



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 102/21

In the matter between:

SOLIDARITY obo MEMBERS

Applicant

and

BARLOWORLD EQUIPMENT SOUTHERN AFRICA

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

**NATIONAL ASSOCIATION OF SOUTH AFRICAN
WORKERS**

Third Respondent

**ASSOCIATION OF CONSTRUCTION AND
MINEWORKERS UNION**

Fourth Respondent

**NATIONAL UNION OF METALWORKERS OF SOUTH
AFRICA**

Fifth Respondent

UASA – THE UNION

Sixth Respondent

Neutral citation: *Solidarity obo Members v Barloworld Equipment Southern Africa and Others* [2022] ZACC 15

Coram: Madlanga J, Madondo AJ, Mhlantla J, Majiedt J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Tshiqi J (unanimous)

Heard on: 11 November 2021

Decided on: 6 May 2022

Summary: Labour Relations Act — meaningful joint consensus-seeking process — selection criteria

ORDER

On appeal from the Labour Court, Johannesburg:

1. Leave to appeal is granted.
2. The appeal on the merits is dismissed.
3. The appeal against costs is upheld and paragraph (3) of the order of the Labour Court is substituted with the following:
“Each party is ordered to pay its own costs.”

JUDGMENT

TSHIQI J (unanimous)

Introduction

[1] This is an application for leave to appeal against the judgment of the Labour Court that dismissed an application brought in terms of section 189A(13) of the Labour Relations Act¹ (LRA) by the first applicant, Solidarity, against the first respondent, Barloworld Equipment Southern Africa, a division of Barloworld South Africa (Pty) Ltd (Barloworld). In the Labour Court, the National Union of

¹ 66 of 1995.

Metalworkers of South Africa (NUMSA) had brought a similar application, and the two applications were heard together. What lies at the core of this application is whether Solidarity was entitled to invoke the provisions of section 189A(13) of the LRA, in challenging mass dismissals of its members by Barloworld for operational requirements in terms of section 189A of the LRA, after the Commission for Conciliation, Mediation and Arbitration (CCMA) consultations.

[2] The essence of the dispute in the Labour Court was whether there was a meaningful joint consensus-seeking process as envisaged in section 189(2) of the LRA, before the dismissals took place. Solidarity and NUMSA alleged that the consultation process was inadequate which resulted in a fair procedure not being followed, and they sought to invoke the provisions of section 189A(13). They sought an order setting aside the dismissals and declaring that the parties should reconvene and continue with the consultations with a view to participating in a joint consensus-seeking process. For various reasons that will be explored fully below, the Labour Court held that the applications did not raise compliance issues, but rather general issues relating to procedural fairness and, to a certain extent, substantive fairness and that section 189A(13) should not have been invoked. It dismissed the applications with costs.

Parties

[3] The applicant is Solidarity, a trade union acting on behalf of its members who are former employees of Barloworld. NUMSA was referred to as the second applicant in the Labour Court and is cited as the fifth respondent in this application for leave to appeal because it has not participated as a party.² For this reason, reference to the interaction between NUMSA and Barloworld will only be made to a limited extent, insofar as it is necessary.

² A few days before the hearing NUMSA addressed a letter to this Court expressing its support for Solidarity's application for leave to appeal. The status of the letter is not clear and it in fact did not comply with the Rules of this Court and no further reference will be made to it.

[4] The first respondent is Barloworld, the former employer of the dismissed employees. The second respondent is the CCMA, the forum through which the consultations between the parties were facilitated during the restructuring process. The third to sixth respondents³ are cited as trade unions that might have an interest in the outcome of these proceedings.

Background

[5] On 27 April 2020, Barloworld sent a notice, as envisaged by section 189(3) of the LRA, to its employees, including Solidarity's members, relating to the restructuring of its operations which it alleged was as a result of the impact of Covid-19 on the entity. On 28 April 2020, Barloworld approached the CCMA and requested it to appoint a facilitator in terms of section 189A(13) to facilitate a joint consensus-seeking process between the affected parties. After a facilitator was appointed, several letters were exchanged between Solidarity and Barloworld and various consultation meetings were held. Reference will only be made to those that are relevant to the main bone of contention between the parties: whether there was a meaningful joint consensus-seeking process and whether the Labour Court should have granted relief in terms of the provisions of section 189A(13).

Correspondence and meetings between the parties

[6] On 10 June 2020, and after the CCMA had appointed the facilitator as requested by Barloworld, the latter made a presentation to the members of Solidarity⁴ and the facilitator relating to the plan that was delineated for restructuring. A further consultation was held by the parties on 9 July 2020. On 23 July 2020, Solidarity made formal submissions to Barloworld and rejected the restructuring plan tabled by Barloworld. This rejection was, according to Solidarity, due to Barloworld proposing to retrench 750 of its members as a result of a temporary situation.

³ National Association of South African Workers; Association of Construction and Mine Workers Union; National Union of Metal Workers of South Africa; UASA-The Union, respectively.

⁴ The focus is on the consultation process with Solidarity. The consultation with NUMSA is covered only to the extent necessary.

[7] On 28 July 2020, Barloworld addressed a letter to Solidarity. The letter referred to the third CCMA facilitated consultation session and thanked Solidarity for the formal submission on its alternative proposals which it had received on 24 July 2020 in line with the outcomes of the consultation session. It stated that the contents of the submission were noted, considered and deliberated on by Barloworld and that the letter was a response to the alternative proposals contained therein. In item 15 of its letter, Barloworld responded to a proposal by Solidarity to consider employees who wanted to take early retirement. One of the responses to this was that where employees volunteer to be considered for early retirement, Barloworld would evaluate the application, taking into account whether several listed factors including “transformation targets (Employee Assistance Programme, Diversity and Localisation) would be negatively impacted”.

[8] On the same day, 28 July 2020, Solidarity responded in writing and stated that its submission was made in a further attempt to reach consensus on the section 189A process. One of the issues canvassed extensively in the letter was the selection criteria. Item 5 of the letter was headed: “Outstanding issues to be consulted on in terms of section 189(3) of the LRA”. In paragraph (A) of this heading, Solidarity listed “selection criteria”. It made several proposals pertaining to voluntary severance pay, early retirement, etc. Towards the end of the letter, it said: “[w]here there are more associates to positions or there are vacant positions, the positions will be filled applying the Last-In, First-Out (LIFO) principle subject to skills and qualifications as the agreed selection criteria”. It then continued and stated that Solidarity upfront “rejects the proposal that such placements should be in line with [Barloworld’s] Employment Equity Plan as [Solidarity] believe[s] the LRA specifically prohibits possible termination based on race”.

[9] On 30 July 2020, Solidarity addressed a letter to Barloworld requesting certain financial records and information.⁵ Solidarity further stated that dismissals due to operational requirements could not be effected until consultation on the issues in section 189(3) had taken place. It further reserved its rights to declare a dispute pertaining to the disclosure of information in terms of section 16 read with section 184(4) of the LRA, should Barloworld fail to provide the information requested.

