**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CC CASE NO: 178/19**

**LAC CASE NO: JA 25/18**

**LC CASE NO: JS 596/15**

In the matter between:

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| **NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA)** | First Applicant |
| **THE INDIVIDUALS LISTED IN ANNEXURE "A"** | Second to Further Applicants |

And

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| **AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA (PTY) LTD)** | First Respondent |
| **IMPERIAL DEDICATED CONTRACTS (A DIVISION OF IMPERIAL LOGISTICS SA (PTY) LTD)** | Second Respondent |

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# FIRST RESPONDENT'S HEADS OF ARGUMENT

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## A. Introduction and summary

1. This application turns on the proper interpretation of Section 187(1)(c) of the LRA[1] - a section amended in 2014 by the LRAA.[2]

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1 The Labour Relations Act 66 of 1995.

2 Labour Relations Amendment Act, 2014.

2. According to the applicants, the amendment radically altered the law on automatically unfair dismissals by prohibiting dismissals that, prior to the amendment, would have been lawful and fair under the principles established in ***Fry's Metals.***[3] The applicants contend for an interpretation that would preclude employers from resorting to dismissal where their operational requirements necessitate a change to employees' terms and conditions of employment, and an offer of continued employment on altered terms as a measure to avoid dismissals is rejected. We submit the applicants' argument is legally untenable. Additionally, we submit the applicants' interpretation would spell disaster for employers, as the facts of this case demonstrate.

3. Aveng's[4] case is that the amendment to Section 187(1)(c) was directed only at doing away with an anomaly arising from ***Fry's Metals***. The anomaly was that employers were disinclined to reinstate retrenched employees for fear of falling foul of Section 187(1)(c). The amendment was not directed at radically altering established case law by outlawing all dismissals that would previously have been lawful and fair under ***Fry's Metals***. The pre-existing legal position was that an employer was entitled to retrench employees who were not prepared to work in accordance with terms and conditions of employment that were operationally problematic, so as to replace them with employees who were prepared to work under new terms that accommodate

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[3] ***Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA*** (2003) 21 ILJ 133 (LAC) and ***National Union of Metalworkers of SA & others v Fry's Metals*** **(Pty) Ltd** 2005 (5) SA 433 (SCA).

[4] Aveng Trident Steel (a division of Aveng (Pty) Ltd), the first respondent in this application.

its operational needs. Aveng contends that these Fry's Metal type dismissals have not been outlawed by the amended section.

4. Both the Labour Court and the LAC[5] upheld Aveng's construction.

5. The applicants have dedicated a sizeable section of their heads to a rendition of the facts. However, this rendition omits certain critical details and the facts are not dealt with at all by the applicants in the remainder of their heads other than by way of an analysis of Aveng's 21 April letter, which is said to contain a demand which led to the dismissals. We submit the argument ignores the factual context necessary to establish whether the Section was contravened.

6. The LAC's judgment contains a summary of the facts at paragraphs 4 to 29,[6] which we ask be read together with the account of the evidence given below. We set out the facts in some detail in these heads because we submit they are material to a determination of the application. They show that the individual applicants were dismissed as a consequence of Aveng's operational needs, rather than a refusal to accept a demand in respect of a matter of mutual interest.

7. In summary, the essential facts are as follows. Aveng operates in the steel industry. In mid-2014, it faced a harsh economic environment. It could not continue with its existing business model and would have to restructure in order to survive. It proposed reviewing its organisational structures and

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5 The Labour Appeal Court.
6 Vol. 17 p. 1620 - 1628.

redefining some employees' job descriptions. At the outset of the consultation process it presented a business case to the Union[7] along those lines. The Union did not contest the need to retrench nor the principle that restructuring was an appropriate response to Aveng's predicament. However, in an attempt to avoid retrenchment altogether or at least to mitigate the potential consequences thereof, Aveng and the Union agreed, firstly, that employees would be offered VSPs[8], and secondly that employees engaged on so-called LDCs[9] would have their contracts terminated. In the result, some 500 odd VSPs / LDCs left Aveng's employ during 2015. The parties also struck an interim agreement in terms whereof the employees agreed to work in accordance with Aveng's redesigned job descriptions pending the finalisation of consultations. Employees worked under the proposed new structure for a period of six months. When the consultation process ended without consensus, Aveng gave notice that the individual applicants faced retrenchment since their old positions no longer existed in the new structure. In an attempt to avoid retrenchment, Aveng offered each employee alternative employment in a post in the new structure. 71 employees accepted the offer and continued working for Aveng. The remainder (the individual applicants numbering 733) declined the offer and were retrenched.

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7 National Union of Metalworkers of South Africa ("NUMSA"), the first applicant in this application.
8 Voluntary Severance Packages.
9 Limited Duration Contracts.

8. It is a particular feature of this case that the retrenchments could have been avoided altogether had the employees accepted Aveng's offers of alternative employment. That the employees declined these reasonable offers is remarkable – a large number of the individual applicants had already worked under the proposed new regime for six months; they would be no worse off financially if they took the offer; and their length of service would have remained unaffected. This curiosity was never explained by the Union.

9. Apart from the fact that the retrenchments were entirely avoidable, there is another important theme in the case, namely, a lack of *bona fides* on the part of the Union. This is evident from its conduct in extracting a wage increase by holding Aveng to ransom in circumstances where – at the Union's insistence – employees on LDCs had been released and other employees had been given VSPs on the understanding that the jobs performed by employees on LDCs and employees granted VSPs would continue to be performed by the employees under the interim agreement. Despite those circumstances, the Union reneged on the interim agreement. It sought to convert the Section 189 consultations (aimed at cutting costs) into wage negotiations calculated to achieve exactly the opposite. This was a demonstration of bad faith.

10. On the applicants' interpretation of Section 187(1)(c), Aveng was not entitled to offer the individual applicants alternative employment in the new posts in its redefined structure and to retrench them if they refused the offer. We submit this would be a remarkably far-reaching consequence of an

amendment designed to remedy an anomaly which discouraged employers from offering reinstatement to retrenched employees. We will submit below that the section continues post amendment to allow employers to terminate their employees' contracts when operational requirements necessitate a change to terms and conditions of employment and employees reject an offer of alternative employment.

11. Against that background, the structure of these heads of argument is as follows: (i) first, we set out the circumstances leading to Aveng's decision to restructure; (ii) second, we detail the chronology of the consultation process, highlighting the important issues which arose; (iii) next, we deal with the offers of alternative employment; and (iv) finally, we make our legal submissions on Section 187(1)(c), which we set out in conjunction with key findings of the LAC and our response to the applicants' submissions.

## B. <u>The need to restructure</u>

12. Aveng presented detailed evidence in the Labour Court through its COO, Mr Deshan Moodley. None of this evidence was seriously contested. Moodley has 25 years' experience in the steel industry[10] and was well-placed to highlight the critical situation in which Aveng found itself during 2014.

13. Moodley testified in summary as follows.

    13.1. The steel industry was in decline from the time of the 2010 World

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[10] Vol. 3 p. 293 lines 7 - 11.

Cup.[11] Aveng's sales volumes dropped by twenty percent (20%) and its costs structure could not be sustained by its income.[12] The decline in sales volumes and increases in costs are reflected in the business case document in the tables at **Vol. 6 p. 531**. 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.[13] As a consequence, trading margins dropped. Volumes are driven by Government spending but there has been none of the promised investment by the Government in infrastructure projects.[14]

13.2. The tables at **Vol. 6 p. 532** demonstrate the decline in Aveng's profitability and sales volume. In order to keep the same profit margin, Aveng had to reduce costs. However, costs had increased, especially labour, electricity and transport costs.[15] As a consequence of all of this, Aveng became unprofitable. Thus in 2014, Aveng 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.[16]

14. <u>Proposed restructuring: rationale</u>

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11 Vol. 3 p. 297 lines 15 - 24.
12 Vol. 3 p. 298 lines 15 - 22.
13 Vol. 3 p. 298 lines 1 - 4.
14 Vol. 3 p. 297 lines 24 - 25.
15 Vol. 3 p. 298 lines 5 - 12.
16 Vol. 3 p. 301 lines 16 - 25.

14.1. In its business case presentation at **Vol. 6 p. 534 and ff** Aveng indicated that its operational and support structures had to be reviewed to ensure the business was streamlined and resources were optimised for the then current market position. This involved reviewing Aveng's organisational structures and redefining some job descriptions (**Vol. 6 p. 535**).

14.2. With the drop in sales volumes, machines were under-utilised. Aveng had therefore to align production output with the market.[17] In addition, Aveng had to reorganise its workforce to align working conditions with the market. Aveng needed to achieve an improvement in productivity as well.[18]

14.3. Aveng was faced with a critically debilitating historical situation, namely, that over time, employees had performed only the tasks that they chose to whilst refusing to do others, e.g. a machine operator would operate his machine but refuse to clean it, insisting that somebody else be employed as a cleaner.[19] Examples of this duplication of function include: (i) driver and conductor;[20] (ii) operator and cleaner;[21] (iii) crane driver (who would only operate one crane);[22] and (iv) sling-man and checker.[23]

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17 Vol. 3 p. 301 lines 22 - 25.
18 Vol. 4 p. 304, line 25 – p 305, line 1.
19 Vol. 4 p. 305 lines 3 - 8.
20 Vol. 4 p. 305 lines 15 - 25.
21 Vol. 4 p. 305 lines 3 - 8.
22 Vol. 4 p. 306 lines 6 - 19.
23 Vol. 4 p. 306 lines 20 - 25.

14.4. Accordingly, the job positions and job content actually performed at Aveng were not aligned with those in the Main Agreement.[24] For example, in terms of the Main Agreement a machine operator is required to clean his machine as part of his function. There is no provision for an additional cleaner to be employed to perform such task. At Aveng, over time, the job functions had been eroded and the content of each job became smaller.

14.5. All this led Aveng 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 he ought to perform the tasks associated with a person in his Grade as reflected in the Main Agreement. This was done to address the divergence between job positions and tasks in the Main Agreement, and the tasks performed by Aveng's employees.[25] The exercise that was performed by Aveng is reflected in **Vol. 13 p. 1253 and ff.**

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14.6. It was hoped this proposed new structure would give Aveng flexibility. Thus, instead of an employee performing only the sling-man function, he could do any general worker job.[26] This would avoid the situation where many people sat idle waiting only to

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24 Vol. 4 p. 307, line 19 – p. 308, line 5.
25 Vol. 4 p. 307 lines 11 - 14.
26 Vol. 4 p. 308 lines 19 - 25.

perform a single function instead of doing any function for which they had the skills.[27] The information contained in **Vol. 13 p. 1253 and ff** was distributed to the Union.[28]

## C. <u>The Consultation Process</u>

15. The consultation process followed a number of distinct phases:

    15.1. Firstly, Aveng initiated a consultation process through a notice dated 15 May 2014 ("**the 15 May notice**")[29] and presented its business case to the Union together with all associated information.

    15.2. Thereafter, the parties consulted on the VSP and LDC issues, following which the affected persons left Aveng's employ.

    15.3. Then, the parties concluded the interim agreement in mid-October 2014.

    15.4. During the period of the interim regime, the parties also concluded the transport agreement.

    15.5. Thereafter, they consulted on the Union's alternative Five Grade Structure proposal, but were unable to reach consensus.

    15.6. Finally, the retrenchments took place in April 2015.

16. Each of these phases is dealt with below.

17. <u>Presentation of Aveng's business case</u>

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27 Vol. 4 p. 306 lines 17 - 19.
28 Vol. 8 p. 762.
29 Vol. 6 p. 523 - 525.

