IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA25/18

NATIONAL UNION OF METAL METALWORKERS OF SOUTH AFRICA	**First Appellant**
THE INDIVIDUALS LISTED IN ANNEXURE "A"	**Second to further Appellants**

And

AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA PROPRIETARY LIMITED)	**First Respondent**
IMPERIAL DEDICATED CONTRACTS (A DIVISION OF IMPERIAL GROUP LTD)	**Second Respondent**

Heard: **07 May 2019**

Delivered: 13 June 2019

Summary: Claim for automatically unfair dismissal on the basis that the reason for the dismissal was the refusal by the employees to accept employer's demands in respect of change of conditions of employment in terms of section 187(1)(c) of the LRA – employer embarking on a restructuring in order to increase profitability – in the process of consultation parties agreeing regrading positions in order to save costs pending finalization on the structure – such consideration necessitating change of condition of employment – employees refused amendment of their terms and condition of employment and were dismissed – union contending that such dismissal automatically unfair – court reasoning that the question for determination is when operational requirements may justify the dismissal of employees who reject employer demands to amend terms and conditions of employment – judgment in *Fry's Metal* considered and distinguished –

Held that while employees cannot be dismissed for refusing to accept a demand, they can be dismissed if that refusal results in a more dominant or proximate operational necessity. This legislative scheme of collective bargaining is in line with the constitutional right of trade unions and employers to engage in collective bargaining in that any limitation of the power play is reasonable and justifiable in the balance struck between the strike weapon and the employer's power of implementation at impasse.

Further that The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal… The failure of the employees to accept the proposals engendered an insurmountable operational requirements problem that constituted a fair

reason for dismissal. Labour Court's judgment upheld and appeal dismissed with costs.

Coram: Coppin JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] This is an appeal against a judgment of the Labour Court (Moshoana J) dismissing the appellants' claim that the dismissal of the second and further appellants ("the employees") by the first respondent ("Aveng") in April 2015 was automatically unfair.

[2] The appellants, the National Union of Metalworkers of South Africa (NUMSA) and the employees contend that the dismissal was in contravention of section 187(1)(c) of the Labour Relations Act[1] ("the LRA") as amended by the Labour Relations Amendment Act of 2014[2] ("the LRAA"). Section 187(1)(c) provides that a dismissal is automatically unfair if the reason for the dismissal is "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer".

[3] The Labour Court also found that it would not be reasonably practicable to reinstate the employees into the employ of the second respondent ("Imperial Dedicated Contracts") which was joined as a respondent owing to the fact that it was the recipient of part of Aveng's business pursuant to a transfer in terms of section 197 of the LRA subsequent to the dismissal. The appellants also challenge this finding.

The facts

[1] Labour Relations Act No. 66 of 1995.
[2] Labour Relations Amendment Act 6 of 2014.

[4] Aveng is a large steel manufacturer comprised of a number of facilities with branches throughout the country. Its two biggest facilities are in Roodekop, Germiston and Alrode, where most of the employees were employed. The steel industry has been in decline since 2010. Aveng's sales volumes fell by 20% and its costs structure could not be sustained by its income. In 2014, there was a 60 000 tonne decrease in sales in a six-month period, which equated to a 20% decline overall. Before that, the market had become fragmented and steel merchants were competing for volume. Turnover is largely driven by government spending and there has been a reduction in investment in infrastructure projects by government. As a consequence, trading margins have dropped significantly.

[5] With the fall in its sales volumes and profitability, Aveng had to reduce costs to maintain its profit margins. In order to survive or remain viable, it needed to restructure and thus contemplated the possibility of retrenchments. It initiated a consultation process in terms of section 189A of the LRA by way of a notice dated 15 May 2014. The notice explained that the challenging economic environment had resulted in continuous low levels of activity in the market with an adverse effect on Aveng's performance. The situation required "realignment of the business to ensure sustainability". Aveng proposed to implement the following: i) a review of organisation structures; ii) redefinition of some of the job descriptions; iii) mothball under-utilised equipment; iv) the review of limited duration contract positions ("LDCs"); and v) a review of the employee transportation benefit at Roodekop and Alrode. The notice set out proposals regarding selection criteria, severance pay and possible assistance to selected employees and stated that Aveng's initial analysis indicated that around 400 jobs could be affected. As at 31 March 2014, Aveng employed 1784 permanent employees.

[6] Aveng recognised that a reduction of staff would not be sufficient to resolve its operational problems. It needed to achieve an improvement in productivity as well, *inter alia* by reviewing job descriptions to allow for the combining of certain functions. The historical situation at Aveng had introduced a rigid and costly division of labour in some areas, which could be modified to effect cost-

savings. Moreover, the job positions and job content actually performed at Aveng were not aligned with those in the applicable sectoral collective agreement ("the Main Agreement") of the Metal and Engineering Industries Bargaining Council ("MEIBC").

[7] Aveng accordingly performed an exercise in which it clustered jobs along lines similar to the provisions of the collective agreement. In a written proposal given to NUMSA on 16 August 2014, Aveng set out the current job titles at Aveng and grouped them for optimization into new titles. Thus, for example, the current Grade H jobs of general worker, labourer, conductor, truck assistant, packer and sling man were grouped under the title "General Handler". Likewise, the current Grade F jobs of crane operator and forklift driver were grouped under the title of "Lifting Equipment Operators". Similar groupings were proposed across the entire spectrum of job titles. By combining functions previously performed separately into a single job, Aveng would achieve significant cost savings - a packer, for instance, could be deployed to perform the functions of a general worker and so on.

[8] During the consultation process, Aveng offered voluntary severance packages to all permanent employees in an endeavour to mitigate the impact of the restructuring process on affected employees. Aveng received an excess number of applications for voluntary severance and the number of employees potentially affected by the restructuring was less than the number of applications for voluntary severance. Ultimately, 249 employees opted for voluntary severance and four were retrenched. Those who opted for voluntary severance were given notice of termination on 10 October 2014, and those who were retrenched received notice of termination on 7 November 2014.