[10] It is clear from the minutes of the consultation meetings and the correspondence exchanged, that, although various items were discussed during the consultation process, the most contentious one was the selection criteria proposed by Barloworld, especially the inclusion of transformation as part of the criteria. The parties were unable to reach consensus on the proposed selection criteria. After the expiry of the initial 60-day period on 3 August 2020, the consultation process was extended. Barloworld arranged further meetings on 7 and 11 August 2020 to discuss outstanding issues from the agreed agenda and these were attended by Solidarity. One of the items to be discussed was the selection criteria. Under this topic, Barloworld proposed the following as the “selection criteria mix”: LIFO; Skills and Qualifications and Transformation Targets (Employment Equity Plan (EEP) Targets, Diversity and Localisation). It is common cause that Barloworld had issued notices of termination of employment at the beginning of August 2020, but despite this, further consultations continued on 7 and 11 August 2020.

[11] On 19 August 2020, Barloworld addressed a letter to Solidarity stating that proper consultations in good faith had taken place and there was no legal basis for withdrawing its termination letters and for re-opening the consultation process. It further stated that the CCMA concluded the facilitated consultation process in terms of section 189A and in line with the initial facilitation period, which had expired on 3 August 2020. It also stated that, subsequently, Barloworld arranged further meetings

⁵ These include the reasons for the retrenchments, alternatives to dismissal that were considered and the reasons for rejecting them, number of employees affected, proposed method of selection, severance pay, assistance offered by the employer and the possibility of future re-employment.

on 7 and 11 August 2020 in good faith in an attempt to discuss outstanding issues from the concluded facilitated consultation process. Regarding the selection criteria applied, it stated that, “as previously indicated, a combination of selection principles [was] being applied consistently” and that these were LIFO, Transformation, Skills and Qualifications. The failure to resolve the outstanding issues led to Solidarity and NUMSA approaching the Labour Court for relief in terms of section 189A(13) of the LRA and, on the part of Solidarity, ultimately this Court for relief.

Litigation history

Labour Court

[12] Solidarity and NUMSA approached the Labour Court in separate applications based on alleged procedural irregularities in relation to the consultation process. Solidarity alleged that Barloworld failed to consult on a number of issues envisaged in section 189(2), including one component of its selection criteria, namely transformation. Further, it argued that the implementation and application of transformation as a criterion was unlawful and unfair as it directly discriminates against its members on the grounds of race and gender. Solidarity sought an order declaring that Barloworld had acted in a procedurally unfair manner when dismissing its members for alleged operational reasons and reinstating its members with retrospective effect, with full remuneration and benefits and directing Barloworld to embark on and continue with a meaningful joint consensus-seeking process (including consultations) as envisaged by sections 189 and 189A of the LRA but without relying on transformation as a selection criterion.⁶ It also sought an order interdicting Barloworld from dismissing any of its members prior to following fair procedures. In the alternative, Solidarity sought compensation for the alleged procedurally unfair dismissals.

[13] For its part, NUMSA alleged that the consultation process was flawed in the following respects: (a) Barloworld had failed to disclose information that was essential

⁶ *Solidarity obo Members v Barloworld Equipment (a division of Barloworld SA (Pty) Ltd)*, unreported judgment of the Labour Court of South Africa, Johannesburg, Case No J950/20 and J913/20 (2 October 2020) (Labour Court judgment).

to ensure the effective participation of the unions in the consultation process; (b) there had been no meaningful consultation on alternatives to retrenchment; (c) there had been no joint consensus-seeking consultation on the selection criterion to be used; and (d) Barloworld had called workers to interviews without furnishing them with important information that they needed prior to attending the interviews.⁷ NUMSA sought reinstatement and an order compelling the parties to resume consultation.

[14] The two applications were consolidated and the Labour Court dealt with them in one judgment. The Court emphasised that, in terms of section 189A(18) of the LRA,⁸ the Labour Court “is precluded from adjudicating disputes about the procedural fairness of a dismissal based on the employer’s operational requirements”.⁹ It referred to this Court’s decision in *Steenkamp II*,¹⁰ and held that “the jurisdiction of the Labour Court to adjudicate on procedural fairness of a dismissal based on the employer’s operational requirements has been ousted”.¹¹ The Labour Court said that there is an incorrect view that its jurisdiction in such matters was restored, pursuant to section 189A(13) of the LRA. The Court held that this view is plainly incorrect because section 189A(13) does not make any reference to procedural fairness but specifically provides that if an employer does not comply with a fair procedure, a consulting party may apply to the Labour Court for an order compelling the employer to comply with a fair procedure. It does not, the Court emphasised, refer to procedural fairness.¹²

[15] The Court distinguished between procedural fairness and compliance with a fair procedure. It held that there is a vast difference between “seeking to find procedural fairness and the compliance with a fair procedure”, because “in a procedural fairness

⁷ Id at para 6.

⁸ Section 189A(18) provides that “[t]he Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer’s operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)”.

⁹ Labour Court judgment above n 6 at para 7.

¹⁰ *Steenkamp v Edcon Limited* [2019] ZACC 17; (2019) 40 ILJ 1731 (CC); 2019 (7) BCLR 826 (CC) (*Steenkamp II*).

¹¹ Labour Court judgment above n 6 at para 7.

¹² Id at para 8.

concept the net is wider as opposed to compliance”.¹³ It highlighted that prior to the introduction of section 189A, the Labour Court could adjudicate disputes relating to procedural fairness in respect of all retrenchment disputes and that it still has jurisdiction to adjudicate those matters in respect of retrenchments of less than 10 employees. In respect of mass retrenchments, however, a quicker and less complicated process is now available and it can only be enforced through an application to compel compliance.¹⁴ That this process is provided for by way of motion proceedings is further evidence of the fact that the Legislature did not intend for the Labour Court to adjudicate matters of procedural fairness, which are likely to raise disputes of fact. According to the Court the issue in such applications is a simple one: it is whether the employer complied with its statutory obligations.¹⁵

[16] The Labour Court held that procedural fairness in a broader sense goes beyond an employer’s statutory obligations alone. A typical example, according to the Court, relates to disclosure of information. It also said that, notwithstanding that disputes over procedural fairness are excluded from the ambit of section 189A(13), the LRA does not leave the consulting parties without a remedy or permit the employer to do whatever it wishes during the consultation process. Rather, it enjoins facilitators to facilitate the process and, where necessary, exercise their wide powers to make rulings. In addition, employees retain their constitutional right to strike over issues arising from procedural fairness throughout the consultation process.¹⁶

[17] The Labour Court concluded that the parties’ complaints regarding the consultation process did not raise compliance issues, but rather general issues relating to procedural fairness and, to a certain extent, substantive fairness.¹⁷

¹³ Id at para 9.

¹⁴ Id.

¹⁵ Id at para 10.

¹⁶ Id.

¹⁷ Id at para 14.

