REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA22/2012

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Appellant**

T G LINDEN **Second Appellant**

and

BLACK MOUNTAIN MINING (PTY) LTD **Respondent**

Heard: **12 September 2013**

Delivered: **10 December 2014**

Summary: Dismissal for operational requirements- employer dismissing employee based on commercial and economic reasons – Labour Court upholding dismissal - Appeal- evidence showing that employer employing contactors to do employee's job – employer not considering alternative to dismissal- employer's commercial and economic reason for dismissal unjustifiable – appeal upheld – Labour Court's judgment set aside.

Coram: Waglay JP, Dlodlo and Francis AJJA

JUDGMENT

FRANCIS AJA

Introduction

[1] The first appellant, the National Union of Mineworkers, had on behalf of its member, the second appellant, referred an unfair retrenchment dispute to the

Labour Court for adjudication and contended that their member's dismissal by the respondent for alleged reasons of its operational requirements was substantively and procedurally unfair. At the commencement of the trial, the appellants conceded that the dismissal was procedurally fair. The court found that the dismissal was substantively fair and dismissed the referral with costs.

[2] This is an appeal against the judgment of Van Voore AJ delivered on 28 June 2012. The appeal is with leave granted by the court *a quo*.

The facts

[3] The respondent is a mining company situated in Aggenys in the Northern Cape. The town of Aggenys is geographically apart from other towns in the region and exists solely for the purposes of the mines activities and those services related to it. The town has some 4000 individuals. It is for all intents and purposes an extension of the respondent's business. The respondent is the *de facto* governance of the town which does not have a municipality and is obliged to maintain not only the structural functionality to its mining activities, but must also maintain the buildings and infrastructure used by the mine staff. The township is not a cost centre in the sense that it is able to generate profit revenue. It does not levy rates and must fund the operating expenses of the town out of its operating budget.

[4] The second appellant was employed by the respondent since 1989 and at the date of his retrenchment was employed as a mason in the respondent's Town Engineering unit that conducts maintenance for the town and its various facilities. The Town Engineering unit is a non-mining or non-core function particular to the nature of the respondent and Aggenys. Prior to the restructuring, the second appellant was one of eight artisans reporting to a foreman (James Richards) who in turn reported to the town engineer Kobus Zandberg. His duties involved general masonry work such as rebuilding and repairing walls, plastering, tiling, fixing potholes and paving, road signage, cement work and the like. He resides in Aggenys with his wife, who works at a local school, in accommodation that is rented from the respondent at a nominal cost as a result of his employment with the respondent.

[5] The respondent has operated the mine at the town since 1977. Prior to 1 October 2008, the respondent operated as a division of Anglo American Operations, but was then unbundled with the result that it became an independent private entity, responsible for its own financial affairs. To generate its working capital, it took loans from Anglo American Finance which eventually totalled R500 million. By the end of 2009, the respondent was still indebted to Anglo American Finance to the value of R155 million and was technically insolvent. One of the strategies that had been identified by the respondent to ensure its long term sustainability was the sinking of a new deep shaft that took place during 2005. This shaft was required to attain a certain design capacity to be profitable. Historically, the shaft had not met this level of production to the extent that the shortfall in budget, from mining, was said to be some R200 million annually. Various other financial pressures such as the strengthening of the rand and the lowering of metal prices caused additional financial pressures to be felt.

[6] The respondent's first attempt to turn its financial fortunes around was the implementation of "operation survival" during March 2009, a strategy aimed largely at the improvement of production and the cutting of associated mining costs. This strategy only had limited success. On 1 October 2008, the respondent issued a notice in terms of section 189(3) of the Labour Relations Act 66 of 1995 (the LRA) with a referral to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for facilitation in terms of section 189A of the LRA. An initial meeting was held with the first appellant. The reasons for the restructuring were listed as lack of competiveness, under performance, low production, increased costs and the strength of the rand. These reasons relate to the core activities of the respondent, namely the functioning of the mine itself. As at 1 October 2009, the respondent contemplated when the process commenced that there would be a retrenchment of up to 100 positions.

