appellant used permanently employed employees, it would be paying them per hour and not per car moved. In

[7] (2006) 27 ILJ 2537 (LAC).
[8] Id at para 39.
[9] Id at para 34.

my judgment, even if it can be said that the appellant did not prove 'peaks' and 'valleys', it was entitled to prefer the use of labour brokers and subcontractors to the use of permanently employed workers because the former arrangement gave it certain benefits which the latter arrangement did not offer. Accordingly, whether the peaks and valleys were proved is neither here nor there. The appellant was entitled to choose a way of doing business that was less risky. The way of using labour brokers and subcontractors was less risky than the one of using permanent workers.'

[52] A similar approach was adopted in *National Union of Metalworkers of SA and Others v John Thompson Africa*[10] where the Court said, of equal application *in casu*:

'Furthermore, the nature of the respondent's business was such that its labour requirements fluctuated in quality and quantity. Labour supplied via a brokerage was therefore more efficient than having a workforce that was fixed.

Outsourcing certain work was more effective for the respondent. Mr Petersen's proposition that the respondent would outsource work whilst its own employees stood idle, purely for the purposes of shrinking the business to justify the ultimate retrenchment of the employees is improbable. The respondent existed to make a profit. If outsourcing was not profitable it would have avoided it.'

The Court in *John Thompson* then concluded:[11]

'I find that there was a commercial rationale for the outsourcing of labour. The respondent's use of labour brokers was therefore not unfair.'

[53] Similarly, and in *Chester Wholesale Meats (Pty) Ltd v National Industrial Workers Union of SA and Others*[12] the Court accepted that the employer was

[10] (2002) 23 ILJ 1839 (LC) at paras 304 – 305.
[11] Id at para 310.
[12] (2006) 27 ILJ 915 (LAC) at paras 16 and 17. .

entitled to use a labour broker for positions that needed to be filled only as and when required without this rendering the retrenchment unfair.

[54] In the end, Smit's explanation as to why it would be prudent to use TES employees where it came to general labour was never contradicted and as I have already said, made sound business sense. The TES positions were temporary and served to cater for a specific, and legitimate, business need. This cannot serve as a legitimate basis upon which to contend that the dismissal of the individual applicants was not for a proper reason. This ground of substantive fairness raised by the applicants thus cannot be sustained.

[55] Finally, and as to the issue of vacancies in Building North in which the individual applicants could simply be transferred, there was no evidence of this. This was never suggested to Smit under cross examination. Considering that Building North itself had gone through a restructuring process at the same time, but had avoided forced retrenchments on the basis of voluntary retrenchments and other forms of attrition, it is highly unlikely that there would be any such vacancies. In any event, the applicants led no evidence as to the existence of such vacancies.

[56] I thus conclude that the general question must be answered in favour of the respondent. There accordingly existed a proper and fair rationale for the retrenchment of the individual applicants.

Evaluation: The specific question

[57] Where it comes to the selection of employees for retrenchment, it was never in issue that the selection criteria itself was unfair. This selection was conducted on the basis of LIFO applied to occupational categories, both in Civils and in Plumbing. The applicants' difficulty lies in the fact that this selection was not also applied in Building North, on the basis of bumping, where it came to employees selected for retrenchment in Civils and Plumbing. The applicants, as part of the pre-trial process, called for the lists of employees with their occupations and starting dates in all the divisions, and then conducted a like for like comparison in respect of all employees, across all divisions, referring to starting date and occupation, as a basis of attack on the selection. The

applicants sought to show that there were employees who had lesser service than the individual applicants remaining in Building North, in positions the individual applicants could competently fill.

[58] It is true that in the consultation process in Civils, the first applicant had pertinently raised the issue of bumping across Building North, and when this was not agreed to, decided to leave the consultation and cry unfairness. Smit testified that the first applicant was provided with an explanation why bumping could not be applied across Building North, but this was not accepted by the first respondent. It was however the subject matter of proper consultation.

[59] The explanation as to why bumping was not applied across Building North has already to some extent been set out above. But what was extensively explored with Smit under cross examination was movement of employees between Civils and Building North. It was suggested to him that employees readily moved between these divisions, which Smit pertinently disputed. As touched on above, he in fact explained that where secondment between Building North and Civils had been tried in the past, it did not work.

[60] Smit did concede that geographical location did not present a difficulty to the respondent if employees were willing to relocate. He also conceded that the skills between the employees in Civils and Building North were interchangeable where it came to certain positions, in particular the positions of shutter hands.

[61] It was put to Smit that Lucky Mazibuko ('Mazibuko') would say that he was a shutter hand that was employed in Civils, but he was used on a building project in Newtown. Smit explained that what happened in Newtown was that the contract was a joint venture between Building North and Civils, and that Civils employees still remained Civils employees working on the Civils component of that project.

[62] Where it came to Plumbing employees, it was undisputed that Building North did not employ plumbers or utilized skills associated with plumbing, and in fact utilised sub-contractors (including the Plumbing division itself) for this purpose. As such, there were simply no suitable positions into which plumbing employees could be bumped into Building North.

[63] Smit also provided an explanation as to why vertical bumping would not be feasible. He gave the example that for a shutter hand to do the work of a general labourer would be such a reduction in status and remuneration that it would never be accepted. He added that in such a situation, the shutter hand would then have to report to and take instructions from other employees that used to be on the same level. These explanations were never contradicted, and are in my view proper explanations. It was suggested by Mazibuko in giving evidence that employees would be prepared to consider lower positions, but his evidence in this regard was sketchy, and he in any event could not speak for other individual employees.

[64] Mazibuko was the only witness that testified on behalf of the applicants as to the merits of the matter. Significantly, and although he said that he moved from site to site, this was always within the context of contracts in Civils. He then gave a number of examples of Civils employees being deployed on Building North projects. This included the site manager that moved from Civils on the Standard Bank project which was a Building North project, and skilled employees being transferred from Civils to Building North for the Newtown Junction project. The problem I have with the Standard Bank example is that it was not put to Smit under cross examination to answer,[13] and thus he was not afforded an opportunity to deal with it in evidence. What was put to Smit was the Newtown project, and this was explained on the basis as set out above and was not a secondment at all.

