IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: JA9/01

In the appeal between:

FRY'S METALS (PTY) LIMITED **APPELLANT**

and

NATIONAL UNION OF METAL
WORKERS OF SOUTH AFRIC
A ND FIFTY FIVE OTHERS 1ST AND FURTHER RESPONDENTS

JUDGEMENT

ZONDO JP

INTRODUCTION

[1] This appeal raises the following questions:-

(a) Does an employer have a right to dismiss employees who are not prepared to agree to certain changes being effected to their terms and conditions of employment when such changes are necessary for the viability of the employer's business or undertaking or are necessary to improve productivity or efficiency in the business?

(b) if an employer has such a right, what is the relationship

between that right, on the one hand, and, on the other, an employee's right implicit in sec 187(1)(c) of the Labour Relations Act, 1995 (Act no 66 of 1995) (**"the Act"**) not to be dismissed for the purpose of being compelled to agree to a demand in respect of a matter of mutual interest between employer and the employee?

[2] The appellant is involved in the business of smelting and refining lead from secondary materials. Its customer base is primarily the lead acid battery manufacturing industry. According to the appellant it supplies approximately 55% of the total South African lead consumption and approximately 75% of all lead manufactured locally. The first respondent is a registered trade union of which the second and further respondents are members. The second and further respondents **("the individual respondents")** are employed by the appellant. In 2000 the appellant sought to dismiss the individual respondents. They, together with their union, brought an urgent application in the Labour Court to inter alia, interdict the appellant from dismissing them and from effecting certain changes in the workplace. The Labour Court granted them an order that effectively achieved that result. The appellant applied in the Labour Court for leave to appeal. The application was refused. The appellant then petitioned this Court which granted leave to appeal against the judgement of the Labour Court. This then is the appeal against that judgement of the Labour Court.

The facts

[3] In May 2000 the appellant contracted a firm of consultants called

Xybanetx to review its operations and to make recommendations on how to increase productivity. It did this because it believed that it was essential for the continued viability of the appellant to be productive and, where possible, to increase its productivity. The appellant believed that, if it did not do this, it would eventually have to close down. In June 2000 the consultants submitted their report.

[4] As a result of the report, the appellant called a meeting between itself and the union. The meeting took place on the 1st September 2000. The only matter of substance for discussion on the agenda of that meeting was given as the appellant's viability. At the meeting the appellants' representatives stated that the purpose of the meeting was two fold, namely:

(a) to give the shopstewards an overview of the status of the appellant, and,

(b) to present a proposed collective agreement to the shopstewards which sought to address the human resources element of the problems.

The minutes of that meeting which were prepared by the appellant's representatives reveal that the appellant informed the shopstewards **"of the various investigations and/or proposals to address the future of [the appellant] to make the company viable and also ensuring employment for its employees"**. The appellant proposed a collective agreement **"to address and formalise the human resources element"**. This was given to, and, discussed with, the shopstawards.

[5] The appellant's employees were working a three shift system. In terms of the appellant's proposals the three shift system was going to be replaced with a two shift system. Each of the three shifts was 8 hours long with the first shift starting at 06h00 each day seven days a week. The two shift system was going to entail two 12 hour shifts with the first one starting at 06h00 seven days a week. In its answering affidavit the

appellant pointed out that at the time of the application the appellant's effluent department worked two eight hour shifts for five days a week. There was no hand-over between shifts. The appellant stated that this caused a productivity problem which it wanted to address. The lack of hand-over resulted in lost productivity time of about one hour per day. Obviously, in seven days this translated to seven hours. The appellant also wanted to withdraw the transport subsidy that it had been giving its employees. It said that this was going to be the consequence of the introduction of the two shift system. The shopstewards were given an opportunity to go and study the proposed collective agreement and respond only at the next meeting which the parties scheduled for the 6th September 2000.

[6] The parties held a meeting on the 6th September. The shopstewards responded to some of the proposals. They accepted some of the proposals and rejected others. In respect of some proposals the shopstewards needed more time or asked for clarification or more information. According to the appellant's answering affidavit, the shoptewards rejected the proposed two shift system **"emphatically and in (an) inflammatory language"** and made no alternative proposals.

[7] The parties held another meeting on the 15th September 2000. The minute of that meeting reveals that the purpose of the meeting was to enable the shopstewards to respond to certain proposals to which they had not as yet responded. The shopstewards rejected most of the proposals but accepted others. It was then agreed between the parties that another meeting would be held on the 22nd September 2002. On the 22nd September a meeting was held as arranged. The

shopstewards responded to the appellant's proposal on the disciplinary procedure. The appellant's representatives outlined which proposals had been accepted and which ones had been rejected by the shopstewards. The management then held a caucus meeting. After the caucus meeting the appellant's managing director explained the need to effect changes in order for the appellant to be efficient. He stated also that the union had rejected the appellant's proposals on most issues. He emphasised the need to implement the proposals by the 1st October 2000. He also stressed the appellant's commitment to continue operating and creating employment for its employees.

