IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 56/2016

In the appeal between:

WOOLWORTHS (PTY) LTD **Appellant**

and

SACCAWU **First respondent**

C MOENG AND OTHERS **Second to further respondents**

Heard: **07 March 2017**

Delivered: **19 September 2017**

Summary: Dismissal for operational requirements in terms of section 189A of the LRA – employer engaged in costs saving measures by converting full time employees to flexi time workers resulting in substantial reduction in wages, benefits and related conditions of employment previously enjoyed by the employees working on full time basis. Employer retrenching full time employees who refused conversion - distinction between procedural unfairness and substantive unfairness restated – purpose of section 189A(13) of the LRA concerning unfair procedure is to prevent unfair retrenchment as soon as the

procedural flaws surface and the appropriate order is that of reinstatement until the correct procedure is followed -

Held that the distinction between procedural and substantive fairness lies close together. It is well known that procedural unfairness may result in substantive unfairness. The appropriate remedy would have been to reinstate the employees pending further consultation on the last mentioned proposal as clarified in evidence. The reinstatement order made by the Court *a quo* was unconditional. This would not be competent as regards the complaint of procedural unfairness. A reinstatement order granted because of the procedural unfairness that is subject to s189A retrenchment may only endure until the employer has complied with a fair procedure.

Substantive unfairness – court finding that it was common cause that the dismissal was to give effect to the requirement based on the employer's economic, technological, structural or similar needs. Held that the dismissal of a full-time employee who would not work flexi-time would be a dismissal to give effect to a requirement based on the employer's economic, technological, structural or similar needs. But this element no longer applied as the employees were prepared to work flexi-time but not on all the terms that would be applicable to flexi-timers. Court finding however that dismissal was substantively unfair because employer did not consider alternatives to dismissal – Court finding that reinstatement not practical as the full time employees were redundant- Appeal partly upheld and partly dismissed –

Labour Court's judgment is substituted with an order of compensation.

Coram: Tlaletsi DJP, Landman JA and Phatshoane AJA

Neutral citation: **Woolworths (Pty) Ltd v SACCAWU obo Moeng and Others** (LAC JA56/201

JUDGMENT

THE COURT

[1] Woolworths (Pty) Ltd, the appellant, retrenched a number of employees in terms of s189A of the Labour Relations Act, 66 of 1995 ("the LRA"). SACCAWU, on behalf of 44 of its members (the first and second to further respondents) referred a dispute concerning their alleged unfair dismissal to the Labour Court. Nkutha-Nkontwana AJ found in a judgment dated 04 April 2016 that the dismissals were substantively and procedurally unfair and ordered their reinstatement. The appeal is with leave of the Court *a quo*.

Outline of facts

[2] Woolworths is a well-known South African retail store. Until 2002, Woolworths employed its employees on a full-time basis. These employees ("the full-timers")[1] 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.

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

[4] Woolworths decided that in order to cater for the current market, 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 convert to flexi-timers. It did not invite the union to participate in this

[1] The Full-timers comprised these types of employees: full-timers; part-timers; key-timers; and rollers. They all worked within Woolworths's chain of retail stores.

phase. Certain inducements were offered to the full-timers for the conversion. All of the full-timers save for 144 employees opted for early retirement, voluntary severance or agreed to convert to flexi-timers.

[5] As Woolworths employed more than the number specified in s189A(1) of the LRA, it was obliged to use the process specified by the section to effect the retrenchments. Woolworths gave the prescribed Notice of termination of employment in terms of s198A(2)(a) as regards the remaining 144 full-timers. It also engaged in a consultation process including one facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of s189A(3) of the LRA with SACCAWU representing some of its members who were full-timers. SACCAWU was entitled in terms of s189A(2)(b) to strike on the issue but did not.

[6] 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 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. 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 and 11% reduction in wages. Woolworths did not understand this to be a different proposal and rejected it.

[7] Woolworths was entitled to and did give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act, 75 of 1997. It retrenched 92 full-timers. On 18 December 2012, SACCAWU, on behalf of 44 of these full-timers, launched an application in terms

of s189A(13) of the LRA in the Labour Court.[2] On 30 November 2012, in terms of section 191(11) of the LRA,[3] it referred a dispute concerning whether there was a fair reason for the dismissal to the Labour Court for adjudication.

[8] 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.