[18] Specifically, in dealing with Solidarity's complaints about the selection criteria, the Labour Court stated that the allegation was that Barloworld did not consult over the transformation issue, and that there was a dispute in this regard. The Court concluded that the notice sent on 27 April 2020 to the employees relating to the restructuring disclosed the selection criteria and that there was no dispute, on the probabilities, that the parties engaged on the criteria. The initial proposal was to take into account the EEP, which according to the Court includes transformation. The Court held that the allegation that the employer did not engage on transformation was inconsistent with the evidence presented. The Court also held that in its view transformation is not a selection criterion per se, and that Solidarity's complaint, properly construed, related to substantive fairness. The issue of which selection criteria to apply is one of substance and not procedure, so reasoned the Court. It then stated that Solidarity had a right, in terms of section 189A(7)(b)(ii), to refer the dispute as to whether there was a fair reason for the dismissal to the Court in terms of section 191(11) of the LRA. The Labour Court then concluded that it would be inappropriate if it were to adjudicate a procedural fairness dispute brought as a section 189A(13) application, as its powers were "taken away" by section 189A(18).¹⁸ It concluded that Solidarity's application based on section 189A(13) had to fail. The Court emphasised that the primary remedy envisaged by section 189A(13) is compliance, which was no longer possible since the consultation process had concluded and the proverbial horse had bolted.¹⁹

[19] In passing, the Court found it unnecessary to determine allegations of unlawfulness. These issues have not been raised by Solidarity in this application and will not be traversed in this judgment.

[20] The Court then dealt with the issues presented by NUMSA, which it also held were issues of substance that fell outside the ambit of the Labour Court's powers in terms of section 189A(13).²⁰ The Court held that NUMSA ought to have dealt with

¹⁸ Id at para 13.

¹⁹ Id at para 20.

²⁰ Id at paras 21-4.

Barloworld's alleged failure to provide it with certain information through the remedial procedure provided for in section 16 read with section 189(4) of the LRA. It held that this process was specifically designated by the LRA, and could not be bypassed by the Court purporting to exercise jurisdiction in terms of section 189A(13).²¹

[21] Finally, in dealing with costs, the Labour Court held that the requirements of law and fairness dictated that an award of costs against Solidarity and NUMSA was apposite in the circumstances, because their applications amounted to an abuse of court process.²²

[22] Aggrieved by the Labour Court's decision, Solidarity and NUMSA applied to the Labour Court for leave to appeal to the Labour Appeal Court. The Labour Court concluded that it lacked prospects of success and dismissed the application for leave to appeal with costs.

Labour Appeal Court

[23] After finding no joy in the Labour Court, Solidarity petitioned the Labour Appeal Court for leave to appeal to it. The Labour Appeal Court refused Solidarity's petition with no order as to costs.

Submissions before this Court

Submissions on jurisdiction and leave to appeal

[24] Solidarity submits that this matter engages this Court's jurisdiction as it concerns, inter alia, the proper interpretation of sections 189 and 189A(13) of the LRA. These sections, so it argues, give content to dismissals for operational requirements (and the fairness thereof), underpinned by the right to fair labour practices which is entrenched in section 23(1) of the Constitution. It contends that the interpretation and

²¹ Id at para 22.

²² Id at paras 25-8.

application of the LRA, which was enacted to give effect to the Bill of Rights, do raise constitutional issues. Thus, so submits Solidarity, this Court's jurisdiction is engaged.

[25] Solidarity further argues that this matter raises important issues that are not confined to the parties involved, but relevant to the general labour force and other future employment relationships. It submits that:

“retrenchments usually involve the loss of jobs and income by a number of employees through no fault of their own. They have a more significant social and economic ill-effect than any other forms of dismissals because they affect a large number of employees”.

Therefore, in Solidarity's argument, reaching certainty and finality on whether dismissals constitute retrenchments that are not automatically unfair in terms of section 187(1)(c) of the LRA is in the public interest and warrants a determination by this Court. It therefore contends that the interests of justice favour the granting of leave to appeal.

[26] Barloworld submits that this matter neither raises a constitutional issue nor does it raise an arguable point of law of general public importance that ought to be considered by this Court. According to Barloworld, this is evident from the fact that Solidarity's action and the primary relief sought is based on section 187(1)(f) of the LRA.

[27] Barloworld further contends that even if this Court is inclined to hold that its jurisdiction is engaged, leave to appeal should be refused because the matter is moot. This, according to Barloworld, is because where a facilitated consultation process is underway, the Labour Court can only be approached for relief during the 60-day consultation period. It follows, so contends Barloworld, that the application by Solidarity, brought roughly 30 days after the notices of dismissal were issued, was brought too late to obtain substantive relief aimed at getting the consultation process back on track. Barloworld further argues that in any event this application has no reasonable prospects of success.

Submissions on merits

[28] Solidarity submits that the distinction drawn by the Labour Court between a “fair procedure” and “procedural fairness” is superficial. To substantiate this point, Solidarity asserts that “there are no other precedents [apart from *TAWUSA*,²³ a judgment of the same Judge] to suggest that the words ‘a fair procedure’ are confined only to the contents of section 189 of the LRA”. In Solidarity’s submission, the Labour Court drew a distinction between compliance issues and general procedural unfairness issues, thereby negating the requirement of consultation and a meaningful joint consensus-seeking process and, instead, requiring only that the relevant parties “engage” (emphasis added).

[29] Solidarity argues that it has been held that consultation must be exhaustive and not sporadic, superficial or a sham, in order to be considered meaningful. And that the Code of Good Practice on Dismissal based on Operational Requirements²⁴ codifies this where it states that the employer should in good faith keep an open mind throughout and seriously consider proposals put forward.²⁵ This, in Solidarity’s view, negates the description that the Labour Court attaches to consultation as being mere engagement. It submits that consultation is seldom deemed sufficient when it is rushed. To be meaningful in terms of section 189(2) of the LRA, the consultation process must allow sufficient time for disclosure, consideration and dialogue. It argues that there was no meaningful consultation on the selection criteria in general and the criterion of transformation in particular.

[30] Although Solidarity accepts that the parties discussed the selection criteria, it denies that these discussions constituted adequate consultations and further denies that

²³ *TAWUSA obo Mothibedi v SATAWU*, unreported judgment of the Labour Court, Case No J885/20 (17 September 2020).

²⁴ Code of Good Practice on Dismissal based on Operational Requirements, GN 1517, GG 20254, 16 July 1999.

²⁵ *Id* at clause 3.

an agreement was reached about the selection criteria, which included the criterion of transformation that was eventually used. Solidarity takes issue with the Labour Court's finding that "transformation is not a selection criterion and that Solidarity's complaint relates to substantive fairness".

[31] Barloworld argues that Solidarity does not deny that it was consulted on the selection criteria used to select employees for dismissal. It submits that whether the selection criteria were fair, or were fairly applied, is a matter for determination at trial on the substantive fairness of the dismissals.

[32] Barloworld submits that the Labour Court was correct in drawing a distinction between the questions whether, all things considered and on the application of a value judgment, the dismissal was procedurally fair; and, on the other hand, whether the employer had complied with its statutory obligation to engage in a fair consultation procedure. Barloworld submits that the Labour Court correctly held that, in proceedings under section 189A(13), the only relevant question was the second one.

[33] Barloworld contends that Solidarity's argument that the enquiry into procedural fairness is far broader ignores the express limitation of the Labour Court's jurisdiction to adjudicate procedural fairness issues in mass retrenchments, as explicitly set out in section 189A(18) of the LRA. The jurisdiction of the Labour Court in terms of section 189A(13) is limited to a judicial supervisory and oversight role, which enables the Court to intervene in exceptional circumstances where there has been a gross failure in the consultation process.