[9] Part of Aveng's proposal was to review all limited duration contract positions - the LDCs. The LDCs were of different durations but typically were for three, six or 12 months and in some isolated incidents, for more than a year. Employees on LDCs occupied positions across the board, from general workers to skilled positions. As at 31 March 2015, there were 257 wage-earning LDCs. During the consultation, process it was agreed to lay off the

LDCs.

[10] After the voluntary severances and the retrenchment of the LDCs, there was no immediate need to retrench more employees. However, consultations continued in relation to the job descriptions.

[11] At a meeting on 11 September 2014, NUMSA proposed, as an alternative to Aveng's job description proposal, that a 5-grade structure be introduced. The Main Agreement has a 13-grade structure. However, it also gives parties the option to convert to a 5-grade structure. NUMSA's proposal entailed the clustering of positions and the collapsing of 13 existing grades into 5. NUMSA's proposal confirmed that it accepted the principle of job restructuring. Its motivation for a 5-grade structure was that it would allow multi-tasking, mobility between grades, and opportunities for worker training.

[12] Aveng maintains that NUMSA's 5-grade structure proposal was motivated also by the false belief that a 5-grade structure would result in higher wages for its members. NUMSA appeared not to appreciate that over time, the gap between remuneration paid to employees in the various grades at Aveng had narrowed with the consequence that the employees would not be better off under the 5-grade structure were it to be adopted.

[13] On 17 October 2014, the parties concluded a so-called "interim agreement" in terms of which consultation about job descriptions would continue while an interim structure with redesigned job descriptions would be implemented, pending consideration of the long-term viability of the proposed 5-grade job structure. It was envisaged that the consultations regarding the redesigned job descriptions would conclude by the end of February 2015. In the interim period, employees performing additional functions (previously performed by the employees whose employment had been terminated) would be paid an additional amount of 60 cents per hour.

[14] In early November 2014, the parties commenced negotiations in relation to the transport benefit referred to in the notice of 15 May 2014. The issue only affected employees employed at the Alrode and Roodekop branches. This consultation culminated in February 2015 with a collective agreement in which

the parties agreed to phase out the bus and taxi transport provided by the company to its Alrode and Roodekop employees and instead to pay a transport allowance of R650 per month to these employees.

[15] There were no consultations regarding the redesigned job descriptions and NUMSA's proposal for converting to a 5-grade system between October 2014 and February 2015. On 13 February 2015, NUMSA addressed an e-mail to Aveng in which it declared that its members were no longer willing to perform the additional duties as agreed in the interim agreement. The e-mail read:

> 'With reference to the above-mentioned matter, we hereby give notice that as of Monday the 16th February 2015 our members will no longer perform duties outside their contract of employment; and will also not perform any duties as per the arrangement we entered into in October 2014.
>
> We further draw your attention to the conditions that were attached to that arrangement that says this 60c arrangement would run for a period of 3 months starting from November 2014 up to the end of February 2015. The parties were to negotiate the issue of a 5 grade structure and that the 5 grade structure would be implemented at the beginning of March 2015. This has not been adhered to by yourselves.'

[16] Aveng was surprised by NUMSA's decision to terminate the interim agreement two weeks before it was due to expire. The consultations between October 2014 and February 2015 had focused on the transport issue. By 13 February 2015, the LDC workers and those accepting voluntary severance (approximately 500 workers) had left Aveng's employ and the employees had been working in the redesigned job descriptions since October performing the duties previously carried out by those workers. Premature termination of the interim agreement meant that from 16 February 2015 Aveng had no one to do the work which the 500 retrenched workers had hitherto performed.

[17] Aveng saw the termination of the interim agreement prematurely on short notice as a deliberate tactic to extract higher wages in the midst of restructuring consultations in which it was seeking to effect savings so as to be able to survive.

[18] The parties met to discuss the issue on 23 February 2015. At this meeting, Aveng informed NUMSA that it had conducted a feasibility analysis in relation to the introduction of a 5-grade structure and sought an extension of time within which to present this and committed to tabling a proposal by 10 March 2015 for possible implementation by 1 April 2015. NUMSA responded by making a demand for the increase of the 60c per hour provided in the interim agreement to R5.00 per hour.

[19] In a letter addressed to NUMSA dated 27 February 2015, Aveng pointed out that it had constantly engaged NUMSA on other issues arising from the restructuring undertaken since June 2014 and disputed that it was in breach of the interim agreement in any way. It added that the process of finalising the grade structure could only be concluded by way of further consultations.

[20] At a meeting on 3 March 2015, Aveng duly made a presentation on the 5-grade structure proposal setting out *inter alia* a "grade comparison" comparing the minimum wage rates payable under the Main Agreement in respect of the existing 13-grade structure with the minimum wage rate payable in respect of the equivalent positions in the 5-grade structure. The comparison revealed that the adoption of the 5-grade structure would not result in higher remuneration for the employees. NUMSA then demanded that Aveng provide it with a list of the pay rates of all its employees so it could work on averages and revert to Aveng on the issue.

[21] On 5 March 2015, it was agreed that employees would continue to perform their services in terms of the redesigned job descriptions and that those performing additional functions would be paid an additional R3.00 per hour. Aveng maintained that NUMSA and the employees acted in bad faith by holding Aveng to ransom in seeking a substantial wage increase during the consultation process aimed at restructuring the business.

[22] In a meeting held on 17 March 2015, NUMSA proposed that the minima in the 5-grade structure be, not as per the minimum wage contained in the Main Agreement, but the average between the actual minimum and maximum rates in a particular grade. Aveng rejected the proposal because increasing costs

further was not an option in attempting to achieve the efficiencies and cost reductions aimed for at the outset of the restructuring consultation.

