IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS81/21

In the matter between:

LUYANDA SHUSHU & OTHERS **Applicants**

and

DISTELL LTD (SPRINGS) **Respondent**

Heard: 6 September 2024

Delivered: 10 December 2024

Summary: Dismissal for operational requirements – company facing liquidity crisis during Covid-19 pandemic requiring workforce to agree to a 10% pay cut for 12 months as an alternative to retrenchment – agreement reached with 99.9% of workforce (4000 employees) but the three applicants refused to agree and were retrenched – dismissals found substantively unfair and reinstatement ordered.

(This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand-down is deemed to be on 10 December 2024.)

JUDGMENT

MYBURGH, AJ

Introduction

[1] Covid-19 has produced many difficult labour law cases – this being amongst them.

[2] Distell, a producer, and distributor of alcoholic beverages – the sale of which was banned and restricted during the lock-down – suffered a liquidity crisis as a consequence, which threatened its going concern status. Having implemented various other remedial measures, it proposed a 10% across-the-board pay cut for 12 months as an alternative to a retrenchment. All 4000 employees (blue and white collar) agreed, except for less than ten employees, including the three applicants, who were then retrenched. They now challenge the fairness of their dismissal.

[3] During the trial of the matter, three witnesses gave evidence for the company: Mr Oelofse (the ER manager: northern region) who testified about the chronology of events overall – he having attended the key meetings and authored the majority of the correspondence; Ms Bhaga (the erstwhile HR manager at Springs) who testified about the consultation process at Springs, where the applicants worked; and Mr Odendaal (the head of supply chain finance) who testified about the company's financial position. This was followed by the evidence of Ms Shushu, who was the only applicant to testify.

Aspects of the evidence

The factual matrix

[4] The company operates at a number of different sites around the country, including at Springs and Wadeville. At the material times, it employed some 4000 employees.[1] About a third of them comprised category 1-6 employees which made up the bargaining unit, while the other two-thirds comprised category 7 and above

[1] The section 189(3) notice refers to there being 4062 employees.

employees, which included management. Within the bargaining unit, the company recognised four unions – FAWU and NUFBWSAW (who each had about 25% representativity) and ABANTU and ITU[2] (who each had about 10% representativity). ITU's membership (some 150 employees) appears to have been predominantly based in Springs and Wadeville.

[5] The applicants (Ms Shushu, Mr Msibi and Mr Xulu) worked at the Springs site. At the time of their retrenchment in November 2020, Ms Shushu was a laboratory analyst, Mr Msibi a supervisor, and Mr Xulu a forklift driver. They all had relatively lengthy service, and earned a basic monthly salary of between R11 500 and R22 500. All three of them were members of ITU, with Ms Shushu being a local shop steward.

[6] The chronology of events kicked off on 3 August 2020 – more than 100 days into the Covid-19 lockdown[3] – when the company invited ITU to a meeting to discuss its intention to ask employees to agree to a 10% pay cut in order to avoid the need to consider the possibility of retrenchments. In the process, the company made reference to the enormous financial impact of the lockdown, which resulted in it not being able to trade for most of the time.

[7] The meeting took place on 12 August 2020, during the course of which the company made a PowerPoint presentation titled, "Challenging Times. Tough Choices."

a) It sketched the action taken by the company to date to protect employees and the business in response to Covid-19, which was described as: "protecting salaries during the lockdown"; "reducing benefits – leave and pension contributions"; "Exco and NED salary sacrifice (April – June)"; "salary increase freeze and no STI pay-out"; "no dividends to shareholders"; and "TERS application for employees".

[2] Inqubelaphambili Trade Union.

[3] It commenced on 27 March 2020.

b) The presentation went on to address further options that had been considered, which included a large-scale downsizing of 10% of the workforce (400) jobs (which was recorded as “not being a solution for our country or our business”) and a pay cut.
c) This was followed by the communication of an in-principle decision to implement a pay cut for 12 months from 1 September 2020 of 12.5% for Exco members and 10% for all other employees.
d) The envisaged consultation process was then set out. In respect of bargaining unit employees, it involved everyone receiving a letter about pay cuts and consultations with the recognised unions, with it being recorded that “the proposed pay-cut is regarded as a reasonable alternative to retrenchment” and that should an employee not agree thereto, “Distell is not obliged to pay any severance package.”
e) Finally, the financial impact of the lockdown (April to June 2020) on the FY 2020 results (ending 30 June 2020) was set out, which included that: volumes were down by 64%; revenue was down by 56%; R100 million of stock would be written off; and forecasted profits were down by between 60% and 80%. In this regard, mention was also made of action taken by the company to mitigate losses incurred and protect its cash position, which involved raising new debt with banks in the amount of R2.8 billion, reviewing all discretionary spend, rephasing Capex projects, and reprioritising all new initiatives.