Analysis

Jurisdiction and leave to appeal

[34] This matter concerns the interpretation of the LRA and the crisp question before the Court relates to the interpretation of sections 189 and 189A of the LRA. This Court,

in *NEHAWU*,²⁶ held that the interpretation of the LRA, a statute that gives effect to the constitutional right to fair labour practices, is a constitutional issue. This principle was later confirmed in *Steenkamp I*.²⁷ There the Court also held that the ambit of the employment rights flowing from section 189A is an arguable point of law of general public importance, which this Court ought to hear.²⁸ As this matter relates to interpretative issues flowing from section 189A, and as the issues raised will undoubtedly impact the labour rights of many South Africans, not just the litigants before the Court, this Court's general jurisdiction is also engaged.

[35] However, jurisdiction is not the only consideration. The next question is whether leave to appeal should be granted. Because in *Steenkamp I* and *II* this Court has already interpreted the provisions of section 189A(13), this would ordinarily have been a ground to refuse leave to appeal. However, this matter raises material errors made by the Labour Court, which, if not corrected and clarified, may cause confusion in labour law jurisprudence. For instance, the Labour Court sought to make a general distinction between procedural fairness and compliance with a fair procedure. The manner in which the distinction is formulated may, if not clarified, lead to confusion and to a deviation from the jurisprudence of that Court, the Labour Appeal Court and this Court, concerning what falls under the umbrella of procedural unfairness in terms of the provisions of the LRA.

[36] Secondly, the Labour Court laboured under the impression that once the consultation process has been finalised, there can be no reliance on section 189A(13). As will be illustrated below, this view is contrary to the jurisprudence of this Court in *Steenkamp I*. Another issue that needs to be clarified pertains to what constitutes meaningful joint consensus-seeking consultations. Although this concept is not novel, it is worth clarifying that this requirement pertains to the quality rather than the quantity

²⁶ *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 13-4.

²⁷ *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) (*Steenkamp I*).

²⁸ *Id* at para 25.

or duration of the joint consensus-seeking sessions. And further, to re-state in what circumstances it can be said that there was a meaningful joint consensus-seeking process in compliance with the provisions of section 189(2) of the LRA. Leave to appeal is thus granted.

Merits

Issues for determination

[37] The submissions on the merits raise a number of issues. However, as stated earlier, the essence of the dispute is whether the Labour Court was correct in holding that Solidarity's application should not have been brought in terms of section 189A(13). To resolve this issue, I first have to determine whether there was meaningful consultation between the parties as required in terms of section 189(2) of the LRA. The next issue to determine is whether the Labour Court was correct in refusing to grant an order in terms of section 189A(13). If the Labour Court erred, then this Court will have to determine appropriate relief in order to remedy the defect in the consultation process. This may include remitting the matter to the Labour Court or ordering the parties to re-open the consultation process or awarding compensation. Finally, it has to be determined whether this Court should interfere with the Labour Court's costs order against Solidarity.

[38] I will firstly look at the law relating to dismissals based on operational requirements, as envisaged in section 189. I will then consider, the jurisprudence relating to what the LRA envisages when it requires that there must be meaningful consultation between the parties before dismissals for operational requirements take place. This will lead me to a conclusion on whether there was proper consultation. The next enquiry will then be the jurisprudence relating to when section 189A(13) may be invoked. The question that will arise after this is whether section 189A(13) should have been invoked. Finally, I will deal with the costs order made by the Labour Court.

Law relating to dismissals based on operational requirements

[39] Section 189(1) of the LRA requires an employer contemplating dismissals based on operational requirements to consult any person, including trade unions whose members may be affected by the proposed retrenchments, prior to implementing the dismissals. Section 189(2) of the LRA requires the employer and other consulting parties to “engage in a meaningful joint consensus-seeking process and attempt to reach consensus” on the issues listed in section 189(2)(a) to (c). These issues include: appropriate measures to avoid dismissals, to change the timing of dismissals, to mitigate the adverse effects of the dismissals and the method for selecting employees to be dismissed. Section 189(3) states that the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information pertaining to the proposed dismissals.

[40] Section 189(4)(a) refers to disclosure of information stipulated in subsection 3 and provides that the provisions of section 16, read with the changes required by the context, apply to the disclosure of information in terms of this subsection. Section 189(4)(b) deals with the onus in the event that there is a dispute on whether the information that the employer has refused to disclose is relevant to the proceedings. Section 189(5) requires that the employer should allow the other consulting party an opportunity, during consultation, to make representations about any matter dealt with in subsections (2), (3), and (4) as well as any other matter relating to the proposed dismissals. In terms of section 189(6)(a), the employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing. In terms of section 189(6)(b) it is required that if representations are made in writing the employer must respond in writing. Section 189(7)(a) and (b) provides that the employer must select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties or, if there has been no agreement, criteria that are fair and objective.

[41] Section 189A regulates dismissals for operational requirements by employers with more than 50 employees.²⁹ Barloworld was such an employer. Section 189A(2) requires that an employer must give notice of termination of employment in accordance with the provisions of the section, that an employee may participate in a strike and an employer in a lock out, and that the consulting parties may agree to vary the time periods for facilitation or consultation. Such variation of time periods may not be refused unreasonably by either of the consulting parties if it is required to ensure meaningful consultation. The CCMA is, in terms of section 189A(3), required to appoint a facilitator to assist the parties engaged in consultations if requested to do so by either the employer or consulting parties representing the majority of employees whom the employer contemplates dismissing. If a facilitator is appointed and 60 days have elapsed from the date on which the notice was given in terms of section 189(3), the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act.³⁰ In that event, the registered trade union or the employees may either give notice of a strike in terms of sections 64(1)(b) or (d) of the LRA; or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11) of the LRA.

[42] Section 189A(13), which is at the centre of this dispute, deals with the powers of the Labour Court if an employer fails to comply with a fair procedure during consultations. Section 189A(14) and (15) provides that the Labour Court may make an appropriate order referred to in section 158(1)(a) and that an award of compensation made to an employee in terms of subsection (14) must comply with section 194. Section 189A(16) provides that the Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16. Section 189A(18) provides that the Labour Court may not adjudicate a dispute about procedural fairness

²⁹ Reference will only be made to the relevant parts of this provision.

³⁰ 75 of 1997.

of a dismissal based on the employer's operational requirements in any dispute referred to in terms of section 191(5)(b)(ii).

What section 189 requires of the parties engaged in a consultation process

[43] The concept of a meaningful joint consensus-seeking process that is envisaged in section 189(2) is not defined in the LRA. In *Atlantis Diesel Engines*,³¹ the Appellate Division had the following to say about it:

“[This] approach requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached. It proceeds on the premise that consultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management only after there has been consultation in good faith.

. . . .

However, an employer cannot be expected to disclose information which, (a) is not available to it, (b) is not relevant to the issues under discussion, and (c) could harm the employer's business interests for reasons other than its relevance to the consultation process, e.g. trade secrets and other confidential information.”³²

[44] Sufficient information must be disclosed to make the process of consultation meaningful. This includes information concerning the need for retrenchment, as well as information that will assist the employees or trade union, as the case may be, in making contributions about ways of avoiding retrenchment.³³

³¹ *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* [1994] ZASCA 183; 1995 (3) SA 22 (AD).

³² Id at 28E-F and 29J-30A.

³³ Id at 28G-29B.

