



**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)**

NOT REPORTABLE

CASE NO: C04/2024 / C252/2024

In the matter between:

PAUL DUVERGE

Applicant

and

**SPANISH FARM GUEST LODGE CC
t/a SKY VILLA BOUTIQUE HOTEL**

First Respondent

SKY VILLA (PTY) LTD

Second Respondent

Date heard: 3 – 6 March 2025

Judgment delivered: 11 April 2025

Summary: Alleged unfair dismissal of the applicant by the second respondent, based on its operational requirements. Finding that his dismissal was procedurally and substantively unfair. Court ordering second respondent to pay applicant eight months remuneration as compensation. Court further ordering that all statutory monies withheld, including severance pay, must be paid.

JUDGMENT

DANIELS J

Introduction

1. The first and second respondents are part of a group of companies, the Wiehahn Group (the “Group”). The first respondent initially employed the applicant. However, by the time of his dismissal, the second respondent employed the applicant, hereafter “Sky Villa” or “the employer,” cost to company equal to R80 250, 00 per month. For ease of reference, from time to time, the applicant may be referred to as “Duverge”.

2. The applicant claims that his dismissal, for operational reasons, by the second respondent was substantively and procedurally unfair, and seeks compensation. The second respondent contends that his dismissal was substantively and procedurally fair.

3. The applicant also claims various statutory monies¹ including severance pay,² leave pay,³ and notice pay.⁴ The second respondent alleges that these monies are not due primarily because they were set off against a loan of R300 000, 00 (the “alleged loan”) allegedly made to the applicant by another company in the Group, Saper Investments (Pty) Ltd (“Saper Investments”). The alleged loan arises, says the second respondent, from an agreed discount to the purchase price of the property, which was sold to the applicant by Saper Investments.

Background facts

¹ The parties agree that the initial value of the statutory claims was R271 306, 73 but an amount of R22 223, 65 was since paid. Accordingly, the balance is R249 083, 65.

² Severance pay in the amount of R92 596,15.

³ Leave pay in the amount of R104 633,65.

⁴ Notice pay in the amount of R74 076,92.

4. The second respondent's first witness, Mr. Stefin Strydom, is the finance director of the Group. He is a director of the second respondent, as well as Saper Investments, the property development division of the Group. The second witness, Ms. Whitney Gabriels ("Gabriels"), is an employee of a labour consultancy, LabourNet, which assisted the employer during the consultation process and facilitated the consultation meetings. The applicant testified on his own behalf.

5. The facts, as extracted from the testimony and the pleadings, are summarized below. The summary proceeds as follows:

5.1. The Group has interests in the property development sector, and the hospitality industry. The Group owns properties, and hotels, including the first and second respondents.

5.2. Directors of the Group include Messrs. Otto Wiehahn ("Otto") and Stefin Strydom ("Strydom"). Otto's son, Mr. Daniel Wiehahn ("Daniel"), though also active in the business, is not a director of the Group.

5.3. Duverge was engaged by the first respondent on 23 February 2018 but his employment contract⁵ was transferred to second respondent during March 2020, with recognition of his service with the first respondent. His employment contract suggests that Duverge was engaged as General Manager for both Sky Villa and the Bungalow though another individual held the title of Operations Manager for the Bungalow, at the same time. After the departure of the Operations Manager, Duverge continued as General Manager for both hotels.

5.4. During April 2019, the Group announced to staff that Duverge had been promoted to the position of Group General Manager because of its intention to expand the hospitality business. Duverge was not given a new employment contract setting out his new job title, functions, or remuneration.

⁵ His employment contract describes his title as "General Manager", while his place of work is described as Sky Villa Boutique Hotel and The Bungalow, Plettenberg Bay.

The Group assisted Duverge to purchase a vehicle and housed him on a property owned by Saper Investments. The property, used by the Group to accommodate senior management, is located at 30 Barons View Estate, Plettenberg (the “property”). Conveniently, the Sky View Boutique Hotel is also located in the Estate.