Judgment of the Court *a quo*

[9] The Court *a quo* in its judgment:

(a) Followed *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*[4] and *SA Transport & Allied Workers Union v Old Mutual Life Assurance Company South Africa Ltd and Another*[5] and concluded at para 20:

'In a nutshell, in determining the fairness on the dismissals for operational requirements, this court must interrogate, objectively, whether the three preconditions in terms section 189A(19) of the LRA were met.'

(b) Outlined the issues that required determination on substantive fairness as articulated by SACCAWU and the 44 full-timers as follows:

'21.1 Whether the dismissal of the affected employees was for a fair reason or operationally justifiable on rational grounds, especially given the fact that they were willing to work flexible arrangements without loss of wages, benefits and

[2] 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-
(a) compelling the employer to comply with a fair procedure;
(b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;
(c) directing the employer to reinstate an *employee* until it has complied with a fair procedure;
(d) make an award of compensation, if an order in terms of paragraphs *(a)* to *(c)* is not appropriate.

[3] Section 191(11) provides for the referral of the dispute to the Labour Court for adjudication within a period of 90 days after the Bargaining Council or the Commission for Conciliation, Mediation and Arbitration (CCMA) had certified that the dispute remains unresolved after conciliation.

[4] (2001) 22 ILJ 2264 (LAC) at 2269-2270 para 19.

[5] (2005) 26 ILJ 293 (LC) at 320-321 para 85.

other conditions of employment as proposed in accordance with Woolworths' first option proposal;

21.2 Whether the insistence by Woolworths to downgrade the affected employees' wages and benefits was rational, necessary or fair; and given the experience, length of service and age of the second to further Applicants;

21.3 Whether there was a financial necessity for Woolworths to reduce the affected employees' wages and benefits to the extent it had proposed;

21.4 Whether Woolworths' operational requirements could have been met through other reasonable options such as natural attrition and migrating employees to the flexi-timer arrangement upon similar or comparable wages and benefits as when they were full-timers;

21.5 Whether there were rational reasons for the timing of the dismissals and the urgency that accompanied the consultation process;

21.6 Whether Woolworths' rejection of the SACCAWU's alternatives was rational or valid;

21.7 Whether the conversion of key-timer employees to flexi-40 employees was rational or fair; and

21.8 Whether there was proper consideration of alternatives.'

(c) Noted that it was common cause that SACCAWU and the 44 full-timers accepted that Woolworths needed to adapt the full-timers' contracts in line with its current trading patterns and trends and did not have any difficulties with the conversion to the flexi-timer arrangement provided that their wages and benefits remain the same.

(d) Considered that Woolworths was entitled to address the issues of equality in order to anticipate the impending equal pay amendments at that time, which have since come into effect but said: "*However, I am not certain as to what canons were applied to justify Woolworths' decision to use equity*

as one of its grounds for operational requirements." It concluded, with reference to the LRA and the amendments to the Employment Equity Act, 55 of 1998 (EEA), *"that the foul that Woolworths hoped to anticipate was illusory".* The pay inequity that arose as a result of implementing flexi-time contracts could have been easily justified in terms of Regulation 7(1)(a) of the EEA since the full-timers had longer service period than the flexi-timers. Alternatively, Regulation 7(1)(d)[6] could have been a perfect justification because, in view of the restructuring process and grading system, the full-timers had to be demoted, so to say. Even if there are instances where the differentiation is found not to be justifiable, employers would have to develop plans to address inequalities identified and, pertinently, without reducing the pay or remuneration of affected employees, in order to bring about pay equity.

(e) After referring to *Dudley v City of Cape Town and Another*[7] concerning unfair discrimination disputes it held that:

> 'Accordingly, it is incompetent for an employer to seek to protect an individual right not to be unfairly discriminated through an operational requirements process and thereby circumventing its obligation under Chapter III of the EEA to develop a plan to deal progressively with any unfair pay differentiation. Woolworths, as a designated employer, ought to have dealt with pay inequity issues in accordance with chapter III of the EEA.'

(f) Aligned itself with the sentiments expressed in *NUM and Another v Black Mountain Mining (Pty) Ltd*[8] where this Court held:

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[6] Regulations 7(1)(a)(d) of the EEA stipulates:

'Factors justifying differentiation in terms and conditions of employment

(1) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

(a) the individuals' respective seniority or length of service;

(c) ……..

(d) where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;'

[7] (2008) 29 ILJ 2685 (LAC).

'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(i)] 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 our 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.'