[8] On 15 August 2020, the company advised ITU that it intended to distribute individual letters to its members, and attached copies to the email.

[9] Also on 15 August 2020, letters explaining the rationale underlying the proposed pay cut, setting out the details thereof and providing a space for signature if accepted, were sent to employees (including the applicants) by email, and were physically issued in the days that followed. All employees (including the applicants) were also provided with individual letters titled, “Net effect of the Rem Base Adjustment,” which set out various scenarios and the exact figures involved. The first

mentioned letters referred employees to FAQs, which were also made available to them.

[10] On 17 / 18 August 2020, the company approved a request by ITU to conduct union feedback meetings on 19 August 2020.

[11] On 19 August 2020, the company (per Mr Oelofse) addressed this email to ITU:

> "Further to my mail below[4] and the various feedback meetings, I am appealing to the ITU membership to accept the 10% pay cut.
>
> At this stage, all our non-unionised employees (2440) have agreed to a pay cut of 10%. They will hence not be subject to a s 189 process and can at least rest assured that we will protect their salaries and jobs for at least the next 12 months.
>
> The purpose of this email is just to do a final check with the UTI membership at Distell. Please advise whether you are going to try and convince the employees to take a pay cut, as per their individualised letters. The deadline for your members to respond is this coming Friday at 12h00, failing which a s 189(3) and s 189A LRA notice will be served upon all ITU members who did not consent to the 10% pay cut.
>
> Employees are encouraged to make individual decisions regarding the 10% pay cut."

[12] On 24 August 2020, the applicants were each issued with a notice in terms of sections 189(3) and 189A of the LRA. For present purposes, these aspects of the notice warrant mention.

> a) The stated purpose of the letter was, inter alia, "to initiate a process of consultations on the proposed adjustment of employee salaries across the business, failing which may result in possible redundancies and the retrenchment of employees."

[4] Which authorised the feedback meetings.

b) It was emphasised that “no final decisions have been taken in relation to these matters and due consideration will be given to your input before any final decision is taken.”

c) The reasons for the proposed reduction in salaries was stated thus:

“Distell has been hard hit by the COVID-19 pandemic and the national lockdowns instituted by the government of the Republic of South Africa. As everyone will know the alcoholic beverages industry has been particularly hard hit with Distell and other employers in this industry negatively impacted by two periods where the sale of alcoholic beverages was prohibited out right. The lost revenue in these periods is permanent in nature and has created sudden, unanticipated pressure on Distell's cash position and working capital lines. Distell was already in a borrowing position at the start of the first ban and, in order to settle all our outstanding liabilities while not receiving any revenue, Distell had to act swiftly.

Distell took a number of measures and also engaged with its lenders to secure an additional R2.85 billion in order to manage its cash flow requirements during the next 12 months.

However, the below graph indicates the actual cash balance (blue line) for Distell since July 17, 2020 and it can be noticed that Distell has a very cyclical cash flow meaning that for certain periods it was cash positive while during other periods it borrowed funds.

The current cash forecast (grey line) is done on the assumption that Distell will be able to start trading from 1 September and, as can be seen, Distell will be borrowing R3.6 billion by June 2021, compared to being cash flow neutral in June 2019. Year on year our net debt position has increased by R2 billion which was used to pay salaries, creditors and operating expenses. This forecast below includes the payment of all outstanding excise liabilities as well as further cost reduction measures – one of which is the proposed reduction in salaries. Without these salary reductions the position would be even worse and Distell will simply not be in a position to remain a going concern.

As such, Distell intends implementing a reduction of 10% of the cost of all positions in Distell.”

d) The alternatives that had been considered were listed, with it being recorded that "we are of the view that at this stage there appear to be no reasonable alternatives to implementing the proposed reduction," but that "should any viable alternative(s) become available or be proposed, Distell will give these alternative(s) its serious consideration."

e) Regarding the number of employees likely to be affected and the proposed selection method, it was recorded that: "All [4 062] employees are affected. Kindly note that all non-unionised employees, totalling 2 400 employees, and some unionised employees, have agreed to a 10% pay cut and will hence not be subject to a s 189 process."

f) In relation to severance pay, "all affected employees will be offered a position on the basis of a salary package reduced by 10%. Distell regards this as a reasonable alternative and if any affected employee refuses to accept such reasonable alternative it is Distell's position that such affected employee shall not be entitled to severance pay."

[13] On 26 August 2020, the company held individual consultations with the applicants, with a second follow up consultation having been held sometime in October 2020. These consultations were conducted by Ms Bhaga.

[14] In relation to those employees who had agreed, the 10% salary reductions came into effect on 1 September 2020. They each signed a "recordal" of their agreement.