[8] The appellant then read out a certain letter to the shopstewards that bore that day's date. In the letter the appellant referred to the fact that it had made certain proposals to the union aimed at effecting certain changes including changes in the terms and conditions of employment of employees in order for the appellant to be efficient and that the union had rejected these proposals. The letter also stated that the effect of the proposed changes was to introduce continuous shifts in the operations of the departments of Polyprop, Smelter, Refinery, Laundry and Cleaners. Another effect was also to introduce a shift hand-over procedure. The appellant attached to the letter a document containing all the proposals. It said that about 55 employees would be affected by the proposed changes.

[9] The appellant stated that at its negotiations with the union it had become clear that the affected employees were not prepared to accept the proposed changes. The appellant stated in the letter that, in the light of this it was proposing that the affected employees who were prepared to accept the changes be retained in their positions and that those who did not accept the changes **"may be retrenched"**. The appellant went on to say in the letter that in the event of retrenchments,

(a) the retrenchments would take place after the 21 day notice required by the main agreement; it also said that

such notice was being given therein;

(b) any affected employee who did not accept the changes and who had an opportunity to obtain alternative employment could request time off to attend job interviews; it further said that, if reasonably possible, permission would be granted for this;

(c) the appellant would consult the employees and/or their representatives regarding any assistance which they may require in the event of retrenchment;

(d) those affected employees who did not accept the required changes would, if no reasonable alternative position was available, be notified of their retrenchment on or about the 16th October 2000; it further stated that, since it was the appellant's view that an acceptance by the affected employees of the required changes was a reasonable alternative to retrenchment, it was not expected that employees who got retrenched would be paid a retrenchment package.

[10] The appellant stated in the letter that the purpose of the letter was to convey in writing a summary of the important points to be considered. The affected employees and their trade unions were invited by the appellant to convey to the appellant their views and representations on any issues referred to in the letter as soon as possible. The letter further said that a meeting would take place between the appellant and the employees' representatives on Thursday the 28th September 2000 to enable the views of the employees' representatives' to be conveyed to the appellant.

[11] According to the minutes of the meeting of the 22nd September the response of the shopstewards to the letter included statements to the effect that the appellant's purpose was to force the employees to accept the appellant's proposals, that the appellant's intention was to divide the workers, that the appellant would no longer be there in six months' time, that this was intimidation by the appellant, that the appellant was playing with fire and that they would close the appellant down. In the founding affidavit the respondents stated that they understood the letter of the 22nd September to be an ultimatum to employees to accept the appellant's proposals or face dismissal. In its answering affidavit, the appellant denies that the letter was an ultimatum to employees to accept its proposals or face dismissal. It states that the letter made it clear that, for cogent reasons, the appellant deemed it necessary to introduce a two shift system and that, **"if the employees were unwilling to accept such a system, retrenchments might occur"**.

[12] The parties held a further meeting on the 28th September. The parties again discussed their differences. The shopstewards asked the appellant's management whether it was their intention to retrench employees. The management confirmed this to be the case. The minutes of the meeting reveal that, when the shopstewards accused the management of using retrenchment as a threat against the workers, the management responded by saying that they were also feeling threatened by the workforce **"not wanting to change to make the company more viable"**. The meeting ended with the shopstewards declaring a dispute with the appellant. In par 33.2 of the founding

affidavit the respondents state that the union **"accused the [appellant] of threatening to retrench workers if they failed to comply with the new terms and conditions of employment as set out in the proposed collective agreement"**. In the paragraph the respondents state that the management replied that the appellant was retrenching **"as workers would not agree to changes to terms and conditions of employment"**. In the last sentence of the paragraph the respondents allege that the appellant stated that, if the union agreed to the new shift system, there would be no need to retrench employees.

[13] On the 2nd October 2000 the union addressed a letter to the appellant asking for clarification whether the appellant was contemplating a new shift system or embarking upon retrenchments. The appellant responded with a letter dated the 3rd October. The body of the appellant's reply, in so far as it is relevant to this matter, reads thus:-

> **"1. Because the consultation process has not produced any other viable alternatives to retrenchment and employees have indicated their rejection of the alternative working arrangement (as documented in annexure "A") [the appellant] has been left with no choice but to contemplate retrenchment.**
>
> **2. ----------**
>
> **3. If the proposed working arrangement is accepted by your members the need to retrench would not arise.**
>
> **4. In the event that the alternative working arrangement is accepted by the employees or a different viable alternative is proposed it would not**

be necessary to continue with retrenchment

5. **We trust that the matter has now been sufficiently clarified".**

[14] On the 3rd October 2000 the appellant distributed notices to workers informing them that they would be retrenched on the 13th October 2000. The contents of those notices are important in this matter. For that reason it is necessary to reproduce them in full. They read thus:-

" Dear Sir

Notice of retrenchment

The [appellant] was unsuccessful in its efforts to negotiate a collective agreement with your union and its members relating to a number of issues including changes to working hours. The [appellant] therefore gave notice to NUMSA and all employees of its intention to consult in respect of the retrenchment of those employees who were not prepared to accept the new working hours needed by virtue of the [appellant's] operational requirements. Having explained the [appellant's] proposals to the union and the shopstewards and, having invited them to consult, the [appellant] has been informed that all affected employees, including you, are not prepared to accept the new hours of work.