[45] The above sentiments have recently been echoed by the Labour Appeal Court in *SACCAWU*,³⁴ where the Court held that the requirements of a meaningful joint consensus-seeking process were satisfied as the employer showed willingness to respond to requests for further information, the employer had considered the proposals received from the parties and provided reasons for the rejection thereof and the parties partook in a lengthy engagement process spanning over three months. In *Minister of Trade*³⁵ the Labour Court held that the purpose of consultation should be considered as a process which entrenches the values of social partnership and joint problem-solving aimed at affording all parties a proper opportunity to make contributions towards a consensus-seeking process.

[46] What may be gleaned from the authorities is that for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations, and seriously consider the representations. This entails that the employer is under an obligation to furnish reasons for rejecting representations after it has considered them carefully. Approaching the consultation with a pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful.³⁶

[47] Did the parties then engage in a meaningful joint consensus-seeking process in this matter? It is not in dispute that on 27 April 2020 Barloworld sent out a notice in terms of section 189A concerning its contemplated restructuring. The notice complied in all material respects with the requirements of section 189(3) and there is no suggestion to the contrary. Solidarity concedes that there were several CCMA facilitated consultation sessions, ending in August 2020, but argues that the consultation process was inadequate regarding transformation as part of the selection criteria. What

³⁴ *South African Commercial Catering and Allied Workers Union v JDG Trading (Proprietary) Ltd* [2018] ZALAC 38; (2019) 40 ILJ 140 (LAC) (*SACCAWU*) at para 28.

³⁵ *National Education Health and Allied Workers Union v Minister of Trade, Industry and Competition* (2021) 42 ILJ 1992 (LC) (*Minister of Trade*) at para 21.

³⁶ *National Union of Metalworkers of SA v Dorbyl Ltd* (2007) 28 ILJ 1585 (LAC).

cannot be gainsaid, however, is that transformation is a component of Barloworld's EEP, that it was tabled upfront during the consultation process, and that in subsequent meetings Barloworld made it clear that the EEP would have to be complied with. That this is so, is evident from the correspondence exchanged between the parties during the consultation process and from the agenda of the meeting between the consulting parties dated 7 August 2020. It is also clear that after the initial 60-day period expired on 3 August 2020, the consultation process was extended to enable the parties to consult further on outstanding issues. We know that one of the issues to be considered further was transformation as a selection criterion. It is unlikely that this would have been part of the agenda if there was no desire on the part of Barloworld to reach consensus on this issue.

[48] It is also not in dispute that Solidarity was afforded an opportunity during the consultation process to make representations about several matters, including making its views known on several occasions on transformation as part of the criteria proposed. In addition, it is also not in dispute that in subsequent meetings, up to the end of the consultation process, when Solidarity made its proposals, it rejected the use of transformation as part of the selection criteria. Towards the end of the consultation process and in its letter dated 28 July 2020, Solidarity stated its stance on the topic categorically and said: "Solidarity upfront rejects the proposal that such placements should be in line with Barloworld's Employment Equity Plan as we believe the LRA specifically prohibits possible termination based on race".

[49] The purpose of consultations is to seek consensus and there is no requirement that the parties should reach agreement. The contents of a letter from Solidarity dated 2 September 2020 shows that Solidarity expected that there should have been an agreement between the consulting parties on the selection criteria. The letter states:

"3.4 What is also of concern is the fact that *the selection criteria was not agreed upon* and appears to have been unilaterally implemented. Our client clearly indicated that LIFO and skills and qualifications may be acceptable as fair and objective criteria. You, however, proceeded to unilaterally implement

so-called ‘transformation’ as a selection criterion. This renders the whole process unfair;

- 3.5 Furthermore, the employer unilaterally imposed a weighted score to the three separate criteria which was neither negotiated, nor *agreed* to;
- 3.6 The scoring attached to the three weighted criteria was, and is unilaterally imposed and implemented, and was never properly consulted on . . .;
- 3.7 Even if it is found that the inclusion of transformation is fair and objective (which our client denies) then the *application of the selection criterion*, in the fashion that you are currently implementing and applying same, is utterly unfair, discriminatory and simply unacceptable.”

[50] That there was this expectation is also evident from Solidarity’s replying affidavit in the Labour Court, where it complained that *no agreement* was reached between the applicant, the respondent, the non-unionised employees and the unionised employees pertaining to selection criteria. The affidavit reiterated that “there was *no consensus* reached between the parties as to selection criteria”.

[51] It is curious, but of some importance to note that presently there is a parallel process in the Labour Court where Solidarity is invoking section 191 of the LRA to challenge, amongst others, the use or adoption of transformation as a selection criterion. In the statement of claim in those parallel proceedings, Solidarity states that “the matter deals with the automatic unfair dismissal of the second to fifth claimants due to the *mala fide* actions of the respondent, in terms of *using* transformation /race and gender as selection criteria for dismissing the second to fifth claimants”. The complaint there is aimed at the fact that transformation was used as a selection criterion. In its statement of claim in the section 191 process, Solidarity refers to the agenda of the further meetings scheduled for 7 and 11 August 2020 and states that “what is evident from the agenda . . . is that transformation is mentioned. However, nowhere is it indicated why transformation would be adopted and how it would be applied. *This was not agreed to at the consultations*”. Solidarity further avers that during the consultation process, the claimants agreed, in principle, to two of the pillars, namely: LIFO and the skills and

qualification. *But they did not agree* to the manner in which the criteria would be assessed and applied. (Emphasis added.)

[52] The relevance of the pleadings in the parallel section 191 proceedings is that when one examines Solidarity's pleaded case before the Labour Court in this matter, what emerges is that Solidarity is also primarily unhappy about the fact that there was no agreement between the parties about the selection criteria and, more specifically, the adoption of transformation as a component of the criteria.

[53] In light of the above, it is clear that Solidarity's complaint relates to the inclusion of transformation in the selection criteria and the fact that there was no agreement on its inclusion. The failure to reach consensus or agreement does not necessarily mean that the consultation process was not meaningful. The references to the correspondence, the pleadings and the agenda show that Barloworld genuinely and meaningfully considered the representations made by Solidarity. Even after the process almost collapsed as a result of the behaviour of another trade union, the National Association of South African Workers (NASA), and although the initial time period for consultation had expired, we know that the consultation period was extended. We also know that the consultations continued, even after Barloworld had issued notices of termination in terms of section 189A(7) of the LRA read with section 37(1) of the Basic Conditions of Employment Act. The selection criteria, including transformation, were squarely raised for discussion during the consultations but Solidarity was adamant that it rejected transformation as part of the selection criteria. This is still the stance in the pleadings as Solidarity states that the inclusion of transformation was discriminatory and unfair.

[54] I am mindful of the fact that although this was and still is the stance adopted by Solidarity, it also seeks to challenge the procedural fairness of the consultation process on the apparent implementation of the contents of an undated annexure that Solidarity argues was introduced at the tail end of the consultation. The impact of transformation on the different racial groupings at Barloworld seems to have been contained in the annexure to that document. It is unclear whether the contents of this annexure were

discussed during the consultations and counsel for Barloworld could also not provide clarity on this aspect. I will deal with the debate on whether Solidarity should have been successful in invoking section 189A(13). When dealing with that debate, I will also deal with the relevance of this annexure and whether the alleged failure to consult on its contents compromised the consultation process, such that section 189A(13) should have been invoked.

