CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 275/17

In the matter between:

SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION First Applicant

C MOENG AND OTHERS Second and Further Applicants

and

WOOLWORTHS (PTY) LIMITED Respondent

Neutral citation:	*South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44
Coram:	Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.
Judgment:	Khampepe J (unanimous)
Heard on:	29 May 2018
Decided on:	6 November 2018
Summary:	Labour Relations Act — section 189A(19) — retrenchment — dismissal for operational requirements Substantive unfairness — operationally justifiable — consideration of alternatives — reinstatement remedy

ORDER

On appeal from the Labour Appeal Court:

1. Condonation is granted for the late filing of the application for leave to appeal.
2. Leave to appeal is granted.
3. The applicants' appeal is upheld.
4. Paragraph 2 of the order of the Labour Appeal Court is set aside and replaced with the following:
   "4.1 The appeal is dismissed.
   4.2 There is no order as to costs."
5. The respondent's conditional cross-appeal is dismissed.
6. No order as to costs is made in relation to the proceedings in this Court.

JUDGMENT

KHAMPEPE J (Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Madlanga J, Petse AJ and Theron J concurring):

Introduction

[1] The right to fair labour practices, whilst incapable of a precise definition, encompasses the right to security of employment and specifically the right not to be dismissed unfairly.[1]

[1] *National Education, Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[2] The concept of unfair dismissals is regulated by Chapter VIII of the the Labour Relations Act[2] (LRA), which gives effect to the recognition by our law that an employer has a right to dismiss an employee based on, inter alia, misconduct, incapacity or operational requirements. However, over and above the circumstances in terms of which an employer may dismiss an employee for substantively fair reasons, an employer is nevertheless required to prove that the dismissal was procedurally fair. It is thus imperative that not only should an employer be able to prove that the dismissal was for a fair reason, but that the procedure adopted was fair.

[3] This is an application for leave to appeal against the judgment and order handed down by the Labour Appeal Court on 19 September 2017. The Labour Appeal Court upheld the appeal from the Labour Court in part and dismissed it in part. The Labour Appeal Court dismissed the claim in respect of alleged unfair procedure but upheld the claim that the dismissal was substantively unfair. The Labour Appeal Court also ordered that an amount equal to 12 months' remuneration should be paid rather than reinstatement (as was ordered by the Labour Court).

[4] The applicants seek to challenge the Labour Appeal Court's substitution of the 12 months' remuneration compensation award for reinstatement, and the Labour Appeal Court's dismissal of the claim for relief based on procedural unfairness. They further seek an order confirming the Labour Court and Labour Appeal Court's finding that the dismissals were substantively unfair, as well as the Labour Court's finding that the dismissals were procedurally unfair.

[5] The respondent has brought a conditional counter-application for leave to appeal. Only if the applicants were to succeed in their application for leave to appeal, the respondent seeks leave to cross-appeal those parts of the Labour Appeal Court's decision and orders which went against it.

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[2] 66 of 1995.

Parties

[6] The first applicant is the South African Commercial, Catering and Allied Workers Union (SACCAWU), a trade union registered in terms of section 96 of the LRA. SACCAWU brings this application in its own name and in its representative capacity as the trade union to which the second to further applicants belong.

[7] The second to further applicants are all members of SACCAWU, who until about 4 November 2012, were employees of the respondent.

[8] The respondent is Woolworths (Pty) Limited (Woolworths), a company with limited liability registered in terms of the company laws of the Republic of South Africa. Woolworths is a well-known South African retail store.

Factual Background

[9] Until 2002, Woolworths employed its employees on a full-time basis. These employees (full-timers) worked fixed hours totalling 45 hours per week. In 2002, Woolworths decided that in future it would only employ workers on a flexible working hour basis. These workers (flexi-timers) would work 40 hours per week.

[10] By 2012, Woolworths' workforce consisted of 16 400 flexi-timers and 590 full-timers. Full-timers earned superior wage rates and enjoyed better benefits. The remuneration package of some full-timers exceeded the wages and benefits applicable to flexi-timers by 50%. Full-timers and flexi-timers did the same work.