[7] A first facilitation meeting took place under the auspices of the CCMA on 14 October 2009 where the respondent made a presentation of its restructuring objectives. The respondent intended to cut 93 positions from its organisational

structures, 29 from the engineering department and 7 from the town engineering unit where the second appellant was employed. No actual posts were identified, nor was any cost-benefit analysis presented to demonstrate why this should be the case. The respondent committed itself to the reduction in the number of contractors and that it would endeavour to place employees in such positions. In response to a request for information tabled by the first appellant at the facilitation meeting, the respondent issued a response on 23 October 2009 indicating that a total of 640 contractors/service providers were currently engaged. There was also a commitment to reduce the use of contractors in part by replacing them with permanent positions. It is unclear to what degree those numbers included the various contractors then conducting township maintenance. The first appellant requested such information on 2 November 2009 together with a disclosure of the identity of the employees filling the positions earmarked for retrenchment. On 4 November 2009, the respondent said that it viewed the request for identification and disclosing the identity of the contractors engaged as at that date as premature.

[8] A fourth and final facilitation meeting was conducted at the CCMA on 24 November 2009 and a presentation was made by the respondent. It was indicated that two unidentified artisans from the town engineering unit were earmarked for retrenchment. This was clarified as being one mason and one carpenter. The respondent undertook to offer the affected employees vacancies filled by "labour hire". Various vacancies were identified.

[9] On 30 November 2009, a further consultative meeting was held and a further presentation was made by the respondent. For the first time, the second appellant with a fellow retrenchee AL Biba a carpenter were identified as two of twelve affected employees who could not yet be placed, but who could apply for the listed vacancies. The second appellant did not qualify for any of the listed vacancies, *ex facie* the listed requirements, save for that of "serviceman" which would have required a drop in salary of approximately 70%, and the ability to work underground. The respondent agreed that this position was not a reasonable alternative to the second appellant's retrenchment. The respondent's response to certain proposals tabled by the

first appellant at the meeting was to the effect that it was only prepared to offer Biba and the second appellant the generally offered "retraining allowance" of R3 000,00 to *inter alia,* form a close corporation and that they would then be "free to tender on any applicable work". There was no undertaking to prefer them as contractors for work at the respondent, and the respondent was bound by its own procurement policy.

[10] Around the same date, the first appellant responded to the respondent's presentation. It submitted that the contemplated retrenchment of the second appellant and Biba was unjustified due to fact that there were a shocking number of contractors which are the respondent's preferred services providers with fixed rates. It listed the contracting companies and pointed out further that due to the high workload, the said contracting companies engaged sub-contractors to assist them in the performance of their duties. It pointed out that the second appellant was recalled from the plant to service the township due to the high work load at the township but that the respondent still showed a preference to using contracting companies. It proposed that if the respondent was insisting on retrenching two employees then it should assist them with the registration of a close corporation and make them preferred service providers with fixed rates and accommodation. It believed that the principle of removing fixed-term employees and employees from labour brokers in other areas should apply even in the township. The respondent did not respond to the aforesaid proposal. It was not prepared to give any preferential status to the second appellant and Biba in respect of tendering for work and they would ultimately be on an equal footing as other companies tendering in terms of its procurement policy.

[11] No written or other response was made by the respondent to those proposals. The respondent did not consider removing contractors as an alternative to retrenchment of the two employees, nor was it able to substantiate the alleged improvements in costs and efficiency of service. The respondent was not prepared to give any preferential status to the employees in respect of tendering for work and they would ultimately be on an equal footing as other companies tendering in terms of the respondent's procurement policy.