(g) Noted that Woolworths' Notice in terms s189(3) set out only one reason for the retrenchments, this being that *'The company needs to be in a position to employ employees who are able to be used on a flexible basis'*. The Court was inclined to accept that Woolworths, as an afterthought, cynically sought to add further reasons of equity and costs efficiency in order to justify the retrenchments because the affected employees were willing to move to flexi-time contracts, of course without loss of benefits.

(h) Found as regards cost efficiency operational requirement that "*Woolworths might have made huge savings consequent to the implementation of flexi-time contracts, those savings are inextricably linked to the drastic reduction of full-timers' pay and changes to their conditions of employment. As such, since it is clear that pay equity ground was untenable, the cost saving ground must also suffer the same demise*."

(i) Found that even if costs efficiency was a standalone operational requirement, Woolworths did not produce any evidence pertaining to the costs associated with the employment of full-timers, total amount of

[8] (CA22/2012) [2014] ZALAC 78 (10 December 2014) at para 37.

targeted costs reduction, and whether such a target had been met. Absent this information, it held, it was not possible for the Court to decide if the decision to retrench was not arbitrary or capricious or a rational or reasonable one.

(j) Found as regards proper consideration of alternatives, that Woolworths conceded that it did not consider alternatives to the retrenchments such as natural attrition and/or a wage freeze for full-timers. However, it noted that Ms Coleen Slabbert, Woolworths' employee relations manager, was adamant that natural attrition could not have addressed the issue of pay equity and anomalies since it occurred at a rate of 6-8% per annum.

(k) Held that nothing turned on Mr Noel Mbongwe's (witness called by SACCAWU and the 44 full-timers) concession that the issue of natural attrition was never raised again after SACCAWU's letter of 07 September 2012. The Court held that the *onus* was on Woolworths to prove that it had adequately considered all alternatives to retrenchment, *"a question that should arise not only at the commencement of the consultation but continually throughout the process as considerations will naturally change as the process plays itself out*."

(l) Referred to *SA Clothing & Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings*[9] that held:

'….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…'

(m) Held that the average age of the affected employees was 50 years, with majority being between 45 and 59. They had been in Woolworths' employ for 20 years on average, ranging between 12 and 32 years. Their benefits were acquired over many years and received regular increase over the

[9] (1998) 19 ILJ 1451 (LAC).

years. Most of them were about to reach the retirement age and the prospects of finding other jobs were almost non-existent. The Court remarked that natural attrition would have been an ideal alternative to retrenchments, regard being had to its conclusion that any differentiation in pay or conditions of employment could have been justified in terms of the EEA and/or LRA alternatively dealt with in terms of the Chapter III of the EEA.

(n) Found that Woolworths failed to prove, on a balance of probabilities, that the dismissal of the affected employees was operationally justifiable. By the same token, Woolworths failed to appropriately consider the alternatives to dismissal.

(o) Found, for reasons that are recorded in the judgment that Woolworths failed to meaningfully consult with SACCAWU and, accordingly, that the dismissal of the 44 full-timers was procedurally unfair.

The issues on appeal

[10] This appeal does not concern the alleged automatically unfair dismissal of the respondents. This aspect was not argued in the Court *a quo*. SACCAWU and the 44 full-timers, however, reserved their right to do so in the event of a further appeal against the judgment of this Court.

[11] The appeal is confined to the findings of the Court *a quo* in respect of the procedural and substantive fairness of the retrenchment of the full-timers which was effected in terms of s189A of the LRA. Section 189A was inserted in the LRA with effect from 01 August 2002 by Act, 12 of 2002, and repealed with effect from 01 January 2015 by the Labour Relations Amendment Act, 6 of 2014.

[12] We deal first with the issue of procedural fairness of the dismissal before considering the findings on substantive fairness. But before doing so, we make the following observations. Although the oral evidence in the application regarding procedural unfairness was heard simultaneously with the evidence

adduced during the trial on the claim for substantive unfairness, it must be borne in mind that these are substantially two separate legal processes. As adumbrated earlier, s189A(13) provides that if an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for relief and the Court may make an appropriate order including an order:

(a) compelling the employer to comply with a fair procedure;

(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;

(c) directing the employer to reinstate an employee until it has complied with a fair procedure;

(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.[10]

[13] The application for relief in terms of s189A(13) must be brought no later than 30 days after the employer has given notice to terminate the employees' services or, if notice is not given, the date on which the employees are dismissed. The Labour Court may, on good cause shown condone a failure to comply with the time limit. Importantly, the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).