[65] Turning then to the lists themselves, and even if LIFO is considered across Civils and Building North divisions, there is not a material deviation from LIFO. In the case of supervisors, there are two individual examples of supervisors in Building North that started employment in 2014. Otherwise, all other supervisors in Building North were more or less in the same realm of the length of service of those supervisors in Civils that were selected for retrenchment.

[13] This means that this evidence should be rejected – see *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* (2005) 26 *ILJ* 1652 (LAC) at para 39; *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 41.

[66] In the case of concrete hands, only Civils employed this occupational category of employee. The application of LIFO affected all these employees in the employment starting date period between 2013 and 2009. There were three individual employees not selected in sequence, but this was explained by Smit as being employees that were still involved in projects to be completed and were in fact retrenched in a second round of retrenchments that followed in 2015.

[67] Construction hands selected for retrenchment were all in the 2012 and 2013 starting date of employment range, which is in line with the shortest serving comparable employees in Building North. The same consideration applies to shutter hands, with the applicable starting date period being between 2009 and 2013 and comparable to Building North.

[68] None of the particular long serving shutter hands, concrete hands, or construction hands, in Civils, with date of commencement of employment prior to 2009, were selected for retrenchment.

[69] In argument for the first time, the applicants also conducted a comparison with the employees in Roadworks, where it came to the issue of bumping. The difficulty I have with this is that this was never part of the applicants' case where it came to bumping. It was not raised in the statement of case nor in the pre-trial minute. It was always, in short, an issue between Civils and Building North. Even in the retrenchment consultations, the first applicant was only adamant that the retrenchment process should also be applied to Building North, and that bumping should be applied in that division, with no reference being made to Roadworks at all. No evidence was presented that the skills of employees in Civils was readily interchangeable with comparative positions in Roadworks or now these positions may in fact be comparable. I shall therefore not consider this issue.

[70] Finally, where it comes to Plumbing, it was the only division that employed employees with plumbing skills, and none of these employees were readily transferrable into comparable positions within other divisions. It must also be considered that bumping was never raised in the retrenchment consultations of Plumbing.

[71] It must always be remembered that bumping is intended to protect long serving employees against retrenchment. This is done by selecting employees in comparable positions in other unaffected departments, but with shorter service, for retrenchment, in place of the long serving employees in affected departments. But because the exercise of bumping is simply the application of the selection criteria, it can be legitimately limited, provided the conducting of selection always remains fair and objective.[14] In *Amalgamated Workers Union of SA v Fedics Food Services*[15] the Court with approval to an article by Halton Cheadle 'Retrenchment: The New Guide-lines'[16], where the learned author said the following about bumping:

> '… In other words, should an employee with long service be made redundant in one department he should be transferred to a similar post elsewhere in the establishment, even though it may be occupied by an employee with shorter service. Should there be no such post, the practice is to offer the longer-serving employee a less skilled position occupied by employees with shorter service. This procedure is graphically called "bumping'. In short, one "bumps' sideways and down. The restriction of this principle to departments can lead to abuse. Long-serving employees can be transferred to departments where redundancy is expected and thereby retrenched at a later stage. Such a practice would clearly subvert the objective application of the principle.'

[72] The Court in *General Food Industries Ltd t/a Blue Ribbon Bakeries v Food and Allied Workers Union and Others*[17] applied bumping as follows:

> 'What was also established at the trial in this matter is that through bumping the second and further respondents could have been transferred to other bakeries to take jobs done by employees who had shorter service periods than themselves but performing work that the second and further respondents could perform … I can see no justification for an employer to retrench an employee who has served him loyally for, for example 20 years, and retain one who has been employed for only a few months to perform work that the one with a longer service period can also perform. … On the contrary allowing that approach in the absence of a really sound reason or explanation could

[14] Section 189(7) reads: 'The employer must select the employees to be dismissed according to selection criteria- …(b) if no criteria have been agreed, criteria that are fair and objective.'
[15] (1999) 20 ILJ 602 (LC) at paras 3 – 4.
[16] (1985) 6 ILJ 127 at 137.
[17] (2004) 25 ILJ 1655 (LAC) at para 36.

lead to abuse. An employer who wants to get rid of an employee (but lacks legitimate grounds to do so) could transfer such employee to a branch which he knows is likely to embark upon a retrenchment exercise in due course if he thought that such employee would be a likely candidate for retrenchment in that branch on the basis of LIFO which is applied only to the affected branch. In that way the employee could be selected for retrenchment at that branch and be retrenched despite the fact that in his old branch there are employees who have shorter service periods than him who perform work that he can perform. … '

[73] Accordingly, bumping is a relevant consideration where it comes to possibly selecting long serving employees for retrenchment in place of short serving employees, and where it is necessary to apply selection across departments or other unaffected business areas / sections in an employer so as to prevent such possible abuse. As enunciated in *Porter Motor Group v Karachi*[18], there are a number of principles applicable to the application of bumping, summarized by the Court as follows:

'… In determining a fair selection of employees for retrenchment bumping has often been implemented and the following principles have developed in relation thereto. This does not purport to be an exhaustive list and merely catalogues the rules laid down which are relevant to this case.

(1) It should be reiterated once again that fairness is not a one-way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.

(2) Bumping is situated within the 'last in first out' (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise are an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated hereinafter, their service alone is sufficient reason for them

[18] (2002) 23 ILJ 348 (LAC) at para 16. See also *Mtshali v Bell Equipment* [2017] JOL 38221 (LAC) at para 22; *Motor Industry Staff Association and Another v Autozone Grahamstown* [2016] ZALCJHB 204 (3 June 2016) at para 70.

to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.

(3) The nature of bumping depends on the circumstances of the case. A useful distinction is that of dividing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.

(4) The first principle is well established, namely that bumping should always take place horizontally, before vertical displacement is resorted to. The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.

(5) Where large-scale bumping, sometimes referred to as 'domino bumping', necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimizing the disruption to the employer. Examples of disruption include difficulties caused by different pay levels, client or customer reaction to a replacement of employees and staff incompatibility. In evaluating the competing interests of the employer and the affected employees the consulting parties should carry out a balancing exercise. Where minimal benefits accrue to employees, while vast inconvenience is the lot of employers, fairness requires that fewer employees should move.

(6) There will always be geographical limitations to bumping in that fairness will require that limits be placed on how far an employee is expected to move to bump another. Although prejudice to the employer in long-distance relocation cannot be excluded, in practice this will be rare. Generally speaking it is the employee who will suffer as a result of being removed from a cultural and social environment he or she has become accustomed to. Second guessing the desires of employees is undesirable; if they are happy to translocate then bumping should take place whatever the distances involved.