[12] On 3 December 2009, the second appellant received a formal letter from the respondent informing him that his position had been made redundant and advising him that he could apply for vacancies as per the list attached, failing which his services would terminate on 1 January 2010. Whilst the respondent did extend the offer to pay the retraining allowance, it did not provide any undertaking regarding preferential engagement. The vacancies set out in the list required qualifications or skills that the second appellant did not possess. The second appellant accepted the retraining allowance and registered a close corporation. He has not however engaged in any business with the respondent.

[13] On 23 December 2009, the second appellant received a *pro forma* letter formally terminating his services. He was informed *inter alia* that he was not successful for the alternative positions that he had applied for due to his current skills that did not match any of the positions. He was advised that there were no further alternatives available for the respondent to consider and that his services would be terminated. He was required to vacate his occupied company accommodation within 30 days from the date of the termination of his services. It was accepted by one, van der Mescht that the reference to the positions applied for was an error and that the respondent had subsequently agreed to allow the Lindens to rent the accommodation provided to them as a consequence of Mrs Linden's work at the local High School. Van der Mescht did however confirm that in the ordinary course, the second appellant would have been obliged to vacate on the legally required month's notice. The second appellant served out his notice month and thereafter referred an alleged unfair dismissal dispute to the CCMA for conciliation. Whilst Biba was included in that referral, he elected not to proceed with his dispute beyond that stage. Only the second appellant and Biba and another employee outside the bargaining council were "'forcibly" retrenched.

[14] Following the retrenchment of the second appellant and Biba, the respondent engaged the services of various contractors (including Biba who was able to generate business in excess of R1,5 million within an 18-month period for "general work") in order to perform the type of work previously conducted by

the township engineering unit. The nature and the extent of work being performed had not changed in any fundamental way after the restructuring and it was really an operational decision which had been made by the respondent to contract out that work. No evidence was presented by the respondent to show the cost effectiveness of that strategy or whether it was a preferable option from an efficiency point of view.

The proceedings in the court a quo

[15] The appellants felt aggrieved with the second appellant's retrenchment and referred to the dispute to the CCMA and thereafter to the court *a quo* for adjudication. The challenge was limited to substantive fairness only.

[16] The court *a quo* set out the evidence that was led before it. It is not necessary to repeat it. The court said that the further evidence of the respondent's witnesses was that during the consultation process, one of the proposals made by the first appellant was a suggestion that the respondent should completely do away with "contractors" and that the work done by contractors should be done by employees. This was however not considered as a viable proposal. At the time the respondent was using contractors and giving them work as and when the need arose. It was the respondent's evidence that in relation to some of the work done by contractors, it did not at the time have the capacity to attend to the projects internally and did not want to expand its non-mining operations.

[17] The court *a quo* said that it was the evidence of the respondent that if it were to retain the second appellant in the face of the restructuring which led to other employees leaving the maintenance department in which the second appellant worked, then the respondent would have to provide him with support to perform those services because in its then existing structure he would not be able to carry out services by himself. The respondent chose not to go down that path because of the express purpose of the restructuring was to re-allocate human and other resources from non-essential or non-critical support services.

[18] The court *a quo* said that the appellants raised a number of issues and responses. The first appellant contended that there were approximately 640 contractors or services providers engaged by the company and that there was some level of commitment to reducing the use of contractors/services providers. Ultimately, the respondent did not consider the blanket removal of all service providers/contractors as an alternative to its right-sizing or restructuring initiatives. Furthermore, the respondent was not in a position to or prepared to give any guarantee to retrenched employees in respect of allocating them work should they establish an enterprise which would apply or tender for work to be done on behalf of the mine. The respondent's evidence was that it had reduced its "above-ground" maintenance work to such an extent that only work that was genuinely essential would be done. In those circumstances, it could not provide any guarantee to any service provider.

[19] The court *a quo* said that it is further common cause that on or about 2 November 2009, the first appellant requested information pertaining to the contractors used by the respondent and the positions that would be affected by possible retrenchments. The respondent did engage the first appellant on that aspect. In its view, the respondent reasonably and fairly decided that doing away with contractors or outside service providers was not viable in light of the way in which it had decided to run the business of the mine.