[11] Woolworths decided that, in keeping with current market trends, it needed to operate with an entire workforce consisting of flexi-timers. It decided to convert the full-timers to flexi-timers on the terms and conditions of employment applicable to flexi-timers. In order to do this, Woolworths first invited full-timers to voluntarily

become flexi-timers during a period from 4 August 2012 to 4 September 2012.[3] It did not invite the union to participate in this phase. Certain inducements were offered to the full-timers for the conversion. All of the full-timers save for 177 employees opted for early retirement, voluntary severance or agreed to become flexi-timers. Woolworths then progressed to the second phase in accordance with section 189A of the LRA,[4] during which 85 out of the 177 full-timers accepted one of the voluntary options. Eventually, only 92 of them were retrenched, 44 of whom are the second and further applicants.[5]

[12] As Woolworths employed more employees than the threshold specified in section 189A(1) of the LRA,[6] it was obliged to follow the process specified by the section to effect the retrenchments. Woolworths gave the prescribed notice of termination of employment in terms of section 189(3)[7] as regards the remaining

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[3] *SACCAWU v Woolworths (Pty) Ltd* [2016] ZALCJHB 126 (Labour Court judgment) at paras 8 and 11.

[4] Id at para 11.

[5] Id at para 12.

[6] Section 189A(1) provides:

> "This section applies to employers employing more than 50 employees if—
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> (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least—
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> (i) 10 employees, if the employer employs up to 200 employees;
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> (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
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> (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;
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> (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
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> (v) 50 employees, if the employer employs more than 500 employees; or
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> (b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a)."

[7] Section 189(3) provides:

> "The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—
>
> (a) the reasons for the proposed dismissals;

177 full-timers. It also engaged in a consultation process including one facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 189A(3) of the LRA. SACCAWU represented some of its members who were full-timers. SACCAWU was entitled in terms of section 189A(2)(b)[8] to strike on the issue, but did not.

[13] During the course of consultation, two things happened. Firstly, 85 of the full-timers accepted the voluntary option; leaving 92 full-timers who opposed conversion and did not accept any of the voluntary options. Secondly, SACCAWU and 44 of its members appreciated the need to work flexi-time and accepted that full-timers should be converted to flexi-timers. SACCAWU initially suggested that the full-timers retain their existing wages and benefits and proposed that although these employees would work 40 hours per week they would be paid for working 45 hours at their full-time wage rates. Towards the end of the consultation process, SACCAWU varied its stance. It proposed that the workers would work flexi-time for 40 hours and be paid only for those hours but at their full-time wage rates (which meant an 11% reduction in wages for full-timers who became flexi-timers). Woolworths did not understand this to be a different proposal and rejected it.

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months."

[8] Section 189A(2)(b) provides:

"In respect of any dismissal covered by this section—

(b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section."

[14] Woolworths gave notice to terminate the contracts of employment. It retrenched 92 full-timers. On 3 December 2012, SACCAWU, on behalf of 44 of these full-timers, launched an application in terms of section 189A(13)[9] of the LRA in the Labour Court. On 18 December 2012, in terms of section 191(11)[10] of the LRA, it referred a dispute concerning whether there was a fair reason for the dismissal to the Labour Court for adjudication.

[15] SACCAWU applied for the consolidation of its unfair dismissal claim and its application seeking redress for the procedural unfairness of the dismissal. This application was granted.

Litigation history

Labour Court

[16] The Labour Court upheld SACCAWU's challenges that the dismissals were both substantively and procedurally unfair. Woolworths was ordered to reinstate the 44 dismissed workers retrospectively from the date of their dismissal. The Labour Court also ordered Woolworths to pay the applicants' costs.

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[9] Section 189A(13) provides:

> "If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—
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> (a) compelling the employer to comply with a fair procedure;
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> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
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> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
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> (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."

[10] Section 191(11) provides:

> "(a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.
>
> (b) However, the Labour Court may condone non-observance of that timeframe on good cause shown."