[15] On 23 October 2020, the company issued the applicants with notices of termination due to operational requirements, in terms of which they were notified of their dismissal with effect from 30 November 2020.

[16] On 28 October 2020, ITU requested to meet with the company the following day, and threatened an urgent court application if the company refused to suspend matters pending the meeting.

[17] The requested meeting took place on 2 November 2020. After it, Mr Oelofse sent this email to ITU:

> "Thank you for meeting with us today. I [would] like to confirm the following.
>
> There are only four ITU members [the applicants and Mr Manyane] who have not yet accepted the 10% pay cut at Springs after various information sessions and internal communication. We agree that the 10% pay cut is an effort from Distell to avoid large scale retrenchments due to the negative impact of the Covid-19 regulations on the business performance of Distell.
>
> We again shared relevant information regarding the process as well as the fact that the 10% pay cut is a suitable alternative to job losses.
>
> You requested time to consult with the members who have not yet accepted the 10% pay cut and you undertake to revert back on or before Friday 6 November 2020. We confirm that 6 November 2020 is the final date to accept the 10% pay cut."

[18] On 6 November 2020, ITU (on behalf of 44 of its members at the Springs' site) referred a dispute to the CCMA for conciliation. The nature of the dispute was described as unfair discrimination in terms of section 10 of the EEA – the contention being that the company was victimising and harassing the employees by cutting their salaries and threatening to dismiss those who did not agree. The applicants were party to this dispute.

[19] Mr Msibi and Mr Xulu signed their notices of termination on 6 and 9 November 2020, respectively.

[20] On 16 November 2020, ITU requested a meeting with the company on 27 November 2020 and that "everything be suspended until the last meeting."

[21] On 17 November 2020, the company (per Mr Oelofse) rejected this request in the following terms:

> "Our consultation meeting on 2 November 2020 refers. You requested time to consult with the members who have not yet accepted the 10% pay cut and

you agreed to revert back on or before Friday 6 November 2020. Instead you referred a dispute to the CCMA … which is clearly not in good faith.

We confirm that ITU members accepted the 10% pay cut at Springs. Feedback on the four remaining ITU members are as follows: Joe Msibi and Thembalihle Xulu have signed their termination letters voluntarily and Samuel Manyane has accepted the 10% pay cut. Luyanda Shushu has not accepted the 10% pay cut and refuses to sign the termination letter.

The company will therefore not 'suspend' the process as per your request in the attached letter dated 16 November 2020."

[22] On 19 November 2020, an HR representative certified that Ms Shushu was issued with her termination notice and that she had refused to sign it.

[23] The applicants' dismissals took effect on 30 November 2020. This was three months after the pay cut took effect, during which time the applicants were presumably paid their full salaries.

[24] On 15 December 2020, ITU (on behalf of the applicants and Mr Manyane for some reason) referred an unfair dismissal (operational requirements) dispute to the CCMA for conciliation. This is the dispute that ultimately wound its way to this court and formed the subject of the trial.

[25] As stated at the outset, save for the three applicants and half a dozen other employees, the entire staff complement of some 4000 employees agreed to the 10% pay cut for 12 months. At Springs, the applicants were the only employees (out of some 400) who did not agree. And the applicants were the only UTI members who did not agree. Although all of the unions appear to have been involved in encouraging members to agree to the pay cut, no agreement was concluded with any of them; members having made individual decisions.

The company's financial predicament

[26] As outlined above, as a result of the ban and restriction on the sale of alcohol during the Covid-19 lockdown, the company suffered a drop in cash flow generated from sales. This amounted to in excess of R4 billion in the period February to end June 2020.

[27] The reduction in cash flow resulted in the company breaching loan covenants with borrowers, and it was only able to secure further loan funding to fund ongoing operations through the intervention of Remgro (the company's primary shareholder). In this regard, the maximum allowable net debt / EBITDA[5] ratio requirement of the loan covenants was 2.75, but it moved to 3.1, thus breaching the covenants.

[28] As already mentioned, in order to improve its cash flow position, the company took a number of steps to limit cash outflows, including cancelling discretionary spending, deferring capital expenditure, a voluntary salary sacrifice by Exco and NED members for a period of three months, extending payment terms with creditors, halting dividend payments to shareholders, and making application for TERS benefits. To improve liquidity, the company also sold two of its wine farms. And at the same time, the company obtained further credit facilities, including R2.85 billion to fund short-term working capital.

[29] As part of the cost-saving that needed to be achieved, consideration was given to engaging in a large-scale retrenchment exercise (10% of the workforce), but the company adopted the view that this was not in the best interests of the country, the company, and its employees. It was as an alternative to this that the company sought a 10% pay cut (12.5% for Exco members) for a period of 12 months (1 September 2020 to 30 August 2021).