[20] The court *a quo* said evidence of van der Mescht was that "right-sizing" as contemplated by the respondent referred to the development of a second "deep shaft" at the mine which was being brought into full production and "town maintenance" within the service department. Throughout the respondent contended that it needed the mine to achieve "design capacity" in the generation of ore. Further the respondent contended that its efforts in restructuring also town maintenance formed part of this broader purpose. It appears to be the first appellant's contention that the restructuring of town maintenance could also only have fallen within the mine's purpose of reaching "design capacity" if staff in town maintenance were moved into production departments. However this does not necessarily follow.

[21] The court *a quo* said that it was common cause that a further consultation meeting facilitated by the CCMA took place on 24 November 2009. At that meeting, the respondent, *inter alia,* informed the first appellant that two artisans from the town engineering were identified for retrenchment. Those persons were one mason and one carpenter. Further the respondent undertook to offer the affected employees the opportunity to apply for vacancies. The court *a quo* said that in the *Forecourt Express (Pty) Ltd v SATAWU and Others*[1] matter, it was held that:

> '…as a general rule an employer has a right to choose the way in which he will run his business provided that in so far as workers are concerned, he respects their contracts of employment and obtains their consent if he wishes to amend such contract or consults with them or their representatives as contemplated by section 189 of the Act if he contemplates dismissing them for operational requirements arising out of such choice.'

[22] The court *a quo* said that whilst it is so that under our law it is in certain circumstances required of an employer not to dismiss affected employees if there is work which they can do with minimal or no retraining, that does not apply in the present matter. It was also put to the respondent's witnesses in cross-examination that following the retrenchment, it has made extensive use of contractors/service providers for doing "general work" and other work. In particular, it was claimed that Biba had apparently been paid approximately R1,5 million over an 18 month period for what appears to be "general work". The court said that in its mind this did not undo the essential rationale for the respondent's decision to allocate more of its resources to "below-ground" activity and less to "above-ground" activities such as town maintenance.

[23] The court *a quo* held that it is part of our law that an employer has the right to choose the way in which it will conduct or run its business. This is of course subject to employees being treated fairly in the process of the employer's decision-making and subject to the employer's decision-making being based on its "operational requirements" as reasonably assessed by it. There is no evidence to suggest that the respondent had prematurely and unfairly made a

[1] (2007) 1 BLLR 101 LAC.

final decision on retrenchment prior to the consultation process and its conclusion. The court *a quo* found that on a proper assessment of the evidence, the respondent has established that it had decided to run its affairs or manage the business differently. Those changes are properly grounded in the respondent's operational requirements. It was claimed that after the retrenchment, the respondent has apparently made extensive use of contractors/service providers in certain areas. The court said that even if this was true, it did not serve to undermine the respondent's reasonable assessment of the way in which it is running the business and the changes which are reasonably assessed are necessary for restructuring. The court said that in those circumstances and its view, the respondent has established that the retrenchment was effected for a fair reason. The court found that the dismissal of the second appellant was for a fair reason and ordered the appellants to pay the respondent's costs.

The grounds of appeal

[24] The appellants contended that the court *a quo* erred generally in finding that the dismissal of the second appellant was for a fair reason and thus that the appellants' referral ought to be dismissed with costs. More particularly, and without derogating from the generality of the aforegoing, the acting learned judge erred in finding that the respondent had acted fairly and reasonable in making use of outside contractors as a replacement for the services performed by, *inter alia,* the second appellant; finding that the respondent had acted within its general right to conduct its business as it wished; finding that the respondent had acted rationally in restructuring its business so as to result in the retrenchment of the second appellant; failing to find that the second appellant was not dismissed as a last resort and that it would have been fair, under the circumstances, to retain his services; failing to find that the respondent had not properly considered and implemented alternatives to the second appellant's dismissal; failing to find that the second appellant's dismissal was not operationally justifiable on rational grounds, particularly given the respondent's extensive use of outside contractors following the dismissal; failing to find that the dismissal of the second appellant *per se*

could never have genuinely been for the respondent's "economic, structural, technological or similar needs"; failing to find that the respondent was obliged to retrench according to the principles of proportionality and that such principles justified the retention of second appellant's services and failing to find that as a consequence of second appellant's personal circumstances, his dismissal by the respondent was substantively unfair.