17.1. The need to retrench has been dealt with above. This section details the process of consultations on that topic.

17.2. The 15 May 2014 notice[30] describes why Aveng was contemplating retrenchments. It sets out the reasons for the proposed restructuring and the alternatives considered.

17.3. Aveng presented its business case at the outset of the consultation process.[31] The business case[32] set out a number of topics, each of which was dealt with in detail at the consultation meetings.

17.4. Later in the process, Aveng gave more detail of the restructuring proposal which, as it indicated at the outset, would involve a review of its organisational structures and a redefinition of some of the job descriptions. To that end, Aveng provided the Union with the detailed organograms which appear at **vol. 11 p. 1074 – vol. 11 p. 1247**[33] and dealt with the organograms in detail during the consultations.

17.5. Aveng also presented to the Union a document setting out the specific jobs which would be affected (**vol. 13 p. 1253 and ff**).[34] This has been dealt with above. Moodley testified about the logic which underlies this document, as explained above.

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30 Vol. 6 p. 523 – 525.
31 Vol. 5 p. 422 lines 18 - 22.
32 Vol. 6 p. 526 - 540.
33 Vol. 5 p. 423, line 22 – p. 424, line 3.
34 Vol. 5 p. 424, line 21 – p. 425, line 2.

17.6. In addition to the information detailed above, Aveng presented a pack of restructured job descriptions to the Union.[35] These set out comprehensively the precise ambit of each job in the proposed new regime. The job descriptions were given to the Union as early as 16 September,[36] although the Union pretended in later consultations that it had not been given them, as a result of which it was given to the Union twice again. Certainly by 6 October the Union had all the job descriptions in their possession[37] and by 17 October, the individual applicants began working according to those redefined positions in terms of the interim agreement.[38]

17.7. Accordingly, the evidence shows that Aveng gave detailed, cogent information to the Union about the need to restructure and the precise form of the proposed restructuring. At no point was this contested in any material way by the Union.

18. <u>The VSPs</u>

18.1. As part of its business case[39] Aveng proposed making offers of VSPs. It did so in terms of a memorandum to all permanent employees dated 1 September 2014.[40] In the result, 249 applications for voluntary

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35 Vol. 11 p. 1 027 – 1 065.
36 Vol. 5 p. 429 lines 10 - 21.
37 Vol. 5 p. 430 lines 12 - 22.
38 Vol. 5 p. 430, line 23 – p. 433, line 1.
39 Vol. 6 p. 538.
40 Vol. 6 p. 541 - 542.

separation packages were approved by Aveng[41] and those people were released without having to work their notice periods.

19. LDCs

19.1. Part of Aveng's business case was to review all LDC positions. These had been a feature in Aveng's business for some years. LDCs are issued to people within Aveng's organisation. They were of different durations but typically for three, six or twelve months and in some isolated incidents, for more than a year.

19.2. LDCs were required in order to cover for people who did not want to perform their full functions e.g. cleaners had to be employed to cover for machine operators and the like.[42]

19.3. Following consultations, Aveng agreed to lay off the LDCs. This was another major success in the consultation process. The LDCs were laid off in 2014.

20. The Interim Agreement

20.1. On 17 October 2014 the parties concluded the interim agreement.

20.2. It came about as follows. Aveng had given the Union the restructured

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41 Pre-Trial Minute par. 3.19 Vol. 1 p. 73. The affected employees left Aveng in September, October and November 2014.

42 Vol. 4 p. 314 lines 1 - 6.

job descriptions and proposed that the employees work under these new documents pending the outcome of consultations.[43] The Union maintained that this would involve some employees performing extra tasks and asked what incentive Aveng could offer as a *quid pro quo*.[44] Although Aveng's stance was that the restructured positions simply aligned the job descriptions with the Main Agreement and ought to have been adhered to by the employees in any event, it was nonetheless prepared to pay a 60c increment[45] to encourage employees to work according to the new regime.[46]

20.3. The interim agreement was set to endure until the engagements on the five-grade structure were concluded (which, at the time, was anticipated to be the end of February 2015), allowing the parties to consult on the various consultation topics in the interim. The agreement was put into effect.

20.4. We submit this fact is of critical importance. It shows that the Union accepted the principle of restructuring and that the employees were quite able to perform the tasks under the restructured arrangement. This makes their later refusal of the offer of alternative employment in accordance with that same structure all the more bizarre.

21. <u>Transport</u>

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43 Vol. 5 p. 432 lines 9 - 14.
44 Vol. 5 p. 432 lines 16 - 19.
45 Vol. 5 p. 432 lines 19 - 23.
46 See 6 October 2014 minutes at vol. 7 p. 658 - 660.

21.1. During November 2014 – January 2015, the parties consulted on the transport allowance issue presaged in the May 2014 notice.[47] After consultations held on 4 November, 4 December[48] and 26 January[49], the parties reached an agreement on 2 February 2015.[50]

22. Union reneges on the interim agreement

22.1. Despite the fact that the interim agreement was to endure until the end of February 2015, the Union gave notice in a letter dated 13 February 2015[51] that as of Monday 16 February 2015, its members across the plant "*will no longer perform duties outside their contract of employment; and will also not perform any duties as per the arrangement we entered into in October 2014*".

22.2. Both Moodley[52] and Mofokeng[53] described Aveng's sense of shock upon receiving this notification. Moodley described it as being as if Aveng *"were being held at a barrel of a gun"*[54] and described it as the Union having reneged on the interim agreement.[55] This characterisation was never challenged.

22.3. We submit the Union exhibited the highest degree of *male fides* in so acting. By 13 February 2015 the VSP and LDC workers had already

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47 Vol. 6 p. 523.
48 Vol. 6 p. 672 – Vol. 7 p. 722.
49 Vol. 7 p. 723 – 725.
50 Vol. 7 p. 726 - 728.
51 Vol. 7 p. 732.
52 Vol. 4 p. 317 lines 19 - 21.
53 Vol. 5 p. 434 lines 19 - 21.
54 Vol. 4 p. 317, line 21.
55 Vol. 4 p. 317, line 23.

left Aveng's employ and the individual applicants had been working in the redesigned job descriptions since October and performing the duties previously carried out by the VSP and LDC members. Premature termination of the interim agreement meant that from 16 February 2015, Aveng had no one to do the work which the 500-odd VSPs and LDCs had hitherto performed, which put Aveng in an obvious crisis. The Union's conduct is all the more egregious since it gave notice on a Friday that the interim agreement would terminate on the following Monday (a weekend's notice) and, despite the fact that the interim agreement was to endure until at least the end of February and thus still had at least two and a half weeks to run.

22.4. We submit that this was a deliberate tactic by the Union to extract more money from Aveng, and made all the worse by the fact that it took place in the midst of retrenchment consultations in which Aveng was seeking to effect savings so as to be able to survive.

22.5. Effectively then, the Union held Aveng to ransom. This is how both Moodley[56] and Mofokeng described it. It demanded that the 60c be increased to R5 at a meeting held on 23 February.[57] Following discussions between the parties at the 5 March 2015 meeting, Aveng agreed to increase the 60c to R3.[58]

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56 Vol. 4 p. 318, line 22.
57 Vol. 8 p. 733 at 735.
58 Vol. 8 p. 745 at 747; Vol. 8 p. 749.

23. Five Grade Structure

23.1. At a meeting held on 11 September 2014 the Union proposed as an alternative to Aveng's proposal, that a Five Grade Structure be introduced.

23.2. The context of this proposal is as follows. The Main Agreement has a Thirteen Grade Structure. However, it also gives parties the option to convert to a Five Grade Structure. An extract from the Main Agreement reflecting this appears at **Vol. 14 p. 1303 and ff** and in particular, at **Annexure B p. 1326 – 1331**. The Union's proposal entailed the clustering of positions and the collapsing of thirteen existing grades into five and therefore accepted the principle of job restructuring. However, the Union did not appreciate that over time, the gap between remuneration paid to employees in the various grades at Aveng had narrowed with the consequence that the Union's members would not be better off under the Five Grade Structure were it to be adopted.

23.3. Consultations on the Five Grade Structure were held in abeyance in late 2014 whilst the other consultation topics dealt with above were considered.[59] The Union did not object to this. At a consultation meeting held on 23 February[60] Aveng informed the Union that it had

[59] Vol. 5 p. 433, line 23 – p 434, line 4.
[60] Vol. 8 p. 733 - 735.

conducted a feasibility analysis in relation to the introduction of a Five Grade Structure. It sought an extension of time within which to present this and committed to tabling a proposal by 10 March for engagement and possible implementation by 1 April. However in response the Union tabled two intractable options which gave rise to a letter dated 27 February 2015 in which Aveng set out is position.[61] Aveng also issued a memorandum to all its employees on the same date.[62] In it Aveng recorded the events with regard to the interim agreement and pleaded with employees to continue working in terms of the interim agreement pending the conclusion of consultation.[63]

23.4. At a meeting held on 3 March 2015[64] Aveng duly made a presentation to the Union on the Five Grade Structure proposal. The presentation appears at **Vol. 13 p 1271 – 1288**. It sets out the potential benefits and described the process followed. Importantly, at **Vol. 13 p. 1279**, it set out a "*grade comparison*" i.e. the minimum wage rates payable under the Main Agreement in respect of the existing Thirteen Grade Structure, compared with the minimum wage rate payable in respect of the equivalent positions in the Five Grade Structure. The summary page at **Vol. 13 p. 1279** is followed by a detailed comparison of the wage rates per division (**Vol. 13 p. 1281 - 1288**).

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61 Vol. 8 p. 736 - 738.
62 Vol. 8 p. 739 - 740.
63 Vol. 8 p. 740.
64 Vol. 8 p. 741 - 744.

23.5. When the Union was shown these wage rates, the penny dropped that the adoption of the Five Grade Structure would not result in higher remuneration for its members. The Union then took a different tack. It demanded that Aveng provide it with a list of the pay rates of all its employees so the Union could "*work on averages*" and then revert to Aveng on the issue.[65] The actual pay rates of employees in Aveng had nothing to do with the Five Grade proposal and it is evident that the Union in bad faith sought a basis to increase the (disappointing) wage rates reflected in Aveng's presentation.

23.6. In the subsequent meeting held on 17 March 2015[66] the Union in fact confirmed its true motivation. The minutes record that: "*The Union mentioned that the Five Grade Structure is about improving the pay of workers and not downgrading employees*". In fact, it ought to have been nothing of the sort. The Five Grade Structure was a suggested alternative to Aveng's Thirteen Grade restructuring proposal and was made in the context of retrenchment consultations, not wage negotiations. The Union's first proposal was that "*averages*" must be agreed upon.[67] In the understanding of Moodley, what the Union proposed was that the minima in the Five Grade Structure be, not as per the minimum wage contained in the MEIBC Main Agreement,

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65 Vol. 8 p. 743.
66 Vol. 8 p. 750 - 753.
67 Vol. 8 p. 759.

but the average between the actual minimum and maximum rates in a particular Grade.[68] Aveng indicated that it was not in a position to accept such proposal.[69]

23.7. The Union also made the following further proposals.

> "*(1) The Five Grade Structure be bench-marked at 60% of the highest paid artisan in Aveng.*
>
> *(2) Alternatively, a bench-marking of 16% can be realised only if the anomalies of pay in the grades are corrected.*"[70]

23.8. Mofokeng testified about what her understanding was of these two proposals.[71] The first was that Aveng should take the highest paid artisan and then apply a 60 % increase to his wage rate. The second was that a 16% increment should be applied to average rates. Neither of these was a sensible option and Aveng rejected them.[72]

23.9. Aveng gave notice that in the circumstances it would implement the new structure with effect from 10 April 2015 as per the redesigned job descriptions. It also made offers of alternative employment.

23.10. However, in a last ditch attempt to find a solution, Aveng invited the Union to put a proposal which took account of the question of cost.