Application for leave to appeal in the Labour Court and Labour Appeal Court

[17] The Labour Court granted Woolworths leave to appeal to the Labour Appeal Court. The Labour Appeal Court upheld only part of the Labour Court's conclusions and orders. The Labour Appeal Court confirmed the Labour Court's conclusion that the dismissals were substantively unfair, but changed the remedy from reinstatement to an award of compensation equal to 12 months' remuneration. In addition, the Labour Appeal Court set aside the Labour Court's relief in relation to the claim based on procedural unfairness. No order as to the costs of the appeal was made.

This Court

[18] In this Court, the applicants seek leave to appeal parts of the Labour Appeal Court's decision. Specifically, the Labour Appeal Court's substitution of the 12 months remuneration compensation award for reinstatement, and the Labour Appeal Court's dismissal of the claim for relief based on procedural unfairness. The applicants also seek an order confirming the Labour Court and Labour Appeal Court's conclusion that the dismissals were substantively unfair.

[19] In respect of substantive unfairness, the applicants submit that Woolworths failed to prove that the dismissal was for a fair reason, based on the employer's operational requirements as required by section 188(1)(a)(ii) of the LRA. In respect of procedural unfairness, the applicants argue that Woolworths has failed to prove that the dismissal was effected in accordance with a fair procedure as required by section 188(1)(b) of the LRA. It was further pleaded by the applicants, in the alternative, that the dismissals were automatically unfair in contravention of section 187 of the LRA. However, this challenge was not pursued in the Labour Court, the Labour Appeal Court or this Court.[11]

[11] This was due to the decisions of the Supreme Court of Appeal in *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; (2005) 26 ILJ 689 (SCA) and the Labour Appeal Court in

Jurisdiction and leave to appeal

[20] This matter engages this Court's jurisdiction as it raises important issues of interpretation and application of sections of the LRA, which give content to the right to fair labour practices as guaranteed by section 23(1) of the Constitution. There are also reasonable prospects of success and it is therefore in the interests of justice that leave to appeal be granted.

Condonation

[21] The delay in filing the application for leave to appeal was only a few days and condonation was not opposed. There was also no prejudice suffered as a result of the late filing of the application. It is therefore in the interests of justice to grant condonation.

Issues for determination

[22] The following issues arise for consideration:

(a) The substantive unfairness of the dismissals;

(b) if the dismissals were not substantively unfair, the procedural unfairness of the dismissals; and

(c) the appropriate remedy in the case that the dismissals are found to be unfair.

Substantive unfairness

[23] The retrenchment occurred in November 2012, at a time when section 189A(19) applied.[12] The section provided that, in a dispute about the

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Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa [2002] ZALAC 25; (2003) 24 ILJ 133 (LAC).

[12] It was introduced into the LRA in 2002 in terms of the Labour Relations Amendment Act 12 of 2002 and was deleted by section 33 of the Labour Relations Amendment Act 6 of 2014 with effect from 1 January 2015.

substantive fairness of large-scale retrenchments, the Labour Court must find that the employee was dismissed for a fair reason if—

> "(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
> (b) the dismissal is operationally justifiable on rational grounds;
> (c) there was a proper consideration of alternatives; and
> (d) selection criteria were fair and objective."[13]

[24] It is trite that the onus of proving that the retrenchments were substantively fair rests upon the employer, Woolworths.[14]

[25] The origins of the wording of section 189A(19) are found in the Labour Appeal Court's judgment in *Discreto* where Froneman DJP held:

> "As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not. . . . For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation

[13] Section 45 of the Labour Relations Amendment Act 12 of 2002.

[14] See section 192(2) of the LRA.

process. 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, properly taking into account what emerged during the consultation process."[15] (Footnotes omitted.)

[26] Section 189A(19) is considered to be a deeming clause directing the Labour Court, in the case of large-scale retrenchments, to equate fairness with rationality.

[27] However, in *Black Mountain Mining* the Labour Appeal Court held, with regards to a dismissal in terms of section 189A(19) that:

"It does not follow that just because an employer dismisses an employee due to its 'economical, technological, structural or similar need' that the [section 189A(19)] 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'."[16]

[28] Woolworths has argued that the test in *Black Mountain Mining* should not be followed as that test is based on case law that does not deal with large-scale retrenchments in terms of section 189A(19)(b) and does not accord with the plain language of section 189A(19)(b).