5.5. During mid-2021, Duverge indicated to directors of the Group that he had identified another property which he intended to purchase. However, Otto advised him that that was a poor investment. Otto encouraged Duverge to purchase the Barons View property instead, and Duverge agreed to consider that. In order to determine the market value of the property, Duverge was requested to secure three independent valuations, which he did.

5.6. Strydom testified⁶ that Duverge agreed that the purchase price for the property would be guided by the median of the three independent valuations. The first valuation was R2.5million to R2.6million, the second was R2.4million to R2.55million, and the third was R2.5million to R2.7million. Strydom testified that, following the valuations, Duverge agreed to a purchase price of R2.5million and agreed that the purchase price would be discounted by R300 000, 00 which would form part of an “off the books” loan (as previously mentioned, this is the alleged loan”). Strydom testified that an additional loan was agreed to, to assist Duverge with the deposit and other costs attendant on the purchase.

5.7. On 6 September 2021, Duverge emailed Strydom and asked him for clarity about the monthly bond repayments as well as the loan for the deposit and the transfer fees. Furthermore, Duverge stated: *“If you have some time, may you kindly share with me your calculations so that I can work through them. We can then discuss any questions I may have when I’m in Somerset West.”* Later that day, Strydom emailed Duverge with the subject titled *“27 Barons View House – Possible purchase calculations”*. In the attachment to his email, Strydom set out an amount of R343 020, 83 to be loaned to

⁶ Transcript of Court Proceedings: 3 March 2025, p 31 lines 9 – 24

Duverge to cover the deposit, transfer duty, bond registration, and conveyancing fees. The calculations indicated that the purchase price for the property would be discounted by R300 000, 00 – the alleged loan. Accordingly, two loans were contemplated, including the alleged loan, with the total value of the loans being R643 020, 83. Duverge testified that he perused the attachment upon its receipt, but these were only “possible calculations”. Notably, Duverge did not testify that he had issues with the purchase price reflected in the attachment.

5.8. Strydom testified that the details of the sale, and the loans, as explained above, were finalized by email, a telephonic conversation between himself and Duverge, and a further discussion in Somerset West in September 2021.

5.9. On 23 September 2021, Saper Investments and Duverge signed an offer to purchase relating to the property. The purchase price, as reflected in the offer to purchase, was R2.2million.

5.10. However, subsequently, due to a poor credit rating, Duverge did not qualify for finance, in his own name. Accordingly, during early 2022, the Group decided to establish a new company, Sky Ray (Pty) Ltd (“Sky Ray”) and apply for finance from Investec, through that company.

5.11. Sky Ray was established, with Duverge and Daniel as co-directors. Duverge was the sole shareholder. To protect the Group, a lease agreement was concluded which granted Saper Investments the rights of access to the property. In addition, Saper Investments required the applicant to affect a cession of the shares of Sky Ray.

5.12. Investec required Otto and Saper Investments to stand surety for the mortgage bond, which they did. Thereafter, Investec approved the loan to Sky Ray.

5.13. On 1 March 2022, Duverge sent an email to Strydom in which he recorded a further aspect of the agreement between himself and the Group - that any salary increases and bonuses, which would become due, would be deducted from monies owed to Saper Investments.

5.14. On 10 March 2022, a second offer to purchase was signed by Saper Investments and Sky Ray. Saper Investments loaned the amount of R309 650, 00 to Sky Ray to assist it to pay the deposit, legal fees, and transfer duty. This loan was recorded in a "term sheet" drafted by Strydom. The term sheet makes no reference to the alleged loan - reflecting the discount to the purchase price. Strydom testified that this was deliberate, to avoid prejudice to the parties and, in any event, the alleged loan was "off the books".

5.15. Strydom testified that an increase and a bonus was awarded to Duverge in December 2022, which was set off against the loans, in accordance with the earlier agreement. At that time, the bonus, due to Duverge, an amount of R77 000. 00, was deducted from the loan/s.