[23] On 30 March 2015, Aveng addressed a letter to NUMSA informing it that the consultation process in terms of section 189 of the LRA, which commenced in March 2014, had now been exhausted and gave notice that Aveng would implement the new structure as per the redesigned job descriptions with effect from 10 April 2015. Paragraphs 9-14 of this letter encapsulate Aveng's position clearly. They read:

> '9. We have carefully considered your proposal and regret to advise that we are not in a position to accommodate you further, given the adverse economic conditions coupled with the continued inefficiencies experienced. Increasing our costs further is not an option which would result in us achieving the efficiencies and cost reductions required and aimed for at the outset of the restructuring consultation. Furthermore, it is evident you are now attempting to deal with issues regulated by the main agreement in contravention of section 37 thereof.
>
> 10. We, despite the facilitator having long exhausted the facilitated process, continued to engage you in the hope of avoiding retrenchments. This now no longer seems possible. In the circumstances we regret to advise that we have now exhausted consultation with you in terms of section 189 on the proposed restructuring (i.e. the implementation of the new proposed structure).
>
> 11. In the circumstances, we now therefore give you notice that we shall implement the new structure as per the job descriptions previously communicated with effect from 10 April 2015.
>
> 12. The jobs as they existed prior to engaging you in consultation (in which jobs your members were engaged) are now redundant. Accordingly, your members face retrenchment, as these positions will no longer exist in the new structure.
>
> 13. Given that your members and other employees have performed the duties as per the new job descriptions in terms of the interim arrangement agreed to between the parties, we shall afford them the opportunity to be engaged in the new positions at the rate prescribed by the main agreement of the MEIBC

> for performing work in such positions. This reasonable offer of alternative employment is a further *bona fide* effort on our part to avoid the contemplated retrenchments.
>
> 14 Should they reject it, they will unfortunately be retrenched. It is our view that the rejection of the alternative employment offered will result in retrenchees being disqualified for severance pay through the application of section 41 of the Basic Conditions of Employment Act 75 of 1997, as such rejection would be unreasonable in all the circumstances.'

[24] The letter added that the additional R3.00 per hour would no longer be applicable as from 11 April 2015 and requested the employees to indicate whether they wished to accept the reasonable offer of alternative employment by no later than 10 April 2015. Aveng also indicated that it was available for further consultation on 31 March 2015. The letter concluded by stating that notice of termination of employment of those not accepting the offer of alternative employment would be given on 13 April 2015.

[25] On 31 March 2015, the parties met again. Aveng refused to withdraw the letter of 30 March 2015. It, however, invited NUMSA to make a further proposal on the 5-grade structure, taking into account the question of costs, and indicated that it would be prepared to participate in a further consultation session on the 5-grade structure in those circumstances.

[26] The parties held another meeting on 16 April 2015. At this meeting, NUMSA expressed confusion about the correspondence sent by Aveng and alleged that it was made to believe that there would be no forced retrenchments and that the process initiated by the May 2014 notice in terms of section 189(3) of the LRA was finalised because certain employees had accepted voluntary severance packages. NUMSA also stated that further confusion was caused by a notice that was issued on 1 April 2015 under section 189 of the LRA. Other proposals were then made by NUMSA regarding the 5-grade structure.

[27] On 17 April 2015, Aveng addressed a further letter to NUMSA informing it that it would implement the redefined job descriptions with effect from 28 April 2015. The subtext of the letter confirmed Aveng's position that it remained

seized with the section 189 consultation process in relation to its operational requirements. The employees would in terms of the new arrangement be paid the rate they were paid before the interim agreement was concluded on 17 October 2014. The employees were required to indicate whether they accepted the new job descriptions or not, by no later than 21 April 2015. If the employees refused, they would be dismissed on 24 April 2015. However, an offer of alternative employment was made in the following terms:

> 'Given that your members and other employees have performed the duties as per the new job descriptions in terms of the interim arrangement agreed to between the parties; we shall afford them to the opportunity, to be engaged in the new positions at the rate prescribed by the Main Agreement of the MEIBC for performing work in such positions. This reasonable offer of alternative employment is a further *bona fide* effort on our part to avoid the contemplated retrenchments. Should they reject it, they will unfortunately be retrenched. It is our view that the rejection of the alternative employment offered, will result in retrenchees being disqualified for severance pay through the application of Section 41 of the Basic Conditions of Employment Act 75 of 1997, as such rejection would be unreasonable in all the circumstances."

[28] All the employees were presented with contracts of permanent employment together with redesigned job descriptions and asked to indicate whether they accepted or rejected the offers.

[29] The offers of alternative employment provided expressly that the employees would be paid in accordance with their actual rates of pay as at 1 February 2015. Accordingly, none of the employees would have been financially prejudiced by accepting the offer, all could have continued working for Aveng and no retrenchments would have been necessary. However, all the employees refused to accept the new terms and conditions of employment. On 24 April 2015, they were dismissed.

The decision of the Labour Court

[30] NUMSA contended before the Labour Court that the reason for the dismissal was the refusal by the employees to accept Aveng's demands in respect of the altered job descriptions and grade structure, matters of mutual interest,

and thus the dismissal was automatically unfair in terms of section 187(1)(c) of the LRA. Aveng denied that the dismissal was automatically unfair and maintained that the reason for dismissal was a fair reason based on its operational requirements.[3] It relied on various judicial pronouncements prior to the amendment of section 187(1)(c) of the LRA in support of its contention that despite the prohibition employers are permitted to dismiss employees and to employ in their place others who are prepared to work in accordance with terms and conditions of employment that are operationally required.

[31] The Labour Court concluded that the employees were dismissed not for refusing to accept any demand but for operational requirements reasons after rejecting the alternative to dismissal proposed by the employer during retrenchment consultations. The Labour Court held that the proposal to alter the job descriptions was an appropriate measure aimed at avoiding or minimising the number of dismissals and thus the dismissal was for a fair reason. Aveng was faced with operational difficulties and the only viable answer to its conundrum was to restructure and redesign the jobs. The court was satisfied that Aveng had done everything reasonably possible to save the jobs and had the employees continued working in line with the new job descriptions they would have remained in employment and suffered no adverse financial consequence. The learned judge relied on the following *dicta* of this court in *Mazista Tiles (Pty) Ltd v NUM and others:*[4]

> 'The appellant could still decide that its business required that the employees' terms and conditions of service be changed in order to be more profitable and more competitive. If the employees rejected its proposal on changing the terms and conditions…. then the appellant would be entitled to dismiss them for operational reasons.'