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[15] *SA Clothing and Textile Workers Union v Discreto – A Division of Trump & Springbok Holdings* [1998] ZALAC 9; (1998) 19 ILJ 1451 (LAC) (*Discreto*) at para 8.

[16] *National Union of Mineworkers v Black Mountain Mining (Pty) Ltd* [2014] ZALAC 78; [2015] JOL 33457 (LAC) (*Black Mountain Mining*) at para 37.

[29] The Labour Appeal Court held that it was unnecessary for purposes of the appeal to revisit the decision in *Black Mountain Mining*.[17] I agree. If the elements listed in section 189A(19)(a) to (d) have not been satisfied, the dismissals were substantively unfair. I consider each of these elements below.

Purpose of the dismissals

[30] Section 189A(19)(a) of the LRA requires the dismissal to give effect to a requirement based on the employer's economic, technological, structural or similar needs. In the notice issued in terms of section 189(3) of the LRA, Woolworths gave only one reason for the retrenchments, being that "the company needs to be in a position to employ employees who are able to be used on a flexible basis".

[31] SACCAWU accepted that the reason for restructuring the workforce and doing away with the class of full-timers was to give effect to a requirement based on the employer's economic, technological, structural or similar needs but that this element no longer applied as the full-timers had indicated that they were prepared to convert to the flexi-time model (albeit not on all the same terms).

Operationally justifiable

[32] Section 189A(19)(b) of the LRA requires the dismissals to be operationally justifiable on rational grounds. The Labour Court found that this requirement was not met. As I have already stated, for the purposes of this judgment it is not necessary for this Court to revisit the decision in *Black Mountain Mining*. That is because, even on the lower standard of rationality set out in *Discreto*, Woolworths has failed to show the retrenchments were operationally justifiable on rational grounds. The sole reason advanced by Woolworths for the dismissal is as contained in the section 189(3) notice, namely that "the company needs to be in a position to employ employees who are able

[17] *Woolworths (Pty) Ltd v SACCAWU* [2017] ZALAC 54; (2018) 39 ILJ 222 (LAC) (Labour Appeal Court judgment) at para 36.

to be used on a flexible basis". This stated purpose was achieved when the individual applicants, represented by SACCAWU, agreed to work the flexible hours and days required. It therefore follows that there was no longer a need for the retrenchments.

[33] Woolworths has argued that a holistic reading of the section 189(3) notice reveals that there were additional reasons for the retrenchments, namely considerations of equity and cost efficiency. This argument is, with respect, farcical. The section 189(3) notice emphasises the "need to employ people who are able to work according to flexible working arrangements. This would improve both the costs and the operational efficiencies of the business". I agree with both the Labour Court and the Labour Appeal Court that a fair reading of this notice reveals that the sole reason for the retrenchments was the need for flexibility, with the benefits of that flexibility being greater cost and operational efficiency and not that these were intended to serve as self-standing reasons. Woolworths' transparent attempt to add these reasons as an afterthought must therefore be rejected.

Proper consideration of alternatives

[34] During the consultation process SACCAWU proposed, as an alternative to retrenchments, that the employees would convert to the flexi-time model but maintain their same remuneration and benefits. In a letter of 30 October 2012, SACCAWU amended this proposal to the effect that the full-time workers would accept an 11% decrease in their remuneration. Woolworths has argued that it did not understand SACCAWU's proposal in its letter of 30 October 2012 to be any different from the other proposals which it had made and therefore did not consider same. This alleged misunderstanding does not save Woolworths from its failure to have properly considered this as an alternative to the retrenchments, but instead it evidences that this alternative was not properly explored.

[35] The applicants also allege that Woolworths did not properly consider the offered alternatives to retrenchment such as natural attrition and / or wage freezes for

the full-time employees. Additionally, the Labour Appeal Court found that Woolworths did not consider the possibility of ring-fencing as an alternative.

