THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS596/15

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA (NUMSA) OBO

MEMBERS LISTED IN ANNEXURE A **First and Second Applicants**

and

AVENG TRIDENT STEEL (A DIVISION OF AVENG

AFRICA) (PTY) LTD **First Respondent**

IMPERIAL DEDICATED CONTRACTS (A DIVISION

OF IMPERIAL LOGISTICS SOUTH AFRICA) (PTY) LTD **Second Respondent**

Heard: **20-21 February 2017 (Before Barnes AJ) and 27, 28 and 30 November 2017 (Before Me)**

Delivered: **13 December 2017**

Summary: A referral in terms of which the second applicants allege that they were automatically unfairly dismissed. An employee who alleges automatically unfair dismissal is required to produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal. Ordinarily, the employer is the one knowing the reason why it dismissed an employee. In *casu*, the first respondent states that it dismissed the second applicants for operational reasons. The second applicants on the other hand allege that the ***true reason* for their dismissal is that because they refused to accept a demand of the first respondent for them to accept new contracts, thus automatically unfairly dismissed within the contemplation of section 187(1)(c) as amended. An employee must produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal before an employer is behoved to show that the dismissal is not for a prohibited reason. The amended section 187(1) (c) interpreted and applied. The principles in *Fry's Metals* and *Algorax* has not gone to waste. Held: (1) The second applicants were not automatically unfairly dismissed. Held: (2) The dismissal of the second applicants is substantively fair. Held: (3) Each party to pay its own costs.**

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191 of the Labour Relations Act[1] (LRA). The second applicants allege that the first respondent subjected them to an automatically unfair dismissal within the contemplation of section 187 (1) (c) of the LRA as amended. In the alternative, the second applicants allege that the dismissal was substantively unfair. On the other hand, the first respondent disputes that the second applicants were subjected to an automatically unfair dismissal. Instead, the respondent

[1] Act 66 of 1995 as amended.

contends that the second applicants were dismissed for its operational requirements. Initially, the matter was allocated to Acting Justice Barnes. She heard the evidence of one witness. After that an application for her recusal was launched which she granted. Whereafter the matter came before me. I was furnished with the transcript of the evidence tendered up to that stage. By agreement between the parties I did not have to hear the matter *de novo*.

Background facts

[2] The essential facts are as follows: The Company operates in the steel industry. In mid-2014, it faced a harsh economic environment in which it experienced a marked decline in its sales volumes and an increase in its cost base, leading to a sharp decline in profitability. The Company decided that it could not continue with its existing business model and would have to restructure its operations in order to survive. To this end it proposed reviewing its organisational structures and redefining some of its job descriptions.

[3] At the outset of the consultation process it presented a business case to the Union along these lines. The Union did not contest the need to retrench nor the principle that restructuring was an appropriate response to the predicament the Company found itself in. However, in an attempt to avoid retrenchment altogether or at least to mitigate the potential consequences of a need to retrench, the Company and the NUMSA (the Union) agreed, firstly, that employees would be offered voluntary severance packages, and secondly that employees engaged on the so-called LDCs[2] would have their contracts terminated. In the result, some 500 odd VSPs / LDCs[3] left the Company's employ during 2015, dramatically reducing the numbers of employees who then potentially faced retrenchment.

[4] In mid-October 2014, the parties also struck an interim agreement in terms whereof the employees agreed to work in accordance with the Company's

[2] Limited Duration Contracts.

[3] Voluntary Severance Packages.

redesigned job descriptions pending the finalisation of consultations. In the event, employees worked under the proposed new structure for a period of six months, from October to April 2015. When the consultation process ended without consensus, the Company gave notice that the individual applicants faced retrenchment since their old positions no longer existed in the new structure.

[5] However, in an attempt to avoid retrenchment, the Company offered each and every employee alternative employment in posts in the new structure. 71 employees accepted the offer. The remainder (the individual applicants numbering 733) declined the offer and were therefor retrenched.

[6] A large number of the individual applicants had already worked under the proposed new regime for six months; they had the skills to do so and they carried out their tasks without difficulty; they would be no worse off financially if they took the offer; and their length of service would have remained unaffected.

[7] From the beginning of the consultation process, the Union was anxious to ensure that the Company released the VSPs and the LDC personnel as soon as possible, before it would engage on the remaining issues in the consultation process. Once those employees left, and once the Union had procured agreement on the transportation issue, then suddenly, out of the blue, on a weekend's notice, it reneged on the interim agreement before its expiry date, leaving the Company entirely at the Union's mercy.

[8] By this device it extracted an increase in the agreed increment payable to employees performing additional duties under the interim agreement. Because it had been held to ransom, the Company was constrained to grant an increase from 60c to R3. Secondly, the Union never contested the need to restructure and it never engaged the Company on the content of the redesigned job descriptions even though it had months to consider them. It recognised the need to restructure and that the job descriptions had to be redesigned for this purpose. Instead, it proposed its own alternative solution, namely moving from the Thirteen Grade Structure

under the Main Agreement[4] to a Five Grade Structure. However, instead of consulting *bona fide* on its proposal, the Union attempted to convert the consultation process into wage negotiations. When the Union found out that the minimum wage rates under the Five Grade Structure were in some cases lower than those under the existing Thirteen Grade Structure (albeit that the employees would retain their wage rates if they were higher than those in the Five Grade Structure), it changed tack.

[9] Instead of consulting on the proposed Five Grade Structure, the Union demanded an increase in members' pay, this in the context of a retrenchment consultation process where the Company's whole objective was to save costs in order to ensure its survival.

[10] Only the respondents led evidence before me. The applicants closed their case before opening it. It is not necessary for the purposes of this judgment to recount the evidence punctiliously.

