**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Case No: D60/2020
Not Reportable

In the matter between:

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| THANDUXOLO A BONGOZA | First Applicant |
| SECOND AND FURTHER APPLICANTS AS LISTED AT ANNEXURE "A" | Second and Further Applicants |

and

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| ADCORP BLU, A DIVISION OF FULFILMENT & SERVICES (PTY) LTD | First Respondent |
| NATIONAL BRANDS LIMITED (PTY) LTD | Second Respondent |
| MR HEIDI DE GROOT (DIRECTOR) | Third Respondent |

Heard: 14 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 4 November 2024.

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**JUDGMENT**

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ALLEN-YAMAN J

Introduction

[1] The action instituted by the applicants concerns the substantive fairness of their respective dismissals which were effected in 2019 for reasons relating to the second respondent's operational requirements. In having opposed the applicants' claim, the second respondent raised three preliminary points together with having disputed the merits thereof.

[2] The first of its preliminary points was abandoned, with the remainder having been upheld on 30 April 2021. On that occasion it was found that three of the applicants were not parties to the dispute which had been referred to the CCMA on 22 November 2019 (being the referral which preceded the present action) and that this court did not have jurisdiction to adjudicate their disputes for want of conciliation. It was also found that this court was, by virtue of the provisions of s189A(13)(a) read with s189A(17)(a) of the LRA, precluded from adjudicating the procedural fairness of the applicants' dismissals.

[3] It may be mentioned at the outset that the issues to which this claim pertain relate only to that part of the second respondent's business operating from Westmead, Pinetown, referred to interchangeably as 'Westmead Biscuits' and 'Snackworks Westmead,' and 'the Westmead operations.' Reference to the second respondent as National Brands is accordingly intended to be reference to that branch of its business only.

[4] The applicants' statement of claim did not disclose the actual cause of their complaint. Having set out the facts of the matter believed to be relevant, the totality of the legal issues involved were stated to have been,

> *'5.1 The LRA 66 of 1995 section 189 provides that when an employer contemplates dismissal on operational requirements grounds, it must engage in a "meaningful joint consensus seeking process" and attempt to reach consensus on:-*
>
> *(i) Appropriate measures to avoid the dismissal; minimise the number of dismissals, change the timing of the dismissals and to mitigate the adverse effects;*

*(ii) The method for selecting the employees to be dismissed; and*

*(iii) Severance pay.*

*The consultation must precede a final decision on retrenchment in order not to forestall what might emerge in the consultation process.*

*5.2 On the premises the dismissal of all applicant [sic] is both procedurally and substantively unfair.*

*5.3 First respondent has no locus standi to dismiss applicants.'*

[5] From this it was impossible to discern the basis upon which the applicants formed an opinion that their dismissals had been substantively unfair, and nor could their concerns be discerned from the facts relied on by them as having been relevant to their claim.

[6] From the minute of the pre-trial conference it was evident that:

- The applicants disputed that there had been any need on the part of the second respondent to retrench employees. In amplification of this issue, they asserted that the respondent had provided no proof of either economic deterioration or a significant reduction in demand.

- The applicants contended further that there were alternatives to their retrenchment by the second respondent, being that other employees ought to have been selected for retrenchment in their place, identified as having been employees of the first respondent.

- In response to that aspect of the minute pertaining to selection criteria, the applicants' response was only that they had not been involved in the consultations concerning the selection criteria to be utilised.

[7] In its answers given to applicants' assertions concerning both selection criteria and alternatives to retrenchment National Brands stated that these issues had not been identified in the applicant's statement of claim and that such issues had been impermissibly raised. If reference is to be had to the statement of claim however, binding the applicants to that document would operate as an absolute bar to any challenge to the substantive fairness of their dismissals, given that no specific complaints were expressly identified therein.

[8] Under that part of the pre-trial minute in which the issues this court was required to decide were set out, the parties did no more than set out the relief sought by each.

[9] The ambit of the applicants' complaint concerning the substantive fairness of the retrenchments was finally articulated in the opening statement given on their behalf:

- By virtue of the award issued under KNDB 16915-17, the second respondent was deemed to have been the applicants' employer.

- In the result, they became permanently employed by the second respondent.

- Notwithstanding their status as permanent employees, they continued to be treated differently by comparison to the second respondent's other permanent employees.

- The applicants' representative at the process of facilitation which had been undertaken understood from an internal memorandum transmitted by the second respondent to its employees, that the retrenchment process applied only to the first respondent's employees, and not to those of the second respondent.

- In the circumstances, the applicants ought not to have been selected for retrenchment.