Therefore, you are hereby notified that your employment

with the [appellant] is to be terminated for reason (sic) of its operational requirements. The following will apply:

1. **should you require time off during working hours to attend job interviews, permission will be granted if reasonably possible;**
2. **All monies due to you including leave pay, leave bonus, etcetera, will be paid to you on your last day;**
3. **It is not the [appellant's] intention to pay a retrenchment package because your acceptance of the changes to working hours would eliminate the need to retrench you and is a reasonable alternative to retrenchment. If, however, you are prevented from accepting the change to working hours for [a] good reason, you are required to contact me as soon as possible and explain these reasons to me. For good reason, the [appellant] may reconsider its position;**
4. **If you reconsider your position and are prepared to accept the changed working hours, please sign the attached document which confirms that you will work in terms of the required shift system. Provided that the signed document is returned to me by Monday 9 October 2000, you will not be retrenched. After that date, even if you accept to work in terms of the required working hours, the [appellant] does not guarantee that**

you will be retained.

5. **If you do not understand any part of this notice, please communicate with me or with your union, without delay, so that it can be explained".**

[15] According to the respondents' founding affidavit, the workers rejected the letters. On the 9th October the workers forcibly removed two managers or directors from the appellant's premises to, according to the respondents, **"convey a sense to the managers of what it was like to be dismissed."** According to the appellant's answering affidavit, the workers prevented the managers' return to the premises in defiance of an order of the Labour Court. Following upon the events of the previous day a meeting was held on the 10th October between the appellant's management and its attorneys, on the one hand, and, the workers, on the other. During this meeting there was a discussion of some of the appellant's proposals on changes but no agreement was reached.

[16] On the 18th October 2000 the appellant gave the affected workers letters of dismissal. The letters read thus:-

"Mr .....

Clock no .....

NOTICE TO RETRENCHED EMPLOYEES

Because you have rejected the new two shift system operationally required by the [appellant], you have been given notice of your retrenchment and your employment will terminate on 20 October 2000.

Please note that the [appellant] does not want to retrench you and will retain [you] in its employ provided that you agree to work the shift system.

If you would like anything explained to you before finally making up your mind to accept or reject the shift system, please contact your manager URGENTLY so that he can explain this to you and answer any questions you may have.

Please do not reject the shift system, unless you are ceratin of your choice. If you have any special personal problem which prevents you from working the proposed shift system, please let your manager know URGENTLY:- in such case, the [appellant] will try to accommodate you.

If you have decided not to accept the shift system, then we confirm that your services will no longer be required and that you will be paid until Friday 20 October 2000. You will be paid your usual wages on that day and as soon as possible next week, your outstanding pay together with pro rata bonus and leave pay will be paid directly into your account.

Yours faithfully

FRYS METALS

_____

TO Karshagen
Technical Director".

Proceedings in the Labour Court

[17] The respondents then launched an urgent application in the Labour Court for an order, inter alia,:-

(a) interdicting the appellant from dismissing the second and further respondents for their failure to accede to the appellant's demands with respect to the implementation of a two shift system and the withdrawal of a transport subsidy in the context of proposed changes to terms and conditions of employment;

(b) interdicting the appellant from implementing the proposed shift system until it had obtained the agreement of the second and further respondents or until it had exhausted the dispute resolution provisions of the Labour Relations Act, 1995 and the main agreement for the Iron, Steel, Engineering and Metallurgical Industry and until it had the necessary exemptions from that agreement from the provisions governing working hours and public holidays;

(c) directing the appellant to withdraw the letters of termination issued to the second and further respondents, and,

(d) declaring that the proposed change constituted a matter of mutual interest.

There were other orders sought which are not relevant for present purposes.

[18] In par 45 of the founding affidavit the respondents submitted that the then proposed dismissals would be unfair and unlawful. They went on to say: **"The [appellant] is proposing to dismiss the second and further [respondents] as a result of their failure to agree to changes to their terms and conditions of employment. It is submitted that this action of the [appellant] constitutes a step to compel a demand, and if implemented such dismissals would be automatically unfair dismissal (sic) in terms of section 187(1)(c) of the Act"**. In par 46 it was submitted that the employees had a clear right not to be dismissed unfairly **"on the above grounds**". In its answering affidavit the appellant denied that the dismissal was effected in order to compel the employees to agree to the proposed changes.