Evidence Led

[11] The Company presented detailed evidence through its Chief Operating Officer, Mr Deshan Moodley (Moodley). None of his evidence was seriously contested. Moodley has 25 years' experience in the steel industry and was well-placed to highlight the critical situation which the Company found itself in during 2014 and which indeed still endures today.

[12] Moodley testified in summary as follows: The steel industry was in decline from the time of the 2010 World Cup. The Company's sales volumes dropped by twenty percent (20%) and its costs structure could not be sustained by its income. The decline in sales volumes and increases in costs are reflected in the business case document in the tables at **B p. 9**. From these graphs, one can see that in 2014 there was a 60 000 tonne drop in sales in a six-month period which equates to a 20% decline overall. Before that, the market had become fragmented and steel merchants were competing for volume. As a consequence,

[4] B p. 773 – 801.

trading margins dropped. Even today the industry has not improved and volumes are still low. Volumes are driven by Government spending but there has been none of the promised investment by the Government in infrastructure projects.

[13] The tables at **B p. 10** demonstrate the decline in the Company's profitability and sales volume. In order to keep the same profit margin, the Company had to reduce costs. However, costs had increased, especially labour, fuel and transport costs. As a consequence of all of this, the Company became unprofitable, as is still the case. Thus in 2014, the Company came to the realisation that its existing assumptions regarding profit margins were no longer correct, that its cost structure was out of kilter with its income, and that in order to survive it had to restructure.

Proposed restructuring: rationale

[14] In its business case presentation at **B p. 12 and ff** the Company indicated that it's operational and support structures had to be reviewed to ensure that the business was streamlined and resources were optimised for the then current market position. This involved reviewing the Company's organisational structures and redefining some of its job descriptions (**B p. 13**).

[15] With the drop in sales volumes, machines were under-utilised. The Company had therefore to align production output with the market. In addition, the Company had to reorganise its workforce to align working conditions with the market. However, a reduction in the number of positions was not enough. The Company needed to achieve an improvement in productivity as well.

[16] In this regard, the Company was faced with a critically debilitating historical situation, namely, that over time, employees had performed only the tasks that they chose to do whilst refusing to do others, for example, a machine operator would operate his machine but refuse to

clean it, insisting that somebody else be employed as a cleaner. Examples of this duplication of functions were given by Moodley.

[17] Accordingly, the job positions and job content actually performed at the Company were not aligned with those in the Main Agreement. For example, in terms of the Main Agreement a machine operator is required to clean his machine as part of his functions. There is no provision for an additional cleaner to be employed to perform such task.

[18] However, at the Company, over time, the job functions had been eroded and the content of each job became smaller.

[19] All this led the Company to perform an exercise in which it clustered jobs as per the Main Agreement: if an employee was employed under a particular job title in a particular Grade, the idea was that he ought to perform the tasks associated with a person in his Grade as reflected in the Main Agreement. This was done in order to address the divergence between job positions and tasks in the Main Agreement on the one hand, and the tasks performed by people employed in those positions at the Company on the other.

[20] The exercise that was performed by the Company is reflected in **B p. 711 and ff**, which groups all of Aveng job titles which fell under (for instance) Grade H into one title, namely General Handler, whose tasks were as per the Main Agreement.

[21] It was hoped that this proposed new structure would give the Company flexibility. Thus, instead of an employee performing only the sling-man function, he could do any general worker job. This would avoid the situation where many people sat idle waiting only to perform a single function instead of doing any function for which they had the skills.

[22] The information contained in **B p. 711 and ff** was distributed to the Union at the outset of the consultation process, at a meeting on 16 August 2014, as is recorded in the letter at **B p. 234(a).**

[23] Nomsa Mofokeng (Mofokeng) was the Head of Human Resources at the relevant time. She was part of the consultation team. The team included, Moodley, Komane, Rabolayo and Grobbler. At the consultation meetings, documents like the business case study, the organogram, job descriptions and other related documents were shared with the Union. She confirmed the transcripts of the consultation meetings as being accurate. She related to the interim agreement and confirmed that after the release of the VSPs and LDCs the individual employees worked in terms of the interim agreement. She testified about the shock that befell her when she saw the email of 13 February 2015. She testified that the company was vulnerable. She alluded to the preparation and presentation of the Five Grades System. The company was shocked by the benchmarking demand of 60% and 16%. She also testified about offers of alternative employment made to the employees. The Union raised issues that were never raised before at any consultation meetings. She was not cross-examined.

[24] The last witness was Mr Andre Enslin (Enslin). His testimony was confined to the issue of the possible re-instatement relief. He is the Managing Director of the second respondent. The second respondent entered into a transfer agreement with the first respondent. The transport business of the first respondent was taken over by the second respondent after a tender process. The employees who were employed at the time by the first respondent were taken over by the second respondent. The second respondent operates efficiently with 90 employees and will not be able to absorb a further 110 as this may immediately throw the second respondent into a retrenchment exercise. He gave estimated costs to the second respondent if the employees were to be re-instated. Such costs will be in the region of R30 million rands. Effectively re-instatement will be impractical. His cross-examination was focused more on criticizing his speculations and the estimation of costs.

Argument

[25] All the representatives submitted detailed written heads of argument to which the Court is grateful. For the purposes of this judgment I liberally drew the background facts and evidence as summarized in the first respondent's heads. In addition, the parties augmented their submissions orally. It is unnecessary for the purposes of this judgment to repeat all those submissions. To the extent necessary, I shall refer to some of the submissions later in this judgment.