[10] Notwithstanding that the challenge to the substantive fairness of the applicants' dismissals had been limited in their opening statement to a singular complaint concerning the effect of the award handed down under s198A of the LRA Mr Nonyongo, who appeared on their behalf, sought to broaden the ambit of their challenge during the course of cross-examination to issues which had not been raised in the statement of claim, identified in the pre-trial conference, nor expressed in his opening statement.

[11] In the circumstances, the substantive fairness of the applicant's dismissals will be assessed on the basis of the challenges identified by the applicants in the pre-trial minute:

- Whether there was a need on the part of the second respondent to have retrenched employees;

- If so, whether the applicants ought to have been excluded from the retrenchment process on account of the arbitration award issued under KNDB 16915-17 by virtue of which their status as National Brands' deemed employees had been confirmed; and

- Whether the selection criteria which had been applied by the second respondent was fair.

Evidence

[12] In May 2018 the trade union of which the applicants were members, African Meat Industry and Allied Trade Union ('AMITU'), entered into an agreement with the first and second respondents (referred to herein as 'Adcorp Blu' and 'National Brands' respectively). Entitled 'Permatising of General Workers Agreement' ('the Permatising Agreement') it was intended to resolve a number of issues which had by then arisen relating to National Brands' contractual relationship with Adcorp Blu, a temporary employment service.

[13] Ms Rosita Otten (previously Botha) testified that she had, at all material times, been National Brands' Industrial Relations Manager. Upon having taken up employment she had established that the pool of employees from which National Brands sourced its part-time workforce through Adcorp Blu had included some 800 people. National Brands acknowledged that the employees utilised by it had rendered services to it for a continuous period of more than three months, and that they were required to be treated on the whole less favourably than its permanent employees. To that end, the part-time employees received the same rate of pay as its full-time employees, pro-rata bonuses, and National Brands had endeavoured to source a suitable provident fund for them.

[14] Due to the number of people involved, it was difficult to ensure that each was given a proportionate number of working hours. This had led to disputes relating to the manner in which the workers were rostered to work, as well as the number of hours allotted to each. The introduction to the Permatising Agreement reflected the issues which had by then arisen and which were sought to be resolved,

*'Due to numerous concerns and disputes referred to the CCMA, in relation to equal treatment, rostering of workers and benefits of TES employees, parties agreed to meet and discuss the nature of the disputes in order to address the dissatisfaction of this class of employees and attempt to resolve the basis for having referred the matters to the CCMA.'*

[15] The parties agreed to a two stage process to attempt to resolve these issues. In the first stage, it was agreed that employees employed by Adcorp Blu who were then rendering services to National Brands would be afforded preferential appointment to the 180 vacancies that then existed in National Brands. In the words of the Permatising Agreement itself, the second stage entailed the following process,

*'2.6 On completion of permatising of the 180 TES employees, the remainder of the active pool of TES employees being provided by*

*Adcorp Blu, will be consolidated to identify the number of individuals in the pool.*

*2.7 Parties will meet in order to:*

- *Identify the size of the pool required to be available when flexible staffing needs are required by NBL;*

- *Agree on the benefits and conditions, if any exist, in offering equal benefits to this class of TES employees;*

- *Provide this group of TES employees amended contracts of employment to ensure current legislative requirements are complied with;*

- *Identify TES employees who will not form part of the identified pool of flexible staff, and*

- *Redeploy and or alternatively operationally affect such employees due to their service no longer being required.'*

[16] Ms Otten testified that the first step in the process was achieved. Mr Kuben Chetty, National Brands' Financial Manager, testified that in 2018 he had been involved in a review of the National Brands' baseload requirements (a concept understood by this court to mean its staffing requirements) upon the conclusion of which it was established that 180 positions could be permanently filled. This was done by the absorption of that number of people from the pool of workers which had been provided by Adcorp Blu, the successful employees having assumed permanent full-time employment with National Brands on 1 July 2018.

[17] The second step, when taken, gave rise to the present action. Having conducted the exercises anticipated, National Brands established that it required a pool of 150 part-time workers, available to work on an *ad hoc* basis as and when the exigencies of its business required a larger workforce. In view

of the fact that there were then some 483 employees included in the pool of part-time employees made available to it by Adcorp Blu, National Brands acted in accordance with the final actions contemplated under the second phase of the Permatising Agreement and commenced a process under s189A. Three trade unions held membership amongst the employees who were potentially to be affected, with FAWU also having had a recognition agreement in respect of National Brands' full-time employees employed at its Westmead operations and each was given a notice in terms of s189(3) by National Brands. Ms Otten explained that a similar notice had previously been transmitted by Adcorp Blu in December 2018 but, as it had by then become apparent that the affected workers were all deemed to be employees of National Brands, such notice was withdrawn and National Brands thereafter issued its own in January 2019. Attached to the notice was National Brand's request for facilitation in terms of s189A(3)(a).