[30] Although the company had contemplated that the 10% pay cut would run for 12 months, it ultimately remained in place for 10 months until 30 June 2020. When it

[5] Earnings before interest, tax, depreciation, and amortisation.

ceased, the company also refunded employees about three months' worth of pay cuts – this from TERS monies that it had claimed and received. The savings achieved by the company was in the order of R20 million per month and R200 million over the ten months.

The applicants' decisions not to agree

[31] During her testimony, Ms Shushu explained that given that she had accumulated debt during the lockdown and was already in arrears with her bond repayments, she would have lost her home if she had accepted the 10% pay cut for 12 months. She had accordingly enquired from the company during the consultation process whether, if she accepted the pay cut, it could arrange a loan for her from her provident fund, but this was rejected as the loan scheme in place only catered for home renovations. Not being able to make ends meet if she agreed to the pay cut, she was forced into being retrenched – this with a view to funding her bond repayments from her provident fund payout while she looked for another job. After having been retrenched at the end of November 2020, she was unemployed from December 2020 until April 2022, when she obtained temporary employment which ran until the end of February 2023, whereupon she obtained permanent employment in May 2023 to date at a dairy in Cape Town. It is noteworthy that in her new temporary and permanent positions, Ms Shushu secured a higher salary than that which she earned at the company. In short, as Ms Shushu put it, she was forced into taking a financial risk

[32] Ms Shushu went on to also explain the plight of her fellow applicants, Messrs Msibi and Xulu. During the lockdown, their earnings had decreased significantly because they had not worked overtime or received allowances, and they were also already in a financial predicament. Mr Msibi had accumulated a huge credit card debt and also had a bond – and was evidentially also unable to make ends meet if he agreed to the 10% pay cut. The same applied to Mr Xulu, who has a special-needs child. In terms of the schedule produced in argument, they have been unemployed since their retrenchment, save for a four-month temporary position held by Mr Xulu.

[33] Ms Shush gave some evidence to the effect that a layoff or a reduction in overtime could have been an alternative to the retrenchment. Precisely what was contemplated by a layoff went unclarified by Ms Shushu. As far as a reduction in overtime was concerned, this had been proposed during the consultative process but the proposal was not accepted, as it did not meet the cost saving and other operational needs of the company.

[34] On the issue of alternatives, although a section 197 transfer is not included in the alternatives listed in the pre-trial minute, Mr Moyo of UTI (who appeared for the applicants) placed some emphasis on it in argument. Like Mr Malan (who appeared for the company), I must confess to not having grasped the point.

The issues for determination

[35] In terms of the pre-trial minute, the issues for determination are defined as being "the fairness of the dismissal of the applicants both substantively and procedurally as well as the relief to be afforded to them if their dismissal is found to have been unfair."

[36] When one reads this together with the facts in dispute and the applicants' answers to the relevant pre-trial directives recorded in the minute, it appears as if the applicants' case may also encompass a section 187(1)(c) automatically unfair dismissal claim (albeit that no explicit reference is made to this). However, Mr Moyo did not pursue such a claim in evidence or argument – despite me having invited him to do so. In the circumstances, I do not consider that a section 187(1)(c) claim stands to be determined. This court cannot make up a case for the applicants.

[37] In relation to the procedural fairness of the dismissal, although the company did not take the point in its pleadings, it emerged during the trial that the applicants' retrenchment was regulated by section 188A of the LRA. Ms Bhaga testified that section 189(3) letters were issued to all employees in Springs (some 400), including the applicants. The letters (dated 24 August 2020) make reference to section 189A

in the heading and reflect that, as at the date of issue, only "some" of the 1500-odd unionised employees had agreed to the 10% pay cut and would thus not be subject to the process – inferring that the rest would be. Furthermore, the applicants' notices of termination were dated 23 October 2020, reflecting compliance with the 60-day period provided for in section 189A(8). Consistent with this, Mr Moyo's heads of argument make multiple references to section 189A. In circumstances where section 189A applied, it follows that this court does not have jurisdiction in this referral in terms of section 191(5)(b)(ii) to determine a claim for the procedural fairness of the applicants' dismissal.[6]

[38] Leaving aside relief, the case thus narrows to whether the applicants' dismissal was substantively fair.

The test for the substantive fairness of a retrenchment

[39] In terms of section 188(1) of the LRA, the onus lies with the company to prove that the reason for the dismissal "is a fair reason based on [its] operational requirements". The term "operational requirements" is defined in section 213 as meaning "requirements based on the economic, technological, structural or similar needs of an employer."

[40] Our courts have recognised that it is permissible for employers to change terms and conditions of employment through a section 189 operational requirements process, where employees who do not accept the proposed changes are retrenched and substituted with new employees who do. The most recent high-ranking judgment in point is *Aveng*,[7] where employees were retrenched after they refused to work in redesigned job positions.