Evaluation

[26] This is one of those matters where the true reason for the dismissal is being disputed. As pointed out elsewhere in this judgment, the first respondent contends that the second applicants were dismissed for operational requirements. Both the applicants contend that the true reason for the second applicants' dismissal is because they refused to accept a demand made by the first respondent to sign new contracts of employment. In the amended statement of case under legal submission, the applicants contended that the dismissals of the individual applicants were unfair in terms of section 187 (1) (c) of the LRA because they were dismissed for refusing to accept a demand in respect of a matter of mutual interest between them and the first respondent.

[27] The first respondent sought to implement redefined job descriptions which would have altered the terms and conditions of the individual applicants 'employment, in that employees would have, *inter alia,* had to take up more functions as the first respondent intended to consolidate various job descriptions into one. The first respondent sought to impose the redefined job descriptions on the individual applicants, the first respondent dismissed them and disguised the dismissals as being based on its operational requirements and emanating from a section 189A process that was conducted and finalized in 2014.

[28] The alleged retrenchments were not the true reason for the dismissals of the individual applicants as the jobs that were performed by the individual

applicants are being performed by new employees, employed through labour brokers and LDCs.

[29] The applicants' alternative case is predicated on the fact that the first respondent failed to demonstrate that there was a need to retrench. The jobs were not redundant as they are performed by other employees. The first respondent cannot justify how it came to retrench 733 waged employees. The first respondent made certain undertakings during the consultation process, which they did not fulfil. The first respondent refused to pay severance pay.

[30] Determining the reason or the principal reason of a dismissal is a question of fact. As such it is a matter of either direct evidence or of inference from the primary facts established by evidence. The reason for dismissal consists of a set of facts, which operated on the mind of the employer when dismissing an employee[5]. They are within the employer's knowledge. The employer knows better than anyone else in the world why it dismissed an employee.

[31] When an employee positively asserts that there was a different and inadmissible reason for his or her dismissal, he or she must produce some evidence supporting the positive case, such as refusal to accept a demand. An employer who dismisses an employee has a reason for doing so. He or she knows what it is and must prove what it is.[6]

Was the dismissal of the second applicants automatically unfair or not?

[32] This matter brings to the fore an interpretation of the amended section 187 (1) (c)[7] of the LRA. Prior to its amendment, the section[8] employed

[5] *Abernethy v Mott, Hay and Anderson* [1974] ICR 323. See also *K Screene v Seatwave* Ltd Appeal No. UKEAT/0020/11/RN delivered on 26 May 2011.

[6] See *Kuze v Rouche Products Ltd* [2008] EWCA Civ 380 (17 April 2008)

[7] Section 187. Automatically unfair dismissals.

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

(c) A refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer. [My emphasis]

the word *compel* as opposed to *refusal*. Further it made it plain that it applies to an employee as opposed to a group of employees. For the purposes of this judgment and to also do justice to the interpretation, it is crucial to have a clear understanding of why the section was amended. The memorandum of the Labour Relations Amendment Bill reads thus: -

> 'The section is amended to remove an anomaly arising from the interpretation of section 187(1)(c) in [*Fry's Metals]*[9] which held that the clause had been intended to remedy the so-called 'lock-out' dismissal which was a feature of pre 1995 labour relations practice. The effect of this decision when read with decisions such as [*Algorax]*[10] is to discourage employers from offering reemployment to employees who have been retrenched after refusing to accept changes in working conditions.
>
> The amended provision seeks to give effect to the intention of the provision as enacted in 1995 which is to preclude the dismissal of employees where the **reason** for the dismissal is their refusal to accept the demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the LRA and is consistent with the purposes of the Act.'[My own underlining and emphasis]

[33] As far as the legislature saw it, the Supreme Court of Appeal (SCA) in interpreting section 187(1) (c) as it stood, was that it did so anomalously. In other words, the SCA deviated from the intended intention and peculiarly or irregularly interpreted the section. The legislature found that the decision when read with the LAC decision in *Chemical Workers' Industrial Union and Others v Algorax* (Pty) Ltd it had the effect that employers are discouraged from offering re-employment to retrenched employees after refusing to accept change in working conditions. From the memorandum one can deduct that the legislature did not find affection to the interpretation by the SCA of the section given its effect

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[8] (c) To compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee. [My underlining]

[9] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA and Others* (2003) 21 ILJ 133 (LAC).

[10] [2003] 11 BLLR 1081 (LAC).

thereafter. That being the case, it will be wrong to suggest that the principles enshrined in the SCA's decision and *Algorax* have since become bad law as submitted by the applicants' counsel. I was referred to a book[11], in it the author expressed a view on the amended section. She finds that the section envisages three elements namely: demand, refusal and dismissal. I agree with this conclusion. However, I may add that also the dismissal should be for a reason prohibited. I also agree with the following view:

> 'Building on the discussion in the previous paragraph about retrenchments in the strike context, it is suggested that the presence of the elements (demand, refusal, dismissal) envisaged by the amended section 187(1) (c) does not exclude the potential application of section 189. It simply entails that when the retrenched employees present evidence suggesting a credible possibility that the dismissal occurred because of their refusal to accept a demand in respect of a matter of mutual interest, it is for the employer to show that the dismissal was for permissible reason. It is at that point that the court will apply the two-stage causation test as formulated in *Afrox* and discussed above. In other words, the court will have to assess the evidence and apply the two-stage causation test like it would in any case where an employer claims that a dismissal was not for one of the prohibited reasons listed in section 187.'