[18] The introductory paragraph to the s189(3) notice evinced the position adopted by National Brands and Adcorp Blu in relation to the affected employees,

*'National Brands Limited ("NBL"), as the deemed employer for the purposes of the Labour Relations Act of 1995 ("the LRA") and Adcorp Blu, as the employer for the purposes of the Basic Conditions of Employment Act of 1997 ("the BCEA"), are contemplating embarking on a rationalisation of the TES pool which may lead to the retrenchment of deemed employees in the TES labour pool as provided by Adcorp Blu.'*

[19] Ms Otten testified that the affected employees were all the temporary workers who had been provided to National Brands by Adcorp Blu from time to time to meets its demand requirements. At that time, all the workers in the pool were regarded by National Brands as its deemed employees.

[20] She confirmed that the reasons for the proposed retrenchment were as had been indicated in the s189(3) notice, which included National Brands' diminished need for part-time workers as a result of a decline in demand for its products. This, in turn, had the effect that employees in the pool of part-time

workers were being rostered less frequently than they had previously been, and were all working fewer hours in the result. It was explained that for these reasons National Brands intended to reduce the pool of employees to 150, who could then be provided with more work on a regular basis.

[21] Present at the first facilitation meeting convened by the CCMA before Commissioner Dhlomo on 11 April 2019 were representatives from National Brands (represented by Ms Otten), Adcorp Blu, AMITU (represented by Mr Musa Jama) FAWU and SATAWU as well as several non-unionized employees who attended in person. Mr Jama raised an objection to the facilitation process proceeding in the face of a parallel process which was then underway at the CCMA not yet having been finalised, which process concerned a dispute which had been referred by AMITU in terms of s198A(3)(b). He took the view that National Brands could not on the one hand deny that the employees were its own, yet on the other hand consider them for retrenchment. He required the facilitation process to be held in abeyance pending the outcome of the s198A(3)(b) dispute. Ms Otten objected and Commissioner Dhlomo, indicated that she had neither the power nor the authority to suspend the proceedings.

[22] In the course of the first facilitation meeting the rationale for the proposed retrenchments was sought to be explained by Mr Chetty. He testified that, in essence, a decline in demand for the confectionary products being manufactured at National Brands' Westmead operations had resulted in a concomitant reduction in the need on the part of National Brands for a large number of temporary employees.

[23] Deterioration in the economy as a whole had impacted demand for biscuits, a luxury item. He took the attendees through a set of slides which demonstrated the reduction of volumes and the need to respond operationally to the reduction in demand. He explained that when the volume of production declines, production activity also declines, with the result that the number of people required for production decreases. One of the graphs included in the presentation evinced the volume of production each financial year: in 2016 National Brands produced 29 972 tons, in 2017 it produced 29 242 tons, and in

2018 production had decreased to 26 972 tons. Although he had anticipated that the volume of production which had been achieved in 2018 would be repeated in 2019, the resultant production was lower than this. The demonstrable trend was a reduction in demand and the volume of production. He explained that such decline in volume affected National Brands' need for part-time employees. Prior to the retrenchment exercise National Brands had absorbed 180 employees from the Adcorp Blu pool. As a result of the decline in volumes the business did not have a great deal of work for the remaining part-time employees outside the peak Christmas season, and retaining 438 employees in the pool was not feasible. These issues were further exacerbated by the need on the part of National Brands to have mechanised certain of its processes in order to remain competitive, which automation obviated certain of the manual processes previously performed by people and, in turn, the number of workers required.

[24] AMITU requested to be provided with certain information by National Brands and, as is evident from the transcript of the first meeting, upon its conclusion it was agreed that any requests for the disclosure of information were to be made by not later than 15 April 2019 which would enable National Brands to provide its response by 18 April 2019.

[25] At the further facilitation meeting which took place on 29 April 2019 Mr Jama took issue with the manner in which the respondent had responded to AMITU's request for the disclosure of information, specifically in relation to the items identified under numbers 3, 14, 15 and 17 of its request. Ms Otten took the view that National Brands had responded to the extent required of it and that no further information would be provided by it. The parties agreed to an extension of the 60 day period envisaged under s189A(7) read with s189A(2)(c) to enable AMITU to bring its application for the disclosure of information, and to enable Commissioner Dhlomo to issue a Ruling thereafter.