[19] The Court a quo subsequently handed down a judgement in favour of the respondents. It found that the appellant's proposed dismissal of the second and further respondents was sought to be effected in order to compel them to agree to its proposed changes on their terms and conditions of employment. It found that this was contrary to the provisions of sec 187(1)(c) of the Act. It made no order as to costs. The Court a quo effectively granted the respondents all the orders they sought except costs.

The appeal

[20] The respondents did not, in challenging the proposed dismissal in the Court a quo and on appeal, rely on any failure on the appellant's part to comply with its obligations under sec 189 of the Act. The respondents' case is a very narrow one. It is that the dismissals which the appellant sought to effect in respect of the second and further respondents on the 20th October 2000 were sought to be effected in order to compel them to agree to the appellant's proposed changes on their terms and conditions of employment. The respondents contended that this would

be contrary to the provisions of sec 187(1)(c). For this reason they contended that they had a clear right to have the dismissals interdicted. The appellant disputes the correctness of the contention that the dismissals were sought to be effected in order to compel the second and further respondents to agree to its proposals. It contends that it sought to dismiss the second and further respondents simply because the appellant's operational requirements required the changes it proposed and, as the second and further respondents were not prepared to agree to the changes, they had to be dismissed so that employees who would be prepared to accept the changes would be employed in their stead.

[21] Sec 188(1)(a)(ii), in so far as it is relevant to this matter, reads:-

> **"188 other unfair dismissals-**
>
> **(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-**
>
> **(a) that the reason for dismissal is a fair reason-**
>
> **(i) ----------**
>
> **(ii) based on the employer's operational requirements; ...**
>
> **(b) ----------"**

The provisions of sec 188 give three grounds of dismissal in our law, namely, conduct, capacity and operational requirements. This is in line with international norms and standards. In this regard article 4 of the Termination of Employment Convention 158 of 1982 provides:- **"The employment of a worker shall not be terminated unless there is a valid reason for such termination**

connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". Sec 188(1)(a)(ii) means that an employer may dismiss an employee for a fair reason that is based on its operational requirements (and, if a fair procedure is followed) such dismissal will be fair. Sec 189(1) reaffirms that the Act does contemplate a dismissal based on the employer's operational requirements. It begins with the words "**when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must -----**".

[22] Sec 67(5) provides that sec67(4) **"does not preclude an employer from fairly dismissing an employee in accordance with the provisions of chapter viii for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements"**. Sec 213 of the Act defines the term **:"operational requirements**" as meaning **"requirements based on the economic, technological, structural or similar needs of an employer"**. Sec 67(5) must be read with sec 67(4) which precludes an employer from dismissing an employee for participating in a protected strike. From the above there can be no doubt that the Act does give an employer the right to dismiss an employee or employees for a reason based on its operational requirements.

[23] Sec 187(1)(c) in so far as it is relevant to this matter, reads:

"A dismissal is automatically unfair ---- if the reason for the dismissal is -

(a)----------

(b)----------

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;"

Accordingly an employer is, by implication, precluded by sec 187(1)(c) from dismissing an employee or a group of employees if the **"reason**" for doing so is to compel him or her or them to accept a demand by the employer in respect of any matter of mutual interest between the employer and employee. The question that arises is when it can be said that, in dismissing an employee or a group of employees, the employer is exercising his right to dismiss for operational requirements as opposed to an employer dismissing employees in order to compel them to agree to a demand on a matter of mutual interest which is contrary to the provisions of sec 187(1)(c).

[24] I do not think that there is any conflict between the two provisions. There is a historical context to sec 187(1)(c). It is that the now repealed Labour Relations Act, 1956 (Act 28 of 1956) (**"the old Act**") included in its definition of a lock-out the **"termination by [the employer] of the contracts of employment of any body or number of persons in his employ if the purpose of that.... termination.....is to induce or compel any person who are or have been in his employ or in the employment of other persons-**

(1) to agree or comply with any demands or proposals concerning terms or conditions of employment....."

[25] When one has regard to the wording of sec 187(1)(c) and that of the relevant portions of the definition of **"lock-out"** in sec 1 of the old

Act, one is left in no doubt that sec 187(1)(c) is based on the definition of the word **"lock-out"** in the old Act. There are a number of cases which feature in our law reports that were decided under the old Act in which the definition of a lock - out featured. These include those cases where lock - out dismissals or purported lock - out dismissals had taken place. Some of the cases are **NUMSA v De Beers Consolidated (1996) 17 ILJ 703 (IC); FAWU v Royal Beech - Nut (Pty) Ltd (1988) 9 ILJ 1033 (IC); Ndlovu & Others v Steynsfields Restaurant CC (1994) 15 ILJ 655 (IC); Techikon SA v NUTESA (2001) 22 ILJ 427 (LAC); NUMSA v Aerial King Sales (Pty) Ltd (1994) 15 ILJ 1384 (IC); National Hotel, Liquor & Restaurant Workers Union & Others v PE Hotels Group t/a The Edward Hotel (1995) 16 ILJ 877 (IC); CWIU & Others v Indian Ocean Fertilizer (1991) 12 ILJ 822 (IC); NUMSA v Cobra Watertech (1994) 15 ILJ 832 (IC); SACWU v Plascon Inks and Packaging Coatings (Pty) Ltd (1991) 12 ILJ 353 (IC); Ngubane & Others v NTE Ltd (1991) 12 ILJ 138 (IC); NTE Ltd v SACWU & Others (1990) 11 ILJ 43 (N); NTE Ltd v Ngubane & Others (1992) 13 ILJ 910 (LAC); FAWU v Midde - Vrystaatse Suiwel Kooperasie Bpk (1990) 11 ILJ 776 (IC); Midde - Vrystaatse Suiwel Kooperasie Bpk v FAWU (1992)13 ILJ 927 (LAC)**).