(7) The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of a company within the parameters of its activities, national or international; fairness requires that the same

circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.

(8) The independence of departments as separate business entities may be relevant but the argument that a company's departments are managed separately should be strictly scrutinized. Even if there is no past practice of transferring between branches or departments, the employer must consider interdepartmental bumping unless it is injurious to itself and to other employees.

(9) Bumping does not apply to employees in a different grade if the longer serving employee cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised skills are involved. Where the necessity arises of retraining those, who are transferred, this should be carried out, unless it places an unreasonable burden on the employer.

(10) The status of the post into which an employee is bumped is relevant, as the employer's prerogative to choose someone of managerial/supervisory level should be respected. Management concerns that downgrading an employee will be demoralizing will not justify a decision not to bump downwards where the employee is prepared to accept downgrading. On the other hand the unwillingness of the affected employee to accept a lower wage may justify not bumping.'

[74] In summing up, bumping is intended to protect long serving employees in the case of a retrenchment exercise where there are other departments, branches or business areas of the employer that may not be affected by the restructuring that has employees in comparable positions with substantially shorter service. Especially in the case of mass retrenchments, the purpose of bumping is not to conduct a post mortem of the selection conducted down to what can colloquially be called the molecular level, long after the fact, by way of comparing lists of all employees in the employer so as to establish which employee may possibly have slightly longer service than another and then calling it unfair. This kind of approach is not conducive to the objective of protecting long serving employees. Using the example in *Blue Ribbon Bakeries*, bumping would be a relevant consideration where an affected employee in one department has twenty years' service, whilst a comparable

employee in another and unaffected department has just started work. To describe it as simply as possible, it must be obviously unfair to retain one employee and retrench another because of a significant discrepancy in length of service. As said in *Porter Motor Group* in the *dictum* quoted above, it must be a case of an employee that had devoted a considerable part of his or her working life to the employer, which in itself would illustrate the value of such an employee and would establish an 'objective tribute', in itself, to that employee's skills and experience.[19]

[75] As a matter of common sense, bumping can also only find application if the employee to be bumped into a position has the necessary skills, acumen and experience to fulfil the duties associated with that position. In other words, it must be a position the employee is objectively competent to fill. It must also be remembered that bumping only works horizontally and vertically downwards. Bumping upwards into a higher or promoted position is thus not a valid consideration.

[76] Despite the above objective behind bumping, the application of this principle may nonetheless be legitimately excluded in certain circumstances. This would be if a 'sound reason' is established for such an exclusion, as said in *Blue Ribbon Bakeries*. Applying the *ratio* in *Porter Motor Group* referred to above, this would be when:

76.1 There is substantial disruption and prejudice to the operations of an employer if bumping is applied, which scenario most often would arise in the case of large scale bumping. Whether disruption and prejudice to operations would be sufficient cause to exclude bumping is a question of fact, and involves a weighing of the competing interests.

76.2 There exists a geographical separation between departments or divisions in an employer, to the extent that bumping would be impracticable and could lead to the incurring of undue additional costs. A relevant consideration in this context is also whether employees indeed express the wish to relocate.

[19] See *National Union of Metalworkers of South Africa and others v Beta Engineering (1969)* [2016] JOL 35829 (LC) at para 87.

76.3 There exists a proper and justified separation of an employers' departments, divisions or operations. Again, this is a question of fact. As said in *Porter Motor Group*, this separation must be carefully scrutinised in order to ascertain whether it is legitimate, based on proper operational considerations, and whether the employer itself has consistently treated such department or divisions as if they were in reality distinct and separate businesses, in all respects. To illustrate by a simple example, does the employer treat the department like a subsidiary in its own right with the employer's central management functioning like a holding company. Of course, the separation consideration is negated where the employer in reality readily transfers, moves and deploys employees between departments or divisions. As said in *Blue Ribbon Bakeries*:[20]

> '… The contention by the appellant that each bakery was an independent business unit with its own cost centre was no bar to the application of bumping in that manner. On the appellant's own version there was an established practice of transferring employees from one bakery to another …'

[77] Applying all these considerations to the facts *in casu*, I am satisfied that the respondent has demonstrated a proper basis for separating its Civils and Building North divisions. This separation is founded on a sound commercial rationale. The nature of the work performed in these divisions differs. The client base is not the same. Each of these divisions is in essence an independent operation, each with its own financials and management. In the case of Civils and Building North, they are even in different defined industries. In fact, the manner in which the retrenchment exercises were conducted in this case illustrates the very point. It is not a case of one division conducting retrenchments whilst another division lies immune. Building North, Civils and Plumbing all conducted their own retrenchment exercises at the same time, but separately, and with separate management. There was no indication that this was some kind of deliberate or clandestine design. All the aforesaid

[20] (*supra*) at para 36.

indicate the kind of separation that would legitimately serve to exclude bumping.

[78] In *Mtshali v Bell Equipment*[21] the Court held:

> 'It is clear from the authorities referred to above that bumping forms part of LIFO as a method for selection of employees to be retrenched. It was therefore incumbent on the respondent to have consulted on its application to determine whether its application would have been appropriate in the circumstances of this case. It was not for the respondent to decide unilaterally that it would not be appropriate to apply bumping especially where it was not specifically prohibited in the collective agreement. Reasons why the respondent considered the application of bumping inappropriate or unfair should have been tabled for consideration by the consultation parties before a final decision could be taken.'

Applying this ratio *in casu*, this is exactly what the respondent did. The respondent did not simply unilaterally decide not to apply bumping. It actually discussed the issue with the first applicant in the consultations in Civils and explained why bumping would not be applied in Building North. The first applicant made its representations in this regard in the consultations, and in the end the parties could not reach consensus and the first applicant left the consultations.

[79] I accept Smit's testimony that employees of Civils were not transferred or seconded to Building North. There is no basis to gainsay what he said to the effect that it had been tried in the past but was not workable. Nothing Mazibuko testified to was sufficient to contradict the evidence of Smit. The one example Mazibuko gave where he was actually involved in was in the end no transfer or secondment at all, but a case of him remaining in Civils on a joint venture project with Building North. In the end, what Mazibuko could say was he transferred from site to site only in Civils itself. I finally add that the lay-off policy itself, relied on by the applicants themselves, applied only within individual divisions, and not across divisions. This all justifies, as sound reasons, the exclusion of bumping across Building North and Civils.