The appeal: procedural fairness

[14] The Court *a quo* found that Woolworths failed to meaningfully consult with SACCAWU and, accordingly, that the dismissal of the 44 full-timers was procedurally unfair. The Court *a quo* also found that the dismissals were

[10] An award of compensation made to an employee in terms of section 189A(14) must comply with section 194 of the LRA.

substantively unfair. Woolworths was ordered to reinstate the 44 full-timers retrospectively from the date of their dismissal without loss of pay.

[15] In *National Union of Mineworkers v Anglo American Platinum Ltd and Others,*[11] Van Niekerk J observed that section 189A(13) contemplates "a degree of judicial management into a contested consultation process".[12] This ought to be done on an urgent basis.

[16] Equally relevant is what Murphy AJ said in *NUMSA and Others v SA Five Engineering and Others*:[13]

> 'Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.'[14]

[17] In *Insurance & Banking Staff Association and Another v Old Mutual Services & Technology Administration and Another,*[15] Pillay J, after referring to the explanatory memorandum accompanying the 2002 Bill to amend the LRA, remarked:

> 'The overriding consideration under s 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible.... So, the key elements of s 189A are: early expedited, effective intervention and job retention in mass dismissals.'[16]

[11] (2014) 35 ILJ 1024 (LC); [2013] 12 BLLR 1253 (LC).
[12] At para 19.
[13] [2005] 1 BLLR 53 (LC).
[14] At para 10.
[15] (2006) 27 ILJ 1026 (LC).
[16] At para 9.

[18] The reinstatement order made by the Court *a quo* was unconditional. This would not be competent as regards the complaint of procedural unfairness. A reinstatement order granted because of the procedural unfairness of a s189A retrenchment may only endure until the employer has complied with a fair procedure. But of course it was competent to order reinstatement if the dismissals were substantively unfair. The difficulty is that the Court *a quo* made no distinction between the remedy for procedural unfairness and the remedy for substantive unfairness. We revert to this aspect.

[19] We are not inclined to accept that Woolworths contemplated that every full-timer would accept the voluntary offers put to them and that no further action such as retrenchment would be needed. But where the consultation process took at least 60 days and the dismissed employees refused the offers; and where there is little evidence of any prejudice to them; we are satisfied that this failure was not one that made the procedure followed, as facilitated by two commissioners, procedurally unfair.

[20] The Court *a quo* considered Woolworth's misunderstanding of SACCAWU's final proposal as a procedural fairness issue saying:

> '[68] Clearly, Woolworths believed that the three options that it had offered during the voluntary phase were reasonable, hence it could not budge. Instead, it urged SACCAWU to convince its members to accept one of those options as they were beneficial to them than the statutory severance pay. This was the attitude displayed by Woolworths throughout the consultation sessions. As a result, Woolworths never bothered to interrogate the last alternative proposal by SACCAWU as contained in its letter dated 30 October 2012. Slabbert conceded that Woolworths misunderstood same.'

[21] Woolworth's misunderstanding is very serious in the whole scheme of events in that a thorough scrutiny of SACCAWU's offer would have assisted in obviating dismissal of the following six full-timers (Mr Bongani Ndaba - Applicant 7 in the Court *a quo*, Ms Pamela Visagie - Applicant 13, Ms Irene Malemela - Applicant

20, Mr Saul Moloisane - Applicant 33; Ms Elizabeth Nkgapele - Applicant 34, and Ms Sharon Adams - Applicant 39) who clearly stood to benefit from converting to flexi-timer contract.

[22] The distinction between procedural and substantive fairness lies close together. It is well known that procedural unfairness may result in substantive unfairness. The appropriate remedy would have been to reinstate the employees pending further consultation on the last mentioned proposal as clarified in evidence. This was not done. But the Court *a quo'*s findings may well be relevant to the substantive fairness of the dismissals of applicants 7, 13, 20, 33, 34, and 39 and the others.

[23] It was probably an issue related to substantive fairness of the dismissal to the extent that the Court *a quo* took the view that the termination of the affected employees' services was a *fait accompli* and that Woolworths' conduct during the s189A phase was consistent with its decision to dismiss the 44 full-timers. This must then be evaluated against the two concessions made: Firstly, the need to restructure the business. Secondly, that the affected employees would work flexi-time. The only substantive issue was whether it was fair to dismiss the full-time employees who would work flexi-time but only at full-time rates save for the concession in the union's final proposal.