[26] In **Commercial Catering and Allied Workers' Union and Others v Game Discount World Ltd (1990) 11 ILJ 162 (IC)** the Industrial Court had to interpret the definition of the word **"lock-out"** in regard to a termination by an employer of contracts of employment of employees within the context of a dispute about a change in terms and conditions of employment. In that case the employer purported to effect a termination of the contracts of employment as part of a lock-out under the old Act. However, it maintained, and, told the employees' representatives and

the public, that the termination of the employees' contracts of employment was final and irrevocable. The Industrial Court held, correctly in my view, that a dismissal that was final and irrevocable fell outside the definition of a lock-out in sec 1 of the old Act. It held that in order for a termination of contracts of employment to fall within the definition of a lock -out in sec 1, it had to be effected for one of the purposes specified in the definition of the word **"lock -out"** in sec 1 of the old Act. At 165D -F of the report the Industrial Court had the following to say:-

> **"There can be no lock-out if the act forming part of the lock -out was not performed for one of the specified purposes. The employer who introduces a lock - out must do so to achieve a purpose. In casu the act which purportedly introduced the lock - out was the dismissal on 11 October 1989. That dismissal was, and was intended to be final and irrevocable. The individual applicants were not dismissed to compel or induce them to accept respondent's demand. The fact that the notice to the employees was for that purpose does not assist the respondent. The termination should have been for that purpose.**
>
> **The termination of the employment of the individual applicants is in casu not a lock -out dismissal. There is in casu no lock- out".**

[27] In my view what was said by the Industrial Court in Game Discount World in respect of a lock - out dismissal under the definition of a lock - out under the old Act, namely, that such a dismissal cannot be final and irrevocable, applies with equal force to the provisions of sec 187(1)(c) of

the Act. In order to fall within the ambit of sec 187(1)(c) a dismissal must have as its purpose the compulsion of the employees concerned to accept a demand in respect of a matter of mutual interest between employer and employee. If a dismissal is not for that purpose, it falls outside the ambit of sec 187(1)(c).

[28] A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept a demand in respect of a matter of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two. An employee's acceptance of an employer's

1. I am aware that I am now using the word **"purpose"** and not **"reason"** when sec 187(1)(c) does not refer in express terms to the word "purpose" but refers to the word **"reason"**. The word **"reason"** is, in my view, a misnomer in the context of sec 187(1)(c). That part of sec 187(1)(c) which follows after (c) makes it clear that it relates to a purpose and not a reason. The dismissal is effected **"to compel the employee to accept a demand ------"**. Accordingly, strictly speaking, the word **"reason"** must be read as **"purpose"** in relation to par (c). This would mean that sec 187(1)(c) must be read as providing that a dismissal is automatically unfair if the purpose of the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between employer and employee.

demand in respect of a matter of mutual interest can only be useful or worth anything if the employee is going to continue in the employer's employ. Let us say that an employer wants his employees to agree that a transport subsidy be done away with. If the employees accept this demand and continue in the employer's employ, that would serve a useful purpose. However, if the employees are dismissed finally and irrevocably, their agreement that the employer may do away with the transport subsidy is irrelevant. The people whose agreement matters to the employer are those who are going to be in his employ.

[29] A lock - out dismissal entails that the employer wants his existing

employees to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employees do not agree to the proposed changes, he would dismiss them - not for operational requirements - but to compel them to agree to the change. In such a case the employees thereafter have an opportunity to agree to the change. When they agree to the change, the dismissal ceases because it has served its purpose. If the employees do not agree to the change after they have been dismissed for the purpose of compelling them to agree, the employer dismiss them finally. The last mentioned dismissal is not a lock -out dismissal. It is an ordinary dismissal for operational requirements.

[30] The purpose of a dismissal for operational requirements in such a case, which is the same as in the present matter, is to get rid of employees who do not meet the business requirements of the employer so that new employees who will meet the business requirements of the employer can be employed. Such a case was **TAWU & Others v Natal Co - Operative Timber (Pty) Ltd (1992) 13 ILJ 1154 (D).** The purpose of a lock-out dismissal is not to get rid of the employees who are not accepting the demand in respect of a matter of mutual interest but it is to keep them but under different terms and conditions of employment, hence the notion that the dismissal is to compel them to accept a demand in respect of any matter of mutual interest between employer and employee.