5.16. On 26 May 2023, the applicant met Otto, who told him that the directors of the Group had decided, for financial reasons, not to expand the hospitality business and to make the position he held - Group General Manager ("Group GM") redundant. Otto expressed his gratitude to the applicant for the excellent service he had rendered to the Group. However, Otto stated, the General Managers of Sky View Hotel and the Bungalow did not require supervision by a Group GM. The applicant complained that a "final decision" had been made. It is unclear from the transcript (of the consultation meeting) whether the applicant's complaint was that a final decision had been made to abolish his position, or to retrench him. Otto did not respond to the complaint and instead stated that they would look at retrenchment if no agreement on a voluntary separation package could be reached. Thereafter, the applicant received an offer of a voluntary separation package, which he rejected.

5.17. On 31 May 2023, the applicant received a notice, contemplated by section 189(3) of the Labour Relations Act 66 of 1995 (the “LRA”) informing him of his possible retrenchment for the following reasons:

“The company has decided to enter into a partnership with a specialized company which is able to provide specialized services specific for the hospitality industry. These services go above and beyond the scope of the current Group General Manager and Financial Manager. It has thus become necessary to make the position of Group General Manager and Financial Manager redundant.” (own emphasis)

5.18. On 9 June 2023, a first consultation meeting was held:

5.18.1. The meeting was attended, among others, by Strydom, Gabriels, Otto, and the applicant.

5.18.2. The applicant noted that the GM for the Bungalow, Ms. June Bouwer (“Bouwer”) commenced her employment during November 2022, while Ms. Zandalee Kemp, the GM for Sky Villa, commenced her employment during March 2023. Nobody contradicted this. The applicant enquired what position the retrenchment exercise related to, because he wore “many hats in the business.” Otto replied that the applicant knew very well that the process related to the Group GM position; even though he was formally employed through Sky Villa.

5.18.3. When the applicant asked for the name of the specialized company referred to in the section 189(3) notice, Otto stated that the company was Proactive Hospitality Solutions (“PHS”). Thereafter, when Duverge asked for clarity on how exactly PHS goes beyond the scope of the Group GM, Strydom replied that PHS provides strategic marketing services, but it was incorrect that PHS goes beyond the scope of the Group GM.

5.18.4. Strydom stated that the reasons for the retrenchment related to economic reasons, such as high overheads, interest rate increases, and the redundancy of the position of Group GM. The applicant questioned why these reasons did not appear on the section 189(3) notice.

5.18.5. The applicant asked about alternatives to retrenchment, referring to existing vacancies and those likely to arise. Gabriels asked the applicant to record these alternatives in writing and send them to her, so they could be considered.

5.18.6. When the applicant asked whether the selection criteria of 'last in and first out' would be used, the employer replied that this was irrelevant because only the position of Group GM would be affected. When Duverge asked why the employer had engaged Bouwer when she was beyond the normal retirement age, Otto responded that there was no normal retirement age.⁷ Otto hotly replied: *"Paul, you are talking crap, you are wasting my time."* Otto followed this up stating: *"I do not have time for your bullshit man, you know you are talking crap."* Gabriels did not intervene to stop Otto's aggression.

5.19. On 20 June 2023, a second consultation meeting was convened. Strydom explained that the rationale for the retrenchment, set out in the section 189(3) notice, was incorrect. He explained that the rationale was unrelated to the appointment of PSH and related to economic reasons, such as high overheads, and the decision by the Group not to expand the hospitality business. The applicant explained that this was confusing, and he could not be expected to immediately deal with the new rationale. He stated that the section 189(3) notice should be amended before the consultation proceeded but Strydom and Gabriels replied that this was unnecessary. When the applicant raised selection criteria, Strydom and Gabriels informed him that that issue did not arise because only his position would be affected. They

⁷ Despite the vehement protests by Otto, it was common cause in these proceedings that there was a normal retirement age applicable to employees.

stated that the situation would be different if all General Manager positions were affected. They did not explain why the Group GM position should be treated differently to the other General Manager positions. Duverge and Strydom became engaged in a heated exchange as to whether he (Duverge) had been employed as Group GM. Duverge maintained that he was employed as General Manager for two hotels, Sky Villa and the Bungalow but asked to perform the role of Group GM for which he charged a consultancy fee. Despite the employer's initial position, Gabriels agreed a new section 189(3) notice would be issued, and consultation would continue thereafter.