[24] The Court *a quo's* finding, based on the letter of termination that was sent to Madikela, that by the time the parties met on 03 November 2012, Woolworths had already made up its mind to terminate the affected employees, which was dealt with as a procedural issue, meant that the consultation process was not exhausted. Therefore, the reinstatement order pending further consultation may have been appropriate if the substratum on which it was based was sound. However, as adumbrated earlier, the reinstatement of the employees was not made conditional. There was nothing which precluded Woolworths, who was dealing with the issue on a national basis, from having a contingency plan in

place when the consultation process was nearing its completion. It is clear that the letter was sent prematurely by a supervisor.

[25] The final issue concerning procedural fairness relates to Woolworth's failure to disclose information that the Court *a quo* found was relevant to the process of determining the appropriate and fair terms and conditions of employment for the affected employees. Where one consulting party is kept in the dark about matters relevant to the issue at hand it will be procedurally unfair.

[26] When a judgment is granted in respect of the substantive fairness of the s189A retrenchment an order granting relief for procedural fairness is no longer competent. The fact that the parties may have agreed to try both issues simultaneously and the Labour Court sanctioned it is of no legal consequence.

The appeal: substantive unfairness

[27] The facts that are relevant to the issue of substantive fairness are relatively narrow. At the conclusion of the trial, it had become common cause that:

(a) Woolworths was justified in seeking to convert its full-time employees to employment based on flex-time.

(b) Woolworths was justified in doing so in order to address the following goals:

(i) the new market realities, particularly customers' preferences for shopping at other hours than in the past, that made working flexi-time imperative;

(ii) the equity considerations (equal pay for equal work and work of equal value) being the fact that most of the full-time workers were earning more than their flexi-time comparators;

(iii) a uniform pay grade consisting of five bands;

(iv) saving of costs on Woolworths' labour bill.

(c) The conversion of full-time workers to flexi-time workers would generally result in lower wages. Some full-time workers would be paid less than what they earned as full-time workers to varying degrees, depending on the individuals concerned, and some full-time workers would earn more than they had previously earned.

(d) All full-time workers would be entitled to significantly less benefits than those they had enjoyed before conversion, to the extent that some benefits such as study leave would fall away whilst other benefits would change such as the medical aid.

(e) In the event that all the 590 full-time workers would convert to flexi-time work (with or without early retirement and voluntary severance) Woolworths would save R24 million per year. The saving in respect of the respondents would appreciably be less than this.

(f) The situation in which the full-time workers found themselves as regards remuneration and benefits was as result of Woolworth's allocation of pay increases and performance awards from time to time in the past.

(g) Woolworths appreciated that some full-time workers would suffer a drastic diminution in the take-home pay and that all full-time workers would experience less advantageous benefits, should they convert to flexi-time. In order to ameliorate this situation, Woolworths, during the course of the consultation period, arrived at a position where it would consider paying each full-time worker who converted to flexi-time an amount, initially R60 000 later raised to R70 000, to compensate them for the conversion.

(h) Leaving aside nuances of how the compensation could be accessed compensation in an amount of R70 000 would also be available to each full-timer targeted by the s189A process.

[28] The summary of facts is sufficient for most purposes but also adequately convey the magnitude of the decrease in wages and benefits for some of the full time employees and the extent of the new working conditions for all the affected employees. It is necessary to provide further details.

Salaries

[29] The wage component of the remuneration for 38 of the 44 employees would be reduced. The extent of this reduction is set out in the schedule in volume 15, at page 1432. By way of example, Kate Moloi employee 52 on the list, would suffer a 54% drop in wages. A further 14 employees would face a reduction in wages of between 39% and 52%. However, 6 of the 44 employees would receive higher wages.

[30] Adv Kennedy SC, for SACCAWU and the 44 full-timers, submits that these employees typically have budget commitments that they could not simply drop, such as home loans, school fees, vehicle and loans. He also points out that the evidence showed that these employees had been employed by Woolworths for a period ranging between 12 and 32 years. They had received regular increases, even while Woolworths' management was busy with its own internal planning which ultimately led to the retrenchments. They were not informed what was being planned for them. Woolworths simply continued to do what it had been doing and increased the extent of the disparity between the remuneration levels of these employees and the flexi-timers.

[31] The employees were given no warning that the salary levels would be reduced so suddenly. The workers had a reasonable expectation that they would be paid what they were earning together with the increases. They had budgeted, took on financial commitments, and planned for the retirement based on their respective ages, working life and pension benefits. The youngest of these employees was 38 years old and the oldest was 59 at the time of the retrenchment. The age spread of the 44 employees is reflected as follows:

- 7 were in the bracket 38 to 44 years;
- 15 were in the bracket 45 to 49 years;
- 17 were in the bracket 51 to 54 years; and
- 9 were in the bracket 55 to 59 years.