[34] It is clear that what did not find affection is the interpretation of the section because of the effects it had thereafter. It seems patently clear that what the legislature did not like are the following portions of the LAC judgment: -

> '[25] When one has regard to the wording of s 187(1)(c) and that of the relevant portions of the definition of lock-out in s 1 of the old Act, one is left in no doubt that s 187(1)(c) is based on the definition of the word lock-out in the old Act. There are a number of cases which feature in our law reports that were decided under the old Act in which the definition of

[11] R Le Roux; Retrenchment Law in South Africa, (Lexis Nexis 2016).

a lock-out featured. These include cases where lock-out dismissals or purported lock-out dismissals had taken place…

[26] In *Commercial Catering and Allied Workers Union and Others v Game Discount World Ltd (1990) 11 ILJ 162 (IC)* the Industrial Court had to interpret the definition of the word lock-out in regard to termination by an employer of contracts of employment of employees within the context of a dispute about a change in terms and conditions of employment. In that case the employer purported to effect a termination of the contracts of employment as part of a lock-out under the old LRA. However, it maintained, and, told the employees' representatives and the public, that the termination of the employees' contracts of employment was final and irrevocable. The Industrial Court held, correctly in my view that a dismissal that was final and irrevocable fell outside the definition of a lock-out in s 1 of the old Act. It held that in order for a termination of contracts of employment to fall within the definition of a lock-out in s 1, it had to be effected for one purpose specified in the definition of the word lock-out in s 1 of the old Act…

[27] In my view what was said by the Industrial Court in *Game Discount World* in respect of a lock-out dismissal under the definition of a lock-out under the old Act, namely, that such a dismissal cannot be final and irrevocable, applies with equal force to the provisions of s 187 (1) (c) of the Act. In order to fall within the ambit of s 187 (1) (c) a dismissal must have a purpose-the compulsion of the employees concerned to accept a demand in respect of a matter of mutual interest between employer and employee. If a dismissal is not for that purpose, it falls outside the ambit of s 187(1) (c).

[29] A lock-out dismissal entails that the employer wants his existing employees to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employees do not agree to the proposed changes, he would dismiss them-not for operational requirements-but to compel them to agree to the change. In such a case the employees thereafter have an opportunity to agree to the change. When they agree to the change, the dismissal ceases because it has served its purpose. If the employees do not agree to the change after they have been dismissed

> for the purposes of compelling them to agree, the employer dismisses them finally. The last mentioned dismissal is not a lock-out dismissal. It is an ordinary dismissal for operational requirements.'

[35] Equating a dismissal within the contemplation of section 187 (1) (c) with a lock-out dismissal is not something that pleased the legislature it seems to me. The old Act was repealed in its entirety. To bring some sections into the new Act was inappropriate it also seems to me. However, it is not apparent from the memorandum that the following principle is to be disturbed: -

> '[31]…In the light of all the above I conclude that there is a distinction between a dismissal for a reason based on operational requirements and a dismissal the purpose of which is to compel an employee or employees to accept a demand in respect of a matter of mutual interest between employer and employee. The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions that meet the employer's requirements. An ordinary retrenchment, where the employees who are being retrenched will not be replaced is, of course, also a dismissal for operational requirements. '

[36] The views expressed by the LAC were accepted by the SCA.[12] To my mind the distinction holds true even to the amended version. A dismissal where the reason for it is the refusal to accept a demand is prohibited[13].

[12] [56] The LAC's solution to the conundrum of the statutory concepts was thus to assign a distinctive meaning to 'dismissal' in s 187(1)(c), and then to restrict this category of automatically unfair dismissal to those effected for the purpose of inducing employees to change their minds regarding the employer's demand. On this approach, only conditional dismissals can fall under section 187(1) (c), and it is this that distinguishes them from the broader category of dismissals… In such cases, the only factual enquiry confronting a court is the employer's reason for effecting the dismissal: once compulsion to accept the disputed demand (with ensuing reversal of the dismissal) is excluded, no further enquiry into the nature or the categorization of the demand is required.

[13] The second part of the memorandum: The amended provision seeks to give effect to the intention of the provision as enacted in 1995 which is to preclude the dismissal of employees

However, a dismissal where the reason for it is the operational requirements is not to be precluded in the section. To say so would render the provisions of section 188(1) (a) (ii) read with section 189 nugatory. Of concern to the legislature in so far as is *Algorax* is concerned was apparently the following finding:

> '[42] Prior to the dismissal of the individual appellants, the respondent's stance was that, if the employees did not agree to work rotating shift, they would be dismissed. This meant that, if the employees agreed to work on Saturdays and Sundays, they would not be dismissed. Prior to the dismissal, the employer made it clear that once the employees had been dismissed, the dismissal would be effective and it would withdraw the dismissal if they agreed to work the rotating shift but would not pay them for the intervening period. That is clearly supportive of the contention that the dismissal was designed to get employees to agree to the respondent's demand. That would fit into the provision of section 187 (1) (c) of the Act'.[14]

[37] Again in *Algorax*, the LAC appreciated that the starting point in determining whether there was a fair reason for the dismissal is the determination of the reasons for the dismissal[15]. This principle remains intact even after the amendment. To my mind the facts in *Algorax* are a typical example of what the current section 187 (1) (c) seeks to prevent.

[38] Management formed a view that a rotating shift system would resolve problems of lack of communication between it and permanent night shift workers. Algorax then informed the Union that it was planning to introduce the new shift system. This was after several meetings with the shop stewards. The employees refused to accept the proposed shift. Algorax then declared a dispute which it referred to the CCMA. It later

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where the reason for the dismissal is their refusal to accept the demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the LRA and is consistent with the purposes of the Act."

[14] The effect of this decision when read with decisions such as *Algorax* is to discourage employers from offering re-employment to employees who have been retrenched after refusing to accept changes in working conditions

[15] Paragraph 58 of the judgment.

requested advisory arbitration failing which a retrenchment exercise would commence.

[39] Thereafter each employee was requested to sign an undertaking to work the new shift system. Employees who refused to sign the undertaking were dismissed. In the memorandum of 19 September 1997, management gave, as reasons for the proposed shift change, that it is to ensure that the packaging department employees still had jobs for the foreseeable future, to no longer have to use contractors in the packaging area, to work on Saturdays and Sundays to ensure that the silos did not get full because if they filled up and that there had to be a product change that was not planned, the costs would be about R20 000 each time.