[31] A dismissal for operational requirements fits comfortably within the definition of **"dismissal"** in sec 186(a) of the Act. There may be an argument that a dismissal contemplated by sec 187(1)(c) - especially if it is understood not to be final - does not fit comfortably within the definition of **"dismissal"** in sec 186(a). This argument would be based on the notion that the word **"dismissal"** as defined in sec 186 does not refer to a dismissal that is not final and that, wherever it appears in the Act, it bears the meaning given to it in sec 186. The argument would be

that to hold that the dismissal that is contemplated in sec 187(1)(c) is not a final dismissal is to give the word “dismissal” in sec 187(1)(c) a meaning that is different from the meaning given to that word in sec 186(a) In my view the difference between a dismissal as defined in sec 186 and a dismissal such as is contemplated by sec 187(1)(c) is that the latter dismissal is required to be effected for the specific purpose given in sec 187(1)(c) and that purpose is absent in an ordinary dismissal such as is defined in sec 186(a). That purpose renders a sec 187(1)(c) dismissal a special kind of dismissal. In the light of all the above I conclude that there is a distinction between a dismissal for a reason based on operational requirements and a dismissal the purpose of which is to compel an employee or employees to accept a demand in respect of a matter of mutual interest between employer and employee. The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer’s demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions that meet the employer’s requirements. An ordinary retrenchment, where the employees who are being retrenched will not be replaced, is, of course, also a dismissal for operational requirements.

[32] The case which the respondents sought to make in their founding affidavit was simply that the dismissal of the second and further respondents was going to be contrary to the provisions of sec 187(1)(c) because it was going to be effected in order to compel the employees to agree to the appellant’s proposals. That was the only ground relied upon for the contention that the dismissals were going to be unfair and

unlawful. There was an attempt by Counsel for the respondents, in his heads of argument and in oral argument, to argue that the appellant could not dismiss for operational requirements when this was done for the purpose of making more profit as opposed to where it was resorted to in order to ensure the survival of the business or undertaking. It seems to me that this argument was inspired by the article:- **"Bargaining, Business Restructuring and the Operational Requirements Dismissal"** by Thompson which appears in **(1999) 20 ILJ 755** where the author discusses the distinction between, and, the reconciliability of, on the one hand, the provision of sec 188(1)(a)(ii) and, on the other, the provision of sec 187 (1)(c).

[33] There are two answers to the argument. The one is simply that no such case was foreshadowed in the respondents' founding affidavit and, therefore, it is not open to the respondents to argue such a case. The second is that, even if it was open to the respondents to argue such a case, that argument has no statutory basis in our law. This is so because all that the Act refers to, and, recognises, in this regard is an employer's right to dismiss for a reason based on its operational requirements 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. Neither Thompson in his article nor Counsel in his argument has pointed to any provision in the Act that can be relied upon to make this distinction. Accordingly, I would have rejected the contention in any event.

[34] It was also argued on behalf of the respondents that, since, on the respondents' argument, the appellant was not entitled to dismiss the second and further respondents for operational requirements in this case, it was obliged to resort to a lock - out. This argument is also without substance. Firstly, the recourse to a lock - out that sec 64 of the Act makes provision for is not an obligation but it is a recourse which an employer is free to resort to when faced with circumstances in which the Act permits the institution of a lock - out. Secondly, the argument proceeds on the assumption that, in dismissing the employees, the appellant was seeking to compel them to accept the proposed changes.

This does not follow. I turn to consider the question whether or not the appellant's proposed dismissal of the second and further respondents was sought to be effected in order to compel them to agree to the appellant's proposed changes.

[35] The respondents' case, as sought to be made out in the founding affidavit, was contained in par 45 of the founding affidavit. Par 45 reads:-

> "I have been advised and respectfully submit that the proposed dismissals would be unfair and unlawful. The [appellant] is proposing to dismiss the second and further [respondents] **as a result of their failure to agree to changes to their terms and conditions of employment. It is submitted that this action of the [appellant] constitutes a step to compel a demand and, if implemented such dismissal would be an automatically unfair dismissal in terms of section 187(1)(c) of the Act".**

That is the only paragraph in the founding affidavit in which the respondents stated what the basis was for their challenge of their proposed dismissals. It also needs to be pointed out that the respondents did not either in par 45 or anywhere else in the founding affidavit allege that, in dismissing the second and further respondents, the appellant sought to compel them to agree to the changes it was proposing. Instead, the respondents allege in the second sentence of par 45 that the appellant was proposing to dismiss the second and further respondents **"as a result of their failure to agree to changes to their terms and conditions of employment"**. That is not the same as to allege, as the respondents should have alleged if they sought to base their case on sec 187(1)(c), that the appellant sought to effect the dismissals in order to compel them to agree to its proposals. This notwithstanding, I propose to deal with the matter on the basis that

> the case the respondents sought to make out was that the dismissals were effected in order to compel them to agree to the proposals made by the appellant. I do this because it is clear from par 4 of the appellant's answering affidavit that this is how it understood the respondents' case and has sought to deal with it on that basis.