[21] [2017] JOL 38221 (LAC) at para 30.

[80] Whilst it may be so that the skills of the various skilled employees in Building North and Civils may be interchangeable and employees in the one division may competently fulfil comparable duties in the other, it does not follow that bumping must apply for this reason alone. It is only one consideration, and is insufficient to outweigh all the others.[22]

[81] Geographical limitations are not a factor in this instance. Mobility however is. Because of the nature of the client base in Civils, it is not a case of simply moving employees from one and onto another site. Induction and exit processes and approvals apply. Even Mazibuko conceded that such processes can take up to 2 weeks, whilst Smit said it was longer, being 6 to 8 weeks. Whatever the case, there is an impact on mobility, which must be considered.

[82] Another concern I have is that if bumping is applied across one division to another, considering the number of employees involved, the nature of businesses in the various divisions, and the fact that these businesses are in essence founded on projects that fluctuate from time to time, the kind of domino bumping may well result would be unduly disruptive and unfair to the respondent and may well make it impossible to have a fair selection exercise. Again, by way of example, if a retrenchment is conducted due to a workload reduction in Civils, this could lead to selection in Building North (disrupting a stable and existing contract there), and then in turn dislodge employees in Building North. But that is only where bumping is horizontal. Then vertical bumping may be considered, leading to the same exploration starting all over again across the divisions to try and place dislodged employees in higher level occupational categories that could do the work of lower level employees. This kind of scenario is in my view not palatable. In such circumstances, and weighing all interests in the balance, it would be fair and justified to limit selection only to the affected division.

[83] Finally, this is simply not a case of needing to protect long serving employees against possible abuse. None of the really long serving employees in Civils were selected for retrenchment. Whilst it may be so that some employees in

[22] Compare *NACBAWU Obo Nhavene and Others v Extra Dimensions 1158 (Pty) Ltd* [2014] ZALCJHB 502 (9 December 2014) at para 38.

comparable occupations with shorter service remained employed in Building North, this discrepancy is not material to the extent of crying out for intervention and protection in order to ensure that fair selection prevails. I have elaborated on this above. After all, fairness is an issue of balance, and has to be what is fair to both parties. Accordingly, there is no need for bumping to apply, *in casu*, to counter abuse.

[84] In the circumstances, it is my view that the selection of the individual applicants for retrenchment is not rendered unfair on the basis of the respondent declining to apply the principle of bumping. I am satisfied that the respondent has demonstrated and proven a 'sound reason' for not applying bumping across the divisions of Building North, Civils and Plumbing, on the basis that these divisions are in reality separate and independent businesses, and the balancing of competing interests works in favour of bumping not being applied. Further, the applicants have in any event not demonstrated that there are employees with such kind of long service in Civils and Plumbing that requires the kind of protection afforded by bumping. I find that the selection of the individual employees for retrenchment was thus fair, and the specific question must be answered in favour of the respondent.

<u>The re-employment undertaking</u>

[85] The re-employment undertaking relied on by the applicants was contained in the letters of retrenchments of 13 November 2014 and 8 December 2014, respectively issued to Plumbing and Civils employees. As set out above, this was an undertaking to contact a retrenched employee if a suitable vacancy arose in 6 (six) months after date of retrenchment. But significantly, the retrenchment letters record that an employee may be offered a position, and there is no guarantee of being offered a position.

[86] The applicants contend that the list of TES employees engaged by Colven and placed at the respondent, especially in January, February and March 2015, proves that there must have been vacancies that later arose and the individual applicants were not contacted about this, thus resulting in a breach of the undertaking. As said above, this list applied to Building North.

[87] Accepting for a moment that such Building North vacancies should be offered to retrenched Civils and Plumbing employees, and was not, the applicants' case in this respect faces a fundamental difficulty. This difficulty is that the failure to comply with such an undertaking cannot serve to establish an unfair dismissal based on operational requirements. The failure to re-employ in terms of an undertaking is not a case of a dismissal. It is actually an unfair labour practice in terms of Section 186(2)(c)[23] of the LRA. In order to successfully rely on a failure to re-employ in terms of such an undertaking, an employee would need to prove that this undertaking establishes an agreement that imposes an obligation on the employer to re-employ the employee, which, in the case of a dismissal for operational requirements, that the employer must rehire the dismissed employee if and when a 'suitable' vacancy arises. As said in *Motor Industry Staff Association and Another v Stanmar Motors (Pty) Ltd and Others*[24]:

> '… It is trite law that failure to re-employ when there is a formal binding written agreement, amounts to an unfair labour practice, in terms of section 186(2)(C) of the LRA. (See *NAAWU v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) at 519).The *onus* rests on the applicants to show that there is an obligation on the employer to re-employ him.'

[88] It is not for this Court to decide this kind of case. I cannot see how the conduct of an employer in not complying with a re-employment undertaking can render the retrenchment which gave rise to that very undertaking in the first place, unfair. It surely cannot change the issue of the rationale for retrenchment, the selection of an employee for retrenchment, and the applying of a fair process prior to retrenchment, in any way. Whether or not the employer complied with a re-employment undertaking also involves completely different considerations, which has nothing to do with the earlier retrenchment, such as what the terms of the undertaking are, whether a suitable vacancy exists, whether or not it was complied with, and if not, whether there was fair cause to depart from it. Insofar as the judgment in *National Union of Metalworkers of*

[23] The Section reads: ''Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving … a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement.'

[24] [2016] JOL 35712 (LC) at para 32. See also *South African Police Services v Smit and Others* [2016] ZALAC 22 (21 January 2016) at para 53; *Mangaung Metro Municipality v SAMWU obo Senoko and Others* [2015] ZALCJHB 274 (27 August 2015) at para 11.

SA on behalf of Members v Timken SA (Pty) Ltd[25] suggests otherwise, it is my respectful view that this judgment is clearly wrong and I shall not follow it.