[36] Given that Woolworths had been phasing out the full-timers for more than a decade, since 2002, it is inconceivable why this same model could not have continued, particularly as the number of full-timers since 2002 had significantly decreased. A wage freeze would also have sped up the rate of natural attrition.

[37] None of the above alternatives were considered or attempted by Woolworths. Woolworths has also offered no tenable reasons for this failure, when it bears the onus to show that it had considered all possible alternatives in this regard. On the evidence before us, Woolworths has not shown that it properly considered these alternatives. This constitutes a breach of section 189A(19)(c) of the LRA.

[38] It therefore follows that the dismissal of the individual applicants was substantively unfair because Woolworths has failed to prove that it complied with section 189A(19)(b) or (c). In other words, Woolworths failed to prove that the retrenchments were operationally justifiable on rational grounds or that it properly considered alternatives to retrenchments.

Procedural unfairness

[39] Section 189(2) of the LRA requires the employer and other consulting parties (the trade union and its members) to "engage in a meaningful joint consensus-seeking process and attempt to reach consensus" on the topics specified in section 189(2)(a) to (c). These topics include appropriate measures to avoid dismissals, to change the timing of dismissals and to mitigate the adverse effects of the dismissals. The employer is also required to disclose relevant information and provide meaningful reasons for rejecting SACCAWU's representations or proposals.

[40] The applicants argue that the dismissals were procedurally unfair as Woolworths failed to consult meaningfully with SACCAWU when retrenchments

were first contemplated, failed to disclose relevant information and failed to provide meaningful reasons for its rejection of the SACCAWU's representations. During the voluntary phase, there was no form of negotiation or consultation with the respective workers but what had in fact occurred was that the workers were merely given options as determined by management. After a substantial number of workers refused to accept the voluntary options, Woolworths moved to the consultation phase under section 189 of the LRA. The applicants argue that when Woolworths entered the consultation phase, management was not genuinely open to meaningful consensus-seeking, as all that was up for discussion was the choice of voluntary retrenchments or loss of jobs. The content of the voluntary options and their benefits were not up for negotiation nor was the issue of avoiding the retrenchments.

[41] During oral argument the question also arose whether, if Woolworths had in fact contemplated the possibility of dismissals at the voluntary stage, its failure to issue a notice of dismissal at that stage would have had the result of infringing on the employees' right to strike. If that is true, it would have considerably diminished the negotiating strength of the workers in this case.

[42] Although there is merit in the above argument, the issue of procedural unfairness only arises in the event that this Court finds that the dismissals were not substantively fair.[18] As this Court has determined that the dismissals were in fact substantively unfair, there is no need for this Court to engage on the issue of procedural unfairness.

Remedy

[43] It is by now axiomatic that reinstatement is the primary remedy that the LRA affords employees whose dismissals are found to be substantively unfair. In *Equity Aviation* this Court held that the ordinary meaning of the word "reinstate" is:

[18] This is because, upon finding that a dismissal is substantively unfair, the consequential relief of either retrospective reinstatement or compensation preclude any additional relief being granted for procedural unfairness.

> "to put the employee back into the same job or position [that] he or she occupied before the dismissal, on the same terms and conditions."[19]

[44] Accordingly, an employee that is reinstated will consequently resume their employment on the same terms and conditions which prevailed at the time of the dismissal.

[45] Reinstatement is thus aimed at placing the employee in the position that they would have been in or that they would have occupied, but for the unfair dismissal. Furthermore, reinstatement is intended to safeguard employment by restoring the employment contract.

[46] Reinstatement must be ordered when a dismissal is found to be substantively unfair unless one of the exceptions set out in section 193(2) applies, namely that the affected employees do not wish to continue working for the employer; the employment relationship has deteriorated to such a degree that continued employment is rendered intolerable; it is no longer reasonably practicable for the employees to return to the position that they previously filled; or the dismissal is found to be procedurally unfair only.