5.20. Later that day, a further section 189(3) notice was issued. The employer recorded the reasons for the retrenchment in the following terms: *"Due to external market factors directly out of its control, the company must downsize its business through means of operational restructuring to ensure the economic viability of its operations."* In respect of selection criteria, the employer recorded that, because the retrenchment would affect only one employee, no selection criteria were applicable.

5.21. On 22 June 2023, Duverge sent an email to Gabriels. He recorded his disappointment with the manner in which Gabriels had facilitated the consultations. He recorded his unhappiness at being called dishonest during the consultation meetings on 9 and 20 June. He recorded that, during the consultations, he had tabled alternatives which had not been considered. He recorded that alternatives to his retrenchment existed, including the reduction of salaries and the termination of contracts with recently appointed third party providers, such as PSH. He maintained that PSH was ineffective and costly, and he had executed those functions previously. In addition, Duverge proposed that he be placed back into his original position – as General Manager for both Sky Villa and the Bungalow.

5.22. On 28 June 2023, a consultation meeting had been scheduled but the applicant was sick and submitted a sick note. Despite the eagerness of Strydom to proceed, on the advice of Gabriels, the meeting did not proceed.

5.23. On 11 July 2023, a third consultation meeting was held, attended *inter alia* by Strydom, Gabriels, Otto, and the applicant. At the meeting:

5.23.1. Duverge read his email dated 22 June, and the employer responded. When Duverge suggested that PSH be terminated, Strydom responded that that issue was not open for debate.

5.23.2. Strydom indicated that the employer could offer Duverge, as an alternative to retrenchment, the position of General Manager of Sky Villa.

5.23.3. Duverge enquired if the employer could offer him his previous position – General Manager for both Sky Villa and the Bungalow, Strydom responded the position no longer existed because the employer had determined that each hotel required its own General Manager.

5.23.4. When Duverge asked about the availability of the Bungalow General Manager position, held by Bouwer. Strydom immediately rejected this stating that LIFO (last in and first out) meant that he could only bump the last employee engaged – Ms. Kemp, the General Manager for Sky Villa. During the meeting, Gabriels and Strydom repeatedly stated that the only alternative available was General Manager for Sky Villa. The applicant undertook to consider it. Strydom stated that the alternative offered (the position of General Manager for Sky Villa) was a reasonable alternative. However, he stated that the salary for that position was not negotiable.

5.24. On 15 July 2023, Strydom sent an email to Duverge. In the email, he stated that:

“The company is downsizing, and the role of Group GM is no longer economically viable. This is not to say that the company itself is not profitable, but the cost of the Group General Manager role outweighs the benefits thereof, hence the position is no longer feasible and being made redundant.”

.... *“The only practical or reasonable alternative which could be (sic) considering is bumping, however your previous role no longer exists. Applying LIFO as selection criteria, the position of General Manager for Sky Villa can be made available as a reasonable alternative at the current package of R28 000 per month CTC. Which the company is willing to offer to you.”* (own emphasis)

5.25. On 17 July 2023, Duverge sent an email to employer rejecting the alternative offered to him – General Manager for Sky Villa. He noted that the salary applicable to the position was R28 000 per month. He indicated that the offer was *male fides* and made with an intention of demoting him. However, Duverge also noted, the remuneration applicable to the General Manager for the Bungalow was similar to the remuneration he received when he was General Manager for both the Bungalow and Sky Villa. Duverge stated that the General Manager of the Bungalow had been preferred over him because he had raised a grievance against her.

5.26. On 18 July 2023, a fourth consultation meeting was held. The employer noted that Duverge had rejected the alternative position (General Manager for Sky Villa). Gabriels noted that the employer had considered bumping, and there were no other alternative positions available. Regarding severance, Strydom stated that the employer would pay no more than one week’s remuneration for each year of service. Duverge once again raised the possibility of bumping the General Manager of the Bungalow. He motivated this on the basis that Bouwer was past the normal retirement age. The employer immediately rejected this because Bouwer was past the normal retirement age when she was first engaged. Following this, Duverge made the following comment:

“Okay, Well, like I said, there is nothing really I can say, because every time I put something forward, it is kind of dismissed, or there is no engagement or

talking. It is just that is the answer. So, it is not really meaningful in terms of coming to a solution, if I can just state that."