[6] Section 189A(18) of the LRA; *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga & others* (2024) 45 *ILJ* 1723 (CC) at para 146(b).

[7] *National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another* (2021) 42 *ILJ* 67 (CC) (*Aveng*).

[41] In *Aveng*, the Constitutional Court found:[8]

> "In an ever-changing economic climate characterised by increasing global competition, operational reasons not only relate to the downsizing of the workforce, but also to restructuring the manner in which an existing workforce carries out its work. Restructuring entails a number of possibilities, including shift system duties; adjusted remuneration; and merging of jobs or duties. Generally, businesses that adapt quickly will survive and prosper. Those that do not will decline and fail. Realising its predicament, Aveng engaged with its employees through NUMSA regarding a re-organisational plan through a structured consultative process. NUMSA's intransigence played a major role in making it impossible to save jobs. To prohibit Aveng from invoking the provisions of the section [i.e. section 189] and dismissing employees under these circumstances would undermine the LRA's objectives in ensuring the viability and vitality of businesses. … It is in the best interests of society that an employer remains economically viable. The owners and managers of the business are best placed to run the businesses. Sight should not be lost of one of the primary purposes of the LRA – to advance economic development."

[42] It is clear from this that provided it is fair to do so in the circumstances of a particular case, employees who do not agree to "adjusted remuneration" may potentially be dismissed based on the employer's operational requirements.

[43] This brings me to the vexed question of the test for the substantive fairness of a retrenchment. Over the years, a number of different and conflicting approaches have emerged.[9] Fortunately, the LAC's recent judgment in *Coca Cola*[10] provides some much-needed clarity. Van Niekerk JA held:

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[8] Ibid at paras 99-100.

[9] See for an exposition thereof, *Ndaba & others v South African Mint (RF) (Pty) Ltd* (unreported LC judgment, case no. JS475/2022, dated 4/11/2024, per Itzkin AJ) (*SA Mint*) at para 40.

[10] *National Union of Food Beverage Wine Spirits & Allied Workers v Coca Cola Beverages SA (Pty) Ltd* (2024) 45 *ILJ* 1813 (LAC) (*Coca Cola*).

"[39] In the case of a dismissal based on an employer's operational requirements, there must necessarily be some objective link between the dismissals and some economic, technological or similar need on the part of the employer. This court has held that while employers have the prerogative to restructure their operations to maximise profits and operational efficiency, the courts do not have to accept the employer's proffered rationale at face value, nor do the courts defer to employers. Earlier decisions by this court limited intervention to those instances where the employer was unable to demonstrate that the ultimate decision arrived at by the employer was not genuine, or was merely a sham, or put in a positive sense, that the dismissal was operationally and commercially justifiable on rational grounds. On this approach, the court's function is not to decide whether the employer's decision was the best decision in the circumstances; rather, the court's enquiry is limited to whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.[11] A different approach was later adopted in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*[12] where Davis AJA rejected the test for fairness predicated on the approach to judicial review of administrative action and said the following:

'The word "fair" introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would

[11] Here the LAC referenced *SA Clothing & Textile Workers Union & others v Discreto – A Division of Trump & Springbok Holdings* (1998) 19 *ILJ* 1451 (LAC) (*Discreto*).

[12] (2001) 22 *ILJ* 2264 (LAC) at para 19.

have been chosen by the court. Fairness, not correctness, is the mandated test.'

[40] In *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd* [*Old Mutual*],[13] the Labour Court said the following:

'[A]s stated in *BMD Knitting Mills*, the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employer in the exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in *Discreto* and *BMD Knitting Mills*.'

[41] … Although certain of the English authorities to which the Labour Court referred in its judgment may reflect an overly deferential approach, the Labour Court acknowledged that fairness, rather than correctness, was the applicable benchmark and that the court was obliged to determine the rationality between the retrenchment and CCBSA's commercial objectives and in particular, whether the decision to retrench was a reasonable option in all the circumstances. This approach cannot be faulted."

[44] Applying this approach, the LAC went on to find in *Coca Cola* that there was "nothing irrational nor unreasonable" in the company's decision to abolish positions of merchandisers and replace them with new posts (aligning the remuneration with industry norms) and to reduce the number of pre-sellers. The LAC concluded thus:

[13] (2005) 26 *ILJ* 293 (LC) at para 85.

> "[43] In short: CCBSA's response to the crisis precipitated by the introduction of the sugar tax, increased costs and a declining market was a rational response to arrest the economic decline that it experienced, and its decision to restructure the commercial division, and in particular the structure within which merchandisers and pre-sellers were engaged, is not unreasonable having regard to its operational requirements."

[45] In effect, on the prevailing jurisprudence of the LAC, a decision to retrench will be substantively fair if it is a rational and reasonable response to an operational requirements predicament faced by an employer. While it is unlikely that this will be the last word on the topic, it is, for now, the prevailing test settled on by the LAC, and the test that I adopt in deciding this matter.