[40] I also agree with Le Roux when she says:

> *'Fry's Metals* and *Algorax* created an anomaly in respect of a narrow issue. However, but for the anomaly, these two judgments and jurisprudence both before and after these two judgments have never seriously suggested that an employer may never retrench when the employer requires changes to the terms and conditions of employees in order to meet its operational requirements'.

[41] What the LAC then did with regard to the reasons set out in the memorandum of 19 September 1997 was to say the following:

> '[71] It seems to me, therefore, that the individual appellants' dismissal was not warranted because the problems that the respondent sought to address when it demanded that the individual appellants agree to work the rotating shift could have been adequately addressed without the implementation of the rotating shift system and without harming the respondent's business in any manner or in any significant manner'…[My own underlining and emphasis]

[42] All of the above are still good law even with the amended section. I therefore reject any submission that the amended section actually outlawed other reasons that can justify a dismissal as they are "trumped", as argued by Mr Van der Riet for the applicants. He drew parallel to the

provisions of section 67(5) [16]of the LRA. In his submission, that is the only time the legislature allows usage of other reasons. This parallel is incapable of being drawn to my mind. The protection in subsection (4) is to insulate a striking employee in a protected strike from a dismissal for reason of participating in that strike. This insulation is different from the preclusion in section 187 (1) (c). In a section 187 (1) (c) situation, if the reason for the dismissal is the refusal to accept a demand then such is considered to be automatically unfair. Whereas section 67(5) insulates completely to a point that an employer may not dismiss.

[43] In addition to this insulation, given the fact that a right to strike is guaranteed Constitutionally, it becomes an automatically unfair dismissal if the reason for participation in the protected strike is used[17]. On the contrary if the legislature intended the same insulation as in section 67(5), there must have been a provision that an employer may not dismiss an employee for refusing to accept a demand. The reason seems obvious to me, there is no right to refuse to accept a demand that is so guaranteed in the Constitution.

[44] To my mind the intention of the amendment was not to guarantee the right to refuse. All the amended section seeks to achieve is to avoid the situation where an employer flexes the right to dismiss muscle in a collective bargaining situation. Like any other automatically unfair dismissal, of importance is the reason the employer used to dismiss. Even if all the three elements (demand, refusal and dismissal) are present, if the evidence shows that the true reason for the dismissal so effected is not because of the refusal, a dismissal shall not be automatically unfair. In a situation where, as in this case, it is shown that the change is offered as an alternative to avoid retrenchment, it must follow that applying the two-stage approach, the dominant reason would

[16] (5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for reasons related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements.

[17] Section 187(1) (a)-if the reason for the dismissal is that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV.

be the operational requirements. It would seem to be fundamentally wrong to imply that in effecting the amendment the legislature intended to create violence in the language employed in section 187.

[45] In all automatically unfair dismissals instances in section 187, they are preceded with the phrase "*if the reason for the dismissal is*." To my mind it is not necessary to imply the provisions of section 189 into section 187 (1) (c). Like all the other prohibited reasons listed in section 187, there can exist other reasons contemplated in section 188 of the LRA in any set of facts. In all respects, the starting point is a dismissal within the contemplation of section 186 of the LRA. On any set of facts, a dismissal within the contemplation of section 186 may potentially be a fair one as contemplated in section 188 or an automatically unfair one within the contemplation of section 187.

[46] What matters is the reason advanced for it. The amendment certainly removes the special kind of dismissal-conditional one, considered in *Fry's Metals* and *Algorax*. A dismissal effected for a reason that an employee refused to accept a demand is final and amounts to an automatically unfair dismissal. As an indication that the legislature never intended to outlaw retrenchment in a section 187(1) (c) situation, it was concerned about the discouragement of offering re-employment to employees retrenched after refusing to accept changes to working conditions. Impliedly, the legislature was alive to a possibility to retrench after refusing to accept changes to working conditions, which was the principle accepted in *Fry's Metals*.

[47] I do not agree with a proposition that there is trumping of provisions. I do not see how a party like an employer who bears the overall onus to justify a dismissal in terms of section 192 can and should be precluded from justifying such a dismissal in terms of other reasons available to it in section 188(1). It ought to be remembered that an employer effects a dismissal, except in the situation contemplated in section 186(2) (b), (e) and (f). In the event of a challenge it will be unfair and inconsistent with the Constitution to suggest that because an employee is suggesting

another reason an employer cannot raise and prove any of the reasons contemplated in section 188 (1) of the LRA.

[48] South Africa is a signatory to the ILO conventions. In terms of section 3 of the LRA any person applying this Act must interpret its provisions in compliance with the public international law obligations of the Republic. Article 4 of Termination of Employment Convention, 1982, says that an employer must have a valid reason for termination based on amongst others the operational requirements of the undertaking, establishment or service. Section 3 also enjoins an interpretation in compliance with the Constitution. In terms of section 23(1) of the Constitution everyone has the right to fair labour practices. With all the above interpretative tools, it would be remiss for this Court to accept the following submission by Mr Van Der Riet:-

> 'As the author points out, section 67(5) expressly permits a dismissal for a reason based on the employer's operational reasons in the context of strike action. It is respectfully submitted that in the absence of a similar provision in relation to section 187(1) (c) of the LRA, section 188(1) precludes the reliance on a fair reason relating to operational requirements where the reason for dismissal is the refusal of the employees to accept a demand in respect of a matter of mutual interest as contemplated in the new section 187(1) (c)'. [My own underlining]

[49] This submission falters on two reasons. Firstly, it is not a given that once an employee suggests the prohibited reason, that is the reason. An employee is still required to produce credible evidence to show that the provisions of the section arose. Most importantly and in line with the Constitution[18], the employer is entitled to dispute such a reason in a court of law.