[36] The respondents did not in their founding affidavit substantiate the submission made by them in the third sentence of par 45 that the dismissal constituted **"a step to compel a demand, and, if unimplemented, such dismissals would be automatically unfair in terms of section 187(1)(c)".** In par 79.3 of its answering affidavit, the appellant categorically denied the allegation that the dismissals constituted a step to compel a demand. It stated that the dismissal was the consequence of the changes to the appellant's business necessitated by economic, health and environmental factors and the second and further respondents' refusal to adapt to, and accept, continued employment on conditions adopted to these changes. This created a material dispute of fact. In regard to this aspect of the matter the Court a quo concluded that the **"most probable reason for the proposed dismissals was to compel the [second and further respondents] to accept the [appellant's] demand for a new shift system."** In reaching this conclusion the Court a quo did not at any stage refer to the fact that the appellant had denied the allegation that the proposed dismissal constituted a step to compel the second and further respondents to accept the changes.

[37] The Court a quo also did not refer to or apply the approach that is applicable whenever a dispute of fact has arisen in affidavits in motion

court proceedings when final relief is sought and no request has been made for the matter to be referred to oral evidence. The applicable approach is, of course, to be found in **Plascon - Evans Paints v Van Riebeeck Paints 1984(3)SA 623(A) at 634H-635C**. That approach is to the effect that in such a case the Court makes its decision, in so far as any dispute of fact is concerned, on the basis of the version of the respondent party unless that version is so far-fetched or clearly untennable that the Court is justified in rejecting it merely on the papers or the denial by the respondent of a fact alleged by the applicant is such as not to create a real or genuine or bona fide dispute of fact. In a case where the respondent party's version is so far fetched or so untennable that the Court is justified in rejecting it merely on the papers or where the denial by the respondent of a fact alleged, bythe applicant is not such as to create a real or bona fide dispute of fact, the court must include the fact alleged by the applicant among the facts it takes into account in deciding whether or not to grant the final relief. Of course, the other facts that the Court will take into account are those that are alleged by the applicant and admitted by the respondent (or which the respondent cannot deny) as well as those facts which are alleged by the respondent.

[38] It was, no doubt, with the Plascon - Evans approach in mind that Mr Tiedeman, who appeared for the appellant, submitted that, as there was a material dispute of fact on whether the dismissal was a step to compel the second and further respondent's to agree tot he appellant's proposed changes, the Court a quo should have based its decision on the appellant's version as the appellant was the respondent in the Court a quo and that in failing to do so it committed an error. I agree with this submission.

[39] In this matter the present appellant's denial was not so far fetched nor clearly untennable that the Court was justified in rejecting it merely on the papers as contemplated by the exception to the general rule as

set out in Plascon - Evans nor was the denial such as to raise a real, genuine or bona fide dispute of fact. In fact in par 79.3 of its answering affidavit in the Court a quo the appellant had substantiated its denial of the allegation. That being the case it was not open to the Court a quo to base its decision on the version of the applicants in the Court a quo. It should have based its decision on the version of the respondent in the Court a quo. This would have resulted in the Court a quo proceeding on the basis that the dismissals did not constitute a step to compel the employees to agree to the proposed changes. On that approach the Court a quo would no doubt have dismissed the application.

[40] In a recent judgement that is not reported as yet, namely, **Molapo Technology (Pty) Ltd v Schreunder and Others, case no CA5/01** handed down on the 8th August 2002, this Court found that the judge dealing with the matter in the Labour Court had failed to apply the Plascon Evans approach to disputes of fact in deciding that matter. I think it is necessary to emphasise that the approach is applicable to motion proceedings in the Labour Court as well and should be applied.

[41] In any event there are a number of areas both in the affidavits as well as in the correspondence exchanged between the parties prior to the litigation that support the appellant's contention that the dismissals were not sought to be effected in order to compel the second and further respondents to accept the proposed changes but were sought to be effected because the second and further respondents' contracts of employment were no longer suitable for the appellant's operational requirements or because the second and further respondents were not prepared to accept the proposed

changes. Par 5.1 of the appellant's letter of the 22nd September said that those employees who did not accept the proposed changes **"may be retrenched"**. It did not say that in dismissing the employees the appellant would be seeking to compel them to accept the proposed changes. On the contrary par 6.2 of that letter made it clear that the appellant did not contemplate that the employees who got dismissed would have any future in the company. There the appellant stated that **"any affected employee who does not wish to accept the changes and who has the opportunity to obtain alternative employment may request time off to attend job interviews. If reasonably possible permission will be granted for this"**. In par 6.3 of the same letter the appellant promised to consult with the employees or their representatives regarding any assistance which employees could require in the event of a retrenchment. In par 6.4 the appellant stated that the employees who got retrenched would not be paid severance pay because, as far as the appellant was concerned, their acceptance of the proposed changes would have been a reasonable alternative to retrenchment.