[46] Finally under this head, I deal briefly with the issue of proportionality. As appears from the quotation above, in *Old Mutual*, Murphy AJ found that it forms part of the assessment of the substantive fairness of a dismissal for operational requirements. Proportionality has its roots in administrative law, where it is generally accepted that reasonableness comprises two components – rationality and proportionality. As this court has mentioned, "the essential elements of proportionality are balance, necessity and suitability, the latter referring to the use of lawful and appropriate means to establish the administrator's objective. In other words, it is the notion that one ought not to use a sledgehammer to crack a nut."[14] In labour law, proportionality has featured prominently in automatically unfair dismissal cases based on unfair discrimination in determining the bounds of reasonable accommodation. So, for example, in applying the principle of proportionality, it has been found that "an employer may not insist on the employee obeying a workplace rule [which interferes with her religious convictions] where that refusal would have little or no consequence to the business."[15] Along similar lines, in balking against zero- tolerance policies, the courts have held that the sanction of dismissal must be

[14] *AngloGold Ashanti Ltd v Mbonambi & others* (2017) 38 *ILJ* 614 (LC) at para 27.

[15] *SA Clothing & Textile Workers Union & others v Berg River Textiles - A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC) at para 38.6.

proportional to the severity of the misconduct.[16] The quantitative / qualitative weigh off undertaken in determining the reasonableness of restraints of trade is another example of proportionality at work in labour law; as is section 66(2)(c) of the LRA, which places a limit on secondary strikes based on proportionality.

[47] Recently, in *SA Mint*,[17] Itzkin AJ dealt with the issue of proportionality in the retrenchment context. As a point of departure, he correctly points out that inherent in the fundamental right to fair labour practices, which applies to both employees and employers, is the need to balance the interests of the respective parties. Drawing on *Old Mutual*, Itzkin AJ goes on to find:

> "[62] In the present case, in my exercise of the value judgment which considers the parties' competing rights and interests (and the notion of proportionality), it is evident that the decision to restructure, which culminated in the plaintiffs' dismissals, constituted a legitimate exercise of the employer's competence to dismiss.
>
> [63] The dismissal was not a disproportionate course in seeking to achieve the efficiencies motivating the restructuring exercise, in the sense that the efficiency gains sought to be achieved through the restructuring do not appear to be outweighed by the countervailing harm. A relevant consideration in this regard is the plaintiffs' regrettable intransigence in not taking up the opportunity to apply for and be considered for the HRBP positions – with the defendant having sought, by way of the process to fill those posts, to make room for the retrenchment-avoidance."

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

[48] To recap on the facts leading up to the applicants' retrenchment:

a) Although the company said that it had considered a large-scale retrenchment of 10% of the workforce (400 employees), it seems unlikely that this was ever a reality. Not only did the company not table the

[16] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2015) 36 *ILJ* 2273 (LAC) at para 18.

[17] Fn 9 above.

proposal before itself rejecting the idea, but by all accounts, it needed the whole workforce and wanted only a short term (12 month) saving of 10% of its salary bill.

b) How this played itself out was by the company advising employees that: (i) “we do not believe that large scale restructuring is the solution for our business or our country at this stage …. it is for these reasons that we would like all employees to agree to this proposal [of a 10% pay cut]” (this in the initial letter proposing a pay cut); and (ii) “as a result [of financial pressures] we are left with no alternative but to reduce our salary bill to safeguard jobs and prevent large scale retrenchments” (this in the accompanying FQAs).

c) At the outset, there was not a threat of any particular employee or group of employees being retrenched. Instead, all employees were asked to, in effect, make a financial contribution (of 10% of their salaries) to avoid the potential for some of them (400) losing their jobs through a large-scale retrenchment exercise. The initial exchanges also did not threaten employees who did not agree with retrenchment.

d) All non-unionised employees – totalling 2400 employees and about 60% of the workforce – and some unionised employees agreed without more. This is significant because by the time the section 189 / 189A process began, by far the majority of the R20-million saving would already have been banked by agreement. This on account of the fact that the 2400 who agreed comprised category 7 and above employees (including management), who would have earned substantially more than the bargaining unit employees.

e) With a view to getting the rest of the workforce over the line, the company issued section 189(3) letters. The letter recorded that it served “to initiate a process of consultations on the proposed adjustment of employee salaries across the business, failing which may result in possible redundancies and retrenchment of employees.” While the letter recorded that “no final decision had been taken in relation to these matters”, the earlier FAQs said there was no alternative to the pay cut.