23.11. Aveng also put out a memorandum to all employees updating them

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68 Vol. 4 p. 325 lines 1 - 8.
69 Vol. 8 p. 755 par. 9.
70 Vol. 8 p. 788.
71 Vol. 5 p. 444, line 21 – p. 445, line 19.
72 Vol. 5 p. 445 lines 23 - 25.

as to the state of play at that date.[73]

23.12. In a consultation held on 16 April 2015 the Union did not (as had been the objective) make a presentation on the Five Grade Structure which would take account of Aveng's cost considerations. Instead it pretended it was confused by the new notice under Section 189 filed on 1 April 2015.[74]

23.13. In short, when Aveng went into discussions on the Five Grade Structure it did not expect the Union to use that as an opportunity to solicit a wage increase for their members, since the parties were consulting because Aveng was in a difficult financial position. In context, the Union's conduct was self-evidently not *bona fide*.

24. Retrenchments

24.1. In light of the Union's *mala fide* conduct Aveng concluded that the retrenchment consultations were at an end and it issued a letter dated 17 April 2015 to the Union.[75] In it, it set out the history of the matter, gave notice that with effect from 28 April 2015 Aveng would implement the new structure as per the redefined job descriptions previously communicated and stated that, since the jobs as they previously existed were now redundant, the Union's members faced retrenchments. However, Aveng once again made offers of

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73 Vol. 8 p. 762 - 764.
74 Vol. 8 p 787.
75 Vol. 8 p. 790 - 792.

alternative employment which were open for acceptance by no later than 21 April 2015.

24.2. Correspondence was thereafter exchanged between Aveng and the Union. In the result, 71 employees accepted the offer, and 733 did not. They were issued with notices of retrenchment dated 24 April 2015[76] and thereafter retrenched.

## D. Offers of alternative employment

25. In its first letter of 30 March 2015 Aveng indicated that it would offer members employment as an alternative to retrenchment. That offer was repeated in the final letter of 17 April 2015.[77] The text of the offer is set out under the heading "Was there a demand?".

26. All employees were presented with contracts of permanent employment together with redesigned job descriptions and asked to indicate whether they accepted or rejected the offers.

27. In response, the Union wrote an unhelpful letter on 20 April 2015[78] alleging that Aveng was "*approaching members individually… trying to intimidate them to sign the alleged contract of employment. We are putting on records (sic) that such conduct will cause division within our members*".[79]

28. The offers of alternative employment provided expressly that employees

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76 Vol. 8 p. 803.
77 Vol. 8 p. 790 – 792 par. 13 – 14.
78 Vol. 9 p. 864 - 865.
79 Vol. 9 p. 864 par. 4.

would be paid in accordance with their actual rates of pay as at 1 February 2015. Accordingly, none of them would be financially prejudiced by accepting the offers. We submit that the offers were eminently reasonable and that there is no basis for the individual applicants to have refused them. But for their inexplicably intransigent attitude, all of the 733 dismissed employees could have continued working for Aveng and no retrenchments would have been necessary at all.

29. In the light of all the aforegoing, we respectfully submit that the retrenchment of the individual applicants was fair based on Aveng's operational requirements. The only remaining issue is the question of law based upon Section 187(1)(c) of the LRA, to which we now turn.

## E. Section 187(1)(c); the LAC's judgment; and our response to the applicants' principal arguments

30. Prior to the LRAA taking effect, Section 187(1)(c) rendered a dismissal automatically unfair if the reason for the dismissal was to *"compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee"*.

31. The provision, as amended, renders a dismissal automatically unfair if the reason for the dismissal is *"a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer"*.

32. In the explanatory memorandum,[80] the rationale for this amendment is explained as follows:

> *"The section is amended to remove an anomaly arising from the interpretation of section 187(1)(c) in [Fry's Metals][81] 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][82] 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."* (Own emphasis.)

33. To unravel the meaning of the section and the implications of these remarks, it is important to understand the historical position with reference to the judgments in ***Fry's Metals*** and ***Algorax***, and to appreciate the nature of the

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80 Memorandum of Objects on Labour Relations Amendment Bill, 2012.
81 ***Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others*** (2003) 21 *ILJ* 133 (LAC).
82 ***CWIU & others v Algorax (Pty) Ltd*** [2003] 11 BLLR 1081 (LAC).

'anomaly' alluded to in the explanatory memorandum. We turn to address these topics next.

34. ***Fry's Metals*** and ***Algorax***

34.1. The vexed question regarding the proper approach to the interplay between Sections 189 and 187(1)(c) (in its pre-amendment guise) was addressed by the LAC in ***Fry's Metals***, wherein the employer had sought to introduce shift changes and the withdrawal of a transport subsidy which the employees refused to accept, following which the employees were retrenched. The employees argued that their dismissals were prohibited in terms of Section 187 and thus automatically unfair.

34.2. The LAC in ***Fry's Metals*** rejected this argument, reasoning that Section 187(1)(c) was derived from the lock-out definition under the 1956 LRA, which defined a lock-out to include the termination of an employee's contract to compel them to agree to an employer demand. The court held as follows in this regard:[83]

> *"A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept a demand in respect of a matter of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two. An employee's acceptance of an*

[83] At par. 28.

*employer's demand in respect of a matter of mutual interest can only be useful or worth anything if the employee is going to continue in the employer's employ. Let us say that an employer wants his employees to agree that a transport subsidy be done away with. If the employees accept this demand and continue in the employer's employ, that would serve a useful purpose. However, if the employees are dismissed finally and irrevocably, their agreement that the employer may do away with the transport subsidy is irrelevant. The people whose agreement matters to the employer are those who are going to be in his employ."*

34.3. The LAC accordingly reasoned that a dismissal falls within the scope of Section 187(1)(c) only if it is conditional in the sense that the employer retains an intention to accept the employees back into its employ if they accede to the changes.

34.4. Following ***Fry's Metals***, the LAC considered similar facts in ***Algorax***, which involved changes to terms and conditions of employment in the form of new shift patterns, culminating in the retrenchment of employees who refused to accept these changes.

34.5. In ***Algorax***, the employer had repeatedly offered to reinstate the retrenched employees if they accepted its proposed changes, and this offer remained open until the trial.

34.6. Ultimately, the employer was unsuccessful in defending the claim notwithstanding the LAC's recognition that the employer may have had a valid operational justification for wishing to implement the new shift system. On the facts, the court was satisfied that the considerations pointing to the employer's intention to rid itself permanently of the employees were outweighed by indications that the purpose of the dismissal was to compel the employees to comply with the employer's demands. The court was heavily influenced in this regard by the reinstatement offer.

34.7. After ***Algorax***, the LAC's decision in ***Fry's Metals*** was confirmed on appeal to the SCA in ***Fry's Metals 2***,[84] wherein the SCA held as follows:[85]

> *"To deal with the apparently overlapping categories the LRA creates, [Thompson] suggested*[86] *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*

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84 ***National Union of Metalworkers of SA & others v Fry's Metals*** **(Pty) Ltd** 2005 (5) SA 433 (SCA).

85 At par. 54.

86 Thompson "**Bargaining, Business Restructuring and the Operational Requirements Dismissal**" (1999) 20 *ILJ* 755..

*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 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."* (Our emphasis).

34.8. In dealing with the "unavoidable complexities", the court pointed out that:[87]

*"[Retrenchments] can never occur, [Thompson] suggested, in disputes about 'the wage-work bargain': it is permissible only in disputes over business restructuring where viability is at issue. The difficulty his argument sought to reconcile is not only that the two categories of dispute manifestly overlap, since wage-work issues [around profits] may ultimately affect viability, but that 'viability' is itself an imprecise concept. When, therefore, will it be permissible for the employer to invoke operational requirements to dismiss employees?"*

And that:[88]

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87 At par. 53.
88 At par. 56.

*"The LAC's solution to the conundrum of the statutory concepts was .... to assign a distinctive meaning to 'dismissal' in section 187(1)(c), and then to restrict this category of automatically unfair dismissals 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 where the employer – irreversibly – 'has terminated' the employment contract. Dismissals intended to be and operating as final – not, in other words, reversible on acceptance of the demand – can thus never have as their reason 'to compel the employee to accept' that demand. They will therefore not be automatically unfair. In such cases, the only factual inquiry 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 inquiry into the nature or categorization of the demand is required."*

34.9. ***Fry's Metals*** type dismissals – being those in which employers have retrenched employees for the purpose of substituting their workforce with employees who are prepared to work to altered terms and

conditions of employment – were since upheld in a number of cases.[89]

34.10. Accordingly, in terms of the law prior to the amendment of Section 187(1)(c), an employer who wished to implement changes to terms and conditions of employment (including remuneration) could, if its proposals were refused, embark on a Section 189 exercise with a view to retrenching those who were not prepared to work to its "operational requirements" provided the retrenchment was final and irrevocable, and the requirements of Section 189 were met.

35. The ***Fry's Metals*** and ***Algorax*** Anomaly

35.1. Given that the explanatory memorandum explains the rationale for the amendment as being to do away with the anomaly resulting from the interpretation in ***Fry's Metals*** and ***Algorax***, a proper identification of this anomaly is the key to the understanding of the meaning of Section 187(1)(c) as amended. The applicants, in their heads of argument, avoid confronting the anomaly by stating that the explanatory memorandum does not spell out what it is.[90] They adopt this stance despite the fact that the portion of the explanatory memorandum which refers to the anomaly, explains that "*[t]he effect of [the Fry's Metals] decision when read with decisions such as*

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89 See for example: ***General Food Industries Ltd v FAWU*** [2004] 7 BLLR 667 (LAC); ***Mazista Tiles (Pty) Ltd v NUM & others*** [2005] 3 BLLR 219 (LAC); ***NUM & others v Mazista Tiles*** **(Pty) Ltd** (2006) 27 *ILJ* 471 (SCA); ***Gold Fields Logistics (Pty) Ltd v Smith*** (unreported LAC judgment, case no. JA42/08, 24/08/10, per Tlaletsi JA); ***Tlou v Anglo American Research (a division of Anglo Operations Ltd)*** (unreported LC judgment, case no. JS1163/09, 29/10/12, per Lagrange J); ***Solidarity obo Wehncke v Surf4Cars (Pty) Ltd*** (JA63/11) ZALAC 6 (20/02/14).

90 At par. 49.

*[Algorax] is to discourage employers from offering reemployment to employees who have been retrenched*".

35.2. The "anomaly" arising from these cases may thus be stated as follows:

35.2.1. Following the decisions in ***Fry's Metals*** and ***Algorax***, employers were wary of offering any form of reinstatement or re-employment to retrenched workers in the context of a Section 189 exercise, even if there was a valid operational requirement for the retrenchment. This was because the courts construed offers to take workers back, as indicating that the true reason for the retrenchment was one proscribed by Section 187(1)(c), irrespective of what the employer's purpose for effecting retrenchments was (whereas the reinstatement offer may simply have been a good faith offer in circumstances where the employer's real objective remained to find workers who were willing to work according to its requirements).[91]

35.2.2. This had the result that dismissed employees were often deprived of offers of re-employment or reinstatement by employers afraid of falling foul of Section 187(1)(c),

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[91] These are sentiments expressed by Todd and Damant in "**Unfair Dismissal – Operational Requirements**" (2004) 25 *ILJ* 896 at 921-922.

contrary to the aim and purpose of the LRA.