The parties' contentions on appeal

[25] The appellants contended that the court *a quo* erred in adopting a so-called "deferential approach" to the respondent's decision to retrench the second appellant whereas the law generally requires the reason for a retrenchment to have been a fair one and ultimately a decision of last resort. To the extent that the second appellant's dismissal may have been motivated by the respondent's "economic, technological, structural or similar" needs, the dismissal of the second appellant was not reasonably necessary to fulfil those needs. Furthermore, the harm caused by the dismissal of the second appellant was not proportional to the benefit or utility of the respondent's business or the alleged operational requirements.

[26] The appellants contended further that the respondent failed to reassess during the course of the restructuring exercise whether it was necessary to dismiss the second appellant at all, particularly in light of the second appellant's limited costs to the respondent and the respondent's widespread engagement of contractors immediately and after the retrenchment in order to perform, *inter alia,* the second appellant's job. The respondent has failed to discharge the *onus* resting upon it to demonstrate that, under all the circumstances, the dismissal of the second appellant was for a fair reason and ultimately a measure of last resort.

[27] The respondent contended that the restructuring was motivated primarily to focus on its core function of mining ore for on-selling. This restructuring was not limited to "economic reasons" as specifically referred to in section 189 of the LRA but falls within the meaning "operational requirements" as contemplated in section 213 of the LRA. It contended that it is entitled and

indeed permitted to deal with "economic inefficiencies" and "structural problems". The restructuring was aimed at dealing with both "economic inefficiencies" and "structural problems". It accepted that maintenance could not be ignored or delayed. It decided that the kind of maintenance that the second appellant and the others did could be attended by "outside" service providers and that this would have the result that the respondent does not bear the costs of a fully fledged maintenance services department. The previous maintenance done by the second appellant carried out by outside contractors/service providers would result in it being in a position to incur expenses on such maintenance when it needed to rather than having to cover the costs of such maintenance even when there was no need for it. This approach it was contended falls within the meaning of "operational requirements" as contemplated in section 213 of the LRA. Its approach so it was contended is "rationally justifiable" in view of its decision to scale down or not to carry on at all any "non-essential or non-critical maintenance". This approach fell within the reasoning of the Labour Appeal Court in the matter of *ForeCourt Express* where the court reasoned that as a general rule an employer has the right to choose the way in which he will run his business. It did indeed consider employing the second appellant in its "below-ground" activity. However, he did not apply for any "below-ground" jobs. It considered alternatives and implemented these wherever possible and alternatives were offered to the second appellant. He declined it for various reasons.

Analysis of the evidence and arguments raised

[28] The appellants had referred an unfair dismissal dispute to the Labour Court for adjudication. The respondent had called three witnesses during the trial. They were Louisa Jakoba Carstens, the financial director of the respondent; Malcolm Lesley Frank van der Mescht, the human resources manager and Jacobus Christoffel Zandberg the section engineer of the respondent. The appellants did not lead any evidence. Carstens dealt with reasons for the respondent embarking on a restructuring exercise. Van der Mescht testified about the consultation process that was followed. Zandberg testified about what the position is within the maintenance department of the respondent. It is

not necessary to repeat their evidence since those are set out in the background facts.