[50] A consultation in terms of section 189 of the LRA is not a collective bargaining process. Section 189 (2) enjoins the consulting parties to attempt to reach consensus on appropriate measures to avoid the

[18] Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

dismissals. In fact the LAC in A*lgorax* correctly held, correctly in my view, that after all, section 189(2) (a) (i) and (ii) read with subsection (3) (a) and (b) imply that the employer has an obligation, if at all possible, to avoid dismissals of employees for operational reasons altogether or to minimise the number of dismissals if possible, and to consider other alternatives of addressing its problems without dismissing the employees[19].

[51] The redesigned job descriptions, on the uncontested evidence, were introduced and proposed in order to save the first respondent from the situation that would make it not survive and to save jobs. This cannot be seen as flexing the muscles within a context of collective bargaining. What purpose would it have served if the first respondent resorted to power play? To my mind no purpose will be served. The redesigned job description viewed in this instance as a demand by the applicants, was introduced in a context that statutorily requires consideration of appropriate measures to avoid dismissals. There is no collective bargaining involved in this regard.

[52] After *Algorax*, the LAC's decision in *Fry's Metals* was confirmed on appeal to the SCA in *Fry's Metals 2,*[20]wherein the SCA held as follows:[21]

> 'To deal with the apparently overlapping categories the LRA creates, [Thompson] suggested that the courts would have to determine on a case-by-case basis when an employer/employee dispute had permissibly 'migrated' from the bargaining domain (where matters of mutual interest cannot legitimately trigger dismissals) to the 'legal domain' (where the employer is permitted to dismiss for operational reasons). The core difficulty with this argument is that the dichotomy between matters of mutual interest and questions of 'right' do not, in our view, form the basis of the collective bargaining structure that the statute has adopted. The unavoidable complexities that arise from the supposed 'migration' of issues from matters of mutual interest to matters

[19] Paragraph 70 of the judgment.

[20] *National Union of Metalworkers of SA* and O*thers v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA).

[21] At par. 54.

> of 'right' demonstrate, in our view, that the dichotomy does not form the basis of the statutory structure, and section 187(1)(c) cannot, accordingly, be interpreted as if the legislation proceeds from that premise.'[My emphasis]

[53] The position of suggesting changes in order to save jobs seems to have received favour in some of the English cases[22]. In *Garside and Laycock Ltd v T G Booth*[23]*,* similar sentiments were expressed. The essential facts in *Garside* were that the company in 2009 was undergoing trading difficulties. Their predicated sales in the year 2008-2009 had dropped from the previous year. The gross profit was low; to maintain the work at least a two per cent profit needed to be demonstrated. A consequence was that the employer decided to ask its employees to accept a reduction in pay. What was proposed was a reduction of five percent.

[54] The respondent employee was only one of two members of the workforce who ultimately refused to accept such a cut to his pay packet. The employer had held a number of meetings at which all staff members were addressed by management, telling them of high level business forecasts and predictions. In April 2009 the employees were asked to indicate on a written slip whether, in order to avoid possible further redundancies, they would accept a pay reduction of five per cent with effect from the May 2009 payroll. The majority of employees voted in favour of the change. On 5 October 2009, the respondent was offered a new contract which gave him an option of either having the new terms and conditions offered to all staff. He declined the offer. Ultimately he was dismissed.

[55] Aggrieved by his dismissal, the employee approached the Employment Tribunal. The Tribunal relying on *Catamaran Cruisers Ltd v Williams and others*[24]*,* concluded that the dismissal was unfair. It reasoned thus: -

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[22] See *Hollister v National Farmers Union* [1979] ICR 542.

[23] Appeal No. UKEAT/003/11/CEA delivered on 27 May 2011.

[24] [1994] IRLR 386

> 'It was reasonable for the claimant to seek to maintain terms and conditions which he had enjoyed for many years and in particular not to agree to a significant reduction in pay in favour of an uncertain bonus scheme.' [My own underlining]

[56] On appeal it was found that the Tribunal misapplied the *Catamaran* decision. Of importance to the matter before me is this which was said by the Appeal Tribunal: -

> '[14] The focus of the Tribunal's attention is thus required to be on the reasoning and reasonableness of the employer and not upon what it is reasonable for the Claimant to do… Thus, in *Chubb Fire Securities Ltd v Harper*[25] the Employment Appeal Tribunal, Balcombe J presiding, dealt with the question that arose when an Industrial Tribunal had to consider whether it was reasonable for an employee to decline the new terms of a contract. The Tribunal's judgment had said: "if it was reasonable for him to decline these terms then obviously it would have been unreasonable for the employers to dismiss for such refusal."
>
> [15] The Judgment of Balcombe J makes it clear that that was a wrong approach. He stated: "We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime having regard for his family commitments, yet from the employer's point of view having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime. […] We agree with the comment […] in Harvey on Industrial Relations in Employment Law' […] 'it does not follow that if one party is acting reasonably the other is acting unreasonably.'

[57] What one observes is that the approach taken is that of assessing the reasonableness of the refusal. In our legislation one sees a similar approach in section 41 of the Basic Conditions of Employment Act[26](BCEA). To my mind, in a context of a retrenchment consultation, it is perfectly reasonable for an employer to suggest change to the terms

[25] [1983] IRLR 311.

[26] Act 75 of 1997.

and conditions of employment if such a change would resolve the economic quack mire faced by the employer at the time and save jobs.