[32] While acknowledging that the issue had become academic in light of its finding that the dismissal was fair, the Labour Court held further that it would not have been reasonably practical for Imperial Dedicated Contracts to reinstate some of the employees had the dismissal been unfair.

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[3] As contemplated in section 188(1)(b) of the LRA.
[4] [2005] 3 BLLR 219 (LAC) para 57

The submissions of the parties in the appeal

[33] NUMSA submits that the Labour Court erred on the facts - most importantly, in finding that NUMSA demonstrated bad faith in seeking wage increases for its members in the context of the negotiations in relation to the interim agreement, the 5-grade structure and new job descriptions; as well as in prematurely terminating the interim agreement. Nothing turns on these issues or any of the other alleged factual errors.

[34] The decisive appeal ground is the submission that the Labour Court erred in its interpretation of section 187(1)(c) of the LRA (as amended). NUMSA contends that the Labour Court's interpretation is inconsistent with the scheme of Chapter VIII of the LRA, the plain meaning of the words used in section 187(1)(c) of the LRA (as amended), a purposive interpretation of the provision and the spirit, purport and objects of the Bill of Rights.[5]

[35] NUMSA submits that the wording of section 187(1)(c) of the LRA (as amended) makes it clear that the intention is to render automatically unfair *any* dismissal where the reason for the dismissal is the employees' refusal to accept a demand in relation to a matter of mutual interest; and there are no qualifications or exceptions in this regard. The amended prohibition envisages only three elements: a demand, a refusal and a dismissal. This implies that section 187(1)(c) (as amended) applies also in circumstances where the demand was motivated by the genuine operational requirements of the employer to change terms and conditions of employment. There is no provision akin to section 67(5) of the LRA, which applies to the dismissal of protected strikers for operational reasons, and there is no basis for reading into section 187(1)(c) of the LRA an entitlement to dismiss employees rejecting an employer's demands.

[36] Hence, NUMSA submits further that the judgments which gave meaning to section 187(1)(c) of the LRA prior to its amendment[6] are no longer relevant

[5] As required by section 39(2) of the Constitution

[6] *Fry's Metal (Pty) Ltd v National Union of Metalworkers of SA and Others* (2003) 24 ILJ 133 (LAC); *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); and *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA).

and applicable to the interpretation of the amended section 187(1)(c); and, thus, the Labour Court erred in relying on them to conclude that the impugned operational requirements dismissal did not fall foul of the prohibition.

[37] This interpretation, NUMSA maintains, better promotes the "spirit, purport and objects" of the Bill of Rights. Dismissing employees for rejecting a demand in relation to a matter of mutual interest limits their rights to collective bargaining and to strike. Interpreting section 187(1)(c) of the LRA (as amended) to not apply in circumstances where the employer's demand is motivated by or arises from its operational requirements is in effect the reading in of an implicit limitation on the fundamental rights to collective bargaining and to strike.

[38] Applying this interpretation to the facts, NUMSA avers that Aveng made a demand relating to a matter of mutual interest when it informed the employees that it intended to implement the new structure as per the redefined job descriptions; secondly that the employees refused to accept the demand; and thirdly the employees were dismissed because they refused to accept the demand, as evident from the letters of 30 March 2015 and 17 April 2015 in which it was stated that if the employees did not accept the demand (by 10 April 2015 and 21 April 2015 respectively) they would be dismissed. Moreover, 71 employees who accepted the demand were not dismissed. NUMSA, therefore, submits that the employees were dismissed because they refused to accept Aveng's demand and the Labour Court erred when it found that the dismissal was not automatically unfair under section 187(1)(c) of the LRA (as amended).

[39] Aveng submits that the definitive enquiry is for the court to establish whether the actual reason for the dismissal was either the prohibited reason contemplated in section 187(1)(c) of the LRA or the legitimate operational requirements of the employer. It argues that the wording of section 187(1)(c) of the LRA does not suggest that because a proposed change to terms and conditions is refused and a dismissal thereafter ensues, the reason for the dismissal is necessarily the refusal to accept the proposed change. The employer's operational requirements can be impacted upon by the refusal and hence the court is obliged to determine the true reason for dismissal.

[40] NUMSA's position, Aveng argued further, ignores the fact that collective bargaining can only yield changes to terms and conditions of employment if it culminates in an agreement. If no such agreement is reached, the employer would be left without any means of addressing its operational requirements and may never resort to retrenchment. This would lead to an impasse which, if it endured indefinitely, could jeopardise an employer's continued survival. The interpretation, if accepted, would undermine the employer's right to fair labour practices in section 23(1) of the Constitution by excluding recourse to retrenchments where legitimate operational requirements are in play.

[41] Moreover, Aveng points out that NUMSA's construction would create an anomaly. Employers engaging in section 189 consultations would be wary of proposing any changes to terms and conditions of employment which may address their operational requirements and – if accepted - save jobs, for fear of facing an automatically unfair dismissal claim if the changes are rejected and retrenchments ensue. This would undermine a fundamental purpose of section 189, which is to encourage meaningful engagement regarding all potentially viable alternatives to retrenchment. There inevitably will be scenarios where such alternatives include changes to terms and conditions of employment, and it is imperative that parties are able, in the section 189 context, to consult regarding these matters where consultation thereon may (if consensus is reached) have a retrenchment-avoidance effect.