[47] As affirmed by this Court previously, the fact that a significant period might have lapsed from the date of dismissal to the date of the judgment is not a bar to reinstatement. An employee whose dismissal is substantially unfair should not be disadvantaged by the delays of litigation where she or he has not unduly delayed in pursuing the litigation.[20]

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[19] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation,Mediation & Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation*) at para 36.

[20] Id at para 51-2.

[48] At this stage, I deem it appropriate to focus particularly on the exception provided for in section 193(2)(c), namely instances wherein reinstatement is not "reasonably practicable".

[49] The LRA does not define the term "reasonably practicable". However, guidance can be sought from various authoritative court decisions. The Labour Appeal Court in *Xstrata* held:

> "The object of [section] 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the job no longer exists, or the employer is facing liquidation or relocation or the like. The term 'not reasonably practicable' in [section] 193(2)(c) does not equate with term 'practical', as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."[21]

It is thus evident that the term "not reasonably practicable" means more than mere inconvenience and requires evidence of a compelling operational burden.

[50] An employer must lead evidence as to why reinstatement is not reasonably practicable and the onus is on that employer to demonstrate to the court that reinstatement is not reasonably practicable. In this case the dismissal was not for misconduct. The respondent dismissed the applicants for the reason that it believed that they were not prepared to work the so-called "flexi-time" that the respondent wanted them to work and were insisting on working and being paid on a full-time basis. It is accepted by all concerned that the respondent was mistaken in understanding this to be the applicants' position after they had made the last proposal before they were dismissed. It is also accepted by all concerned now that in fact the

[21] *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha* [2016] ZALAC 25; [2017] 4 BLLR 384 (LAC); (2016) 37 ILJ 2313 (LAC) (*Xstrata*) at para 11.

last proposal that the applicants made to the respondent entailed that they would work flexi-time. The applicants' proposal entailed that they would accept an 11% reduction in their salaries.

[51] The effect of this proposal was that, whereas all along the applicants' employment was on a "full-time" basis, the basis upon which they were going to continue to be employed was going to change. In fact their hours of work were going to change from those applicable to the so-called "full-time" employment to those applicable to working "flexi-time". Full-time employment in this sense meant fixed hours and on fixed days in a week. "Flexi-time" employment meant employment on the basis of flexible hours and flexible days. The respondent was no longer prepared to employ the applicants and others doing the same job on a full-time basis and wanted all of them to work on a flexi-time basis. The overwhelming majority of cashiers had accepted the respondent's proposal to work on a flexi-time basis by the time the applicants made their last proposal before they were dismissed.

[52] Counsel for Woolworths contended that the positions in this instance were no longer available and had ceased to exist upon the dismissal of the employees. He therefore submitted that the applicants' employment contracts could not be revived as full-time employment contracts. I do not agree that the positions in which the applicants were employed no longer exist. They were employed as cashiers and there has been no suggestion that the number of cashiers has decreased. It is the conditions of employment that have changed and not the positions themselves. Cashier positions do still exist within various Woolworths stores, and have not become redundant nor have they ceased to exist. If this was the position, Woolworths would not be able to be fully functional and operational as it is. As this Court said in *Equity Aviation*, reinstating an employee means restoring the employee to the position in which he or she was employed immediately before dismissal.[22] This means reviving the employee's contract of employment that had been terminated previously.

[22] *Equity Aviation* above n 19 at para 36.

[53] What raises the question whether reinstatement would be competent or appropriate in this case is not only the fact that the respondent had decided that all its cashiers should work flexi-time and the overwhelming majority of the cashiers had accepted this position but also the fact that, before the applicants were dismissed, they had put forward to the respondent a proposal which entailed that they were prepared to work flexi-time. It is necessary to consider what the effect is of that proposal to the question whether reinstatement is competent or appropriate.

[54] One view would be that, since the applicants had already accepted the notion of working flexi-time when they were dismissed, if they are to go back and work for respondent, they have to go back on the basis that they will work flexi-time and not on the basis that they will work on a full-time basis. Another view would be that a reinstatement order cannot require the applicants to work flexi-time because the contracts that governed their employment when they were dismissed were based on them working on a full-time basis. In other words, you cannot restore a flexi-time contract of employment which did not exist between each applicant and the respondent. If you are going to reinstate, you can only reinstate the full-time contract of employment that governed the employment relationship between the applicants and respondent at the time of dismissal.