[58] It is certainly unreasonable for an employee to refuse to accede to the change at the altar of the preclusion in section 187(1) (c) when the acceptance will avoid a dismissal. Of importance becomes the purpose of the change. If its purpose is to preserve jobs, as it is the case in the matter before me, then the refusal will be unreasonable and inconsistent with the purpose and objects of the LRA. By proposing the change in such a situation, an employer does not gain bargaining advantage in any manner or shape.

[59] Returning to the requirement to produce credible evidence: during argument, I enquired from the applicants' counsel as to which evidence are the applicants relying on to satisfy the requirement, since the applicants led no evidence? He referred me to the evidence of Moodley, the first respondent's witness. In his submission, the requirement does not necessarily await evidence from the employee who alleges another prohibited reason. I don't agree. He relied on the following evidence by Moodley:

> 'Mr Van Der Riet: They are told there effectively that they have to accept the new contracts of employment by 21 April 2015. Is that correct?
>
> Mr Moodley: That is correct, as it stands there.
>
> Mr Van Der Riet: Ja but the process was, and that will be the evidence, that each of those 804 employees, wage earners, were given a contract of employment and attached and say: you will accept that? If not, you are going to be retrenched. Is not that so?
>
> Mr Moodley: Arising from the operational requirements, yes.'[27]

[60] The above arose only during cross-examination. It is clear from the exchange that in the first answer, Moodley was confirming the contents

[27] Pages140-141 of the transcript.

of paragraph 16[28] of the letter written on 17 April 2015. It is clear from the question that the phrase '*they have to accept the new contracts of employment'* was coined by the cross-examiner, it does not occur in paragraph 16. However, the witness answered in line with what clause 16 stated. The second answer is the most telling one. Moodley gave a qualified answer. He said the termination will be for operational reasons and not for the refusal to accept the demand.

[61] For the provisions of section 187(1) (c) to obtain, there must be some credible evidence that shows that firstly there was a demand and secondly a refusal. Thirdly that the ensuing dismissal objectively viewed, was as a result of the refusal (causal connection). I struggled to observe the demand alleged in this case by the applicants.

[62] Paragraph 16 of the letter refers to a request to indicate willingness to accept an alternative reasonable offer. An offer and a demand are two distinct things. The evidence which surprisingly the applicants sought to rely on does not credibly show that there was a demand and a refusal which led to a dismissal. Ironically, in this matter there is clear evidence that the second applicants did perform duties in terms of the redesigned job description for a period of about six months. It baffles me why there can be a talk about a refusal. All it boils down to is more money and nothing else. To this proposition, Mr Van Der Riet correctly conceded.

[63] Regard being had to the email of 13 February 2015, it is clear that in October 2014, the second applicants agreed to the "demand"-to work according to the redesigned job descriptions. They did not refuse, but what they did in an attempt to extract more money from the already limping first respondent was to renege, knowing full well that the first respondent is in a vulnerable position-the LDCs[29] and VSPs[30] had left. I

[28] 16 As from 28 April 2015 the R3.00 temporary rate will no longer be applicable as we would have implemented the redefined job descriptions in respect of the positions that will remain in the organisation. Your members and employees in affected positions will be requested to indicate whether they wish to accept the reasonable offer of alternative employment by no later than 21 April 2015. Page 255 of Volume 1 Bundles.

[29] Limited Duration Contractors.

[30] Voluntary Severance Packages.

agree with Mr Franklin for the first respondent that this evinces *mala fides* on the part of the Union and its members. In their wisdom, the applicants chose to lead no evidence. Versions put in cross examination and not confirmed in evidence remain as versions and do not constitute evidence.

[64] Despite suggesting to Moodley that there will be evidence which suggest that dismissal will be used if they do not accept contracts of employment, such evidence was not produced in this Court. Absent credible evidence the first respondent in my mind is not behoved to show that the dismissal is not for prohibited grounds. Recently the Labour Court per La Grange J in *Bakulu v Isilumko Staffing (Pty) Ltd and Another*[31], had the following to say, to which I associate myself with:-

> '[9] Thus, in order to establish a basis for his case of automatically unfair dismissal, Bakulu needed to adduce some evidence that would tend to suggest that the real reason for his dismissal was not incapacity, which was the reason given by Isilumko, but was possibly race
>
> [15] …But he has brought his case to this court on the basis that the real reason was because of his race and he needed to raise a credibly possibility that his dismissal in question fell within the scope of section 187(1) (f)'. [My own emphasis]

[65] The approach taken by my brother in the *Bakulu* matter was to grant an absolution from the instance. In this matter, I am not taking that approach. Since the employer is not behoved to prove otherwise, I then gravitated towards the reasons given by the employer for the dismissal. The SCA has found in the *Fry's Metals* matter that once compulsion to accept is excluded no further enquiry should occur into the nature or categorization of the demand.[32] I understand that to mean that the claim ought to be dismissed on that basis alone. What applies is the test set out in *Kroukam v SA Airlink (Pty) Ltd*[33]*,* which is that, the employee must

[31] Case JS 105-16 delivered on 15 November 2017

[32] Paragraph 56 of the judgment.

[33] [2005] 26 ILJ 2153 (LAC).

produce credible evidence that shows that an automatically unfair dismissal has occurred. This I call the first hurdle. Should an applicant fail to cross this hurdle such an applicant must to my mind, fail.[34]

[66] In the circumstances I conclude that the second applicants were not automatically unfairly dismissed. I particularly conclude that the amended section 187(1) (c) does not outlaw, as argued, dismissal for operational reasons. All it does is to introduce as it were final dismissal if the reason is the refusal to accept the demand. *Fry's Metals* and *Algorax* are still good law to the extent that they allowed dismissal for operational reasons in a situation of not accepting change aimed at addressing the operational requirements of an employer.

Were the Individual applicants' dismissals substantively unfair?