[89] If the applicants wanted to legitimately pursue this issue, the applicants needed to refer an unfair labour practice dispute to the CCMA for conciliation in the first place. Because the applicants never pursued such a dispute to conciliation, it cannot be entertained at adjudication stage.[26] Further, and in any event, this kind of dispute must be determined by the CCMA by way of arbitration, and not adjudication in this Court.[27] I may add that the applicants have in any event failed to establish, in evidence, the existence of any agreement as contemplated by Section 186(2)(c), as an undertaking to contact an employee coupled with a stipulation that the employee 'may' be offered a position is not an agreement to re-employ. As a result, this part of the applicants' case cannot succeed and falls to be rejected.

Procedural fairness

[90] As a point of departure in deciding procedural fairness, it must be remembered that in mass retrenchment dismissals, it was the intention of the legislature to clearly separate substantive and procedural aspects of dismissals for operational requirements, where it comes to deciding the fairness of such dismissals. In *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[28], Zondo J (as he then was), and writing for the majority, held:

> '… Section 189A also specifies the process for the adjudication of disputes. In this regard it makes provision for the referral to the Labour Court for adjudication of a dispute about whether there is a fair reason for dismissal. It makes provision for the route of a strike and lock-out for the resolution of a dispute. … In s 189A(13) the LRA specifies special remedies for non-compliance with a fair procedure. All of that — including subsection (8) — is about the right not to be unfairly dismissed which the LRA creates in s 185.'

[25] (2009) 30 ILJ 2124 (LC) at paras 38 – 42.
[26] *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at para 137.
[27] See 191(5)(a) which reads: '… the council or the Commission must arbitrate the dispute at the request of the employee if- (iv) the dispute concerns an unfair labour practice …'
[28] (2016) 37 ILJ 564 (CC) at para 131

[91] Section 189A (18) precludes this Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred for adjudication in terms of Sections 191(5)*(b)*(ii).[29] In *National Union of Metalworkers of SA and Others v SA Five Engineering and Others*[30] the Court said:

> 'Disputes about procedure in cases falling within the ambit of s 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in s 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of s 189A(13), read with s 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.'

[92] Thus, the only manner in which procedural fairness can be challenged in the case where Section 189A applies is by way of an application in terms of Section 189A(13) of the LRA.[31] In this regard, there is a specific objective underlying Section 189A(13), which must always remain at the forefront. This objective is a proactive intervention in the consultation process in the case of mass retrenchments in order to ensure that it is properly done, in line with Sections 189 and 189A of the LRA, up front, so as to save jobs. In short, the idea behind Section 189A(13) is first and foremost to remedy. As such, it is in reality an urgent application that must be expeditiously disposed of, whilst remedying is still possible. In *Insurance and Banking Staff Association and*

[29] Section 189A(18) reads: 'The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii)'. See also *Edcon* (*supra*) at paras 157 – 158.

[30] (2004) 25 ILJ 2358 (LC) at 2361I-2362B. See also *Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Hlophe and Others v Bayfibre Central Co-Operative Ltd* (2017) 38 ILJ 627 (LC) 20; *Perumal and Another v Tiger Brands* (2007) 28 ILJ 2302 (LC) at para 19; *Thomas v Fidelity Corporate Services (Pty) Ltd* (2007) 28 ILJ 424 (LC) at para 8.

[31] The Section reads: ''If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order – (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee H prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.'

Another v Old Mutual Services and Technology Administration and Another[32] the Court dealt with the very idea behind Section 189A and said:

> '… According to the explanatory memorandum accompanying the 2002 amendments to the LRA, s 189A was aimed at enhancing the effectiveness of consultations in large-scale retrenchments. … The overriding consideration under s 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible. All too often the changes in an enterprise with the passage of time deter reinstatement as a remedy. So, the key elements of s 189A are: early expedited, effective intervention and job retention in mass dismissals.'

[93] The Court in *Banks and Another v Coca-Cola SA — A Division of Coca-Cola Africa (Pty) Ltd*[33] made the following valid and pertinent comments in this regard:

> 'In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties , the nature and extent of the procedural shortcomings that are alleged, and the like. ….'

[94] An application in terms of Section 189A(13) is thus in essence an urgent one that bypasses all the normal dispute resolution processes for unfair dismissal cases under the LRA and allows direct access to this Court. In *Zero*

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[32] (2006) 27 ILJ 1026 (LC) at para 9.
[33] (2007) 28 *ILJ* 2748 (LC) at para 18. See also *Association of Mineworkers and Construction Union and Others v Shanduka Coal (Pty) Ltd* (2013) 34 ILJ 1519 (LC) at para 27; *National Union of Metalworkers of SA on behalf of Members v General Motors of SA (Pty) Ltd* (2009) 30 ILJ 1861 (LC) at para 35; *Zero Appliances (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 1836 (LC) at para 23.

Appliances (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[34] the Court said:

> 'The labour relations legislation makes specific provision for a special dispute-resolution procedure in a case where a large number of employees participating in or affected by possible mass retrenchment based on operational requirements feel that the employer is not adhering to a fair procedure. Section 189A (13) provides that employees with such a grievance may directly approach the Labour Court by way of a formal application and seek a court order compelling an offending employer, among others, to comply with a fair procedure. The benefits of this special dispute-referral procedure are obvious. It obviates the conciliation procedure and the arbitration proceedings which characterize the ordinary dispute-referral procedure as stipulated in s 191 Labour Relations Act 66 of 1995. It affords the aggrieved employees direct and speedy access to the Labour Court and accelerates the eradication of an employer's labour misdemeanours during the retrenchment process.'

[95] As touched on above, the possibility of effective proactive intervention diminishes as time marches on. Preferably, this application should happen before the dismissal is effected or at least before the consultation process is concluded. In *National Union of Metalworkers of SA on behalf of Members v General Motors of SA (Pty) Ltd*[35] the Court held:

> '… where an application is brought in terms of s 189A (13) after the consultation process has been completed (as in the present case), it is in most cases entirely inappropriate for an applicant to use the provisions of the subsection to seek relief compelling the employer to comply with a fair procedure.'

Especially where large scale measures have already been implemented in the retrenchments, which if upset could cause a material disruption and prejudice to the employer's operations, the remedies in Section 189A(13)(a) to (c) may very well not be appropriate. As was said in *Old Mutual*:[36]

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[34] (2007) 28 ILJ 1836 (LC) at para 23.
[35] (2009) 30 ILJ 1861 (LC) at para 47. See also *National Union of Metalworkers of SA and Others v Shakespear Shopfitters (Pty) Ltd* (2008) 29 ILJ 1960 (LC) at para 9.
[36] (*supra*) at para 13.