[32] Mr Kennedy further submitted that typically employees in their fifties or even mid to late forties would be settled in their current employment and do not engage in job hopping as often happened in the retail sector. Those employees of an average age of 50 would struggle to find other employment. Mr Kennedy submitted that the employees had secured terms and conditions of employment in the form of salaries and other benefits that had been achieved and maintained and increased over many years in terms of their contracts of employment. These entrenched contractual rights represent an important element in the consideration of fairness.

Benefits

[33] The benefits the full-time employees enjoyed would decrease on conversion to flexi-time. Their benefits on retirement would be substantially less than they would have been because they would be calculated on a lower income. There would be a change to the medical benefits in the sense that the employees would be restricted to consulting with a fixed panel of doctors. Maternity benefits would be reduced from 11 months to six months. This would affect a minority of the female employees concerned. Ante-natal leave, which consisted of one-day leave per month until the commencement of maternity leave would be abolished. Post-natal leave of three days for six months would also be abolished as would compassionate leave of five or six days per incident. Paternity leave of five or six days per incident would also be abolished. Moving leave of one day per move would be abolished. The study leave of 10 days per annum would fall away.

Working conditions

[34] The full-timers worked Monday to Friday from 08:00 to 17:00. They seldom worked on Saturdays, but if they did so, it would attract overtime pay at the applicable rates. The full-timers were not required to work on Sundays. The full-timers would be required to work on the flexi-40 arrangement. Full-timers who were to become flexi-timers would work a total of 40 hours per week. Their working day would terminate at 19:00. They would work every Saturday and three out of four Sundays. No overtime would be paid. Mr Kennedy submitted that these changes would have a dramatic effect not only on the employees' daily and weekly routines, but also as regards their lifestyles and it would impact on their families. The employees would not, he submitted, have any real time to spend with their families over most of the weekends. On most weekdays, they would work until late into the early evening. This would leave them with little time to spend with their children and partners.

What is substantive fairness in the context of s189A dismissal?

[35] The question whether the dismissals of the 44 full-timers were substantively fair must be answered within the parameters set by s189A. It is the general consensus of writers on this subject that the test for the fairness of a retrenchment where s189A applies differs from that applicable to retrenchments to which the section does not apply.[17] We agree with this view. Section 189A(19)[18] which is worded in peremptory terms provided that in any dispute referred to the Labour Court in terms of s191(5)(b)(ii), concerning the dismissal of this category of employees, the Labour Court must find that the employee was dismissed for a fair reason if four grounds are satisfied namely:

(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;

[17] See South African Labour Law, Jutastat e-publications, Clive Thompson and Paul Benjamin at RS 66, 2016 AA1-p518 under "**The broad section 189A formula"** where the following is said: "Larger-scale retrenchments are governed by both sections, with s 189A representing the extra and commanding layer. Smaller-scale retrenchments are governed by s189 only, with a necessarily arbitrary set of numbers determining which workplaces are to be governed by which bundle of rights and obligations. Different consultation processes with different times limits apply, **and the test for fairness varies as well**."

[18] Section 198A(19) was repealed by s33 *(b)* of the Labour Relations Amendment Act, 6 of 2014.

(b) the dismissal was operationally justifiable on rational grounds;

(c) there was a proper consideration of alternatives; and

(d) selection criteria were fair and objective.

It is trite that the *onus* of proving this rests upon the employer.[19]

[36] In *NUM and Another v Black Mountain Mining (Pty) Ltd*[20] this Court held, with reference to section 189A(19)(b), that "a dismissal can only be operationally justifiable on rationale grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons." Adv Myburgh SC, for Woolworths, suggested that this test should not be followed. He argued that insofar as the Court in *Black Mountain Mining* found further that "*the deferential approach is no longer part of our law"* and that retrenchment "*must be a measure of last resort*" or "*the only reasonable option under the circumstances"*, it is based on case law that does not deal with section 189A(19)(b); does not accord with the plain language of section 189A(19(b); and is at odds with the origin of the phrase "*operationally and commercially justifiable on rational ground*" as propounded in *SA Clothing & Textile Workers Union & others v Discreto - A Division of Trump & Springbok Holdings*[21]. There is something to be said for the proposition that the Court in *Black Mountain Mining* possibly intruded more on the jurisprudence concerning other retrenchments into the sphere of section 189A than it should have done. However, in view of our finding, it is unnecessary for purposes of this appeal to revisit that judgment even though we take the view that the passing of a moral judgment has been supplanted by what is in effect a deeming provision. If the Labour Court finds that the elements listed in section 189A(19) (a), (b), (c) and (d) are satisfied, it follows that the employee was dismissed for a fair reason.