[26] During this facilitation meeting Mr Jama had raised the possibility of National Brands' full-time employees who were then close to retirement age being offered voluntary severance packages. He had also requested to speak with all

of National Brands' employees although it had been made clear by Ms Otten that such a meeting was unnecessary as the operational requirements of its business impacted the flexible staff component only.

[27] These suggestions by Mr Jama led Ms Otten to having disseminated an an internal memorandum to National Brands' full-time employees which read,

*'As most employees may be aware by now that the Westmead site is currently busy consulting with the two relevant trade unions namely; FAWU and AMITU, to effect operational changes which will be affecting the current temporary employees being utilised at Westmead. Unfortunately, this operational requirement will lead to reduced total number of Adcorp Blu TES employees who render general work service to this site.*

*Please be aware of the following important points below:*

1. *The Operational Requirements is only applicable to the Adcorp Blu temporary employees;*

2. *No NBL permanent employees are affected by the operational requirements consultation;*

3. *No NBL permanent employee will be given the option of applying for a severance package;*

4. *The next operational requirements consultation meeting is happening on 16 May 2019; and*

5. *The operational requirements process is to be finalised at the end of May 2019.'*

Ms Otten explained in her evidence that in this memorandum reference to National Brands' permanent employees was intended to have been reference to its permanent full-time employees, whereas reference to Adcorp Blu

temporary employees was intended to have been reference to the part tiem staff provided to it through Adcorp Blu.

[28] In the meantime, and in the course of the facilitation process, a dispute which AMITU had previously referred to the CCMA in terms of s198A(3)(b)(ii) on behalf of its members (prior to either the Permatising Agreement having been entered into or National Brands having issued its notice in terms of s189(3)), was finalised. Although the form 7.11 was not placed before this court, the ensuing award issued under KNDB 16915-17 in May 2019 reflected that AMITU had claimed that its members who were employed by Adcorp Blu and placed at National Brands ought to be deemed employees of the latter, and given the same benefits as those given to National Brands' other employees. National Brands did not dispute that the employees in question were deemed to be its own. The point of difference between National Brands and AMITU concerned the effect of the deeming provision. National Brands contended that the deeming provision operated for the purposes of the LRA only and that any other obligations, as well as the contracts of employment themselves, remained with Adcorp Blu. AMITU argued that the effect of the deeming provision operated to exclude Adcorp Blu in its entirety from the employment relationship. The award read,

*'42. The first respondent [National Brands] is deemed to be the employer of the applicants in terms of s198A(3)(b)(i) of the Act.*

*43. The first respondent is the sole employer of the applicants for the purpose of the LRA.*

*44. The first respondent is not prohibited from continuing its commercial arrangement with the second respondent [Adcorp Blu] and for as long as it does so, the second respondent may continue to remunerate the applicants and perform other HR and administrative functions.*

*45. In the event that the applicants still wish to challenge the application of s198A(3)(b) and aver disparate treatment between themselves and*

*similar employees employed by the first respondent, this dispute may be heard by the CCMA and the applicants are to advise the CCMA accordingly.'*

[29] Thereafter on 15 May 2019 Mr Jama addressed correspondence to National Brands on behalf of AMITU's members, prompted by his own understanding that the effect of the award was that nothing distinguished its members who were deemed to be employees from National Brands' permanent full-time employees. In this letter he set out the actions which AMITU required be taken by National Brands in compliance with the award so as to ensure the equal treatment of the employees to whom the award related,

*'Make sure that all AMITU members works shifts like other employees within your workplace.*
*Make sure that Adcorp Blu does not roster our members since now they entitled on shift system.*
*All AMITU members must getting six thousand rands (R6000,00) basic salary like other employees.*
*All AMITU members must get similar or same pay slip and get same provident fund scheme under same umbrella fund (NBC) like other employees.*
*Just do equal treatment to all our members even from any conditions that we are not stated on that letter.'*

[30] This letter was transmitted the day before the third facilitation meeting held on 16 May 2019, from which process AMITU then withdrew. Ms Otten recalled that Mr Jama had advised the other participants thereof that AMITU was no longer interested in the process because it no longer had any affected members. His conclusion was informed by the award under KNDB 16915-17, in which he had represented AMITU, as was set out in its letter. Ms Otten disputed the correctness of Mr Jama's understanding of the position and testified that whilst National Brands recognised that it was the deemed employer for the purpose of the LRA, it nevertheless retained a commercial agreement with Adcorp Blu. As such, it was not correct that none of National Brands' employees were affected. She expressed her concern about AMITU's

intention to withdraw from the process to both the AMITU representatives as well as Commissioner Dholomo, having explained that AMITU's members fell within the labour pool and remained affected by the operational process. Ms Otten endeavoured to clarify the position to Mr Jama and, in so doing, expressed her concern that AMITU's withdrawal from the process would leave its members who stood to be affected thereby without representation. Commissioner Dhlomo echoed those self-same concerns.