> 'Thus, if there is undue delay between the occurrence of the procedural flaw … remedies under subsections (13)*(a)* to *(c)* would be inappropriate. Such remedies also become less appropriate for an individual employee if it would have a domino disruptive effect on the enterprise and other employees.'

[96] In my view, the very reason why it was necessary to distinguish between substantive and procedural unfairness in the case of mass retrenchments where Section 189A applies is to avoid a case of scavenging, long after the fact, the carcass of a completed retrenchment exercise to pick out individual juicy pieces that may serve to prove some failure in the process where it comes to consulting on all the topics under Section 189, and claiming money as a result. Such an approach helps no one where it comes to the very idea behind urgent proactive intervention, being the possibility to save jobs and remedy defects before they become entrenched. As the Court held in *SA Society of Bank Officials v Standard Bank of SA*[37]:

> 'The introduction of the s 189A procedure has a short-term preventative aim of proactively fostering proper consultation, as opposed to a long-term remedial one of compensating employees, following a belated 'post-mortem' examination on what was wrong with the process, long after workers have been retrenched.'

[97] In the end, in the case of a retrenchment where Section 189A applies, and where there has been no proactive intervention in terms of Section 189A(13) to remedy defects in the consultation process either during or immediately after conclusion of the consultation process, policy considerations dictate that only the substantive fairness of the retrenchment should remain a live issue for consideration in this Court.

[98] A practice has however developed in this Court in terms of which the consideration of procedural fairness is still introduced, by way of a back door so to speak, when a case of substantive fairness is decided in this Court. This is done by way of filing a Section 189A(13) application, setting out in that application individual grounds of procedural unfairness, and seeking

[37] (2011) 32 ILJ 1236 (LC) at para 29.

compensation in terms of Section 189A(13)(d). This application is then not decided on its own, but consolidated with a statement of claim challenging substantive unfairness under Section 189A(8)(b)(ii)(bb), as read with Sections 191(5)(b)(ii) of the LRA. That way, both substantive and procedural unfairness is challenged, when challenging the fairness of a mass retrenchment. The matter *in casu* is a case in point.

[99] I have a difficulty with this kind of approach. It circumvents what was specifically intended with the separation of substantive and procedural unfairness in the case of mass retrenchments. It also negates an essential component of the distinction drawn between retrenchments under Section 189 and 189A of the LRA. Simply described, what is the point of requiring proactive and expeditious intervention in the case of possible procedural failures, with the view to saving jobs, if this very process is in reality simply used to reserve procedural fairness challenges to be raised later for the purposes of claiming money? The fact is that Section 189A(13) is not intended to be used as a basis for claiming compensation. I accept that Section 189A(13)(d) does provide for compensation to be awarded. But it must always be considered when it is appropriate to do so. Zondo J in *Edcon* dealt with this very consideration as follows:[38]

> 'Subsection (13)*(d)* provides that a consulting party may apply to the Labour Court for an award of compensation 'if an order in terms of paragraphs *(a)* to *(c)* is not appropriate'. It seems to me that the phrase 'if an order in terms of paragraphs *(a)* to *(c)* is not appropriate' constitutes a condition precedent that must exist before the court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)*(a)* to *(c)* as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)*(d)* when it is not appropriate to make any of the orders in subsection (13)*(a)* to *(c).'*

[100] Similar sentiments were expressed in *Old Mutual*,[39] where the Court dealt with compensation claims in the context of Section 189A(13), and held as follows:

[38] (*supra*) at para 162.
[39] (*supra*) at para 14.

> '… an award of compensation in motion proceedings is an extraordinary remedy for which special circumstances must exist. Such special circumstances can firstly be implied from subsection (13) itself. An applicant must claim, as the primary relief, an order in terms of either para *(a)*, *(b)* or *(c)*. Only if relief in terms of any those paragraphs is inappropriate can compensation be claimed in terms of para *(d). …'*

[101] Applying the above, the applicants have in essence snookered themselves in seeking to use their application in terms of Section 189A(13) to claim compensation for procedural unfairness, as they have done in the case before me. The applicants have not made out a case that what they seek in terms of this application is to remedy the defects in the process, so that proper consultation can take place. Also, the applicants continue to contend that the individual applicants be reinstated, which means that what the Court in *Edcon* called a pre-condition for an award of compensation to be appropriate does not exist. It is in any event not appropriate, as I have discussed above, to use Section 189A(13) to simply claim compensation for procedural unfairness in trial proceedings brought to this Court to challenge the substantive fairness of the dismissal. For these reasons alone, the application under Section 189A(13) must fail.

[102] In *SA Commercial Catering and Allied Workers Union and Others v Southern Sun Hotel Interests (Pty) Ltd*[40] the Court was critical of the practice of bringing separate proceedings under Sections 189A(13) and 191(5)(b)(ii), and then consolidating these into one process at trial. The Court held:[41]

> 'Read together with s 189A (13), it would appear that, in permitting H employees to elect to seek the early, expedited and effective intervention of the Labour Court in procedural obligations that attach to s 189A dismissals, the legislature has seen fit to exclude employees from coupling these procedural claims with claims of substantive unfairness. The LRA provides for the adjudication of I procedural claims by way of motion proceedings and claims of substantive unfairness by way of a separate trial.

[40] (2017) 38 ILJ 463 (LC).
[41] Id at paras 19 – 20.

> To my mind, consolidating unfair dismissal claims raised separately in respect of procedural and substantive unfairness, on the face of it, goes against the grain of s 189A as a whole and against the plain wording of s 189A (18) in particular …'

The Court concluded:[42]

> 'To the extent that the court has permitted consolidations of this nature previously, I respectfully differ with those approaches. …
>
> I thus find that consolidation or any other co-hearing of the procedural issues raised in the applicants's 189A (13) application together with the applicants' s 191(5)*(b)*(ii) referral is impermissible in terms of the LRA.'

[103] I consider the aforesaid reasoning in *Southern Sun Hotel Interests* compelling and I am in agreement with same. It is fully in line with what I have said above. In summary, the applicants' application in terms of Section 189A(13) to claim compensation for procedural unfairness along with the applicants' challenge of substantive fairness is not competent, or permissible. Section 189A(13) was never intended to be utilized in such a fashion, which can only serve to negate the primary objective of proactive intervention to remedy procedural unfairness at the outset.