5.27. Duverge testified that, following his dismissal (with effect from 18 August 2023) the employer attempted to evict him and his family from the property, which had become his family home. The employer tried to reclaim the motor vehicle which it had assisted Duverge to purchase. In addition, Duverge testified, the employer threatened to liquidate Sky Ray. Duverge testified that he felt bullied and "it was terrible." Duverge consulted with a commercial attorney and borrowed R283 000, 00 to settle the only loan he had agreed to (for the deposit, transfer, and conveyancing costs) from Saper Investments. However, Saper Investments informed him that the loan had not been fully settled. Duverge testified that, after his retrenchment, he could not afford to relocate his family from Plettenberg Bay. He could also not afford to pay school fees for his young children, and his son was forced to continue his education via online classes. Ultimately, however, Duverge and his family were forced to leave Plettenberg Bay. This testimony was unchallenged.

5.28. Duverge also testified that the employer refused to provide him with a letter of recommendation, and failed to immediately provide him with necessary documentation to submit to the UIF. This made it difficult for him to secure employment, and secure unemployment benefits. Despite this, shortly after the dismissal, Duverge managed to secure a four-month contract between September and December 2023, earning a gross salary of R60 000, 00 per month. Thereafter, he secured work with his sister's company at a salary of R60 000, 00 per month. He is still working for his sister, at the same salary. The employer did not contradict this testimony either.

Alleged substantive unfairness

6. During argument, the applicant did not vigorously pursue its allegation that the position of Group General Manager was not, in fact, redundant. This was proper. The evidence demonstrated that the position of Group General Manager had been

created in anticipation of an expansion of the Group's hospitality interests. However, the expansion plans were scuttled by the disruption occasioned by the global coronavirus pandemic, as well as other economic factors beyond the control of the employer.

7. It is trite that the redundancy of a post need not result in the dismissal of the incumbent. There must be a consideration of whether there are suitable alternatives, including relocation to other posts. In *South African Breweries (Pty) Ltd v Louw*⁸ the Labour Appeal Court held: *"Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed."*

8. Furthermore, in *Oosthuizen v Telkom SA Ltd*⁹ the Labour Appeal Court held:

"[4] ...Implicit in s 189(2)(a) (i) and (ii) and s 189(3)(a) and (b) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if that can be avoided. Accordingly, these provisions envisage that the employer will resort to dismissal as a measure of last resort. Such an obligation is understandable because dismissals based on the employer's operational requirements constitute the so-called 'no-fault terminations'. ... [8] In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirement. . . . A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason."
(own emphasis)

⁸ (2018) 39 ILJ 189 (LAC) at para 19

⁹[2007] 11 BLLR 1013 (LAC) at paras 4 and 8.

9. In the absence of any agreement, section 189(7) of the LRA requires that the employer must select the employees to be retrenched according to criteria that are fair and objective. It was common cause in this matter that there was no agreement. Accordingly, the employer was obliged to apply fair and objective selection criteria.

10. It was common cause that the bumping of Bouwer was proposed by the applicant, and rejected by the employer.¹⁰ That proposal was rejected by the employer solely on the basis that it was an incorrect application of bumping. The applicable legal principles must be considered.

11. In *Porter Motor Group v Karachi*¹¹ Nicholson JA commented as follows:

"In determining a fair selection of employees for retrenchment bumping has often been implemented and the following principles have developed in relation thereto. This does not purport to be an exhaustive list and merely catalogues the rules laid down which are relevant to this case.

(1) It should be reiterated once again that fairness is not a one-way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.