[42] As regards NUMSA's claim that the reason for the dismissal of the employees was their refusal to accede to a demand by Aveng that they sign new contracts of employment and was not based on Aveng's operational requirements, Aveng asserts that no demand was in fact made. Instead, an alternative to retrenchment was offered by Aveng to the employees, which they had a choice to accept or not. In sum, Aveng submits that the employees' dismissals fell "within the zone occupied by permissible dismissals for operational requirements", and did not fall foul of section 187(1)(c) and thus the Labour Court did not err.

<u>The history of the amendment to section 187(1)(c) of the LRA</u>

[43] In order to appreciate the scope of the amendment to section 187(1)(c) of the LRA, it is necessary to canvass in some detail the history of the enactment and amendment of section 187(1)(c) of the LRA.

[44] The prohibition in section 187(1)(c) of the LRA was incorporated into our law for the first time with the enactment of the LRA in 1995. It forms part of the scheme of the LRA regulating lock-outs and must be understood and interpreted in that context. A lock-out is a legitimate form of economic pressure which is deployed by an employer with the object of compelling its employees to comply with its demands.

[45] Prior to the enactment of the LRA, the previous legislation, the Labour Relations Act 28 of 1956 ("the LRA of 1956"), permitted both termination and exclusion lock-outs. A termination lock-out involved the termination of the employees' contracts of employment to compel or induce compliance with the employer's demand, while an exclusion lock-out merely excluded employees from the premises for that purpose.

[46] Under the LRA of 1956, a termination lock-out invariably resulted in the dismissal of the affected employees.[7] The fairness of such dismissals at that time could not be determined by the Industrial Court since the definition of an "unfair labour practice" in the LRA of 1956 expressly excluded a lock-out. However, that did not mean that the employer was entirely without obligation. The employer would be obliged, while the lock-out prevailed, to accept back ex-employees who tendered their services on the basis of acceptance of the employer's demand or change. The obligation to re-employ (rather than to reinstate) resulted from the acceptance of a new offer of employment which endured for the duration of the lock-out.[8] The offer was thus akin to an option for re-employment on the different terms. The offer could remain open for a specific time or a reasonable time. However, if a collective dismissal was not to compel or induce employees to comply with or accept a demand, or if

[7] Trollip: "Lock-outs in South African Law" in *Strikes, Lock-outs and Arbitrations in South African Labour Law,* 83 et seq (Juta) 1989

[8] There was however protection against unfair selective re-employment of locked out workers under the unfair labour practice jurisdiction - *NAAWU v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A). Similar protection exists in terms of section 186(1)(d) of the LRA which includes selective re-employment under the definition of a dismissal and thus subject to the unfair dismissal jurisdiction.

the dismissal was effected on operational grounds after the lock-out had ended, such dismissals were not lock-out dismissals and could be challenged on the grounds of fairness under the unfair labour practice jurisdiction of the Industrial Court.[9]

[47] The law of lock-outs in South Africa was fundamentally altered with the enactment of the LRA in 1995. Section 64 of the LRA confers on every employee the right to strike while every employer has recourse to a lock-out.[10] A lock-out is defined in section 213 of the LRA as the exclusion by an employer of employees from the workplace for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches the employees' contracts of employment in the course of or for the purpose of the exclusion. The definition greatly narrows the ambit of a lock-out as previously defined in the LRA of 1956. It specifies only one form of employer conduct, namely exclusion from the workplace (with or without a breach of contract).[11] Unlike the definition of a lock-out in the LRA of 1956, the current definition of lock-out does not include the termination lock-out. A dismissal cannot therefore by definition constitute a lock-out, and *vice versa*.[12]

[48] Two other provisions of the LRA constrain the employer's recourse to lock-out. Firstly, in terms of section 76 of the LRA, the employer may not replace any employee whom it has locked out unless the lock-out is in response to a strike. Secondly, section 187(1)(c) of the LRA in its original form prohibited the dismissal of employees if the reason for the dismissal was to compel the employees to accept a demand in respect of any matter of mutual interest between the employer and the employee.

[49] The scheme regulating lock-outs in the LRA, unlike the provisions governing strikes, does not explicitly address the question of when operational requirements may justify the dismissal of employees who reject employer

[9] *CCAWUSA and Others v Game Discount World Ltd (*1990) 11 ILJ 162 (IC); and *CWIU and Others v Indian Ocean Fertiliser* (1991) 12 ILJ 822 (IC).
[10] Lock-outs must comply with the requirements of sections 64 and 65 of the LRA in order to be legal.
[11] Any exclusion from the workplace is likely to constitute a breach of contract at common law if wages are not paid to locked-out employees tendering their services.
[12] Grogan; *Workplace Law* 10th Ed (Juta 2009) 421.

demands to amend terms and conditions of employment. Section 67(4) of the LRA provides that an employer may not dismiss an employee for participating in a protected strike. The prohibition is bolstered by sections 187(1)(a) of the LRA which provides that a dismissal is automatically unfair if the reason for the dismissal is that the employee participated in a protected strike. However, section 67(5) of the LRA enacts exceptions. It provides that section 67(4) of the LRA does not preclude an employer from fairly dismissing an employee for reasons related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements. Thus, a dismissal for striking is automatically unfair, but an operational requirements dismissal of strikers may not be.

[50] It was this lack of symmetry in the LRA's treatment of strike and lock-out dismissals that prompted Prof. Clive Thompson to observe:

> 'An employer may not dismiss to compel an employee to accept a demand relating to 'a matter of mutual interest' (s 187(1)(c) …). An employer may, however, dismiss for a fair reason based on operational requirements (s 188(1)(a)(ii)). How can these two propositions be reconciled? Not easily, as the world of work and business defies sharp categorization and the statute appears to pursue competing policy objectives in successive breaths.' [13]

[51] The issue of demarcating the scope of the prohibition in section 187(1)(c) of the LRA came before the courts soon enough. In *ECCAWUSA and Others v Shoprite Checkers t/a OK Bazaars Krugersdorp*,[14] the Labour Court held that where amendments to terms and conditions of employment are proffered by an employer as an alternative to dismissal during a *bona fide* retrenchment exercise and it is a reasonable alternative based on the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer.[15] The Labour Court in *NUMSA and Others v Fry's Metal (Pty) Ltd*[16] took a different tack in a