[29] It is clear from the evidence led that the parties had been involved in extensive consultations that were facilitated by the CCMA. At the commencement of the trial, the appellants stated that they were no longer challenging the procedural fairness of the retrenchment. They were also not stating that the selection criteria were unfair or non-objective or applied inconsistently. Their attack was brought in terms of section 189A(19) subsection (c) of the LRA that requires an employer to prove that there was a proper consideration of alternatives. They had proposed alternatives which ought to have been considered by the respondent but were not, so the appellants contended that the respondent's failure to do so infected the substantive fairness of the dismissal. The appellants alleged that on the evidence, the dismissal of the second appellant was not objectively justifiable nor did the respondent appropriately consider alternatives to the dismissal.

[30] It is clear that the alternative that was proposed by the first appellant during the consultation process was that the contemplated retrenchment of the second appellant and Biba was not justified due to fact that there were numerous contractors which were the respondent's preferred services providers with fixed rates. It listed the contracting companies and pointed out further that due to the high workload, the said contracting companies engaged sub-contractors to assist them in the performance of their duties. It pointed out that the second appellant was recalled from the plant to service the township due to the high work load at the township but that the respondent still showed a preference to using contracting companies. It proposed that if the respondent was insisting on retrenching two employees then it should assist them with the registration of a close corporation and make them preferred service providers with fixed rates and accommodation. It believed that the principle of removing fixed-term employees and employees from labour brokers in other areas should apply even in the township.

[31] It is common cause that no written or other response was made by the respondent to those proposals. The respondent did not consider removing

contractors as an alternative to retrenchment of the second appellant and Biba, nor was it able to substantiate the alleged improvements in costs and efficiency of service. The respondent was not prepared to give any preferential status to the second appellant and Biba in respect of tendering for work and they would ultimately be on an equal footing as other companies tendering in terms of the respondent's procurement policy.

[32] Despite the aforegoing, the court *a quo* found for the respondent. It adopted what has been termed a deferential approach to the determination of substantive fairness in the retrenchment context. It quoted *Forecourt Express*) namely that as a general rule an employer has the right to choose the way in which it will run his business. The deferential or abstentionist approach has its roots under the 1956 LRA in *Morester Bande (Pty) Ltd v NUMSA and Another*[2] where it was stated that as long as dismissals were linked to a genuine economical rationale, the courts were generally reluctant to interfere in legitimate business decisions, even if those may have been unwise or incorrect.

[33] The deferential approach is no longer part of our law. It was called into question and rejected in *BMD Knitting Mills (Pty) Ltd v SACTWU*[3] and in *CWIU and Others v Algorax (Pty) Ltd.*[4] In *BMD Knitting Mills,* this Court observed at paragraph 18 that the test enunciated in *Discreto* was one amounting to the judicial review of an administrative action akin to that utilised in applications for review under section 145 of the LRA as then understood following *Carephone (Pty) Ltd v Marcus NO and Others,*[5] namely that the courts should not impose value judgments or concepts of correctness on administrative bodies. The true test was whether the decision was rationally justifiable. The court then proceeded as follows at paragraph 19:

> 'I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicably to a decision by

[2] (1990) 11 ILJ 687 (LAC).
[3] (2001) 22 ILJ 2264 (LAC).
[4] (2003) 24 ILJ 1917 (LAC).
[5] (1998) 19 ILJ 1425 (LAC),

> an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, 'the reason for the dismissal is a fair reason'.
>
> 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 extend 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 have been chosen by the court. Fairness, not correctness is the mandated test.'

[34] In *CWIU and Others v Algorax,*[6] this Court per Zondo JP (as he then was) dealt with the issue as follows:

> 'Sometimes it is said that a Court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a business person may have to deal with the problems in the workplace. This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this Court is seised (sic) with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question.'

[35] The Court rejected the notion of a deferential approach to operational requirements, preferring instead an objective approach where a court must determine what was fair. The Court then considered the standard to which the employer should be held when testing, objectively, the fairness of the dismissal and held at 1940 D – F as follows:

[6] (2003) 24 ILJ 1917 (LAC) at paras 69.