[31] Mr Jama, however, remained undeterred, steadfast in his view that National Brands was prevented from terminating its members employment by reason of operational necessity on the basis of the award which had been handed down under KNDB 16915-17, and he withdrew AMITU from the facilitation. His explanation at the time for doing so is reflected in the transcript,

*'Reason number 1, in terms of section 200 of the Labour Relations Act, or members does not have an interest since they belong to NBL, not to Adcorp Blu. So our members from now, does not have an interest in this matter because in terms of section 200 we can represent them if there is an interest in the matter. So since from now, does not have any interest in the matter because they belong to NBL, not to Adcorp Blu. Secondly, our members was protected by Section 198, subsection 5 of the Labour Relations Act for equal treatment. Since NBL employees are not applicable here, our members are not applicable based on the award. I've submitted the award there from those documents. These employees now, deemed to be employees of Snackworks NBL. So then, our members have got equal treatment from the employees of NBL. That point, the notice of Section 189 of Labour Relations Act, and internal memoranda, internal memorandum that page. That page it stated clear that the operational requirements only applicable to Adcorp Blu general employees. From now as AMITU trade union, we don't have temporary employees. Our members is finished, in 10 years, 5 years' service, that is why is deemed employees. So we don't have temporary employees from our members. So we, in terms of this notice, our members is not affected. That is why the notice is clear, its only applicable to TES, so we don't have TES. Our members now, point number four, does not fall from the problems that caused the applicant,*

*Snackworks, to do Section 189 since our members were under terms and conditions of contract of employment, NBL. Our members now is belong to the contract of NBL because deemed and it means equal treatment is going to belong from the contract of NBL, in terms of terms and conditions, is going to be treated by that contract.'*

The internal memorandum to which Mr Jama then referred was that which had been transmitted to the permanent full-time employees of National Brands upon it having been alerted to the suggestion that certain of these employees should be considered for voluntary severance packages in the course of the facilitation meeting of 29 April 2019.

[32] He elaborated upon his reasons for the reliance he had placed on both the memorandum and the award under KNDB 16915-17 in his evidence. Insofar as the memorandum was concerned, his interpretation and understanding was that it clearly stated that only Adcorp Blu temporary employees would be affected by National Brands' operational requirements, and that National Brands' permanent employees would not be affected. As the applicants were permanent employees, having been so deemed by virtue of the award, they were then excluded from the process. Having formed the view that the issue of retrenchments did not involve any of AMITU's members and affected only Adcorp Blu employees who had worked for less than three months, he withdrew AMITU from further participation in the facilitation process and concomitantly abandoned its request for the disclosure of information which had yet to be determined.

[33] In response to the position adopted by National Brands, Mr Jama testified that he understood the law very well. The deeming provision meant that any employee who worked for more than three months should have only one employer. Moreover, s198(2) and s198(3)(b) cannot be applied contemporaneously. After a period of three months, the applicants became permanent and were required to be treated no differently than National Brands' other employees.

[34] Ms Otten disputed the correctness of the conclusions arrived at by Mr Jama. National Brands recognised that it was the deemed employer for the purpose of the LRA, but nonetheless retained a commercial agreement with Adcorp Blu. She expressed National Brands' position that it was incorrect that no National Brands employees were affected. This was reflected in National Brands subsequent response to AMITU's letter of 15 May 2019, in which declined to do as AMITU had suggested, having disputed that the award required it to do so. On National Brands' understanding of the award, it did no more than address the issue of whether it was the deemed employer of the employees in question for the purpose of the LRA, and endorsed its standpoint that the continued contractual relationship between the employees and Adcorp Blu remained unchanged.