35.3. As pointed out by Grogan:[92]

> *"[It] seems somewhat strange that the legislature should have categorised conditional dismissals in the context of collective bargaining as automatically unfair, but excluded final dismissals occurring in the same context … ."*

And:[93]

> *"The ironical result of [Fry's Metals] and [Algorax] is that an employer perpetrated an automatically unfair dismissal by offering to reinstate or re-employ workers who refused to accept a demand, but did not do so by simply [finally] dismissing them for the same reason."*

36. <u>The Proper Meaning of Section 187(1)(c)</u>

36.1. The applicants' central contention is that the amendment of Section 187(1)(c) has had the effect that employers are no longer permitted to dismiss employees and to employ others in their place who are prepared to work in accordance with terms and conditions of employment that are operationally required. They contend that not only has the distinction between conditional and final dismissals (from which the anomaly arose) fallen away, but that the causation test which

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92 Grogan "Chick**en or Egg – Dismissals to Enforce Demands**" (2003) 19 (2) *Employment Law* 11.
93 Grogan *Workplace Law* (10th Ed) at 188.

determined whether the dominant reason for the dismissals was the employer's operational requirements (on the one hand), or the refusal to accept a demand (on the other), has also fallen away.

36.2. We submit that the applicants' position is unsustainable for the following reasons:

36.2.1. It is important to give effect to the opening words of the section, which read as follows:

> *"A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, <u>if the reason for the dismissal is</u> —"*
>
> (Own emphasis.)

36.2.2. The section, in its express language, thus confines its application to cases where the reason for the dismissal is one of the reasons proscribed in the section. The definitive enquiry is therefore to establish the reason for the dismissal. The applicants' analysis of the language of the section overlooks or gives insufficient emphasis to the phrase *"if the reason for the dismissal is…"*. This wording was contained in the section in its pre-amended guise, and it remains in the section as amended. It clearly denotes a causation analysis in establishing whether the section has been contravened.

36.2.3. The wording of Section 187(1)(c) (as amended) does not suggest that simply because a proposed change is refused and a dismissal thereafter ensues, the reason for the dismissal is necessarily the refusal to accept the proposed change. On the contrary, the true reason for the dismissal (irrespective of whether a proposed change is rejected) stands to be determined with reference to the test in ***Afrox***, and there is no basis on which to exclude an employer's operational requirements from consideration as a possible reason for dismissal. The distinction that the applicants seek to draw in respect of ***Afrox*** in their heads of argument, on the basis that ***Afrox*** pertained to the right to strike, is we submit without merit.[94] The causation analysis espoused in ***Afrox*** was premised on the fact that section 187(1) uses the words the phrase *"if the reason for the dismissal is…"*, and not on the nature of the rights at play.[95]

36.2.4. The typical contestation in an automatically unfair dismissal case where the employer retrenched employees, centres around whether its operational requirements were in fact the reason for dismissal, or whether the employer put these up to conceal its real reason for dismissing. This was

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94 At par. 64.
95 At par. 45 - 48.

the applicants' pleaded case in the Labour Court.[96] In contrast to the stance now adopted by the applicants (i.e. that a causation analysis does not come into play other than where the right to strike is concerned), the parties agreed in the pre-trial conference minute that the issues that the court was required to decide included these:[97]

> *"5.1 Whether the individual applicants were dismissed for refusing to accept a demand in respect of a matter of mutual interest between them and the Respondent and whether their dismissals were therefore automatically unfair in terms of section 187(1)(c) of the LRA.*
>
> *5.2 Whether the dismissals of the individual applicants were due to the operational requirements of the Respondent."* (Own emphasis)

36.2.5. The LAC *in casu*, having considered ***Fry's Metals***, found (with respect, correctly) that the position under Section 187(1)(c) (as amended) is this:[98]

> *"The amendment of section 187(1)(c) of the LRA had*

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96 Vol. 15 p. 1474 par. 27.
97 Vol. 1 p. 94.
98 Vol. 17 p. 1639 par. 61.

*a restricted purpose and limited reach. It shifted the focus from the employer's intention in effecting the dismissal to the refusal of the employees to accede. It no longer matters what the employer's intention or purpose might be. It is hence now irrelevant whether or not the dismissal was intended to induce the employees to comply with a demand. The upshot is that the distinction between final or conditional dismissals as a basis for the application of section 187(1)(c) of the LRA has fallen away since it no longer has utility."*

36.2.6. The LAC proceeded to the make the following findings which, we submit, with respect, are correct:[99]

*"The fact that a proposed change is refused and a dismissal thereafter ensues does not mean that the reason for the dismissal is necessarily the refusal to accept the proposed change. The question whether section 187(1)(c) of the LRA is contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal of the employees is. The proven existence of the refusal of a demand merely prompts a causation*

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[99] Vol. 17 p. 1639 - 1640 par. 65.

*enquiry. The actual reason for the dismissal needs to be determined and there is no basis in principle for excluding an employer's operational requirements from consideration as a possible reason for dismissal."*

36.2.7. As was found by the LAC, the material inquiry is whether "the" (as opposed to "a") reason for the dismissal is the refusal to accept the proposed changes to employment in terms of the ***Afrox*** test for factual and legal causation.[100]

36.2.8. If the purpose of the LRAA amendments to Section 187 was to do away with ***Fry's Metals*** type dismissals altogether, one would have expected the legislature to make this clear in both the explanatory memorandum and the LRAA. This would have been as easy as stating that a retrenchment under Section 189 cannot be resorted to in order to implement amendments to terms and conditions of employment.

36.2.9. Also, doing away with ***Fry's Metals*** type dismissals in their entirety (even in circumstances where a valid operational requirement is at stake) effectively requires reading Section 189 (and Section 188(1)(a)(ii)) as being subject to

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[100] Vol. 17 p. 1641 par. 68.

Section 187. Nothing in the LRA or the LRAA, indicates that such a reading is required.

36.2.10. The applicants contend that because Section 188(1) is prefaced with the words *"[a] dismissal that is not automatically unfair, is unfair if the employer fails to prove…"* before identifying operational requirements as a potentially fair reason for dismissal, this means that a dismissal can only be justified as being fair based on operational requirements if it is not automatically unfair, and thus that operational requirements cannot be advanced as a reason excluding the dismissal from being automatically unfair in the Section 187 inquiry.[101] We submit that this construction is unsustainable. These words were in the statute prior to the amendment and remain unaffected by the amendment. The established legal position has always been that an employer's operational requirements can be advanced as the true reason for dismissal in an automatically unfair dismissal claim under Section 187(1)(c). A reading of Section 187(1)(c) does not suggest that operational requirements cannot be advanced as the reason for a dismissal that is alleged to be

[101] At par. 60.

automatically unfair – the section only identifies a prohibited reason without enumerating or excluding other reasons that are not prohibited, including operational requirements. Moreover, on the applicants' construction, the same dismissal could be automatically unfair under Section 187(1)(c) whilst being fair under Section 188. This would be anomalous. As the LAC correctly found, the two sections operate in tandem.[102]

36.2.11. The applicants' construction would create a further anomaly: employers engaging in Section 189 consultations would be wary of proposing any changes to terms and conditions of employment which may address their operational requirements and – if accepted - save jobs, for fear of facing an automatically unfair dismissal claim if the changes are rejected and retrenchments ensue. This would, we submit, undermine a fundamental purpose of Section 189, which is to encourage (and indeed require) engagements regarding all potentially viable alternatives to retrenchment. There will inevitably be scenarios where such alternatives include changes to terms and conditions of employment, and it is imperative that parties are able, in the

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[102] Vol. 17 p. 1640 par. 64.

Section 189 context, to consult regarding these matters where consultation thereon may (if consensus is reached) have a retrenchment-avoidance effect. These submissions found favour with the LAC.[103]

36.2.12. The applicants' next contention is that the LAC's approach is not constitutionally congruent. They contend that the LAC's interpretation limits the right to strike.[104] They effectively seek to advance a position in which an employer, in order to address its operational requirements, may never retrench employees based thereon if such requirements stem from employees' terms and conditions of employment, and instead must collectively bargain and use the power-play to secure their employees' agreement regarding changed terms and conditions.

36.2.13. This position is inconsistent with the wording of Section 187(1)(c) and the explanatory memorandum, and is a radical departure from the established body of jurisprudence.

36.2.14. The applicants' position also ignores the fact that collective bargaining can only yield changes to terms and conditions

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103 Vol. 17 p. 1640 - 1641 par. 66.
104 At par. 68.

of employment if it culminates in an agreement – on the applicants' construction, if no such agreement is reached, the employer is left without any means of addressing its operational requirements and may never resort to retrenchment without contravening Section 187(1)(c). This is self-evidently an untenable position, as the facts of this matter so vividly demonstrate: the Union was not prepared to agree to any changes unless they resulted in a wage increase for its members (this being completely incongruous with the purpose of the retrenchment consultation exercise, which was to address Aveng's dire financial situation). This stance led to an impasse which, had it endured indefinitely, would have jeopardised Aveng's continued survival. These submissions also found favour with the LAC.[105]

36.2.15. The applicants' interpretation also comes perilously close to introducing a duty to bargain on the part of the employer; a duty not imposed on employers by our post-constitutional employment law dispensation (having been deliberately excluded from the LRA when it was enacted).[106]

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105 Vol. 17 p. 1639 - 1640 par. 63.

106 *See* ***SANDU v Minister of Defence & others; Minister of Defence & others v SA National Defence Union & others*** (2006) 27 *ILJ* 2276 (SCA), where the SCA confirmed that section 23(5) of the Constitution does not establish a duty to bargain. On appeal, in ***SA National Defence Union v Minister of Defence & others*** (2007) 28 *ILJ* 1909 (CC), the Constitutional Court (per O'Regan J) found it unnecessary to decide whether

36.2.16. Furthermore, the construction posited by the applicants undermines the right to fair labour practices in Section 23(1) of the Constitution, which applies to employers and employees alike,[107] by excluding employers' recourse to retrenchments where legitimate operational requirements are in play. In ***SACTWU v Discreto*** the LAC (per Froneman DJP) said this about the employer's right to fair labour practices in the retrenchment context:[108]

> *"Every person has the constitutional right to fair labour practices (section 27(1) of the interim Constitution; section 23(1) of the final Constitution). As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not (cf the Atlantis Diesel case at 1252H (ILJ); 28I (SA)) ... ."* (Own emphasis.)

36.3. It is submitted that properly construed (in line with the explanatory

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the SCA was correct in finding that section 23(5) of the Constitution does not establish a justiciable duty to bargain. The Constitutional Court did, however, find as follows at para 55: "*... were s 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, courts may be drawn into a range of controversial, industrial relations issues..*." (Own emphasis.)

107 ***National Education Health & Allied Workers Union v University of Cape Town and other*** (2003) 3 SA 1 (CC) at par. 37.

108 ***SACTWU v Discreto*** [1998] 12 BLLR 1228 (LAC) at par. 8 - 9.

memorandum), all that the amended wording of Section 187(1)(c) does is to remove the anomaly created by ***Fry's Metals*** and ***Algorax*** identified above, which was the by-product of the distinction between final or conditional dismissals.

36.3.1. On the LAC's construction, the question whether Section 187(1)(c) is contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal of the employee is, i.e. whether the proximate reason for the dismissal – *à la* ***Afrox*** – is the refusal to accept a mutual interest demand or instead the employer's legitimate operational requirement.[109] The LAC found that the test for causation espoused in ***Afrox*** remains applicable in relation to Section 187(1)(c) (as amended) – albeit that the test is now whether or not the reason for the dismissal was a "*a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer"* rather than to *"compel the employee to accept a demand in respect of any matter of mutual interest"*.[110]

36.4. The learned authors, Newaj and Van Eck, favour a construction

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[109] This is the interpretation preferred by Coetzee and Beerman in their article "**Can an employer still raise the red flag in interest negotiations? The *Fry's Metals* case under the Labour Relations Amendment Bill 2012**" (2012) 45 (2) *De Jure* 348.