[19] See section 192 of the LRA.

[20] (CA22/2012) [2014] ZALAC 78 (10 December 2014) (*Black Mountain* Mining).

[21] (1998) 19 *ILJ* 1451 (LAC) at 1454-1455 para 8. We refer to the *Discreto* exposition in para 40 of our judgment.

The purpose of the dismissals

[37] The first inquiry relates to the purpose of the dismissals. Was the purpose to give effect to a requirement based on the employer's economic, technological, structural or similar needs? The evidence showed and SACCAWU accepted that the reason for restructuring the workforce of the class of full-timers was to give effect to a requirement based on the employer's economic, technological, structural or similar needs; in particular, those identified above. It follows from this that the dismissal of a full-time employee who would not work flexi-time would be a dismissal to give effect to a requirement based on the employer's economic, technological, structural or similar needs. But this element no longer applied as the full-timers were prepared to work flexi-time but not on all the terms that would be applicable to flexi-timers.

[38] The Court *a quo* pointed out that in its Notice in terms of s189(3), Woolworths gave only one reason for the retrenchments, namely that: "*the company needs to be in a position to employ employees who are able to be used on a flexible basis"*. The Court *a quo* went on to find that "*therefore, Woolworths' attempt to add further reasons (equity and costs efficiency) in order to justify the retrenchments must be rejected since it was clearly an afterthought and a cynical attempt by Woolworths to extricate itself from its self-created predicament*".

[39] The Notice in terms of s189(3) read as a whole 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*." In our view, a fair reading of the notice identifies the need to work flexi-time because it mentions the benefits to be derived from this with regard to the costs and operational efficiencies of the business. The purpose of saving costs by insisting that all flexi-timers will enjoy the wages and benefits applicable to flexi-timers is identified clearly enough and constitutes an economic, structural or similar need. Equity considerations are probably inherent in the conversion to flexi-time wages and benefits but it was not made a purpose of the exercise.

Operationally justifiable

[40] The question, whether the dismissal was operationally justifiable on rational grounds was answered in the negative by the Court *a quo*. The phrase "the dismissal was operationally justifiable on rational grounds" is one that was used by this Court in its judgment in *SA Clothing & Textile Workers Union and Others v Discreto—A Division of Trump & Springbok Holdings*[22] where Froneman DJP (as he then was) held:

> '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 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.'[23]

[22] (1998) 19 ILJ 1451 (LAC) (*Discreto*)
[23] At para 8.

[41] Parliament is deemed to know the law so that when it uses words that have been employed by a Court this is generally an indication that the legislature intends to give it the same meeting.[24] Anton Roskam 'An Exploratory Look into Labour Market Regulation'[25] suggests that: "If the union refers a dispute about the substantive fairness of the retrenchments to the Labour Court, the test for substantive fairness is limited to the test set out in the *Discreto* case." That may well be provided the test in *Discreto* is confined to paragraph (b) of section 189A(19).

Proper consideration of alternatives

[42] The question, whether there was a proper consideration of alternatives, in the context where it is conceded that the employer was justified in restructuring its workforce, can only relate to alternatives to dismissal as there was no possibility of avoiding the restructuring. A proper consideration of alternatives is not necessarily linked to the alternatives that were raised by the employer or employee parties at the consultation but must be open to include the possibility that effect would be given to meritorious alternatives.

[43] Woolworths initially considered the following alternatives: maintaining the status *quo*, a voluntary offer (to convert to flexi 40 employment and voluntary retrenchment) made to the full-timers.

[44] SACCAWU approached the consultation on retrenchment on the basis that its members who were full-time workers of Woolworths would convert to flexi-time work, but maintained, initially, that the remuneration and benefits should remain the same. Its proposal mutated to one in which the full-time workers would accept an 11% reduction in remuneration while working flexi-time. SACCAWU pursued the consultation on a collective basis but the problem lied, as far as the

[24] Cf *Randfontein Estates Gold Mine Co v Minister of Finance* 1928 WLD 77.
[25] Development Policy Research Unit, DPRU Working Paper 07/116, January 2007 at ages 18-19 and 20.

wage component of remuneration is concerned, only with those who would earn a lesser wage.