[13] *Bargaining, Business Restructuring and Operational Requirements Dismissal*, (1999) 20 ILJ 755.
[14] (2000) 21 ILJ 1347 (LC). See also *MWASA and Oothers v Independent Newspapers (Pty) Ltd* (2002) 23 ILJ 918 (LC).
[15] This line of thinking has been endorsed by this court in similar cases. See *Mazista Tiles (Pty) Ltd v NUM and Others* (2004) 25 ILJ 2156 (LAC).
[16] (2001) 22 ILJ 701 (LC).

collective bargaining situation. This case involved an alteration of shift arrangements and the removal of a transport subsidy. The employer threatened to dismiss the employees if they did not agree to the new arrangements. The union sought and was granted an interdict prohibiting the employer from dismissing the employees. The court rejected the contention that the threat of dismissal was operationally justified, holding that dismissal is "not a legitimate instrument of coercion in the collective bargaining process" because the definition of lock-out meant that tactical dismissals were precluded and section 187(1)(c) of the LRA rendered any dismissal to compel acceptance automatically unfair.

[52] On appeal in *Fry's Metals (Pty) Ltd v NUMSA and Others,*[17] the LAC held that a dismissal could not be a lock-out if it was not performed for one of the specified purposes, and thus where a dismissal was intended to be final and irrevocable and not intended to compel compliance with a demand it was not a lock-out. A dismissal falls within the scope of section 187(1)(c), according to this interpretation, only if it is conditional in the sense that the employer retains an intention to accept the employees back into its employ if they accede to the changes in relation to which there is an impasse. The target of section 187(1)(c) of the LRA was not final dismissals but temporary or strategic dismissals.[18] The LAC's decision was confirmed on appeal by the SCA[19]

[53] Accordingly, in terms of the law prior to the amendment of section 187(1)(c) of the LRA by the LRAA, an employer who wished to implement changes to terms and conditions of employment (including remuneration) could, if its proposals were refused, embark on a section 189 exercise with a view to retrenching those who were not prepared to work to its "operational

[17] (2003) 24 ILJ 133 (LAC) (*Fry's Metals)*.
[18] The LAC conceded that its interpretation of the meaning of a "dismissal" in section 187(1)(c) of the LRA did not fit with the definition in section 213 read with section 186 of the LRA which defines a dismissal to mean "an employer has terminated employment with or without notice." The LAC held that the word "dismissal" in section 186 does not refer to a dismissal that is not final. Though it did not say as much, the LAC clearly accepted that it was permissible in terms of section 213 of the LRA to depart from the ordinary definition of "dismissal" since "the context otherwise indicates".
[19] *National Union of Metalworkers of SA & others v Fry's Metals* (Pty) Ltd 2005 (5) SA 433 (SCA).

requirements" provided the retrenchment was final and irrevocable, and the requirements of section 189 were met.[20]

[54] The decision in *Fry's Metal* met with criticism.[21] As Grogan neatly put it:

> 'The ironical result… is that an employer perpetrates an automatically unfair dismissal by offering to reinstate or re-employ workers who refuse to accept a demand, but does not do so by simply dismissing workers for the same reason.'[22]

[55] It was never the intention of the legislature that temporary or conditional dismissals deployed strategically to compel or induce compliance with an employer's demand (such in effect being no different to a suspensive exclusionary lock-out) would be automatically unfair. Rather, the target of section 187(1)(c) of the LRA was the termination lock-out. Thompson lucidly captures what is wrong with *Fry's Metals* as follows:

> 'In the event, the superior courts have now decided that s 187(1)(c) exonerates the crime of yesteryear even as it condemns what used to be legitimate. And so we are left with a quite anomalous result…A contingent dismissal is not a particularly pernicious form of employer conduct…It is not particularly odious precisely because of its transient intent and effect – it is within the contemplation of all that the employment relationship will be re-asserted. .A permanent (final) dismissal to press home partisan economic advantage is self-evidently far more damaging and clearly what the drafters had in mind. But after *Fry's Metals* we have a situation where a temporary dismissal to compel acceptance with a mutual interest demand must be branded as automatically unfair and countered with the strongest possible remedies available at law while a permanent dismissal for the same reason but without justification …is treated as a lesser industrial offence with lesser remedies.'[23]

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[20] See *General Food Industries Ltd v FAWU* [2004] 7 BLLR 667 (LAC); and *NUM and Others v Mazista Tiles* (Pty) Ltd (2006) 27 *ILJ* 471 (SCA).
[21] C Thompson: *"Bargaining Over Business Imperatives: The Music of the Spheres After Fry's Metals* 2006 ILJ 704; J Grogan *"Chicken or Egg"* 2003 ELJ 4.
[22] Grogan: *Workplace Law* 10th Ed (Juta 2009) 188.
[23] C Thompson: *Bargaining over Business Imperatives: The Music of the Spheres after Fry's Metals* (2006) 27 ILJ 704 at 727 -728.

[56] The finding in *Fry's Metals* that section 187(1)(c) of the LRA does not prevent employers from dismissing on operational grounds employees who do not accept proposals to amend terms and conditions of employment is however on safer ground. Although, section 187(1)(c) of the LRA, prior to its amendment, offered little on how best to reconcile the often incompatible imperatives of collective bargaining and business productivity, the courts before and after *Fry's Metals* developed the law to permit dismissal along similar lines to the dismissal of protected strikers as sanctioned by section 67(5) of the LRA.[24] Prof du Toit accurately described the legal position at the time of the amendment as follows:

> 'Where collective bargaining has ended in deadlock, nothing prevents an employer from initiating consultation about dismissals based on operational requirements due to its stated need to implement the changes it desires, in which those changes may be on the table as an alternative to dismissal.'[25]

[57] The essential question for determination in this appeal is whether the amendment to section 187(1)(c) of the LRA by the LRAA has altered the law in that respect.