[110] Vol. 17 p. 1641 par. 68.

consistent with that advanced by Aveng and upheld by the LAC.[111] Following a thorough analysis of the legislative history, the explanatory memorandum, and the text of the amended section, they state the following:[112]

> *"There is a need to allow for the use of dismissals in certain instances where there is a refusal to accept proposed changes to the terms and conditions of employment. The scheme of the LRA of 1995 accommodates this, and a holistic consideration of all the relevant sources of law, as discussed in this article, finds no authority to suggest that section 187(1)(c) in its current form should not be interpreted in a manner that permits the use of operational requirement dismissals."*

36.5. Newaj and Van Eck go on to state the following:[113]

> *"It is our view that the test which the LAC applied in SA Chemical Workers Union v Afrox Ltd in determining the true reason for the dismissal in the context of strikes and retrenchments is also the appropriate test to be applied in the intersection between automatically unfair and operational requirement dismissals. Froneman DJP stated that the courts must:*

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111 Newaj K and van Eck S "**Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments**" *PER / PELJ* 2016 (19).

112 At p. 25.

113 At p. 26.

> *... determine factual causation: was participation or support, of the protected strike a sine qua non (pre-requisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal.*
>
> *In applying this test to section 187(1)(c) of the LRA of 1995, the question that must be asked is whether the dismissal would have occurred if there had been no refusal by the employees to accept the demand proposed by the employer. If the answer is yes, the dismissal is not automatically unfair. If the answer is no, then one would proceed to the issue of legal causation in order to determine whether the refusal by the employees was or was not the most likely cause of the dismissal...''*

36.6. With respect, this approach accords with a long line of jurisprudence. Applied to the facts of this case, the LAC correctly found that the proximate cause for the dismissal of the employees was Aveng's operational requirements, and thus that the employees' dismissals fall

within the zone occupied by permissible dismissals for operational requirements, and do not fall foul of Section 187(1)(c).[114]

37. By way of summary, and with reference to the four points raised in paragraph 41 of the applicants' heads of argument in support their first ground of appeal, we submit as follows:

38. <u>The plain, literal interpretation of Section 187(1)(c)</u>

38.1. We agree with the applicants that the meaning of the Section is plain. However, unlike the applicants, we emphasise the opening words thereof, namely: "*a dismissal is automatically unfair… if the reason for the dismissal"* is one of the proscribed grounds. Consequently, establishing the reason for the dismissal is paramount. If the reason for the dismissal is the employer's operational requirements, then a dismissal based thereon is not automatically unfair. On the facts, the individual applicants were not dismissed for rejecting a demand. The fact that the individual applicants refused an offer of alternative employment which could have avoided their retrenchment does not mean that they were dismissed because they failed to accept a demand in respect of a matter of mutual interest.

39. <u>Purposive interpretation</u>

39.1. The explanatory memorandum which accompanied the amendment

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[114] Vol. 17 p. 1644 par. 75.

sets out the objectives of the amendment. The first was to remove the anomaly arising from Fry's Metals. It was not to outlaw Fry's Metals' type dismissals entirely. The second - to protect the integrity of the collective bargaining process by prohibiting dismissals where the reason is an employee's refusal to accept a demand by the employer over a matter of mutual interest – simply reinforces the purpose of the provision as originally enacted. The collective bargaining process is distinct from the retrenchment consultation process. The amendment reinforces the fact that the LRA does not allow employers engaged in collective bargaining to dismiss employees for refusing to accept the employer's demands. That is a quite different situation from the facts of this case.

39.2. Aveng's interpretation of Section 187(1)(c) takes proper account of both purposes set out in the explanatory memorandum.

40. Contextual Interpretation

40.1. The applicants' argument under this head is based upon Section 188(1), and on Section 187(1)(c) when contrasted with Section 67(5) of the LRA.

40.2. For the reasons given in paragraph 39.2.10 above, and paragraph 67 p 1641 of the LAC judgment, we submit this part of the argument is misconceived.

41. Constitutional Interpretation

41.1. The applicants correctly contend that Section 187(1)(c) must be interpreted in a constitutionally compliant manner.

41.2. However, we submit the argument that their interpretation gives greater recognition to constitutional principles than Aveng's, is without merit.

41.3. The applicants rely on the right to strike in Section 23(1)(c) of the Constitution in support of their proposition and contend that it is this right to strike that is protected by their interpretation of Section 187(1)(c).

41.4. The argument is based on a wrong premise. Permitting employers to dismiss employees based on the employer's operational requirements (if this is the true reason for the dismissal) does not impact in any way upon the employees' right to strike. And so, the argument based upon the right to strike fails because the starting point is wrong.

41.5. Aveng's construction of Section 187(1)(c) is preferable, constitutionally speaking, since (per ***Discreto***) Section 23(1) of the Constitution recognises an employer's "*ultimate competence to make a final decision on whether to retrench or not*".

42. On the strength of what is set out above, we accordingly submit there is no merit in the applicants' first ground of appeal.

43. <u>Was there a demand?</u>

43.1. A further basis on which the LAC found that the applicants' case could not succeed is that properly construed, no demand was made by Aveng.[115]

43.2. What the applicants frame as a "demand" is encapsulated in the following paragraphs of Aveng's letter of 17 April 2015 to NUMSA:[116]

> "*Given that your members and other employees have performed the duties as per the new job descriptions in terms of the interim arrangement agreed to between the parties, we shall afford them to the opportunity, to be engaged in the new positions at the rate prescribed by the Main Agreement of the MEIBC for performing work in such positions. This reasonable offer of alternative employment, is a further bona fide effort on our part to avoid the contemplated retrenchments.*
>
> *Should they reject it, they will unfortunately be retrenched...*"

43.3. Both on the plain wording of the letter, and in context, Aveng made no "demand". The letter was not sent in the course of a collective bargaining exercise (in which demands and counter-demands are made). More importantly, the letter simply conveys offers of alternative employment made by Aveng in the course of retrenchment

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115 Vol. 17 p. 1643 par. 72.
116 Vol. 8 p. 790 – 792 par. 13 – 14.

consultations, the very purpose of which was to avoid retrenchments, as is required by the LRA. The letter does not contain any demand.

43.4. Sections 189(2)(a)(i) and 189(3)(ii) of the LRA enjoin an employer to consider and explore measures to avoid retrenchment, including alternatives to retrenchment. Typically, this would include offers of alternative positions where available.

43.5. The offers of alternative employment made by Aveng were not only permissible but required by Section 189 as part of the compulsory engagements regarding retrenchment-avoidance measures. The offers avoided the retrenchment of the 71 employees who accepted them, and would have avoided the retrenchment of the balance of the employee, but for their recalcitrance.

44. Accordingly, we submit that the applicants' second ground of appeal ought to be rejected as well.

## F. <u>Conclusion</u>

45. In all the circumstances we respectfully submit that the application for leave to appeal falls to be dismissed with costs, including the costs of two counsel; alternatively (and in the event of the grant of leave to appeal), the appeal should be dismissed with costs, including the costs of two counsel.

**AE FRANKLIN SC**

**RIAZ ITZKIN**

24 January 2020

# LIST OF AUTHORITIES

## Reported Judgments

1. **CWIU & others v Algorax** *(Pty) Ltd* [2003] 11 BLLR 1081 (LAC)
2. **Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA** (2003) 21 *ILJ* 133 (LAC)
3. **General Food Industries Ltd v FAWU** [2004] 7 BLLR 667 (LAC)
4. **Insurance & Banking Staff Association & others v SA Mutual Life Assurance Society** (2000) 21 *ILJ* 386 (LC)
5. **Mazista Tiles (Pty) Ltd v NUM & others** [2005] 3 BLLR 219 (LAC)
6. **National Education Health & Allied Workers Union v University of Cape Town and other** (2003) 3 SA 1 (CC)
7. **National Union of Metalworkers of SA & others v Fry's Metals** (Pty) Ltd 2005 (5) SA 433 (SCA)
8. **NUM & others v Mazista Tiles (Pty) Ltd** (2006) 27 ILJ 471 (SCA)
9. **SACTWU v Discreto** [1998] 12 BLLR 1228 (LAC)
10. **SANDU v Minister of Defence & others; Minister of Defence & others v SA National Defence Union & others** (2006) 27 *ILJ* 2276 (SCA)
11. **SA National Defence Union v Minister of Defence & others** (2007) 28 *ILJ* 1909 (CC)

## Unreported Judgments

12. **Gold Fields Logistics (Pty) Ltd v Smith** (unreported LAC judgment, case no. JA42/08, 24/08/10, per Tlaletsi JA)

13. **Tlou v Anglo American Research (a division of Anglo Operations Ltd)** (unreported LC judgment, case no. JS1163/09, 29/10/12, per Lagrange J)
14. **Solidarity obo Wehncke v Surf4Cars (Pty) Ltd** (JA63/11) ZALAC 6 (20/02/14).

**Academic Literature**

15. Coetzee and Beerman "**Can an employer still raise the red flag in interest negotiations? The Fry's Metals case under the Labour Relations Amendment Bill 2012**" (2012) 45 (2) *De Jure* 348.
16. Newaj K and van Eck S "**Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments**" *PER / PELJ* 2016 (19)
17. Thompson "**Bargaining, Business Restructuring and the Operational Requirements Dismissal**" (1999) 20 *ILJ* 755

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: CCT178/19
LAC: JA25/18
LC: JA 25/18

In the matter between:

NUMSA obo Members — Applicants

and

AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA (PTY) LTD ("AVENG") — First Respondent

IMPERIAL LOGISTICS DEDICATED CONTRACTS (A DIVISION OF IMPERIAL GROUP LIMITED) ("IMPERIAL") — Second Respondent

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# IMPERIAL'S HEADS OF ARGUMENT

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Introduction

1. Imperial's role in this litigation is limited, given the context in which it took over a portion of Aveng's business. In brief, during April 2015, Aveng terminated the employment of approximately 800 employees on the grounds of operational requirements, and appointed replacements, either permanently or by way of labour brokers. One year later, Aveng outsourced the transport function in respect of its Trident Steel business to Imperial. A written contract governed the transaction. 120 employees were transferred from

Aveng or labour brokers to Imperial, in terms of s197 of the Labour Relations Act 66 of 1995 ("the LRA").

2. Imperial obtained the Aveng contract after succeeding in a competitive tender process, based *inter alia* on being able to provide cost savings to Aveng.

3. In the outsourcing agreement, Aveng comprehensively indemnified Imperial from any financial implications arising from the litigation brought by Numsa against Aveng.[1] It follows that should the Court grant compensation to the appellants, this ought not affect Imperial, as Aveng will be liable to pay it. Imperial seeks in its plea an order giving effect to this agreement,[2] and Aveng has not indicated any opposition to such an order being made. Such an order should include Imperial's legal costs.

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[1] AR V14 p1382: Indemnity clause.

[2] AR V2 p168 para 10: Imperial's statement of response.

4. Insofar as the Court considers ordering reinstatement in respect of the 110 drivers who, but for their dismissals, would probably have been transferred to Imperial (if the contract had still been commercially viable to Abeng to outsource), it is submitted that an order of reinstatement to Imperial would be impracticable, and would have inequitable effects, to the extent that the most appropriate relief to be granted would be compensation.

5. Imperial pleaded that reinstatement would be impracticable. Neither of the other parties has pleaded any denial or objection to this claim, and at the trial, Imperial presented evidence to show why a reinstatement order would place an onerous and compelling operational burden on it. The cross-examination of Imperial's witness by Numsa's counsel indicates that Numsa pursues an order of reinstatement against Imperial, and the tenor of the cross-examination indicates that it disputes Imperial's contentions about the impracticability of reinstatement.