The correct interpretation and application of section 189A(13)

[55] In order to deal with this topic, it will be helpful to: (a) first clarify the correct interpretation of and approach to section 189A(13) and deal with the circumstances in which it may be invoked; and (b) consider the circumstances in which it is appropriate for parties to approach the Labour Court in terms of section 191(5)(b)(ii) and the powers that the Labour Court has pursuant to that provision. This will resolve the question whether Solidarity was entitled to invoke section 189A(13) of the LRA to address its grievances. The next enquiry will be whether the Labour Court was correct in holding that, generally, there is a distinction between disputes about procedural fairness and those relating to compliance with procedure. I will also determine the effect of section 189A(18) on the jurisdiction of the Labour Court.

[56] Section 189A(13) of the LRA provides:

“If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—

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

[57] In *NUM*,³⁷ the Labour Court described section 189A(13) as follows:

“Section 189A(13) was introduced in 2002 and was intended, broadly speaking, to provide for the adjudication of disputes about procedural fairness in retrenchments at an earlier stage in the ordinary dispute resolution process, and by providing for their determination, inevitably as a matter of urgency, on application rather than by way of referral. The section empowers employees and their representatives to approach the court to require an employer to apply fair procedure, assuming, of course, that the jurisdictional requirements set out in section 189A are met. The section affords the court a broad range of powers, most of which appear to suggest that where a complaint about procedure is made by a consulting party, the court has a broad discretion to make orders and issue directives, thereby extending to the court an element of what might be termed a degree of judicial management into a contested consultation process.”³⁸

[58] In *Steenkamp I* this Court also considered the provisions of section 189A(13). There an employer, Edcon, had issued termination notices prior to the expiration of the 30-day period prescribed by section 189A(8). Aggrieved by this, the applicants referred 51 disputes, involving 1 331 employees, to the Labour Court challenging the validity of the dismissals. It was alleged that Edcon had acted in contravention of sections 189A(2)(a) and (8) and that the failure to comply with those provisions rendered the dismissals invalid. In its analysis, this Court highlighted that sections 189 and 189A provide for procedures and processes that must be complied with before any dismissal for operational requirements can be effected, and that they seek to give effect to the requirement in section 188(1)(a)(ii) that a dismissal must be effected in accordance with a fair procedure.³⁹

[59] This Court emphasised that the sole underlying purpose of section 189A(13) is to provide a convenient and expedient mechanism to ensure that a fair procedure is followed during retrenchment consultations. This Court held further that the

³⁷ *National Union of Mineworkers v Anglo American Platinum Ltd* (2014) 35 ILJ 1024 (LC) (*NUM*).

³⁸ *Id* at para 19.

³⁹ *Steenkamp I* above n 27 at paras 123 and 131.

Legislature has gone out of its way to give special protection for the rights of employees and to protect the integrity of the procedural requirements of dismissals governed by section 189A.⁴⁰ It also held that in cases of dismissals, other than those envisaged in section 189A(13), such as those concerning alleged infringement of the right not to be unfairly dismissed, the protection for employees is sourced elsewhere in section 191 of the LRA.

[60] Bearing in mind the purpose of invoking the provisions of section 189A(13), it is apposite to consider whether the failure, in the present instance, to present the selection criteria matrix as contained in the undated annexure leads to a conclusion that the consultation process was procedurally unfair. In its founding affidavit, Solidarity states that its perception was that Barloworld's desired outcome in implementing transformation was to rid it of certain racial groups, especially whites. It seems that this is one of the reasons why Solidarity made it clear that it rejected transformation as part of the selection criteria. What cannot be gainsaid is that transformation, generally, as part of the selection criteria was part of the ongoing discussions between the parties during the consultation process. Solidarity persistently rejected it as part of the selection criteria until the period of the CCMA-facilitated consultations expired. As stated, this is still its stance in the pleadings as Solidarity states that the inclusion of transformation was discriminatory. The relief Solidarity sought in the Labour Court was that consultation be resumed on the basis that transformation be excluded altogether as a selection criterion. Curiously, Solidarity has not submitted that the failure to present the selection criteria matrix deprived it of the opportunity of considering this aspect further. This is unsurprising because its stance throughout was that this aspect was non-negotiable. The parties had therefore clearly deadlocked on this issue and the next route for Solidarity was to approach the Labour Court in order for it to adjudicate on the substantive fairness of relying on transformation as part of the selection criteria.

⁴⁰ Id at para 163.

[61] Furthermore, Solidarity did not specifically allege in its founding affidavit that it did not have sight of the weightings in the selection criteria matrix during the consultations. Barloworld therefore cannot be faulted for not specifically addressing this issue, nor could its version that there was meaningful consultation be rejected on the papers. The issue was raised in Solidarity's heads of argument in this Court where it submits that:

“[T]he selection criteria proposed at the onset of consultations morphed into something totally different during the last session of 7 August 2020, by the implementation of a construct of ‘*weighted scores/selection criteria*’ and then with the inclusion of ‘*transformation*’, versus the initial proposal as contained in the section 189(3) notice of Barloworld’s ‘employment equity plan’”.

This submission by Solidarity complains about the implementation of the weighted score. It also complains about the inclusion of transformation as part of the selection criteria. I have already shown that the inclusion of transformation as part of the selection criteria was disclosed upfront and was part of ongoing consultation. The other complaint seems to suggest that the inclusion of transformation as part of the selection criteria should be differentiated or contrasted with the initial proposal as contained in the section 189(3) notice of Barloworld's EEP. As already stated, transformation is part of employment equity in the workplace. The Labour Court was therefore entitled to accept Barloworld's version that there had been meaningful consultation on the selection criteria.

Is there a distinction between disputes about procedural fairness and those relating to compliance with procedure?

[62] In *Steenkamp I* the Court also considered the consequences of dismissals that occurred due to non-compliance with the provisions of section 189A. It held:

“If non-compliance with section 189A results in dismissals being procedurally unfair, the ordinary unfair dismissal provisions of the LRA as well as the special remedies that section 189A provides may be invoked. If the employer's operational requirements for

dismissals are inadequate, this can be challenged as rendering the dismissal substantively unfair with the advantage of immediate access to the Labour Court or the right to strike provided for in section 189A may be invoked.

If the procedural requirements of section 189 or 189A are not complied with in circumstances where there is no acceptable reason for non-compliance, the result will be that the dismissal was not effected in accordance with a fair procedure as contemplated in section 188(1)(a)(ii). It is, therefore, procedurally unfair”.⁴¹

[63] The Court explained that the orders the Labour Court may make under section 189A(13) are very extensive. These include an order for re-instatement which could be with retrospective effect to the date of dismissal.⁴² The Court elaborated on the process or procedure that an employer must follow when contemplating the dismissal of an employee for operational requirements. It highlighted that section 189A creates rights and obligations for a certain category of employers and their employees in regard to dismissals for operational requirements which did not form part of the LRA before 2002. It is worth noting that it also makes provision for the referral to the Labour Court for adjudication of a dispute about whether there is a fair reason for dismissal. It said that in section 189A(13), the LRA specifies special remedies for non-compliance with a fair procedure and that in section 191 it sets out the dispute procedure that must be used to resolve disputes concerning alleged infringement of the right not to be unfairly dismissed.⁴³ In considering the remedies available to a dismissed employee, the Court stated:

“If an employer has not issued notices of dismissal but has failed or is failing to comply with a fair procedure in the pre-dismissal process, a consulting party may make use of the remedy in subsection (13)(a). In such a case the consulting party would apply to the Labour Court for an order compelling the employer to comply with a fair procedure. If an employer gives employees notices of dismissal without complying with a fair procedure, or, if an employer dismisses employees without complying with a fair

⁴¹ Id at paras 124-5.