[67] The issue of procedural unfairness does not arise before me. It has been resolved by this Court earlier. Before me is the question whether dismissal is substantively fair or not. To a large extend, the applicants fought their case on the basis that *Fry's Metals* and *Algorax* are no longer good law.

[68] There is no *iota* of evidence to gainsay the evidence of the first respondent's two witnesses. This Court must then accept that the first respondent was faced with difficulties and the only viable answer to that conundrum was to restructure and redesign the jobs. I am satisfied that the first respondent did everything possible to save the jobs. Had the second applicants continued with the redesigned jobs, without a financial dent as it was the situation, they would still be in employment. Put differently, their jobs would have been saved. It perplexed me when Mofokeng was not cross-examined. The tenor of her evidence and that of Moodley suggest that they, at the very least, had secured an agreement that the redesigned job descriptions are the appropriate answer to the

[34] *Tshivhase-Phendla v University of Venda Case JS 1145-12 delivered 12 October 2017*.

difficulties faced by the first respondent. It was for that reason that they expressed shock when they learned about the reneging.

[69] The duty to avoid a dismissal befalls the other party too in a consultation process. The applicants had a duty as it were, to make reasonable proposals to avoid a dismissal. Nowhere in the minutes was I able to find any counter proposal to the redesigned jobs nor better still a proposal to be paid anything else other than the 60% and the 16% reflected in the unchallenged evidence of Moodley and Mofokeng. The first respondent had a commercial rationale to restructure.

[70] In *Mazista tiles (Pty) Ltd v NUM and Others*[35]*,* the LAC had the following to say, which is still valid to this day:-

> '[57] …The appellant could still decide that its business required that the employees' terms and conditions of service be changed in order to be more profitable and more competitive. If the employees rejected its proposal on changing the terms and conditions, as it was the position in this matter, then the appellant would be entitled to dismiss them for operational reasons.'

[71] I have no other evidence to compare with and or reject the clear and concise evidence of Moodley and Mofokeng. In their statement of case what they sought to make was that the first respondent failed to demonstrate that there was a need to retrench. The evidence of the first respondent's witnesses remains largely unchallenged. When it comes to substantive fairness, the court relies on the evidence adduced in court. No evidence was led to demonstrate that the old positions were not redundant as testified by the first respondent's witnesses. Similarly, there was no evidence to support the alleged undertakings made. For the reasons set out above, the dismissals are substantively fair.

[35] [2005] 3 BLLR 219 (LAC).

The issue of the practicability of reinstatement.

[72] Given the view I take at the end of this matter, this question becomes academic in a sense. The second respondent was joined in the proceedings on the strength of the provisions of section 197 (2) (c)[36]. The essential facts in relation to this part of the case is that almost a year after the dismissals, the first respondent outsourced its fleet and actually transferred its transport business to the second respondent. If this Court were to find that the dismissal of the second applicants, is unfair, some 110 employees would be required to be re-instated by the second respondent.

[73] The second respondent left the substantive fairness part of the case to be fought by the first respondent alone. It sought to resist and or exclude the primary remedy should the Court find that the dismissals are substantively unfair.

[74] The second respondent led the evidence of Enslin who testified about the impracticability of reinstatement as a remedy. Other than criticizing his evidence in cross-examination no other comparable evidence was presented to this Court.

[75] The relevant section of the LRA in this part of the case is section 193(2) (c)[37]. The submission of Mr Van der Riet is simply that there was no evidence that it is not reasonably practicable to reinstate the individual applicants. In his submission, the evidence of Enslin does not show that. The dictionary meaning of the word 'practicable' means-*capable of being effected, done, or put into practice; feasible*. Reasonable has as its

[36] Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer.

[37] The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless-

(a)…

(b)…

(c) It is not reasonably practicable for the employer to re-instate or re-employ the employee.

meaning to be being within the bounds of common sense, not excessive, extreme or fair.

[76] So to my mind the phrase reasonably practicable means that which is effectively fair. An objective value judgment predicated on some evidence is thus required. The only facts upon which the Court could predicate a value judgment is the evidence of Enslin. He told the Court in no uncertain terms that the second respondent has positions for 90 drivers and if 110 is added such would lead to an immediate retrenchment. Courts are enjoined by the Constitution to give effective orders. Granting re-instatement under the circumstances testified to by Enslin would not only offend the provisions of the section but it would be ineffective to do so.

[77] For an employer to exclude the primary remedy, evidence supporting one of the exceptions must be led. In *casu*, the second respondent did that and I am satisfied that re-instatement if ordered would be impracticable. Had I found that the dismissal is unfair, I would not have ordered re-instatement as a remedy

[78] As to costs, I have taken into account that this matter raised a novel issue, which the applicants were entitled to argue in this Court. Also there must be an on-going relationship between the Union and the first respondent or the second respondent perhaps. Had it not been for the novelty issue, I was prepared to make an order that costs should follow the results. Therefore, the appropriate order is one that each party to pay its own costs. Although none of the parties suggested that there is a constitutional issue belying this matter-right to collective bargaining, I believe such an issue does exist although not argued before me.

[79] In the results, I make the following order:

<u>Order</u>

1 The dismissal of the second applicants is not automatically unfair.

2 The dismissal of the second applicants is substantively fair.

3 Each party to pay its own costs.

_____

GN Moshoana,

Judge of the Labour Court of South Africa

Appearances:

For the Applicants : Advocate J G Van Der Riet SC

Instructed by : Ruth Edmonds Attorneys, Observatory, Johannesburg

For the First Respondent : Advocate A Franklin SC and Advocate R Itzkin

Instructed by : ENS Inc, Sandton

For the Second Respondent: Advocate A Redding SC and Advocate G Fourie.

Instructed by : Cliffe Dekker Hofmeyer, Sandton.