[42] In its letters distributed to employees on the 3rd October, the appellant, after explaining in the first paragraph that it had been told by the union that the employees including the addressees were not prepared to accept the proposed changes, specifically stated in the second paragraph that the addressee was being notified that **"your employment with the [appellant] was to be terminated for reason (sic) of its operational requirements"**. It then told the addressee in the next sentence that his last shift would be on Friday 13 October 2000.

Just below that the appellant once again stated that permission would be granted for time off to attend job interviews should that be required by the addressee. It said also that all monies due to the addressee including leave pay and bonus would be paid on the addressee's last day.

[43] Although in par 4 of the appellant's letter of the 3rd October the appellant said that the addressee would not be dismissed if he reconsidered his position and was prepared to accept the proposed changes and signed a document therein enclosed, that does not assist the respondents because the date by which the envelope enclosing the acceptance of the proposed changes had to be submitted, namely the 9th October, in order for the addressee not to be retrenched was before the proposed date of dismissal. In other words what this meant was not that, if the acceptance of the proposed changes was conveyed after the dismissal had taken effect, the dismissal would be withdrawn but that, if the acceptance was conveyed before the dismissal could take effect, the dismissal would not be effected. In fact in the next sentence the appellant made it even clearer that the dismissal was not effected for the purpose of compelling the employees to accept the proposed changes because it stated that **"(a)fter that date, even if you accept to work in terms of the required working hours, the [appellant] does not guarantee that you will be retained"**. This is not the language of an employer who plans to effect the dismissal in order to compel the employees to accept the proposed changes so that it can withdraw the dismissal and have the employees back in its employ. It is the language of an employer who is not basing its plans on having those employees in its employ.

[44] In par 3 of the document that the appellant delivered to the union as its response to the union's reasons for rejecting the proposed two shift system, the appellant also stated that it had decided to retrench the employees who were not prepared to work the two shift system and they would be paid up to and including Friday 20 October. It did not say anything along the lines that if, subsequent to their dismissals, the employees accepted the proposed changes, their dismissal would be withdrawn.

[45] In its notice of the 18th October 2000 to the employees who were being retrenched, the appellant made a statement in the second paragraph that it did not want to retrench the addressee and would retain him in its employ provided he agreed to work the shift system. That statement seems to be in conflict with the one that the appellant had made that has been referred to earlier to the effect that, after the 9th October, even if an employee accepted the proposed changes, there was no guarantee that he would be retained. However, that statement must be understood on the basis that it does not say that, even if the acceptance was conveyed after the 20th October, which was the date on which at that stage the dismissals were intended to be effected, the employees would be retained. It is reasonable, in the light of all the other statements, to infer that this statement related to an acceptance that was conveyed before the dismissals could be effected. In any event the statement must not be read in isolation. It must be read in the light of all the contents of that letter and the other correspondence. In the first paragraph of that letter the appellant stated that **"(b)ecause you have rejected the new two shift system operationally required by the [appellant], you have been given notice of your retrenchment and your employment will terminate on 20 October 2000"**. That was as final as any dismissal could be. In the last paragraph of the letter or

notice dated the 18th October 2000 the appellant told each affected employee: **"If you have decided not to accept the shift system, then we confirm that your services will no longer be required and that you will be paid until Friday 20 October 2000. You will be paid your usual wages on that day and, as soon as possible next week, your outstanding pay together with pro rata bonus and leave pay will be paid directly into your account**".That indicates quite clearly that the dismissal that the appellant was going to effect was going to be final and was not meant to compel the second and further respondents to accept the proposed changes so as to then continue to employ them or so as to have the dismissals withdrawn upon acceptance by the employees of the proposed changes.

[46] In the light of all of the above the appeal must succeed. There is no warrant for costs not to follow the result. Indeed, both Counsel submitted that costs should follow the result.

[47] In the premises I make the following order:-

1. The appeal is upheld.
2. The respondents are ordered to pay the appellant's costs of the appeal jointly and severally, the one paying the others to be absolved.
3. The order of the Court a quo is hereby set aside and replaced with the following one:-

"(a) the application is dismissed.

(b) The applicants are ordered to pay the respondent's costs jointly and severally, the one paying the others to be absolved".

_____
ZONDO JP

I agree.

_____
NICHOLSON JA

I agree.

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HLOPHE AJA

Appearance:

For Appellant:	Adv T.C. Tiedeman SC
Instructed by:	Webber Wentzel Bowens
For Respondent:	Adv K.S. Tip SC with Adv R Lagrange
Instructed by:	Cheadle Thompson & Haysom
Date of Judgement:	6 December 2002