[104] However, and even if I consider the merits of the applicants' Section 189A(13) application, it faces problems. In presenting the case of procedural unfairness of the applicants in Court, and as set out above, the applicants relied on two issues, the first being alleged non-compliance with Section 189A(8) of the LRA, and the second being that the Section 189(3) notice where it came to the labourers in Civils was defective and that they were not properly consulted as a result. I will deal with the latter contention first, in the next paragraph.

[105] Whilst I must confess that when this matter was presented and argued in Court, I did consider that on the evidence, the applicants may have made out a case for procedural unfairness where it came to the labourers as a result of the fact that the Section 189(3) notice did not refer to them, and it appeared

[42] Id at paras 29 – 30.

they were not properly consulted as a result. But even if this is true, the applicants face an insurmountable obstacle. This obstacle is that such a case was never pleaded or made out in the applicants' founding affidavit in their Section 189A(13) application. As I have dealt with above, the proceedings under Section 189A(13) relating to procedural unfairness is an application with a founding affidavit, and it is trite that an applicant must make out a case in the founding affidavit.[43] The only issue the applicants raised in the founding affidavit was that the dismissal of the individual applicants was unlawful for want of compliance with section 189A(8). The applicants are bound to this case and simply cannot be allowed to pursue a case not pleaded.[44] In the end, as held in *Knox D'Arcy AG and another v Land and Agricultural Development Bank of South Africa*[45]:

> 'It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. And a party may not plead one issue and then at the trial, … attempt to canvass another which was not put in issue …'

[106] Accordingly, it is not open for me to decide the procedural fairness of the applicants' dismissal based on defects in the Section 189(3) notice and lack of proper consultation, where it came to the labourers in Civils, even if I did believe there may have been some substance in the case. For these reasons, this ground of procedural unfairness must be rejected.

[107] Turning then to the issue of non-compliance with Section 189A(8), this is in reality what the crux of the applicants' case on procedural unfairness was.[46] I appreciate that when the applicants brought this application, the judgments of

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[43] See *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) para 29; see also *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 122; *President of the Republic of SA and Others v SA Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29-30.

[44] See *Imprefed (Pty) Ltd v National Transport Commission* [1993] 2 All SA 179 (A) at 188-189.

[45] [2013] 3 All SA 404 (SCA) at para 35. See also *Naidoo v Minister of Police and Others* [2015] 4 All SA 609 (SCA) at para 30; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11; *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) at para 67.

[46] Section 189A(8) reads: 'If a facilitator is not appointed- (a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189 (3); and (b)once the periods mentioned in section 64 (1) (a) have elapsed- (i) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the Basic Conditions of Employment Act …'

the Labour Appeal Court in *Edcon v Steenkamp and Others*[47], and the Constitutional Court in *Edcon*[48] had not yet been delivered, and the concept of an unlawful dismissal for want of compliance with the provisions of Section 189A was still very much a live issue.[49] However, and following the judgment of the Constitutional Court in *Edcon*, this is no longer a valid consideration, as the Court made it clear that the LRA does not provide for nor contemplate an unlawful dismissal. Zondo J held:[50]

> 'I conclude that invalid dismissals and a declaratory order that a dismissal is invalid and of no force and effect fall outside the contemplation of the LRA. Such an order cannot be granted in a case based on the breach of an obligation under the LRA concerning a dismissal.'

And then in dealing specifically with Section 189A(8), the learned Judge said:[51]

> 'Having regard to the purpose of the LRA in general, the purpose of s 189A, the purpose of s 189A(8) and the provisions of s 189A(8)*(a)* and of 189A(13) in particular, and other factors, there is no sufficient basis for the proposition that the purpose of the LRA is that the consequence of a breach of s 189A(8) is the nullity of the act done contrary thereto.'

[108] Because the applicants' Section 189A(13) case was squarely founded on an unlawful dismissal, which case is clearly no longer valid, the applicants then sought to in effect convert this case to one of procedural unfairness based on the very same contention. In simple terms, the applicants say that non-compliance with Section 189A(8), even if it does not render the dismissal unlawful, would still render the dismissal *per se* procedurally unfair. I cannot agree with such a case, based on the following ratio of Zondo J in *Edcon*:[52]

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[47] (2015) 36 ILJ 1469 (LAC).
[48] (*supra*) footnote 28.
[49] See Revan Civil Engineering Contractors and Others v *National Union of Mineworkers and Others* (2012) 33 ILJ 1846 (LAC); *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* (2011) 32 ILJ 1293 (LAC). Both these judgments have now been overturned.
[50] (*supra*) at para 136.
[51] Id at para 186.
[52] Id at para 135.

> 'The LRA spells out the consequences of an employer's breach of the procedural requirements of s 189A(8) both in s 189A(9), which is the strike route, and in subsection (13). That the subsection (13) orders are consequences of non-compliance with the procedural requirements is made clear when subsection (13) refers to 'non-compliance with a fair procedure'. That phrase is a reference to the procedure set out in s 189A. If the provisions that cover the 'fair procedure' referred to in subsection (13) include the procedural requirements of subsection (8), then logically that would lead to the conclusion that the subsection (13) orders represent the consequences of non-compliance with subsection (8).'

[109] In the end, therefore, even when Section 189A applies, what must be considered is overall procedural fairness, which entails an enquiry into whether there was proper and fair consultation on all the consultation topics as envisaged by Section 189 of the LRA.[53] Where the procedural prescripts relating to time limits in Section 189A(8), or for that matter Section 189A(7) where there is a facilitator, are not complied with, procedural unfairness would only follow if it can be established that this non-compliance had the effect that the consultation topics in Section 189 had not been properly and fairly dealt with in consultations, and that as a result, holistically speaking, there was a material failure of procedural fairness. As said in *Communication Workers Union v Telkom SA SOC Ltd and Others*[54]:

> 'A final consideration is the nature of the alleged procedural defect or flaw. It is not every minimal procedural failure that will attract the application of the remedies in s 189A(13)*(a)* to *(c).* The failure must be material, to the extent that it can be said that a fair consultation on one of the consultation topics in s 189(2) is absent. A simple example would be where there is no consultation on the basis of selection of employees to be retrenched, and the employer simply unilaterally applies its own criteria. …'

[53] These are, in terms of Section 189(2): '(a) appropriate measures- (i) to avoid the dismissals; (ii) to minimise the number of dismissals; (iii) to change the timing of the dismissals; and (iv) to mitigate the adverse effects of the dismissals; (b) the method for selecting the employees to be dismissed; and (c) the severance pay for dismissed employees'.

