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Is a decision taken by the board that a restructure is to occur manifestly unfair?

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This question arises frequently in practice. In October 2018 the Labour Appeal Court had occasion to consider the issue in the matter of S*outh Africa Commercial Catering and Allied Workers Union (SACCAWU) obo Members v JDG Trading (Pty) Ltd*. JDG Trading is a large SA corporation that, like others in a filing local economy, found itself caught in the tough financial headwinds

Its board passed a resolution providing that the number of stores and staff numbers "must be reduced". Following this resolution, a notice under section 189(3) of the Labour Relations Act was issued to trade union SACCAWU as its members were impacted. The union claimed that because the company was bound by the resolution to reduce the number of stores and staff, the consultations would be "superficial" and would unfold against the background of a decision already taken.

The issue before the LAC was whether JDG had taken a final decision to retrench before issuing the notice, which effectively involved interpreting the board resolution. As a general proposition, the court accepted that employers faced with financial difficulties invariably take a *prima facie* view on the need for retrenchments and this is not unfair, provided that management keeps an open mind.

On the facts and because the consultation was properly managed by the company, the LAC found that the union was unrealistic, technical and formalistic in seizing upon the word "must" in the board resolution divorced from its context.

The company's subsequent conduct made it clear that management did not regard the resolution as an instruction to retrench. The dismissals were rendered fair.

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