(2) Bumping is situated within the 'last in first out' (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise are an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated

¹⁰ Transcript of Court Proceedings : 5 March 2025 at p8 lines 14 – 19

¹¹ [2002] 4 BLLR 357 (LAC) at para 16

hereinafter, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.

(3) *The nature of bumping depends on the circumstances of the case. A useful distinction is that of dividing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.*

(4) The first principle is well established, namely that bumping should always take place horizontally, before vertical displacement is resorted to. The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.

(5) Where large-scale bumping, sometimes referred to as 'domino bumping', necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimizing the disruption to the employer. Examples of disruption include difficulties caused by different pay levels, client or customer reaction to a replacement of employees and staff incompatibility. In evaluating the competing interests of the employer and the affected employees the consulting parties should carry out a balancing exercise. Where minimal benefits accrue to employees, while vast inconvenience is the lot of employers, fairness requires that fewer employees should move.

(6) *There will always be geographical limitations to bumping in that fairness will require that limits be placed on how far an employee is expected to move to bump another. Although prejudice to the employer in long-distance relocation cannot be excluded, in practice this will be rare. Generally speaking it is the employee who will suffer as a result of being removed from a cultural*

and social environment he or she has become accustomed to. Second guessing the desires of employees is undesirable; if they are happy to translocate then bumping should take place whatever the distances involved.

(7) The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of a company within the parameters of its activities, national or international; fairness requires that the same circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.

(8) The independence of departments as separate business entities may be relevant but the argument that a company's departments are managed separately should be strictly scrutinized. Even if there is no past practice of transferring between branches or departments, the employer must consider interdepartmental bumping unless it is injurious to itself and to other employees.

(9) Bumping does not apply to employees in a different grade if the longer serving employee cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised skills are involved. Where the necessity arises of retraining those, who are transferred, this should be carried out, unless it places an unreasonable burden on the employer.

(10) The status of the post into which an employee is bumped is relevant, as the employer's prerogative to choose someone of managerial/supervisory level should be respected. Management concerns that downgrading an employee will be demoralizing will not justify a decision not to bump downwards where the employee is prepared to accept downgrading. On the

other hand the unwillingness of the affected employee to accept a lower wage may justify not bumping. (own emphasis)

12. In *Fischer Tube Technik SA v Bayene & another*¹² the Labour Appeal Court stated:

“[11] What the applicable authorities require is that *an employer applying LIFO must raise and discuss the question of bumping with consulting parties during the consultation process.* In the absence of any agreement on the issue, the employer must be in a position to justify its decision not to bump, or to bump either horizontally or vertically, within the selection pool that it has defined. Ultimately, any requirement to bump is a matter of fairness, both to the employer (who faces the disruptive consequences of bumping), the employee selected for retrenchment (whose job security is at risk in the absence of bumping) and the displaced employee (whose job security is equally prejudiced on account of the application of bumping).”

13. The employer is required to justify its decision not to implement bumping, whether vertical or horizontal. However, here, the employer did not attempt to justify its decision not to bump Bouwer. The employer did not argue that it would have been disruptive, unfair, there were problems concerning skills or experience, or that Bouwer was a better employee. This was unsurprising given that Duverge had held that position for several years and received no complaints. Instead, after holding the position, Duverge was promoted. In addition, it must be noted, as the authorities suggest, where small numbers of employees are involved, the implementation of horizontal or vertical bumping presents few, if any, operational difficulties. To repeat, here, the employer did not contend that bumping would have presented operational difficulties.

14. The respondents’ argument was simply that it was not possible to bump Bouwer because she was not the last person employed. This is an incorrect understanding of bumping. As the authorities demonstrate, dismissal for operational

¹² (2024) 45 ILJ 1804 (LAC)

reasons must be a measure of last resort and the employer is obliged, genuinely, to consider all alternatives short of dismissal. This includes horizontal and vertical bumping. Had the employer implemented bumping, as it ought to have done, Duverge would have bumped Bouwer, and Bouwer would have bumped Kemp. Both Duverge and Bouwer would receive reduced remuneration, but neither would have been permanently displaced. Their longer service would have been rewarded. The inherent fairness of LIFO, or bumping, was not disputed by the employer. Accordingly, LIFO, with bumping, would have satisfied the requirement of fair and objective selection criteria.