6. In the alternative, if the Court were to find that the second applicants' dismissals were automatically unfair, it is submitted that the issue of appropriate relief should be referred back to the Labour Court for consideration, so that the parties can present evidence as to current factors which are relevant to the decision as to whether to order reinstatement or compensation.

General submissions on the merits of Numsa's appeal

7. Numsa argues that, properly interpreted, the effect of the amendment to section 187(1)(c) of the LRA is that the section now applies to any dismissal where dismissal follows a refusal to accept the employer's demand in relation to a matter of mutual interest, including where such 'demand' (in reality, a proposed alternative to dismissals) was based on the employer's legitimate operational requirements, and was made in the context of the mandatory consultation process in an operational requirements dismissal.

8. Stated differently, NUMSA now asserts that it is no longer possible for an employer to dismiss on grounds of operational requirements, where the alternative to dismissal is to change to terms and conditions of employment, but no agreement on the changes can be reached. On Numsa's reasoning, if an employer needs to restructure its operations for any reason whatsoever, and retrenchments could be minimised or avoided if the existing workforce agreed to a change to terms and conditions of employment (wages, duties, shifts etc), the employer's only option is to attempt to reach agreement on these changes, by way of collective bargaining, including lockout. But if collective bargaining fails to produce agreed changes, the employer may not proceed to restructure and dismiss for operational requirements, as this would contravene s187(1)(c), and would result in automatically unfair dismissals.

9. It is submitted that this argument is not sustainable, and is not an accurate reflection of the intention behind the amendment, or the wording of the amendment itself. The interpretation contended for by NUMSA:

9.1. Seeks to ignore the broader context, including the history of lockout dismissals pre-1995, the changes brought about by the LRA, unintended consequences or ‘anomalies’ arising from the application of section 187(1)(c) prior to its amendment, and the intention of the amendment, as expressed in the Explanatory Memorandum;

9.2. Would have far-reaching effects on an employer’s right to dismiss by virtue of its operational requirements;

9.3. Would render it impossible for an employer to comply with its statutory obligation to consult fully with stakeholders in an effort to avoid the need to retrench or to reduce the number of employees to be retrenched;

9.4. Would effectively grant trade unions a veto on proposed changes to terms and conditions of employment, which if implemented would reduce or do away with the need to retrench;

9.5. Would drastically weaken an employer's right to dismiss for operational requirements;

9.6. Would have other anomalous results, for example by allowing employers to retrench for operational requirements during a protected strike (which could include a lockout), but not in a normal retrenchment scenario where job losses could be minimised or (as in this case) avoided by a change to terms and conditions of employment.

10. It is submitted that the judgment of the LAC is correct, and the reasoning underpinning it is sound. The judgment takes proper regard of the history and context of the contentious provision, the development of case law prior to its amendment, and the effect of the amendment itself.

11. The recent judgment of this Court in *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* [2020] ZACC 1 is relevant to the present debate.

There, this Court warned against conflating the concepts of collective bargaining and consultation during the retrenchment process (See in particular, paragraphs 68-78 of the minority judgment (penned by Ledwaba AJ) and paragraphs 120-126 of the majority judgment (penned by Froneman J).

The background and context to the section to be interpreted cannot be ignored

12. The 1995 LRA constituted a complete overhaul of the entire labour relations system. It had the effect of recasting employer-employee relations. One of the significant changes brought about was the removal of the employer's right to effect so-called 'lockout dismissals' in the context of collective bargaining.

13. The 1956 LRA (Act 28 of 1956) expressly allowed such dismissals. As Neway and Van Eck[3] explain:

[3] Neway K and van Eck S "Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments" PER / PELJ 2016(19) – DOI – Available at https://www.ajol.info/index.php/pelj/article/view/151577/141170.

“Prelude to Fry's Metals: the lock-out dismissal

The key to understanding the Fry's Metals decisions and the recent amendment to the LRA of 1995 lies in the wording of the definition of "lock-out" in terms of the former Labour Relations Act 28 of 1956 ("the LRA of 1956") and the interpretation of fair and unfair bargaining tactics by the IC. A "lock-out" was defined as:

> any one or more of the following acts or omissions by a person who is or has been an employer – .....
>
> (c) the breach or termination by him of the contracts of employment of any body ... in his employ; or
>
> (d) the refusal ... by him to re-employ any body ... who have been in his employ,
>
> if the purpose of that ... breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ ... –
>
> (i) to agree or comply with any demands or proposals concerning terms or conditions of employment.
>
> The definition had a wide meaning and included the "termination" of employment as long as it was associated with

the purpose of persuading workers to accept a demand. If this criterion was met, the action fell within the realm of lock-outs. This, in turn, formed part of the "acceptable" process of the amendment of conditions of service, which falls within the arenas of power-play and disputes of interest.

…

The IC [Industrial Court] in *Commercial Catering and Allied Workers Union of SA v Game Discount World Ltd*[4] confirmed the principle that temporary or tactical dismissals fell within the statutory definition of lock-outs. According to the IC such dismissals potentially had as their goal the purpose of persuading workers to accept a demand and were therefore immune to unfair labour practice scrutiny. However, it was deemed unacceptable to import the "final and irrevocable" dismissal, which did not advance collective bargaining, into the definition of lock-out. Consequently, the IC concluded that the final retrenchment of workers was unfair as it did not advance collective bargaining. On the other hand, it did permit temporary tactical dismissals as part of the collective bargaining process."

[4] 1990 ILJ 162 (IC).

14. The 1995 LRA did away with lockout dismissals entirely. Whether permanent or temporary, the employer could no longer dismiss as part of the power-play in collective bargaining. Such dismissals were deemed to be automatically unfair in terms of section 187(1)(c).

15. However, an employer retained the right to dismiss by reason of its economic, technological or structural needs, collectively defined as its operational requirements. The underlying premise is that, in a free-market economy, it is in the collective best interests of society that an employer remain economically viable, and the owners and managers of the business are best placed to run the business.

16. One of the primary purposes of the LRA is "*to advance economic development*"[5]. Thompson and Benjamin equate this to ensuring the

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[5] LRA s1: "Purpose of this Act.—The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of
the Republic of South Africa, 1996;
(b) to give effect to obligations incurred by the Republic as a member state of the International Labour
Organisation;
(c) to provide a framework within which employees and their trade unions, employers and employers'

viability and vitality of business.[6] The authors propose a broad definition of an employer's operational requirements:

> "An operational requirement is one relating to an employer's need to run its business or undertaking effectively, efficiently and competitively in the marketplace or public sector."[7]

17. The authors also warn that interpreting the employer's right to restructure and retrench too restrictively would undermine this aim – a company needs to be able to adapt when the market changes, in order to remain competitive and viable.[8]

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organisations can—

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote—

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decisionmaking in the workplace; and

(iv) the effective resolution of labour disputes." (Underlining added).

[6] Thompson & Benjamin *South African Labour Law*, Juta, Vol 3 pAA1-487.

[7] Vol 3 AA1-473.

[8] See Thompson & Benjamin *supra* at Vol 3 pAA1486-487.

18. The Explanatory Memorandum[9] issued with the original Labour Relations Bill did not restrict the employer's right to dismiss for operational requirements, in the sense now contended for by Numsa. In fact, it advocated for a new Labour Relations Act that complied with South Africa's obligations to comply with public international law (notably the ILO Conventions) and expressly recorded that:

> "The Bill seeks to balance the demands of international competitiveness and the protection of the fundamental rights of workers… .It recognises that South Africa's return to the international economy demands that enterprises compete with countries whose labour standards and social costs of production vary considerably. For this reason, the Bill seeks to avoid the imposition of legal rigidities in the labour market by promoting collective bargaining agreements as the preferred method of regulating labour relations and settling terms and conditions of employment."[10] (Underlining added)

[9] Explanatory Memorandum (1995) 16 ILJ 278.

[10] At para 2 and 3.

19. The 1995 LRA expressly incorporates key principles set out in the Articles of the International Labour Organisation (ILO), including the following articles in ILO Convention 158:

> "Article 4
>
> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.
>
> …
>
> Article 13
>
> 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
>
> (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." (Underlining added)

20. Clearly the ILO, and the LRA, recognise the right of an employer to dismiss for operational reasons. The amendment does not change this fact. In many instances, the operational reasons leading to dismissal relate not to the downsizing of the workforce, but to the need to adapt to an ever-changing economic climate and increased global competition, by restructuring the manner in which the existing workforce carries out its work. This could involve a change to shift systems, duties or remuneration, or any combination of the above and other factors. What the ILO and LRA do provide for is the requirement that such changes leading to dismissals must be objectively fair, and that a fair process of consultation must be followed prior to any dismissals.

21. As explained by Froneman DJP (as he then was) in *Discreto*[11]:

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

The 'anomaly' sought to be addressed by the 2014 amendment

22. The approach of the Labour Appeal Court in *Fry's Metals (Pty) Limited v NUMSA and Others*[12] established the principle that an employer may fairly dismiss employees who refuse to agree to

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[11] *SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC)

[12] 2003 (24) ILJ 133 (LAC), upheld by the Supreme Court of Appeal (*NUMSA and Others v Fry's Metals (Pty) Ltd* [2005] 3 All SA 318 (SCA). An application for leave to appeal to the Constitutional Court was refused.

operational changes which the employer deems necessary, provided that the dismissals are final (i.e. unconditional). This had the opposite result to the position under the 1956 LRA, and had the effect of discouraging employers from offering changes to conditions of employment as a viable alternative to retrenchment, or reinstating employees who, pursuant to their dismissals, agreed to resume employment on revised conditions of employment.

23. In the judgment of Labour Appeal Court under appeal[13], Murphy AJA described the position prior to the amendment as follows:

> [56] The finding in Fry's Metals that s 187(1)(c) of the LRA does not prevent employers from dismissing on operational grounds employees who do not accept proposals to amend terms and conditions of employment is however on safer ground. Although, s 187(1)(c) of the LRA, prior to its amendment, offered little on how best to reconcile the often incompatible imperatives of collective bargaining and business productivity, the courts before and after Fry's Metals developed the law to permit dismissal along similar lines to the dismissal

[13] AR V17 p1618, at para 56 p1637.

of protected strikers as sanctioned by s 67(5) of the LRA. Prof du Toit accurately described the legal position at the time of the amendment as follows:

'Where collective bargaining has ended in deadlock, nothing prevents an employer from initiating consultation about dismissals based on operational requirements due to its stated need to implement the changes it desires, in which those changes may be on the table as an alternative to dismissal.'

[57] The essential question for determination in this appeal is whether the amendment to s 187(1)(c) of the LRA by the LRAA has altered the law in that respect." (Underlining added)

24. Numsa's argument that there was no real 'anomaly' to address, is clearly lacking in merit. The Explanatory Memorandum to the 2014 amendments to the LRA expressly identifies the anomaly:

"Clause 31 of the Bill seeks to amend section 187 of the Act to remove an anomaly arising from the interpretation of section 187(1) (c). In the case of the *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA), the court 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 of *Chemical Workers Industrial Union and others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) is to discourage employers from offering re-employment to employees who have been retrenched after refusing to accept changes in working conditions.

The proposed amendment 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 a 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 Act and is consistent with the purposes of the Act." (Underlining added)

25. As stated by Professor du Toit, notwithstanding the amendment:

> "Where collective bargaining has ended in deadlock, nothing prevents an employer from initiating consultation about dismissals based on operational requirements due to its stated need to implement the changes it desires, in which

those changes may be on the table as an alternative to dismissal."[14]

26. Accordingly, it is submitted that *Fry's Metals* continues to be good law, notwithstanding the amendment.

27. It is apparent from the above, that the intention of the Legislature, in bringing about the amendment to section 187(1)(c), was not to create a new form of dismissal, or to amend the purposes of the LRA, but simply to give effect to the original intention underlying the provision in the 1995 Act, by dealing with a particular anomaly that had arisen in case law, which had a detrimental effect, namely to preclude employers from offering alternative positions to employees short of dismissal, or from offering any dismissed employee reinstatement on amended terms and conditions of employment, following a restructuring process.