f) So while employees were initially asked to take a 10% pay cut to avoid a large-scale retrenchment (which more than 60% of the workforce subscribed to), things changed fundamentally: now if employees did not agree, there was no longer a prospect of a large-scale restructuring in the ordinary course (where they might possibly face retrenchment), but they themselves stood to be retrenched as a result of not agreeing to the 10% pay cut.
g) The strategy overall was hugely successful – ultimately 99.9% of the workforce (more than 4000 employees) voluntarily agreed to the pay cut, which took effect on 1 September 2020. The company thus achieved the required 10% saving on its salary bill.
h) The issue that then arose was how to deal with the outliers – less than ten employees including the three applicants who had not agreed. The 'outstanding monthly saving' in relation to the applicants was minuscule: R1 120 in respect of Ms Shushu, R1 536 in respect of Mr Msibi, and R882 in respect of Mr Xulu – totalling R3 538 per month.[18]

[49] When Mr Oelofse was asked why there was a need to dismiss the applicants given that the company had effectively achieved its objective of a 10% saving on the salary bill (R20 million) and stood to gain virtually nothing by their dismissal, his answer was that they were dismissed with a view to ensuring consistency and avoiding labour disputes. What Mr Oelofse did not say is that the applicants were dismissed because the company's operational requirements were such that it needed to save R3 538 per month.

[50] Although Mr Malan submitted in argument that this was an ancillary consideration, and that the applicants were actually retrenched with a view to the company achieving the saving, this cannot be reconciled with Mr Oelofse's clear evidence. Two difficulties arise from this. Firstly, in my view, a dismissal based on this somewhat unusual objective does not fall within the definition of "operational

[18] These figures appear from the individual pay-cut letters issued to the applicants which were attached to the company's heads of argument.

requirements," i.e. "requirements based on the economic, technological, structural or similar needs of an employer." Secondly, even if it did, it was not established in evidence that there was any real threat that the failure to retrench the applicants would have given rise to labour disputes – still less that there was a threat that it would have caused the unravelling of the deal with the workforce. Employees who agreed to the pay cut had done so in writing, and 60% of the workforce (making up by far the majority of the saving) had agreed without any real threat of retrenchment. For these reasons alone, I find that the company has failed to prove that the reason for the applicants' dismissal was a fair reason based on its operational requirements in terms of section 188(1) of the LRA.

[51] In the alternative, and assuming that the applicants were actually dismissed to effect a saving, was it fair to dismiss them once the R20-million target had effectively already been achieved, and for the sake of only R3 538 per month? The case advanced by the company runs along these lines. In assessing fairness in the context of a retrenchment process aimed at achieving a universal saving, one cannot disaggregate individual employees from the collective and engage in a granular savings analysis per individual. To achieve the R20-million monthly saving, each and every employee was required to make a salary sacrifice in equal proportion, with the result that the applicants stood to be retrenched to round out the universal savings objective, irrespective of how small their outstanding contribution to the collective pot may have been. And in this scheme of things, those who agreed last or did not agree had no greater claim to withhold their consent or contest the fairness of their retrenchment than those who subscribed first. I refer to this as the "aggregation thesis."

[52] Before dealing with the thesis, it is necessary to first deal with the fundamental assumption that underlines it, i.e. that a decision to retrench to save R20 million by way of a 10% pay cut is fair in the first place (the thesis only kicks in once that question is answered in the affirmative). This requires close scrutiny.

[53] Although there is compelling evidence that the company faced a liquidity crisis and needed to effect savings, there is little, if any, evidence to explain the extent to

which the 10% pay-cut saving actually assisted the company. During Mr Odendaal's initial evidence, he said that the saving amounted to R30 million per month and that "it didn't look a lot". When he later returned to testify, he said that the saving was actually only R20 million per month, and explained that the pay cut ceased after ten months, with employees then having been repaid the equivalent of three months' worth of deductions from TERS monies. Although it appeared from Mr Odendaal's evidence that the company was effectively in a position where every rand not saved was a rand borrowed, he did not contextualise the R20-million saving and explain its impact on the company's financial position.

[54] While it stands to be accepted that "the owners and managers of the business are best placed to run [it]",[19] that it is permissible to retrench to save costs and increase efficiencies (and even profitability),[20] and that this court should not readily be drawn into questions involving complex commercial calculations,[21] it, nevertheless, remains incumbent on an employer to establish its economic rationale for the retrenchment in evidence.[22] In order to do so, the company needed to establish – in the context of it being a huge business then listed on the JSE with a newly secured credit facility of R2.85 billion underwritten by Remgro – what the impact of the saving of R20 million per month was (and that it was material). In my view, it failed to do so. In the result, I am unable to find that a retrenchment based on the target of saving R20 million per month by way of a pay cut was fair.[23]

[55] In the alternative, and assuming that I am wrong and that it can be inferred from the evidence that the R20-million pay-cut saving was of some material consequence to the company, this brings me to its aggregation thesis as a basis for the alleged fairness of the applicants' retrenchment. If the thesis were adopted, it

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[19] *Aveng* at para 100.