⁴² Id at para 128.

⁴³ Id at para 131.

procedure, the consulting party may apply to the Labour Court for an order interdicting the dismissal of employees in terms of subsection (13)(b) until there is compliance with a fair procedure. This would include giving premature notices of dismissal.

If an employer has already dismissed employees without complying with a fair procedure, the consulting party may apply to the Labour Court in terms of subsection (13)(c) for an order reinstating the employees until the employer has complied with a fair procedure. The significance of the remedy of reinstatement in subsection (13)(c) is that it is made available even for a dismissal that is unfair only because of non-compliance with a fair procedure. That is significant because it is a departure from the normal provision that reinstatement may not be granted in a case where the only basis for the finding that the dismissal is unfair is the employer's failure to comply with a fair procedure. In such a case the norm is that the Labour Court or an arbitrator may award the employee only compensation."⁴⁴

[64] This Court accordingly made it clear that "fair procedure", as contemplated in section 189A, refers to the procedure that has been set out in sections 189 and 189A, which gives effect to section 188.⁴⁵ The Court also dealt with the provisions of section 189A(18) and said that it precludes the Labour Court from adjudicating any dispute about procedural fairness of a dismissal for operational requirements referred to it in terms of section 191(5)(b)(ii). The Court explained the position as follows:

"In terms of [section 189A(8)(b)(ii)(bb)] only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred to it in terms of section 191(5)(b)(ii). It reads:

⁴⁴ Id paras 160-1.

⁴⁵ Section 188(1) of the LRA provides, in part:

- "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) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
 - (b) that the dismissal was effected in accordance with a fair procedure."

‘The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).’

Subsection (18) may seem very drastic and harsh on employees who may be having a dispute with their employer concerning the procedural fairness of their dismissal. However, it will be seen that, when read with subsection (13), it is not harsh at all. Subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure.”⁴⁶

[65] It is thus clear that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii). As this Court reasoned, in *Steenkamp I*, section 189A(13) provides adequate protection for employees where there has been a failure to comply with a fair procedure. Moreover, in *Steenkamp II*, this Court confirmed the features of section 189A(13) and said:

“A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the substantive fairness of the dismissals to the Labour Court in terms of section 191(11) of the LRA.

Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair.”⁴⁷

[66] The Court elaborated further:

“Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such

⁴⁶ *Steenkamp I* above n 27 at para 158.

⁴⁷ *Steenkamp II* above n 10 at paras 47-8.

irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track. The purpose of section 189A(13) has been recognised in a long line of cases. In *Insurance & Banking Staff Association* the Labour Court explained:

‘The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible. All too often the changes in an enterprise with the passage of time deter reinstatement as a remedy. So, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals.’

Similarly in *SA Five Engineering* the Labour Court held that—

‘Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.’⁴⁸

[67] The above excerpts read with section 189A(18) remove disputes about procedural fairness, as a distinctive claim or cause of action, that a dismissal on the basis of operational requirements was procedurally unfair, from the adjudicative reach of the Labour Court.

[68] It follows from this jurisprudence that, in order for the Labour Court to adjudicate a claim of the unfairness of a procedure in dismissals for operational requirements, the Court must be approached in terms of section 189A(13) on the basis of non-compliance with the procedures prescribed by sections 189 or 189A of the LRA. *Steenkamp II* further holds:

⁴⁸ Id at paras 52-3.

“In exercising its powers in terms of section 189A(13) of the LRA, the Labour Court thus acts ‘as the guardian of the process’ and exercises a ‘degree of judicial’ management or oversight over the process. The aim is to proactively foster the consultation process by allowing parties to seek the intervention of the Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the consultation process before it ends.”⁴⁹

[69] This approach to section 189A(13) has been followed by the Labour Court in numerous matters, including *AMCU*⁵⁰ where the Labour Court was approached in terms of section 189A(13). In that matter, it was common cause that the respondent did not enter into a consultation process with AMCU or the employees as required by section 189 of the LRA. The Labour Court accordingly confirmed that the purpose of section 189A(13) is to “compel an employer in large scale retrenchments to follow a fair procedure if it has not done so”.⁵¹ The Court held that the employer had failed to comply with a fair procedure in that it did not find it necessary to consult, as prescribed by section 189. Ultimately the Court ordered that:

“The employers have not consulted in terms of sections 189 and 189A of the LRA. They must be compelled to do so. The employees must be reinstated until the employers have complied with a fair procedure, as contemplated by section 189A(13)(c).”⁵²

[70] When the matter was taken on appeal to the Labour Appeal Court, that Court upheld the decision of the Labour Court:

“The Labour Court correctly stated that, after Exxaro terminated its contracts with the appellants, there may exist ‘justifiable and fair reason for dismissing the employees for operational requirements’ but that that issue would only be capable of being ascertained

⁴⁹ Id at para 54.

⁵⁰ *Association of Mineworkers and Construction Union v Piet Wes Civils CC* (2017) 38 ILJ 1128 (LC) (*AMCU*).

⁵¹ Id at para 21.

⁵² Id at para 30.

*through a proper consultation process as contemplated in section 189 and section 189A. I agree. It follows for these reasons, that the Labour Correct was correct in granting the relief sought by the respondents in terms of section 189A(13) and in reinstating the respondent employees to enable the appellants to follow a fair pre-dismissal procedure in accordance with section 189A.”*⁵³ (Emphasis added.)

[71] The following emanates from the above discussion. Firstly, the power of the Labour Court to adjudicate the procedural fairness of retrenchment consultations is limited to the “fair procedure” that is prescribed in sections 189 and 189A, which give effect to section 188. Secondly, it is evident that a party seeking the Labour Court’s intervention when an employer fails to follow a fair procedure during retrenchment consultations must approach the Court for relief in terms of section 189A(13). This is because the Labour Court is barred from determining the procedural fairness of a dismissal based on operational requirements when it is approached in terms of section 191(5)(b)(ii). Thirdly, it is evident that these provisions are in place to serve the interests of expediency and efficiency, and to ensure that the procedural requirements of the LRA are followed when parties engage in consultation in anticipation of a large-scale retrenchment, and that any defects in the procedures can be cured before jobs are lost. This policy choice was adopted to avoid the courts having to adjudicate alleged procedural unfairness in the aftermath of mass retrenchments. It was self-evidently a sensible legislative decision, for it reduces the likelihood of parties being exposed to the inconveniences and complications that could arise from a court ordering them to unscramble the proverbial scrambled egg. Of course section 189A(13) does envisage, and apply to a situation where a dismissal has already taken place. Paragraph (c) of this section empowers the Court to direct “the employer to reinstate an employee until it has complied with a fair procedure”. Because the section 189A(13) process is meant to take place immediately and to be finalised expeditiously, the