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[14] Darcy du Toit 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' 2016 (37) ILJ 1 at 21

28. If anything, the intention behind the amendment was to open the door to employers to adopt a less rigid approach than that set out in *Fry's Metals,* by allowing for employees faced with retrenchment or the acceptance of an alternative position on different terms and conditions, to accept the alternative, or to agree to reinstatement to the altered position after dismissal for operational reasons, without the employer running the risk of falling foul of the distinction drawn between final and conditional dismissals in *Fry's Metals*.

29. The 'anomaly' thus sought to be corrected, is not (as Numsa contends) the wholesale abandonment of the right to dismiss for genuine operational requirements, but rather the relaxation of the need for the employer to adopt a rigid and final approach in the context of operational requirements dismissal, as the SCA found was necessary in *Fry's Metals* in order to avoid falling foul of section 187(1)(c).

30. Somewhat ironically, Numsa's preferred interpretation of section 187(1)(c) would have the effect of introducing even more rigidity

into the consultation process, as employer's would be compelled to refuse to contemplate changes to terms and conditions (that unions could veto) as viable alternatives to dismissal. This type of inflexibility is exactly what the amendment is aimed at preventing.

Numsa's argument on interpretation

31. Numsa argues that the right to strike is so fundamental to employee rights that any interpretation that seeks to limit it, is likely to infringe on principles of constitutional interpretation.

32. However, this matter is not really about the right to strike. The contentious provision does not deal with the right to strike at all. It finds application in the context of retrenchments, where it is settled law that an employer has the right to dismiss for operational requirements, subject to the mandatory consultation process, in which it is statutorily obliged to engage in a meaningful joint consensus-seeking process on ways to avoid or reduce the impact of retrenchments.

33. The purported ‘demand’ is nothing like a demand in the collective bargaining context – it is a proposal made during the joint consensus-seeking consultation process taking place as a result of contemplated restructuring for operational requirements which may result in job losses.

34. The interpretation of section 187(1)(c) as contended for by Numsa, would have the effect of depriving an employer of the right to dismiss for operational requirements in circumstances where it needs to adapt its operations (and consequently, terms and conditions of employment) to remain competitive. In essence, Numsa argues that the employer is limited to engaging in collective bargaining to effect such changes, and if it cannot reach agreement with the workforce, it may not bring about the required operational changes by way of dismissals. This is not at all what the Legislature requires during an operational requirements consultation process.

35. This contention would amount to a significant amendment to the LRA, which would require an amendment to its foundational goals,

and which would place South African labour law outside of the parameters of ILO resolutions to which it is legally bound.

36. Clearly the Legislature, by bringing about the amendment to s187(1)(c), had no intention of significantly restricting an employer's right to dismiss for operational requirements. It only sought to remedy a single anomaly brought about by the interpretation of the Courts in specified cases, so as to give effect to the original intentions of the drafters of the 1995 LRA, which allows for more flexibility and the option of re-employing dismissed workers without fear of running afoul of section 187(1)(c).

37. Numsa conveniently ignores the fact that the LRA expressly allows for strike action to take place in certain situations in the context of a mass retrenchment process, in terms of section 189A (9)-(11). Had the Legislature intended bringing about wide ranging changes to the playing field, to give effect to the interpretation contended for by Numsa, it would most likely have amended section 189A.

38. Turning to the requirement that the LRA must be interpreted in compliance with the Constitution – which overlaps with the requirements of section 39(2) of the Constitution – this process of interpretation is sometimes referred to as "reading down" a provision so as to comply with the constitutional standard.[15] In a series of judgments dealing with the limitation of the right to strike, the Constitutional Court[16] has explained what this entails, with the following principles having emerged:

38.1. the first question is whether the LRA is reasonably capable of being interpreted in the manner contended by Numsa (if it is not, that is the end of the matter);[17]

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[15] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at para 9.

[16] Albeit not the strike context, see most recently, *National Union of Public Service & Allied Workers and Others v National Lotteries Board* [2014] ZACC 10 at para 151.

[17] *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) ("*Bader Bop*") at para 37; *SAPS v POPCRU & another* [2011] 9 BLLR 831 (CC) ("*SAPS*") at para 52; *South African Transport and Allied Workers Union (SATAWU) and others v Moloto NO and another* [2012] 12 BLLR 1193 (CC) ("*SATAWU*") at para 43.

38.2. if the LRA is capable of a restrictive (or broader) interpretation that does not limit the constitutional right to strike, that interpretation should be preferred;[18]

38.3. in undertaking this analysis, the relevant provisions should not be construed in isolation, but in the context of the other provisions of the LRA;[19] and

38.4. the right to strike should not be restricted more than is expressly required by the section, and implicit limitations on the right to strike should not readily be read into the LRA.[20]

39. While an interpretation that least limits constitutional rights is thus required, it is worth emphasising that such an interpretation only applies if the text is reasonably capable of bearing that meaning. Put differently, there must first be two reasonably plausible

[18] *Bader Bop* at para 39; *SAPS* at para 53; *SATAWU* at para 43.

[19] *SAPS* at para 53.

[20] *SATAWU* at para 54.

interpretations before the court can opt for the one that least limits the constitutional right involved. That is simply not the case here.

40. Numsa also conveniently ignores the requirement in section 187 (which applies to all forms of automatically unfair dismissal) that the reason for the dismissal is the key determination to be made. The courts have developed and fine-tuned the approach to determining the reason for a dismissal, by adopting the generally applicable legal tests of factual and legal causation, as applied (correctly, it is submitted) by the LAC in paragraphs 68 to 75 of its judgment.

41. The LAC also correctly found that this type of dismissal is likely to face an increased level of scrutiny in proceedings to determine whether the dismissals were fair, to ensure that the employer is not subverting the collective bargaining system or abusing its right to dismiss for operational requirements. This provides adequate protection to workers.

42. Ultimately the LAC held that the dominant reason for the dismissals was Aveng's operational requirements. (Judgment para 75). It is submitted that the Court a quo correctly concluded that, on the facts, Numsa failed to establish an automatically unfair dismissal. The appeal should accordingly be dismissed with costs.

Appropriate relief if the appeal is upheld

43. In the event that the Court were to uphold the appeal, it is submitted that, at least in respect of the employees who seek reinstatement to Imperial, this relief should not be granted, for the reasons that follow.

Reinstatement: General principles

44. In the commentary on these exceptions to the default remedy of reinstatement, du Toit *et al*[21] describe the general principles as follows:

> "In *Dunwell Property Services CC v Sibande*[22] the Labour Appeal Court noted that, in determining whether to reinstate an unfairly dismissed employee, "*the overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus*." Fairness, the Constitutional Court held in *Equity Aviation Services (Pty) Ltd v CCMA*[23] "*ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment*". A decision whether to reinstate "*is therefore, in part, a value judgment and, in part, a factual finding made upon the evidence adduced about the unworkability of a resumption*".[24] In

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21 *Labour Law Through the Cases*, Lexis Nexis, Commentary on LRA s193(2), SI30 (May 2017, online version).

22 *Dunwell Property Services CC v Sibande & others* [2012] 2 BLLR 131 (LAC).

23 *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC). See also *Eskom Holdings Ltd v Fipaza and others* [2013] 4 BLLR 327 (LAC).

24 *DHL Supply Chain (Pty) Ltd and others v National Bargaining Council for the Road Freight Industry and others* [2014] 9 BLLR 860 (LAC) 866. See also *Potgieter v Tubatse Ferrochrome & others* (2014) 35 ILJ 2419 (LAC).

> *Mediterranean Textile Mills (Pty) Ltd v SACTWU*[25] the LAC held that, even where no specific evidence is submitted as to the existence of "*non-re-instatable conditions", the court or arbitrator is both entitled and obliged "to take into account any factor which . . . is relevant in the determination of whether or not such conditions exist*".

45. The relevant exception here is section 193(c) - where reinstatement would be impracticable in the circumstances. In this regard, du Toit states:

> ""*Not reasonably practicable*" must mean more than inconvenient, troublesome or uncomfortable.[26] The term 'practicable' does not equate with 'practical', but refers to feasibility.[27] The object of this provision is accordingly '*to exceptionally permit the employer relief when it is not practically feasible to reinstate*'.

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25 *Mediterranean Textile Mills (Pty) Ltd v SACTWU & others* [2012] 2 BLLR 142 (LAC) at para 30.

26 *Equity Aviation Services (Pty) Ltd v CCMA & others* [2010] JOL 26456 (LC).

27 *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (2016) 37 ILJ 2313 (LAC).

> The fact that an employer has replaced an employee does not render re-instatement "*not reasonably practicable*" and "*was not a factor to be taken into account as the respondent had created the situation by its own unfair conduct*".[28]

The impact of s197 on the practicability of reinstatement

46. The fact that a transfer in terms of section 197(2) has taken place after dismissal but before a final judgment in respect of the dispute is rendered, does not in itself constitute an absolute bar to an order of reinstatement to the new employer.[29]

47. However, it is submitted that the fact of a s197 transfer is a relevant factor when considering if reinstatement would be impracticable in the circumstances, at least for the following practical reasons:

    47.1. The reinstated workforce would have to be absorbed into a new organisation, with entirely different terms and

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28 *Manyaka v Van de Wetering Engineering (Pty) Ltd* [1997] 11 BLLR 1458 (LC).

29 See for example *High Rustenburg Estate (Pty) Ltd v National Education Health & Allied Workers Union on behalf of Cornelius & others* (2017) 38 ILJ 1758 (LAC).

conditions of employment, regulated by a different Bargaining Council.

47.2. The basis on which the contract to provide transport services to Aveng was secured by Imperial, was on increased efficiencies and cost savings. Many of the key drivers of cost savings and efficiencies will be eliminated by a reinstatement order, as a reinstatement order would be in terms of the existing terms and conditions of employment in place at the time of dismissal from Aveng.

47.3. Mr Mathys Enslin testified[30] that, aside from the costs of retrenching the existing driver workforce, a reinstatement order would have the impact of increasing the monthly costs of providing transport services to Aveng by approximately R30 million, or 48%[31], which would almost certainly result

[30] Enslin's evidence commences at AR V5 p454, and should be read in full.

[31] AR V5 p469 line 20 – p470.

in the entire contract failing, thus resulting in at least 200 job losses.

47.4. Imperial is blameless in the dismissals by Aveng – it only obtained the transport contract with Aveng a year after the dismissals took place.

47.5. Imperial has managed to put in place the necessary efficiencies (disposal of unnecessary fleet, optimisation of working hours etc.) to render the contract with Aveng sustainable. The severe disruption caused by the sudden increase of the driving workforce from 90 to 200 employees, with different terms and conditions of employment, together with the need to engage in a lengthy retrenchment consultation process, is likely to disrupt the efficiency, and thus the cost effectiveness and viability, of the contract.

47.6. The fact of reinstatement may result in a scenario similar to that in *Fry's Metals* (and indeed similar to that faced by

Aveng), where employees who refuse to accept changes positions face dismissal. A reinstatement order raises the spectre of a repeat of the retrenchment process and another claim based on similar complaints.