[58] The LRAA of 2014 amended section 187(1)(c) of the LRA with effect from 1 January 2015 with the aim of clarifying the situation and removing what was perceived as the anomaly flowing from *Fry's Metals*. Section 187(1)(c) of the LRA (as amended) now provides as follows:

> 'A dismissal is automatically unfair…if the reason for the dismissal is:
>
> (c) a refusal by employees to accept a demand in respect of any matter of mutual interest.'

[59] The only difference between the previous definition and the current definition is that the old section's wording "to compel the employee to accept a demand" has been replaced by the words "is a refusal by employees to accept a

[24] *General Food Industries Ltd v FAWU* [2004] 7 BLLR 667 (LAC); and *NUM and Others v Mazista Tiles* (Pty) Ltd (2006) 27 *ILJ* 471 (SCA).
[25] Darcy du Toit *The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?'* 2016 (37) ILJ 1 at 21.

demand". The explanatory memorandum to section 187(1)(c) of the LRA (as amended) describes the purpose of the amendment as follows:

> '[S]eek to amend section 187 of the Act to remove an anomaly arising from the interpretation of section 187(1)(c). In the case of *National Union of Metalworkers of SA v Fry's Metals (Pty) Limited* (2005) 26 ILJ 689 (SCA), the Court held that the clause had been intended to remedy the so-called 'lock-out' dismissal which was a feature of pre-1995 labour relations practice. The effect of this decision when read with the decision of *Chemical Workers Union and Others v Algorex (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) is to discourage employers from offering reemployment to employees who have been retrenched after refusing to accept changes to working conditions.
>
> The proposed amendment seeks to give effect to the intention of the provision as enacted in 1995, which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the Employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the Act and is consistent with the purposes of the Act."

[60] The anomaly referred to was that after *Fry's Metals,* employers were wary of offering any form of re-employment to workers retrenched in the context of restructuring, even if there was a valid operational requirement for the retrenchment because such might be construed as indicating that the true reason for the retrenchment was one proscribed by section 187(1)(c) of the LRA. This had the result that dismissed employees were often deprived of offers of re-employment.

Evaluation

[61] The amendment of section 187(1)(c) of the LRA had a restricted purpose and limited reach. It shifted the focus from the employer's intention in effecting the dismissal to the refusal of the employees to accede. It no longer matters what the employer's intention or purpose might be. It is hence now irrelevant whether or not the dismissal was intended to induce the employees to comply with a demand. The upshot is that the distinction between final or conditional

dismissals as a basis for the application of section 187(1)(c) of the LRA has fallen away since it no longer has utility.

[62] The amendment is less clear about the more challenging question of when it may be permissible in terms of sections 188 and 189 of the LRA to dismiss on operational grounds employees who refuse to accede to the employer's demands for changes to their terms and conditions of employment. The LRA defines operational requirements generally to mean requirements based on the economic, technological, structural or similar needs of an employer.[26] The definition does not specifically include a need to change terms and conditions of employment. However, as discussed, our prevailing jurisprudence has interpreted the LRA to permit dismissal on such grounds, being structural or similar needs – the upshot being that the right to retrench is implicit in section 187(1)(c) of the LRA. It is doubtful, for the reasons following, that the purpose of the amendment was to change the law in this respect.

[63] If it is no longer permitted in terms of the amendment to section 187(1)(c) of the LRA to dismiss recalcitrant employees and to employ in their place others who are prepared to work in accordance with the new terms and conditions of employment that are operationally required, as NUMSA suggests, the only way to satisfy the employer's operational requirements would be through collective bargaining and ultimately the power play. If no collective agreement can be reached on a proposed restructuring, the employer's only means of addressing its operational requirements would be an offensive exclusion lock-out or unilateral implementation in breach of contract. There will often be practical obstacles in the way of such action, especially when an employer is confronted with economic or structural challenges. An offensive lock-out, in which the employer will be denied the right to employ replacement labour, or a breach of contract leading to litigation, usually will be self-defeating, adding to the economic pressure on an employer struggling financially and needing to restructure for that reason.

[64] NUMSA's interpretation of the amendment is not sustainable for a few reasons. Section 187(1)(c) of the LRA must be read in the context of LRA's

[26] Section 213 of the LRA

scheme for the protection against unfair dismissal. The prohibition in section 187(1)(c) of the LRA is one of a number of the automatically unfair dismissals outlawed by section 187. It must be read with section 188 of the LRA which provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove a fair reason such as one based on operational requirements under section 189 of the LRA. It follows that even where there is evidence suggesting a credible possibility that dismissal occurred because the employees refused to accept a demand, the employer can still show that the dismissal was for a different more proximate fair reason.[27]

[65] The fact that a proposed change is refused and a dismissal thereafter ensues does not mean that the reason for the dismissal is necessarily the refusal to accept the proposed change. The question whether section 187(1)(c) of the LRA is contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal of the employees is. The proven existence of the refusal of a demand merely prompts a causation enquiry. The actual reason for the dismissal needs to be determined and there is no basis in principle for excluding an employer's operational requirements from consideration as a possible reason for dismissal.

[66] There is furthermore merit in Aveng's submission that NUMSA's construction would lead perversely to employers being wary of proposing any changes to terms and conditions of employment in section 189 consultations. That would undermine the fundamental purpose of section 189 to encourage engagements on all potentially viable alternatives to retrenchment.