⁵³ *Piet Wes Civils CC v Association of Mineworkers and Construction Union* [2018] ZALAC 18; (2019) 40 ILJ 130 (LAC) at para 28. See also *Retail & Associated Workers Union of SA v Schuurman Metal Pressing (Pty) Ltd* (2004) 25 ILJ 2376 (LC) at para 32.

paragraph (c) power does not detract from the metaphor of the scrambled egg, because the scrambling will not be complete.⁵⁴

[72] In light of these principles and the jurisprudence canvassed above, it is clear that, other than *TAWUSA*,⁵⁵ there is no authority in support of the Labour Court’s finding that there is a distinction between “compliance with a fair procedure” and “procedural fairness”. While there is no clear example in law where non-compliance with the statutory provisions of section 189 and 189A would not also translate to procedural unfairness, one cannot rule out that possibility, but there was no basis here for making that distinction. Until that scenario is presented, it may be safely concluded that the Labour Court’s jurisdiction to adjudicate procedural fairness is only ousted in respect of unfair dismissal proceedings brought in terms of section 191(5)(b)(ii). It is uncontroversial and has been settled by this Court that if an employer fails to follow the procedures prescribed by section 189 and 189A of the LRA, a party is entitled to approach the Labour Court in terms of section 189A(13) and the Court, in turn, is entitled to grant any of the remedies contained in that provision.

Non-disclosure of information

[73] Regarding the complaint about non-disclosure of information, it is important to note that this issue was raised by NUMSA, which is not a party to this appeal. The complaint was that the consultation was flawed because Barloworld refused to disclose information (the list of names and the order books for 2019/20) that was vital to ensure the effective participation of the unions in the consultation process.⁵⁶ In this Court, Solidarity takes issue with how the Labour Court dealt with this issue. In essence, it argues that the Court “erred in not finding that a consulting party is entitled to an order of procedural unfairness where an employer failed to disclose relevant information or, alternatively, directing the employer to disclose the information and interdicting the

⁵⁴ I deal with the power more fully below.

⁵⁵ *TAWUSA* above n 23.

⁵⁶ Labour Court judgment above n 6 at para 6.

dismissals as a result thereof”. It seems that Solidarity’s complaint in this regard concerns the failure to discuss the annexure containing the selection criteria matrix at the consultation meeting. I have already found that this omission did not lead to the process being procedurally unfair. In light of that conclusion, I do not deal with the issue further.

[74] It follows that the Labour Court was correct in holding that there could be no reliance on section 189A(13) of the LRA.

[75] The next enquiry is whether the Labour Court’s assertion was correct that, once dismissals have taken place, the horse has bolted. It is helpful to deal with this issue, notwithstanding that any conclusion on it will not impact the order in this matter. I am minded to deal with it because it was one of the reasons the Court non-suited Solidarity. The Labour Court’s stance, as a general legal principle, is contrary to the various decisions of this Court where it held that an application in terms of section 189A(13) may be brought after consultations have concluded. Section 189A(17)(a) of the LRA provides that “[a]n application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employees’ services or, if notice is not given, the date on which the employees are dismissed”. Section 189A(17)(b) provides that “[t]he Labour Court may, on good cause shown condone a failure to comply with [this time limit]”. In *Steenkamp II*, this Court held that—

“the procedure within section 189A(13) of the LRA provides for an urgent remedy on application whilst the parties are still locked in consultations or shortly thereafter in circumstances where the reinstatement of the dismissed employees can still salvage the consultation process by restoring the status quo ante.”⁵⁷

[76] In making the assertion that the horse had bolted, the Labour Court reasoned that section 189A(13) is primarily aimed at compelling compliance with a fair procedure

⁵⁷ *Steenkamp II* above n 10 at para 71.

during the consultation process, and that this was no longer possible in this matter. In support of this conclusion, the Labour Court simply stated that Solidarity brought the application too late. Furthermore, by too eagerly dismissing a section 189A(13) application without applying its mind to whether condonation ought to be granted, a court risks allowing employers to evade responsibility for flouting the obligations imposed on them by sections 189 and 189A of the LRA. Considering that Solidarity's members started receiving termination notices on 17 August 2020 and Solidarity approached the Labour Court on 14 September 2020, the application was brought within the requisite 30-day period.

Costs

Submissions

[77] Solidarity challenges the costs order granted by the Labour Court on the basis that the application raised constitutional matters as well as other matters deserving of the Court's attention pertaining to the patent unfairness meted out to Solidarity's members. It also argues that the mere fact that it was litigating against a private company and not the State does not justify an order as to costs. Furthermore, Solidarity submits that the Labour Court erred in not having regard to the fact that the trade unions, which are non-profit organisations, have now been mulcted in costs where a constitutional issue was raised. It also argues that there is no basis to award costs where general unfairness in the process existed and where there was patently no malice or vexatious conduct in bringing their applications. Finally, it asks that costs in this application be costs in the appeal.

[78] Barloworld submits that in awarding costs against Solidarity, the Labour Court lamented the fact that it had to deal with volumes of documentation during truncated time lines in an application that dealt with substantive issues and which was not supposed to be brought in terms of section 189A(13). Thus, according to Barloworld, the Labour Court did furnish the reasons for the adverse costs order, as this Court had

stated in *Union for Police*.⁵⁸ Barloworld accordingly submits that this application ought to be dismissed with costs.

Analysis

[79] This Court in *Union for Police* confirmed the position that applies to costs in labour matters. It held that costs are not generally awarded in labour matters in recognition of the right to fair labour practices and the right of access to courts, and also on account of section 165 of the LRA, which requires a court to make a costs order that accords with the law and fairness. It reasoned that these rights ring hollow when employees are at risk of adverse costs orders which act as a deterrent to enforcing their rights.⁵⁹ This Court proceeded to confirm that in some instances, costs may be appropriate, and that this will always be an exercise of a court's judicial discretion. It reasoned:

“In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in section 162, and the constitutional and statutory imperatives that underpin it.”⁶⁰

[80] The costs order by the Labour Court has to be considered against the backdrop of the fact that, although section 189A(13) should not have been invoked, it is harsh to describe Solidarity's conduct as an abuse of court process. The matters raised were arguable and raised issues that affected the livelihood of many members of Solidarity and NUMSA. Furthermore, one of the reasons the Labour Court decided to grant an adverse costs order against Solidarity was its view that the application was an abuse of the Court's process. In this regard, the Labour Court misdirected itself in that its view was based on a fallacious distinction between “compliance issues” and general

⁵⁸ *Union for Police Security and Corrections Organisation v South African Custodial Management* [2021] ZACC 26; 2021 (11) BCLR 1249 (CC) (*Union for Police*).

⁵⁹ Id at paras 24-8.

⁶⁰ Id at para 35.

procedural defects. The adverse costs order was thus not warranted and should not be allowed to stand as there was no basis for it.

[81] I make the following order:

1. Leave to appeal is granted.
2. The appeal on merits is dismissed.
3. The appeal against costs is upheld and paragraph (3) of the order of the Labour Court is substituted with the following:
“Each party is ordered to pay its own costs.”

For the Applicant:

W P Bekker Instructed by
Serfonteni Viljoen and Swart

For the First Respondent:

G Fourie SC and K T Mokhatla
instructed by Bowman Gilfillan
Incorporated