47.7. It should be borne in mind that the applicants were dismissed largely as a result of making extortionate wage demands and refusing reasonable offers of employment on the amended structure. Were they to be reinstated to Imperial, they are not likely to be more reasonable when they are armed with a court order to the effect that their dismissals were unfair, and reinstating them on the same terms and conditions that prevailed at the time of their dismissals from Aveng (i.e. MEIBC rates, shorter working hours, transport allowances etc). It is notable that no tenders whatsoever were made by Numsa's counsel during cross-examination of Enslin, with regard to what terms and conditions of employment the applicants would be willing to accept with Imperial. The lack

of flexibility on the part of the second to further appellants is telling.

47.8. It would also be highly risky to retrench employees reinstated in terms of a court order, directly after they are reinstated – the risks of litigation on automatically unfair dismissal, contempt etc. are high. This fact alone illustrates the impracticability of ordering reinstatement to Imperial.

47.9. For historical reasons, the retrenched employees were employed on conditions of service regulated by way of the Metals and Engineering Industry Bargaining Council. Imperial's staff fall under the National Bargaining Council for the Road Freight and Logistics Industry.

47.10. These bargaining councils have widely divergent rates of pay and other conditions of service. A reinstatement order would have the practical effect that Imperial would be saddled with 100 plus drivers employed on materially different terms and

conditions of employment, under the auspices of a different bargaining council. This would have significant detrimental effects to Imperial's business, as it would inevitably lead to claims of unequal treatment and pay for similar work, different bargaining periods (and thus national strikes) in the different bargaining councils, and other potentially intractable problems.

Practical difficulties on reinstatement – the evidence

48. The only party to lead evidence on this issue was Imperial. Mr Mathys Enslin, CEO of Imperial Dedicated Contracts (a division of Imperial Group Ltd), testified and provided a financial breakdown of the anticipated additional costs likely to arise in a reinstatement scenario. His evidence was not seriously challenged in cross-examination. His evidence can be summarised as set out below.

49. During March 2016, Imperial contracted with Aveng to provide transport services, being the delivery of steel on behalf of Trident Steel (a subsidiary of Aveng) to its customers. This function was previously performed directly by Aveng. As part of the agreement, Imperial purchased Aveng's fleet of trucks used for the services, at R21million, and took transfer of all Aveng employees engaged in the transport function.

50. Imperial's business lies in the optimising of transport so as to reduced operating costs. In fulfilling this contractual duty to Aveng, Imperial reduced the fleet size from 100 to 78 vehicles. It is able to perform the same amount of work with 20% less vehicles by optimising driver starting times and working hours to best suit the needs of customers of Trident Steel. Imperial employers 90 drivers (78-day shift, 12-night shift), 21 administrative staff and 12 workshop staff to operate the Aveng contract.

51. Imperial uses an 'open book' system, whereby full disclosure is made to Aveng of all costs incurred on a monthly basis. Aveng can

query charges and can assess the efficiency of Imperial's operations. Imperial charges an agreed percentage of the total monthly cost as its fee.

52. If reinstatement were ordered, on the same terms and conditions that applied to drivers prior to the dismissals, Imperial would be required to purchase 22 more vehicles to perform the same amount of work.

53. Aside from the significant capital outlay involved in purchasing these vehicles, the biggest problem associated with reinstating the Aveng drivers, is that they were employed on entirely different terms and conditions of employment, under a different Bargaining Council.

    53.1. Aveng drivers were classified as an ancillary part of Trident's Steel business, and thus fell under the auspices of the Metals and Engineering Industry Bargaining Council (Metals Bargaining Council).

53.2. Imperial's entire driver workforce falls under the auspices of the National Bargaining Council for the Road Freight and Logistics Industry (Road Freight Bargaining Council).

53.3. There are major differences between the main collective agreements of the Metals and Road Freight Bargaining Councils in respect of terms and conditions of employment, wages and benefits, concerning drivers.

54. There are also significant differences between the specific terms of employment of the old Trident drivers, compared to the standard operating procedures and terms and conditions of employment across Imperial's Logistics business. For example:

54.1. Trident drivers worked 40 hours per week, and started working at 7:30am, while Imperial's drivers commence work at 5:30am and work a 45-hour week.

54.2. In terms of Road Freight rules, drivers can work up to 45 hours per week overtime, while under Metals rules, overtime

is capped at a maximum of 10 hours per week. Drivers employed in terms of the Metals Bargaining Council are therefore far less productive than other drivers employed in terms of Road Freight Bargaining Council rules.

54.3. Trident drivers were provided with bus transport to and from work. Shortly before their dismissal, this was changed to an agreed monthly transport allowance of R650 per employee. Imperial does not provide transport and does not pay transport allowances to its employees.

54.4. Trident drivers were allocated van assistants to help with tarping, loading and offloading. Imperial does not employ van assistants – drivers perform these duties themselves.

54.5. Imperial's drivers have agreed to work staggered starting times, and commence driving between 4-6am. This assists with preventing bottlenecks when departing from or arriving at the depot, and improves efficiency.

55. Enslin estimated that reinstatement would add approximately R30 million to the monthly costs of operating the contract, a 45% increase. This would render the contract unsustainable as Aveng would become uncompetitive in the steel industry, and would inevitably have to exit the contract.

56. If reinstatement to Imperial were ordered, it would result in 200 drivers being employed where only 90 jobs are available. The cost of employment of an additional 110 drivers would render the contract unsustainable, and it would almost certainly fail. This would result in loss of jobs to all 200 employees' drivers, together with further knock-on job losses (administrative and workshop staff).

The practicability of reinstatement

57. The present case is quite unlike the usual scenario when reinstatement is being considered. The differences in the present case include –

57.1. The reinstated employees do not return to their former employer, but to a new employer substituted by operation of section 197.

57.2. They do not return to their old jobs, at their old premises and driving their old trucks.

57.3. They come into a business that operates on different terms and conditions, using different business practices, in a different industry with a different Bargaining Council and main agreement.

57.4. They are managed by different managers operating different management systems.

58. The reinstatement has serious ramifications for many people. To illustrate:

58.1. The reinstatement will create a pool of 200 drivers for a contract that requires 90.

58.2. For at least 60 days (and probably considerably longer) after the reinstatement and while a retrenchment process is on-going there will be 200 drivers employed by Imperial, drawing a salary, while only 90 actually work.

58.3. There will have to be a retrenchment of 110 drivers.

58.4. The outcome of the retrenchment consultations cannot be known at this stage. Imperial is obliged to use fair and objective criteria to select employees for retrenchment, in the absence of agreement. In this regard, two main possibilities can be foreseen (although there may be others) – LIFO or the selection of the 110 Trident/reinstated drivers.

58.4.1. LIFO – This means the retrenchment of the existing drivers and their replacement with Trident drivers on different terms and conditions of employment.

58.4.2. Retrenchment of the 110 Trident drivers – In cross-examination it was suggested that the prohibitive cost of retaining the 110 drivers and the potential for the failure of the transport contract could mean that these would be fair and objective criteria for selection for retrenchment. The Union, however, has challenged the objectivity and accuracy of the company's calculations concerning the additional cost of the contact and the likelihood that the transport contract with Aveng could fail. The Union's approach therefore has the seeds of its failure – it contests and would contest the selection of the 110 drivers for retrenchment on the basis that the criteria are not fair and objective.

58.4.3. Assuming the Union did not contest these criteria (and that the dispute did not end up in further litigation), the effect of reinstatement would not be

the preservation of employment, which is the LRA's aim in making reinstatement the primary remedy, but immediate retrenchment. It could never be practicable to reinstate employees only for them to be immediately retrenched.

58.5. If LIFO was used (the most likely anticipated scenario) then the company's evidence of the massive cost increase in the contract supports the conclusion that the contract will probably fail, causing further retrenchments.

59. Numsa argues that Enslin conceded that it was possible that the inevitable retrenchments that would follow on an order for reinstatement, would not necessarily be based on the 'last in first out principle', and that the consequences of a reinstatement order are therefore not predictable. The probabilities are however that if Numsa succeeds in obtaining a reinstatement order, it would not simply agree to any other method of selecting employees for retrenchment, but would act to protect the rights of the second to

further applicants. This would most likely result in the newer employees (who have agreed to work on the amended terms and conditions) being retrenched, and the contract between Imperial and Aveng failing, as the reinstated employees will insist on working on their old terms and conditions of employment[32], thus rendering the contract commercially inoperable.

60. To conclude, the reinstatement will certainly have far-reaching consequences, not all of which can be foreseen. What can be anticipated as a probability is massive disruption to the operation of Imperial's business in the event of reinstatement, inevitable retrenchments, considerable insecurity concerning jobs and the real potential for labour disputes and unrest by those who will be negatively affected. It is submitted that none of these contemplated consequences produces a fair outcome either for the employees

[32] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (1) SA 390 (CC), this Court held that reinstating an employee means restoring the employee to the position in which he or she was employed immediately before dismissal.

reinstated or any other employee or employer affected by the reinstatement.

61. *In SACCAWU v Woolworths*[33], this Court held that the phrase '*not reasonably practicable*' means more than mere inconvenience and requires evidence of a compelling operational burden. It is submitted that the evidence amply shows such a compelling operational burden.

62. In *Republican Press*[34], Nugent JA recognised that the impracticability of reinstatement will necessarily increase with the passage of time, and that this is exacerbated where the company has restructured since the dismissals took place.[35] While the mere fact of delay is not a bar to reinstatement, it remains a relevant factor.

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[33] *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* (2019) 40 ILJ 87 (CC)

[34] *Republican Press (Pty) Ltd v CEPPWAWU & Gumede & Others* [2007] 11 BLLR 1001 (SCA).

[35] At para 20-21.

63. Since the dismissals, Aveng has restructured its business by outsourcing the transport function to a transport specialist, whose business is premised upon maximising efficiency in the entire delivery process. Fewer trucks and drivers, employed on materially different terms than the Aveng drivers, are used to provide the service. Reinstatement, some 5 years after dismissal (and 3 years after the outsourcing) is impracticable for the multitude of reasons set out above. It would add such significant costs to the contract that it would cause the contract to fail, leading to multiple further job losses.

Conclusion on reinstatement

64. In the circumstances, it is submitted that reinstatement (insofar as Imperial is concerned) is not practicable. If the Court were to find the applicants' dismissals to have been unfair, compensation should be awarded, and Aveng should be ordered to pay all compensation.

65. Alternatively, this Court should refer the matter back to the Labour Court for evidence as to whether reinstatement is practicable. The dismissals took place almost five years ago. The economic realities facing the construction and transport sectors are probably far different (and less favourable) now than they were in 2015. This issue, and issues relating to the financial health of Aveng, and its current contractual arrangements with Imperial, are clearly pertinent to the question of reinstatement.

66. It is submitted that, in accordance with the indemnity clause in the contract between Aveng and Imperial, and Imperials statement of response, Aveng should be ordered to pay Imperial's legal costs in the appeal. Otherwise, no order as to costs should be made.

AIS Redding SC

GA Fourie SC

Counsel for Imperial

Chambers, Sandton

24 January 2020

Schedule of authorities

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2. *Chemical Workers Industrial Union and others v Algorax (Pty)* Ltd (2003) 24 ILJ 1917 (LAC)

3. *Commercial Catering and Allied Workers Union of SA v Game Discount World Ltd* 1990 ILJ 162 (IC)

4. *DHL Supply Chain (Pty) Ltd and others v National Bargaining Council for the Road Freight Industry and others* [2014] 9 BLLR 860 (LAC) 866.

5. *Dunwell Property Services CC v Sibande & others* [2012] 2 BLLR 131 (LAC).

6. *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC).

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23. *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (2016) 37 ILJ 2313 (LAC)

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2. *Labour Law Through the Cases, Lexis Nexis, Commentary on* LRA s193(2), SI30 (May 2017, online version)
3. *Neway K and van Eck S "Automatically Unfair and Operational Requirement Dismissals: Making Sense of the* 2014 Amendments" PER / PELJ 2016(19).