[35] Ms Otten testified that in the course of the facilitation process which ensued pursuant to AMITU's departure, the selection criteria were discussed. National Brands proposed that this be premised on skills and thereafter LIFO, which was ultimately agreed to upon the conclusion of the facilitation process. The practical implementation of this agreement was recorded by Commissioner Dholomo in the report she prepared which documented both the process which had been followed and its outcome. Confirmed by Ms Otten in her evidence, it reflected that 65 positions had been identified as having required critical skills. Of those positions, 24 individuals who were members of AMITU had been selected therefor. Of the 85 remaining positions which remained to be filled on the basis of LIFO, 47 of the individuals identified had been members of AMITU. Of the current applicants who were identified to be retained on the basis of either their skills or long service, none were willing to sign the contracts reflected their status as deemed part-time employees, intended to explain the relationship between the parties, their obligations and entitlements. They were duly retrenched and the positions were offered to other individuals, selected on the same basis.

[36] Upon the conclusion of the process, the pool of part-time employees was reduced to 150 individuals. Subsequent thereto, opportunities arose for the absorption of these individuals into full-time positions within the business, with

the result that by the time of the trial, all those employees had acquired permanent full-time positions within National Brands.

Analysis

[37] The argument presented by the applicants concerning whether there had been a need to retrench employees was merely that National Brands had failed to provide evidence by way of financial statements demonstrating the financial losses experienced by it in the two years which preceded the retrenchments. Insofar as the issue of National Brands' financial statements were concerned, the applicants' complaints extended beyond the question of whether retrenchments were justified, to that concerning National Brands' alleged failure to have provided this information to Mr Jama in the course of the facilitation process.

[38] Put to Ms Otten in the course of cross examination, and in respect of which Mr Jama testified at some length, included his complaints regarding her alleged failure to have provided AMITU with National Brands' financial statements during the course of the facilitation process, notwithstanding request having been made therefor. This complaint was wholly devoid of merit for a number of reasons. Firstly, it is clear that she had, in fact, done so, although not in a format approved of by Mr Jama. By way of an email sent in response to his request, she directed him to National Brands' website on which its financial statements were made publicly available, which actions were described by Mr Jama as 'out of order' as he had expressly required the documents to be made available for his collection. Whether Ms Otten's conduct sufficed for the purposes for which it was intended was, however, immaterial. When Mr Jama first complained that the documentation sought by AMITU had not been provided to it, his complaints were limited to four items on his list of requests, items numbers 3, 14, 15 and 17, none of which included National Brands' financial statements. Whatever was eventually requested by AMITU by way of its formal application, that application was abandoned by it when it withdrew from the process.

[39] As to the rationale for the retrenchments, seemingly overlooked by the applicants was the fact that a dismissal for operational reasons may have as its cause a reason other than the financial exigencies of a business. S213 defines the concept to mean, *'requirements based on the economic, technological, structural or similar needs of an employer.'* National Brands' case for the need to retrench was not premised on issues of affordability or economic hardship – it was premised on the structural needs of its business.

[40] Mr Chetty's evidence which demonstrated the deterioration in demand of National Brands' confectioneries over the course of 2016 to 2018 was unchallenged in cross-examination. His further evidence that a decline in demand results in a decline in production, with the result that a reduced workforce suffices to meet such diminished production was also unchallenged, and was logically unassailable.

[41] The applicants' denial that there had been a need to retrench was also difficult to appreciate in circumstances in which the trade union of which they were all members, AMITU, had expressly agreed that there was a need to do so in the course of 2018 when having entered into the Permatising Agreement. This was done in circumstances in which it had acknowledged the negative effects then being experienced by all the employees in the pool of part-time workers as a result of their number and what by then had become a limited demand for their services.

[42] The applicants' further (and main) complaint concerned the effect of the award issued under KNDB 16915-17. Mr Jama's understanding of the award, which informed his decision to withdraw from the facilitation process, was that the effect thereof was to place AMITU's members to whom it applied on precisely the same footing as that of National Brands' permanent full-time employees. This being so, these employees (which included the applicants) ought not to have been selected for retrenchment for the reason that the process was directed at Adcorp Blu temporary workers only. On his version, his understanding was fortified by the memorandum which Ms Otten had

transmitted to National Brands' employees, in which a distinction was drawn between 'permanent' and 'temporary' employees.

[43] Both Mr Jama's understanding of the award and interpretation of the memorandum were flawed.

[44] Firstly, and regardless of Mr Jama's perception of matters, the fact remained that the employees whose employment stood to be affected by the retrenchment process were those who formed part of the pool of part-time workers, supplied to National Brands by Adcorp Blu. This fact remained unchanged irrespective of who was to be regarded as their employer. As the point of the exercise was to reduce the number of part-time employees, and the applicants were factually a part of that group, AMITU could not simply elect to remove them from the process on the basis of its own opinions. Otherwise stated, that Mr Jama believed that they ought not to have been affected by the process did not and could not have altered the factual position which then prevailed:

- The Permatising Agreement anticipated that the pool of workers then provided to National Brands by Adcorp Blu stood to be affected by an agreed restructuring process;

- The s189(3) notice issued in due course by National Brands made it clear that the individuals who would potentially be affected by the proposed rationalisation were, *'the deemed employees in the TES labour pool as provided by Adcorp Blu'*;

- The information conveyed by National Brands to those participating in the facilitation process entrenched the position previously conveyed by it, that the process related only to the employees who formed part of the pool of part-time employees.