[55] The applicants' counsel submitted that the applicants remained bound by their last proposal to the respondent. He submitted that consequently any order as may be made should take account of that last proposal. That counsel for the applicants took this attitude is understandable. However, I do not think that it is correct that in law the applicants remain bound by their last proposal to the respondent.[23] I say this because the respondent rejected their proposal. They cannot be bound by a proposal that was

[23] During oral argument counsel for the applicants conceded that there was no agreement between the respondent and the union based on the applicants' last proposal as that proposal was never accepted by the respondent.

rejected. Their dismissal followed upon the respondent's rejection of their proposal. In any event, that proposal was made a number of years ago.

[56] Although the respondent knows now that it had misunderstood the applicants' last proposal, there is nothing on record that suggests that it has, in the meantime, accepted that proposal as it was. They may have wanted to discuss it further with the applicants. Accordingly, we do not know what agreement the two sides could have ultimately agreed upon. That means that we do not know the terms and conditions under which the applicants would have continued to work for the respondent if they had never been dismissed. In these circumstances it seems to me that we should revive the contracts of employment which existed between the applicants and the respondent at the time of dismissal on the basis that as soon as possible after this judgment has been handed down the parties may resume the consultation process which ended when the dismissal took place and the applicants may then revive their proposal or make another proposal aimed at the parties reaching an agreement on the issue of them working flexi-time. Accordingly, Woolworths has not shown that reinstatement is not reasonably practicable.

Retrospectivity of reinstatement

[57] Section 193(1)(a) of the LRA confers a discretion on an arbitrator or the Labour Court to order reinstatement with retrospective effect. Thus, a court may order reinstatement effective from any previous date provided that this a date is not earlier than the actual date of dismissal.[24] The dismissal was substantively unfair. That means that there was no fair reason for the dismissal of the applicants. Additionally, this was a dismissal for operational requirements and not a dismissal for misconduct. It is a so called no-fault dismissal. There was no fault on the part of the applicants which brought about their dismissal. On the contrary, it was the employer who was at fault in dismissing them. It made an error and misunderstood the

[24] Section 193(1)(a) of the LRA. See also *South African Commercial Catering & Allied Workers Union v Primserv ABC Recruitment (Pty) Ltd t/a Primserv Out Sourcing Incorporated* (2006) 27 ILJ 2162 (LC).

applicants' last proposal. There is no suggestion that the applicants have in any way been dilatory in taking steps to pursue the litigation to vindicate their rights. Therefore, the Labour Court was correct in ordering reinstatement with retrospective effect to the date of dismissal.

[58] Once the order of the Labour Appeal Court has been set aside and has been replaced with an order dismissing Woolworths' appeal against the order of the Labour Court, the order of the Labour Court will automatically be restored. What we emphasise is that, after this judgment, the parties will be free to resume their discussions aimed at reaching agreement on the working of flexi-time by the applicants.

Conditional cross-appeal

[59] For the same reasons that the applicants' appeal must succeed, so must Woolworths' cross-appeal fail.

Costs

[60] The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

> "The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless those requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those

parties to bring to the Labour Court and this court frivolous cases that should not be brought to court."[25]

[61] In accordance with the requirement of law and fairness, no costs order is warranted in this matter.

Order

[62] The following order is made:

1. Condonation is granted for the late filing of the application for leave to appeal.
2. Leave to appeal is granted.
3. The applicants' appeal is upheld.
4. Paragraph 2 of the order of the Labour Appeal Court is set aside and replaced with the following:
   "4.1 The appeal is dismissed.
   4.2 There is no order as to costs."
5. The respondent's conditional cross-appeal is dismissed.
6. No order as to costs is made in relation to the proceedings in this Court.

[25] *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) (*Dorkin*) at para 19, as approved by this Court in *Sibongile Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (6) BCLR 686 (CC); (2018) 39 ILJ at para 24.

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