> '…resort to dismissal, especially a so-called no-fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort… It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer only to resort to dismissing employees for operational requirements as a measure of last resort. If that is correct, the court is entitled to intervene where it is clear that certain measures could have been taken to address the problems without dismissals … or where it is clear that dismissal was not resorted as a measure of last resort.'

[36] Section 189A(19) of the LRA provides that the Labour Court must find that the employee was dismissed for a fair reason if – (i) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs; and (ii) the dismissal was operationally justifiable on rational grounds; and (iii) the selection criteria were fair and objective. Since the procedural fairness of the second appellant's dismissal is not in issue and the process that concluded with his dismissal was one that fell within the parameters of section 189A, the question that had to be determined in the court *a quo* was whether the three aforementioned preconditions were met.

[37] Various guidelines have been given over the years about how one determines if the aforementioned preconditions have been met. It does not follow that just because an employer dismisses an employee due to its "economical, technological, structural or similar need" that the precondition has been met. An employer must first establish on a balance of probabilities that the dismissal of the employee contributed in a meaningful way to the realisation of that need. In my view, dismissals for operational requirements must be a measure of last resort, or at least fair under all of the circumstances. A dismissal can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons. The selection of an employee for retrenchment can only be fair if regard is had to the employee's personal circumstances and the effect that the dismissal will have on him or her compared to the benefit to the employer.

This takes into account the principles that dismissal for an employee constitutes the proverbial "death sentence".

[38] The aforementioned questions must be asked and answered by the employer not only at the commencement of the restructuring process, but continually throughout that process as considerations will naturally change as the process plays itself out. This principle was endorsed in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at paragraphs 42 to 45. See also *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A). An employer cannot prejudge the consultative process which will render the dismissals a *fait accompli*.

[39] It is trite that in retrenchments, the real question is not merely the employer's *bona fides* and commercial justification but whether the dismissals were the only reasonable option under the circumstances. In this regard see, *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC). In *SACTWU and Others v Discreto – A Division of Trump & Springbok Holdings*[7] the court stated at paragraph 8 as follows:

> 'The function of a court scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision … but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham..... It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision…'

[40] The appellants attack is contained in section 189A(19) of the LRA that requires the respondent to prove that there was a proper consideration of alternatives that were proposed and which ought to have been considered by the respondent off its own back and was not and that affects the substantive fairness of the dismissals. As stated earlier, the respondent did not respond to the first appellant's proposal and this much was conceded by van der Mescht namely that the respondent did not consider removing the contractors as an

[7] (1998) 19 ILJ 1451 (LAC) at para 8.

alternative to retrenchment of the second appellant and Biba, nor was it able to substantiate the alleged improvements in costs and efficiency of service. The respondent was not prepared to give any preferential status to the employees in respect of tendering for work and they would ultimately be on an equal footing as other companies tendering in terms of the respondent's procurement policy.

[41] Following the retrenchment of the second appellant and Biba, the respondent engaged the services of various contractors in order to perform the type of work previously conducted by the township engineering unit. Van der Mescht conceded that the nature and the extent of work being performed had not changed in any fundamental way after the restructuring and it was really an operational decision which had been made by the respondent to contract out that work. No evidence was presented by the respondent to show the cost effectiveness of that strategy or whether it was a preferable option for an efficiency point of view. The first appellant's position regarding the second appellant and Biba was that their jobs could be saved if some contractor agreements were cancelled.

[42] I accept that as a general rule an employer has a right to choose the way in which he will run his business provided that in so far as workers are concerned, he respects their contract of employment and consults with them if he contemplates dismissing them for operational requirements. It is unfair for an employer, in selecting a solution to deal with problems in his business to choose a solution that entails job losses if there is another solution which can satisfactorily address its problems without job losses. Dismissals must be a last resort and if they are not that renders them unfair.