[45] Mr Jama's reliance on the award under KNDB 16915-17 as operating as a bar to the retrenchment of the applicants was misplaced. National Brands had at all material times acknowledged that the employees in question (being all the employees in the pool) were deemed to be its own for the purposes of the LRA in terms of s198A(3)(b)(ii), an issue that the award did no more than confirm. The award, in addition, endorsed National Brands' argument that nothing prohibited it from continuing its contractual relationship with Adcorp Blu, and directed AMITU as to what steps it should take in the event that it wished to persist in its assertions that its members were subject to disparate treatment by National Brands.

[46] Ms Otten's assessment of the legal consequences of the award was correct: whilst the award confirmed the permanency of the applicants' employment by National Brands, what it did not do was convert their part-time employment to full-time employment. For this to have been achieved, AMITU was required to have taken the further step suggested in the award. As may be discerned from the introductory portion of the award, the question of differential treatment between National Brands' full-time employees and its deemed employees was raised as an issue by AMITU. Notwithstanding this, it was not recorded as one which was required to be determined, and nor was any such finding made. Instead, the arbitrator ruled that AMITU was at liberty to advise the CCMA in the event that it wished to persist in this complaint. This being so, the position which prevailed at the conclusion of the arbitration was that the applicants, although deemed to be permanent employees of National Brands, remained part-time employees.

[47] If AMITU was of the view that the continued retention of the applicants as part-time employees was in breach of the provisions of s198A(5) it was then at liberty to finalise this dispute by way of arbitration at the CCMA, as the award indicated it should do. There was no evidence before this court that it did so, Mr Jama seemingly having been of the view that the award itself sufficed. Rather than attempting to secure an award in its favour, AMITU chose simply to ignore both the clear meaning of the award and the factual situation which then

prevailed, and withdrew from the facilitation process which was clearly of application to all its members, including the applicants.

[48] As regards the internal memorandum upon which Mr Jama placed reliance, this document was not directed to AMITU. Its contents evinced what had by then become erroneous nomenclature (the part-time employees still having been referred to as Adcorp Blu temporary employees) in circumstances in which this group of employees had previously been referred to in this way. Notwithstanding the terminology used, the contents and purport of the memorandum was clearly not intended to detract from or to alter the substance of National Brands' s189(3) notice previously sent to AMITU. From both, howsoever the employees in question were referred to, it was clear that the employees who stood to be affected by the retrenchment exercise were National Brands' part-time employees, and not its full-time employees.

[49] Affording the memorandum the interpretation favoured by him, notwithstanding that such interpretation stood in conflict with the Permatising Agreement, the s189(3) notice, and that which had by then been conveyed to AMITU in the course of the facilitation process, Mr Jama neither sought clarification as to its intended meaning from its author, Ms Otten, nor paid her any heed when she attempted to explain to him why his interpretation was wrong.

[50] Moreover, given that it was the pool of part-time employees which was required to be restructured, and National Brands' evidence that all the employees who formed a part thereof were deemed to be its own for the purposes of the LRA, there was no reason for National Brands to distinguish AMITU's members to whom the award applied from the remaining part-time employees who held membership with other trade unions or who were members of no trade union at all, as the award did not give the employees who had participated in that dispute any greater rights or benefits than the other employees to whom s198A(3)(b)(ii) applied were, as a matter of law, entitled.

[51] The final fallacy in AMITU's argument that National Brands ought to have retrenched Adcorp Blu's temporary workforce, was something which was

neither possible nor would it have been required. The only workers who could, at the time of the retrenchments, have remained excluded from the deeming provisions of s198A(3)(b)(ii) of the LRA would have been those who had been employed by Adcorp Blu and placed with National Brands for less than three months. Assuming that such employees existed, they would not have been deemed to have been National Brands' employees, and National Brands would not have been empowered to retrench them. Nor, given the limited duration of their placements with National Brands, would National Brands have been required to have done more than to have advised Adcorp Blu that the services of those employees were no longer required.