[20] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 *ILJ* 133 (LAC) at para 33.

[21] Du Toit et al, *Labour Relations Law : A Comprehensive Guide* (7th ed) at 561.

[22] *Ndhlela v Sita Information Networking Computing BV (Incorporated in the Netherlands)* (2014) 35 *ILJ* 2236 (LC) at para 42-43.

[23] Ibid at paras 52-53 (by way of analogy).

would serve to prevent the assessment of the proportionality of the applicants' retrenchment, thus creating a sort of 'no-go area' for the court. In my view, this cannot be correct. In fact, particularly where one is dealing with pay cuts to save costs, proportionality should play a key role because tolling the lowest paid employees generally has little benefit for the employer.

[56] In the present matter, irrespective of how one undertakes the proportionality analysis, the stark reality is that all the company gained by the applicants' retrenchment was R3 538 for just seven months (there being no permanent saving[24]), while the applicants lost their livelihoods – and this in circumstances where the company had effectively achieved its objective of a R20-million saving on its salary bill by agreement with 99.9% of its workforce. Simply put, the applicants' dismissals were disproportionate because they were of no (or very little) consequence to the company,[25] but severely impacted on the livelihoods of the applicants.

[57] By this I am not suggesting that proportionality in this context simply involves determining, in effect, who R3 538 per month means more to – the company or the applicants? If that is how proportionality worked, then it would invariably operate in favour of the dismissed workers. Instead, it seems to me that where one is dealing with incommensurable interests – the employer's interest in the profitability, efficiency or survival of the business versus an employee's interest in job security – what is required is a determination of the extent to which the parties' respective interests have been realised, with a view to comparing the degrees of proportional fulfilment. Adopting this approach, and accepting that an employer is entitled to dismiss for operational requirements to effect savings and increase efficiencies and

[24] This is not a case where through the employees' retrenchment, the employer would, for example, permanently save the cost of their employment because their jobs were redundant and no longer existed, or permanently saved the reduced costs of their employment because their positions were redesigned and wages commensurately reduced with the old positions no longer existing; instead, it is a case of the company having, through the applicants' retrenchment, achieved no more than a minuscule temporary saving for just seven months, where the applicants' jobs still existed.

[25] See para 46 above.

profitability (albeit fairly), to what extent was the company's interest in remaining viable and profitable realised by the applicants' retrenchment? In my view, it was hardly realised at all in the circumstances discussed above. Turning to the applicants, to what extent was their interest in job security realised? Although they lost their jobs (with the virtually inevitable consequence of a lengthy period of unemployment), it is relevant here that they were offered continued employment at the pay-cut rate – albeit that they could not afford it. Turning then to a comparison of the degrees of proportional fulfilment, in circumstances where the company's proportional fulfilment ranking is close to zero, the outcome is patently in favour of the applicants.

[58] As mentioned above, in *SA Mint*, Itzkin AJ found that the dismissal in that case was not a "disproportionate course."[26] In the present case, I am driven to the opposite conclusion. As proportionality is a component of reasonableness, I conclude that the applicants' dismissals were unreasonable and thus, on the *Coca Cola* test, substantively unfair.

[59] To sum up, I have found the retrenchment of the applicants substantively unfair on these grounds: (i) the applicants were dismissed with a view to ensuring consistency and avoiding labour disputes, but the company failed to prove that this was a fair reason for dismissal based on its operational requirements; (ii) alternatively, insofar as the applicants were dismissed to achieve a cost saving as part of the R20-million savings target, the company failed to establish the impact and materiality of the R20-million saving, so as to justify a retrenchment based on achieving it; and (iii) alternatively, insofar as the impact and materiality of the R20-million saving was established, the applicants' dismissals were a disproportionate course, and thus unreasonable (and unfair).

Relief

[26] See para 47 above.

[60] The applicants seek reinstatement and there exists no basis upon which to refuse it.

[61] In exercising my discretion regarding the degree of retrospectivity of an order of reinstatement, I have taken cognisance of the fact that Ms Shushu has been employed for most of the time since her dismissal and at a higher salary than she earned at the company.[27]

Order

[62] Accordingly, the following order is made:

1. The dismissal of the applicants was substantively unfair;
2. The respondent shall reinstate the applicants into its employ;
3. In the case of Ms Shushu, her reinstatement shall be retrospective to 30 November 2022;
4. In the case of Messrs Msibi and Xulu, their reinstatement shall be retrospective to their date of dismissal on 30 November 2020; and
5. There is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicants: Union official

For the respondent: Mr F Malan of ENS Africa

[27] See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 2507 (CC) at para 43 (read with fn 60).