[43] A court in considering a dismissal for operational requirements is obliged to ask not only whether there was a *bona fide* commercial rationale to begin with, but also whether the reason for the dismissal was a fair one. An employer must establish on a balance of probabilities that the reason for the dismissal was fair.

[44] In *CWIU and Others v Latex Surgical Products (Pty) Ltd,*[8] the employer had retrenched certain of its employees, on the basis of its financial difficulties, and had then engaged approximately 80 to 100 contractors through a labour broker to fulfil its needs. This Court noted that the determination of substantive fairness in the retrenchment context required a determination of whether there was both a general need to dismiss employees at all, and whether there was a need to dismiss specific employees, namely those that were before the court. Thus whilst the court accepted that the employer did have cause to retrench employees generally because of its operational requirements, the court nonetheless had to determine whether the dismissal of the employees before it was fair. The employer had failed to explain how it could have employed those contractors when it stated that financial losses were the reason for the dismissal of the employees. The court accepted that the *onus* was on the employer to explain its behaviour, irrespective of whether the point had been put to its witnesses by counsel for the employees as it ultimately had to prove that the dismissals were substantively fair. The employer's failure to do so left unexplained this contradictory conduct and allowed the court to find the dismissals substantively unfair.

[45] The respondent bears the *onus* to prove that the dismissal was substantively fair. It has failed to discharge that *onus*. It is clear from the evidence led that the dismissal of the second appellant was not a measure of a last resort. The maintenance department of the respondent was not closed down entirely. They still had to and are still rendering a service on behalf of the respondent. The second appellant could easily have been accommodated in it. No cogent reasons were given why this option was not considered by the respondent. The position might have been different if the entire maintenance department was closed. Based on the evidence let at the trial proceedings, I am satisfied that the dismissal of the second appellant was not objectively justifiable nor did the respondent appropriately consider the alternatives to the dismissal and that was the nub of the case put before the court *a quo*.

[8] [2006] 2 BLLR 142 (LAC).

[46] It was contended on behalf of the respondent that the court had adopted the correct approach in its decision as to the fairness of the retrenchment. It was further contended that the court *a quo* did not just accept the commercial rationale at face value but instead undertook an investigation of the evidence led in support of its rationale by the respondent, which evidence it found to be compelling proof that the decision to dismiss the second appellant for operational requirements was fair in the circumstances.

[47] There is no substance to the respondent's contentions. The court *a quo* adopted the deferential approach. The respondent has failed to prove that the second appellant's dismissal was motivated by "economic, technological, structural or similar" needs and that the dismissal of the second appellant was reasonably necessary to fulfil those needs

[48] The court *a quo* erred when it dismissed the appellants' referral. It should have found that the second appellant's dismissal was substantively unfair.

[49] The second appellant sought reinstatement. No evidence was led by the respondent that it would be impossible to reinstate him. None of the exceptions in section 193 of the LRA have been shown to exist. There is no reason why he should not be reinstated from the date of his dismissal.

[50] I do not believe that it will be in the interest of justice and fairness to order that costs should follow the result. I have taken into account that the parties will have an ongoing relationship. An appropriate order would be to order that each party is to pay its own costs.

[51] The appeal accordingly succeeds.

[52] In the circumstances, I make the following order:

52.1 The appeal is upheld with no order as to costs.

52.2 The decision of the court *a quo* is set aside and is replaced with the following order:

52.2.1 The second applicant's dismissal was substantively unfair.

52.2.2 The respondent is ordered to reinstate the second applicant from date of his dismissal.

52.2.3 Each party is to pay its own costs.

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Francis AJA

Waglay JP and Dlodlo AJA concur in the judgment of Francis AJA

APPEARANCES:

FOR APPELLANTS:	J Whyte of Cheadle Thompson & Haysom
FOR RESPONDENT:	E. Ellis Instructed by Edward Nathan Sonnenberg