[54] (2017) 38 ILJ 360 (LC) at para 43. See also *National Union of Mineworkers v Anglo American Platinum Ltd and Another* (2014) 35 *ILJ* 1024 (LC) at para 25; *Retail and Associated Workers Union of SA v Schuurman Metal Pressing (Pty) Ltd* (2004) 25 *ILJ* 2376 (LC) at para 32; *Old Mutual* (*supra*) at para 13; *Banks* (*supra*) at para 15.

[110] I will illustrate by way of examples. If retrenchment consultations are held between an employer and a trade union (or employees) over a period of two weeks, and in this period proper consensus is achieved on all the consultation topics in Section 189, then why should the employer simply wait for a further six weeks to pass just to be able to effect retrenchments, just because there is such a time period in Section 189A(7) or (8). Similarly, and if all the consultations topics have been fully ventilated and the parties have come to the point of agreeing to disagree, there is no reason to just wait out a time period. I accept that the time period in Section 189A(7) and (8) have been created so as to establish what Zondo J in *Edcon*[55] called a 'dismissal free period'. That will enable the parties to at least be committed to consult for that period. But once the objectives of consultation have been achieved, then the dismissal free period should fall away, as there is simply no point to it.

[111] If the trade union or the employee parties believe that the failure of the employer to comply with the time period as prescribed in Section 189A(7) and (8) has the result of prejudicing proper consultation, then that scenario is exactly what Section 189A(13) is there for. The Section 189A(13) application is then brought as one of urgency to compel the employer to continue with consultations until such time as there has proper compliance with the consultation objectives as envisaged by Section 189, and this Court is certainly empowered to grant such relief.[56] But it simply cannot be said that just because the time period in Section 189A(7) or (8) has not been complied with, procedural unfairness *per se* exists.

[112] This brings me back to the applicants' case. It is unfortunately a case to the effect that non-compliance with the time period in Section 189A(8) is *per se* unfair. This case has no substance, in the absence of any further case made out that the consultations topics as contemplated by Section 189 have not been properly and fairly dealt within the consultations. With no such further case made out, that has to be the end of it where it comes to this alleged ground of procedural unfairness.

[55] (*supra*) at para 98.
[56] See *Edcon* (*supra*) at paras 160 – 161

[113] For the sake of being complete, however, I in any event do not believe that the respondent had failed to comply with Section 189A(8). In my view, there is no necessity created by Section 189A(8) for the respondent to first refer the matter to the CCMA before being able to effect a termination of employment under that Section. This argument of the applicants is in essence based on the *ratio* of the judgments in *De Beers* and *Revan*, which have now been overturned by *Edcon*. In my view, Zondo J in *Edcon*[57] made it clear that the reference to a referral to the CCMA in Section 189A(8) is nothing more than providing a formula to calculate a time period for the dismissal free period, where the learned Judge said:

> '… In terms of subsection (8) a period of at least 30 days must elapse from the date of the giving of the s 189(3) notice before a party may refer a dispute to a council or the CCMA. A referral of a dispute before the expiry of that period would be a breach of the provision. Once the period of 30 days has elapsed, the employer must also wait for the periods referred to in s 64(1)*(a)* to elapse before it may give the employees dismissal notices. If the employer were to give employees dismissal notices prior to the expiry of those periods, that would be a breach of subsection (8)*(a)*.'

Simply put, and practically considered, Section 189A(8) it is just a roundabout way of defining a period of 60 (sixty) days, similar to the 60 (sixty) day period in Section 189A(7) where facilitation is involved.

[114] In the case of Civils, the Section 189(3) notice was given on 15 July 2014. The dismissal notice followed on 8 December 2014. This is long after the expiry of the 60 day time period, and thus there is compliance. It is true that in Plumbing, the Section 189(3) notice was given on 23 October 2014, and the dismissal notice followed on 13 November 2014. Even though the 60 day time period was not complied with, all the consultation topics were fully canvassed and exhausted, to the extent that the first applicant accepted that retrenchments were inevitable. Overall, it is my view that Section 189A(8) was not contravened.

[57] (*supra*) at para 151.

[115] In sum therefore, and for all the reasons as set out above, the applicants' Section 189A(13) application has no substance, and must fail. This application accordingly falls to be dismissed, and that must be the end of the applicants' case of procedural unfairness.

Conclusion

[116] In conclusion, I hold that the dismissal of the individual applicants by the respondent for operational requirements is substantively fair, both in terms of the general question and the specific question as articulated in *Latex*.[58] The applicants' unfair dismissal claim brought by way of their statement of claim dated 16 September 2015 under case number JS 620 / 15 thus falls to be dismissed. Further, the applicants have failed to make out a case of procedural unfairness in terms of the application under Section 189A(13) also dated 16 September 2015 brought under case number J 1687 / 15, and this application equally falls to be dismissed.

[117] As to costs, I do not consider that the applicants have acted unreasonably in seeking to pursue their matter. I also consider that there is an ongoing relationship between NUM and the respondent. Mass retrenchments are always trying on the relationship between employees, trade unions and employers, and there is no need to put further pressure on this relationship by way of costs orders. One must also consider that employees lost their jobs due to no fault of their own, and they should feel free to approach this Court to scrutinize whether all that happened was in order, and fair. It is my view that despite the fact that the applicants were unsuccessful, a costs order against them is unjustified. In terms of my wide discretion under Section 162 of the LRA, I consider it fair and appropriate that no order as to costs should be made in this matter.

Order

[118] For all of the reasons as set out above, I make the following order:

1. The dismissal of the second to further applicants by the respondent was substantively fair.

[58] (*supra*) footnote 3.

2. The applicants' referral under case number JS 620 / 15 is consequently dismissed.

3. The applicants' Section 189A(13) application under case number J 1687 / 15 is dismissed.

4. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants: Mr R Daniels of Cheadle, Thompson & Haysom Attorneys

For the Respondent: Advocate T Bruinders SC

Instructed by: Fluxmans Inc Attorneys