[45] Woolworths did not understand that SACCAWU's last alternative proposal, set out in its letter of 30 October 2012, differed from its previous proposal regarding an alternative to avoid dismissal. When a proposal is misunderstood and therefore not explored it means that the employer has not shown that this alternative had been properly considered.

[46] It is clear that there was no possibility of a transfer to other full-time jobs. Early retirement was offered at the voluntary stage and was available during the retrenchment consultation although it would not have avoided the retrenchment but may have been an attractive option to a few of the full-timers. In view of the concession, the full-time posts were redundant which meant that the continued payment of wages and benefits at the full-time rates was not an alternative (theoretically, it could have been extracted by the duress of a strike). The same may be said about the continuation of payment of the wages save that overtime pay would be paid at the rates for flexi-timers. The continuation of payment of full-time rates until natural attrition took place would probably not be viable because the full-timers were unlikely to choose other employment and the normal rate of 6% attrition was low.

[47] The sudden decrease in take home pay, which was a major concern for the full-timers, would have had a severe financial impact on them. Woolworths appreciated this and was prepared to make available an amount of R70 000 (it is not clear whether this would be fully taxable) during the voluntary stage as a sweetener or inducement and at the stage of the possible retrenchment. In the course of the consultation process it may have retained this character but it would also have served as token compensation for the loss of the employees' full-time status and it could be regarded, in a sense, as an alternative to dismissal.

[48] The principle that compensation for the loss would be payable was established. It was on the table and the union could have pressed for more generous compensation as Woolworths would be making significant savings on its wage bill. Woolworths may have been reluctant to increase the amount of compensation and may have pointed to the fact that other full-timers had, during the voluntary process accepted the R70 000. But that was a separate process and the union was excluded. An increase in this amount was not explored and the union appears to have been agreeable to accept less compensation but of course this must be seen in the context of its related proposal.

[49] An alternative proposal that could have been considered would have been to have ring fenced the wages of the full-timers and to the extent that the law allowed this, to forgo wage increases until the corresponding flexi-time wage had risen, by sectoral determination increases or amendments and otherwise, to the level of the ring fenced wage.

[50] There could be many permutations of such an alternative and ways of funding it. For instance, the R70 000 could have remained or have been exchanged for the ring fenced option. Consideration could have been to accelerate the meeting of a ring fenced wage and an increasing flex-time wage, by gradually reducing the ring fenced wage. There is no way of knowing what the ring fenced alternative or inducement would have turned out had it been pursued but it is sufficient for purposes of this appeal to find that it was a reasonable alternative that was not considered.

Selection criteria

[51] The selection criteria were fair and objective because all the full-timers in the targeted category were identified without exception.

[52] It follows that the dismissal of the individual respondents was substantively unfair because Woolworths was unable to prove that it complied with section

189A(19)(c) of the LRA, put differently, it failed to show that it properly considered the alternatives.

The remedy

[53] The usual remedy for substantive unfairness is an order of reinstatement. This is the remedy which the Court *a quo* ordered. In this case, as already alluded to, the full-time posts have become redundant and the respondents have conceded this. The result is that reinstatement is not feasible. This leaves compensation. We are of the opinion that compensation of an amount equal to 12 months of the remuneration due to each of the 44 full-timers should have been ordered.

[54] In the result, the appeal should be dismissed in part and upheld in part and the order of the Court *a quo* should be replaced with an order providing that the application seeking relief in respect of the alleged unfair procedure is dismissed. The dismissal of the 44 full-timers is found to be substantively unfair. The 44 full-timers are awarded compensation in an amount equal to 12 months of the remuneration due to each of them.

Costs

[55] We are of the view that no order should be made as regards the costs of the appeal.

[56] The following order is made:

Order

1. The appeal is upheld in part and dismissed in part.

2. Paragraph 2 of the order of the Labour Court is set aside and replaced with the following:

'2.1. The application seeking relief in respect of the alleged unfair procedure is dismissed.

2.2. The dismissal of the second and further applicants is found to be substantively unfair.

2.3. The second to further applicants are awarded compensation in an amount equal to twelve months of the remuneration due to each of the applicants.'

3. There is no order as to the costs of the appeal.

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The Court

APPEARANCES:

FOR THE APPELLANT:	Adv A Myburgh SC
	Instructed by Mervyn Taback Inc
FOR THE RESPONDENTS:	Adv P kennedy SC
	Instructed by Haffegee Roskam Savage Attorneys