[52] As to the selection criteria which was applied, AMITU had withdrawn from the facilitation process prior to this particular issue having been finalised. On the evidence of Ms Otten, the negotiating parties who participated thereafter reached agreement that the 150 positions available would be filled so as to firstly ensure the retention of skills and, secondly to favour those with the longest service by way of the application of LIFO. Nothing suggested in either cross-examination or argument revealed that the criteria so applied was regarded by the applicants as having been contentious.

[53] It was further National Brands' case that by the application of the agreed selection criteria 24 members of AMITU would have retained employment on the basis of their skills and 47 would have done so on the basis of the length of their service. Although it was put to Ms Otten that the applicants would testify that none of them had been offered employment at the conclusion of the retrenchment process, no such evidence was ultimately introduced. This being so, this court accepts the correctness of Ms Otten's further evidence that 34 of the applicants, but for their having declined to accept the offers of continued employment made to them, would not have been retrenched.

Conclusion

[54] In consideration of the issues in dispute, the evidence presented and the applicable legal principles, this court finds that the applicants' dismissals were substantively fair.

[55] National Brands established the existence of *bona fide* operational requirements which simultaneously underpinned and necessitated the retrenchment process in question, being the need to reduce the number of employees in its pool of part-time workers as a result of the decreased demand for its products, which led to a diminished need for an increased workforce from time to time.

[56] As beneficiaries of the award under KNDB 16915-17, the argument that the applicants were thereby to be excluded from the possibility of retrenchment, and that their eventual retrenchment was resultantly substantively unfair, had its foundation in neither fact, nor law. Absent any determination by the CCMA that the continued retention of the deemed employees as part-time employees constituted treatment less favourable than that which was enjoyed by National Brands' full-time employees, there was no basis upon which they were to have been included within the category of National Brands' full-time employees and thereby automatically excluded from the retrenchment process which was then underway.

[57] Distinct from the reliance placed on the award under KNDB 16915-17 as informing the suggestion that Adcorp Blu temporary workers ought to have been retrenched in their stead, the applicants did not, in the final analysis, challenge the selection criteria utilised by National Brands which was not, on the face of it, unfair.

[58] The application will accordingly be dismissed.

Costs

[59] Had AMITU participated in the present proceedings, this court would have been inclined to order it to pay National Brands' costs.

[60] It is probable that at least 34 of the applicants herein would, but for Mr Jama's conduct, not have been retrenched by National Brands. Ignoring both the clear terms of the award and that which was subsequently conveyed to him in obvious good faith by Ms Otten and Commissioner Dhlomo, he disregarded the interests of AMITU's members and abandoned them, together with the facilitation process on the assumed correctness of his own opinion. He recklessly indicated that he was perfectly content to allow the applicants to face dismissal (with all the hardships which this state entails), in the belief of eventual vindication by this court. Having simply allowed the applicants to be dismissed, AMITU rendered no assistance to them thereafter, their subsequent referral to the CCMA and thereafter to this court having been undertaken by them on their own behalf.

[61] Although Mr Jama testified on behalf of the applicants, as was pointed out by Mr Murray in his written closing argument, Mr Jama's evidence left a great deal to be desired, having been contradictory, evasive and illogical. For example:

- He seemingly could not recall when, exactly, he had ceased to be employed by AMITU, his response to this question having varied between the years 2019, 2020 and 2021;

- Notwithstanding having confirmed that he had familiarised himself with the documentation relied upon in the trial, he indicated thereafter that he had not read the Permatising Agreement and required time to do so;

- He testified that the first time he had seen the Permatising Agreement was in the course of the trial, notwithstanding that he signed as a witness thereto;

- He testified that he did not recall having withdrawn AMITU's application for documentation upon withdrawing from the facilitation process;

- He denied that he recalled Mr Chetty having made a presentation at the facilitation process, despite that he remained in attendance at that meeting and the presentation itself constituted the main focus thereof; and

- He denied having been aware of who the affected employees may have been, notwithstanding that the transcript clearly evinced Ms Otten having provided this information to the trade union representatives who were then present, including himself.

[62] The applicants themselves cannot, however, be blamed for having initiated these proceedings in which they sought to vindicate rights which they were induced to believe were theirs. This being the case, this court is not of the view that the interests of justice would be served by requiring them to pay National Brands' costs, either of the trial or in relation to those which were previously reserved on 30 April 2021.

**Order**

1. The termination of the applicants' employment by the second respondent was substantively fair.

2. The applicants' claim is dismissed.

3. There is no order as to costs.

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K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr M P Nonyongo, M P Nonyongo Attorneys

Second Respondent:

Mr M Alexander, Norton Rose Fulbright SA Inc