[67] Moreover, if it is permissible in terms of section 67(5) of the LRA to dismiss protected strikers where the employer is able to demonstrate (on all the facts and circumstances of a particular case) a legitimate and substantial business necessity,[28] the underlying policy rationale applies equally to the dismissal of employees resisting employer demands or proposals. Striking workers may

[27] See R le Roux: *Retrenchment Law in South Africa* (Lexis Nexis 2016) pg 48-49.
[28] *NUM v Black Mountain Mineral Development Co (Pty) Ltd* [1997] 4 BLLR 355 (A) – the determination necessarily involves strict scrutiny of the employer's justification and ultimately a judicial value judgment.

not be dismissed for striking but can be retrenched where a genuine substantial operational necessity arises. By the same token, while employees cannot be dismissed for refusing to accept a demand, they can be dismissed if that refusal results in a more dominant or proximate operational necessity. This legislative scheme of collective bargaining is in line with the constitutional right of trade unions and employers to engage in collective bargaining in that any limitation of the power play is reasonable and justifiable in the balance struck between the strike weapon and the employer's power of implementation at impasse. [29]

[68] Hence, the essential inquiry under section 187(1)(c) of the LRA is whether *the* reason for the dismissal is the refusal to accept the proposed changes to employment. The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*.[30] The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.

[69] As in all operational requirements dismissals, the merits of the employer's decision in such circumstances are open to scrutiny, but a stricter scrutiny in light of the need for judicial sensitivity to the dynamics of a legitimate power play - the driver of collective bargaining. As discussed earlier, the LAC and the SCA in *Fry's Metal*, in considering the merits of the dismissal in that case, accepted that the LRA does not distinguish between dismissals for operational reasons intended to save a business from failure and those intended simply to increase profitability. In this regard Zondo JP said:

> 'This is because all the Act refers to, and recognises, in this regard is an employer's right to dismiss for a reason based on operational requirements

[29] Section 23(5) and section 36(1) of the Constitution. In *SACTWU v Discreto* [1998] 12 BLLR 1228 (LAC) par 8-9 this court accepted that 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.
[30] (1999) ILJ 1718 (LAC)

> without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.'[31]

[70] However, employers do not have *carte blanche*. As Prof du Toit put it:

> '…though the notion of employers being free to dismiss workers "merely to increase profit" may seem to open the floodgates to dismissal virtually at will, the causal nexus between a dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be fair in the given circumstances to dismiss employees in order to increase profit or efficiency?'[32]

[71] NUMSA's contention that the reason for the dismissal of the employees was solely their refusal to accede to the demand by Aveng that they sign new contracts of employment is not sustainable on the facts.

[72] Firstly, as the Labour Court held, there was strictly speaking no employer "demand". The relevant correspondence shows that the proposals of Aveng in relation to the 5-grade structure and job descriptions were made in terms of section 189(2) and (3) of the LRA and intended to avoid or mitigate dismissals or were alternatives to dismissal in the context of consultations over retrenchments. The process embarked on in May 2014 was not only seeking agreement to changes to terms and conditions of employment but was intended to avoid dismissals. The distinction between a demand and a proposal is admittedly a fine one, but nonetheless goes beyond semantics. Collective bargaining demands are made ordinarily in negotiations over wages. Although both wage negotiations and restructuring proposals may

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[31] At para 33. See also *General Food Industries v FAWU* (2004) ILJ 1260 (LAC) at para 52 and Newaj K and van Eck S: *Automatically Unfair and Operational Requirement Dismissals: Making sense of the 2014 Amendments - PER/PELJ* 2016 (19).

[32] D du Toit: *"Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond"* 2005 ILJ 595 at 606. Thompson initially argued that the sanctity of the collective bargaining process is only protected by permitting retrenchments in cases where the intended changes have ramifications for the survival of the employer's business and not merely for its profitability - *Bargaining, Business Restructuring and Operational Requirements Dismissal*, (1999) 20 ILJ 755. More recently, in light of the developments in our jurisprudence, he has conceded that an employer may dismiss on "a convincing case of fairness" and that economic imperatives and society's interest in continuing economic progress in a competitive world may often deliver that case - C Thompson: *Bargaining over Business Imperatives: The Music of the Spheres after Fry's Metals* (2006) 27 ILJ 704 at 706.

impact similarly on the bottom line, and restructuring proposals can feature regularly in wage negotiations, the retrenchment risk arises when the operational requirements for the viability of the employer are compelling, overriding and the dominant objective of the proposal.

[73] The proposals regarding the 5-grade structure and job descriptions were put forward as part of a continuing consultation process aimed at improved profitability and viability; and were necessary, if not essential, for Aveng's sustainability in the constricted circumstances in which it found itself. The grouping of the job functions was a sensible way of introducing efficiencies and cost savings, and had proved effective under the interim agreement. The proposals were the only reasonable and sensible means of avoiding dismissals and entailed no adverse financial consequences for the employees.

[74] As Aveng's viability was at stake, proceeding with a bargaining power play, either an offensive lock-out without replacement labour or unilateral implementation of the changes, was not a realistic option in the circumstances. The primary purpose of Aveng in making the proposal was not to grasp an advantage in the wage bargain, it was rather to restructure for operational reasons to ensure Aveng's long term survival. The proposal was not made at the expense of existing wage levels. NUMSA, the facts indisputably demonstrate, sought to convert the proposal to a bargaining opportunity for increased wages. The bargaining pressure thus brought to bear exacerbated the operational requirements problem. The proposal having been negotiated to impasse, the imperative or dynamic to dismiss for operational reasons transcended tactical positioning to become a fair reason. The failure of the employees to accept the proposals engendered an insurmountable operational requirements problem that constituted a fair reason for dismissal.

[75] The dominant reason or proximate cause for the dismissal of the employees, therefore, was Aveng's operational requirements, which underpinned the entire process throughout 2014 and 2105 and informed all the consultations regarding the changes to the terms and conditions of employment. The

employees' dismissals accordingly fell within the zone of permissible dismissals for operational requirements and did not fall foul of section 187(1)(c) of the LRA. In the result, the Labour Court did not err in its conclusion.

[76] There is consequently no need to determine the second appeal ground concerning the practicality of reinstating the employees in the employment of the second respondent.

[77] The appeal is accordingly dismissed with costs, such costs to include the costs of two counsel.

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JR Murphy

Acting Judge of Appeal

I agree

_____

P Coppin

Judge of Appeal

I agree

_____

K Savage

Acting Judge of Appeal

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