15. In the circumstances, there was no fair reason for the dismissal of the applicant. An obvious alternative to the dismissal of the applicant existed, and it should have been implemented. The employer failed to use fair and objective selection criteria. Accordingly, the dismissal of the applicant was substantively unfair.

Alleged procedural unfairness

16. Section 189 of the LRA places certain obligations on an employer to ensure that an employee is not unfairly dismissed. For instance, an employer must initiate the consultation process when it contemplates dismissals for operational reasons, it must disclose relevant information to the other consulting party; it must allow the other consulting party an opportunity to make representations about any matter on which they are consulting; it must consider those representations and, if it does not agree with them, it must give its reasons. All these obligations are geared to a specific purpose, namely, to attempt to reach consensus on the objects listed in s 189(2). The ultimate purpose is to *achieve a joint consensus seeking process*. The LRA recognizes an employer's right to dismiss for operational reasons, but only if a fair process aimed at achieving consensus has failed.¹³ The object of the consultation process is to genuinely attempt to reach consensus on various issues, particularly measures to avoid dismissals, measures to change the timing of dismissals, measures to mitigate the adverse effects of the dismissals and the

¹³ See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at para 27

method for selecting employees to be dismissed. These principles were recently confirmed by the *National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another*¹⁴ where the Constitutional Court held as follows:

*“[40] Retrenchments should not be resorted to until ‘certain procedural requirements intended to minimise the impact on employees’ have been complied with. When employers contemplate dismissing their employees for operational requirements, they are required to consult in terms of s 189(1) of the LRA. The nature of such a consultation process, including ‘its objective and agenda’, is prescribed by s 189(2) of the LRA. This consultation ‘requires engagement by all the consulting parties with the purpose of reaching consensus’. It is important to note that the approach to this consultation must not merely be a checklist approach — that is, it must not be purely formalistic. There is both a procedural and substantive aspect to this consultation process. This has been clarified by the Labour Appeal Court in *Afrox* where the court stated: ‘It is implicit in the terms of s 189(2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals; to minimize the number of dismissals; to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees.” (own emphasis)*

17. Furthermore, in *Solidarity obo Members v Barloworld Equipment Southern Africa and Others*¹⁵ the Constitutional Court held:

“... 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

¹⁴ (2021) 42 ILJ 67 (CC)

¹⁵ (2022) 43 ILJ 1757 (CC) at paras 45 - 46

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. (own emphasis)

18. Here, the consultation process fell well short of a “meaningful joint consensus seeking process” as contemplated by the LRA. The consultations are peppered with instances where the applicant was insulted, and his proposals summarily rejected. This is apparent by reference to the following examples:

18.1. When the applicant raised the prospect of bumping Bouwer, in the consultation meeting held on 9 June 2023, this was met with an angry and abusive response from Otto that Duverge was talking crap and his wasting time.¹⁶ Otto, disingenuously, refused to acknowledge that Bouwer had been employed beyond the normal retirement age. At the trial, it was common cause that there was a normal retirement age, and Bouwer had been employed when was past the normal retirement age. The abusive comments from Otto were not only unwarranted, but also at odds with a “meaningful joint consensus seeking” process envisaged by the LRA.

18.2. At the meeting on 20 June 2023, when the applicant indicated that he had raised alternatives, in the previous meetings, he was told that those were just ideas, and his alternatives must be recorded in writing.¹⁷

18.3. When the applicant raised the prospect of bumping Bouwer at other consultation meetings, both Gabriels and Strydom quickly closed down further discussion.¹⁸ The employer did not approach the matter with an open mind.

¹⁶ Transcript of consultation meeting held on 9 June 2023 at p21 lines 3 - 22

¹⁷ Transcript of consultation meeting held on 20 June 2023 at p10 lines 5 - 13

¹⁸ Transcript of consultation meetings on 11 July 2023 at p1 (line 21) and 18 July 2023 at p2 (lines 7 – 10) and p11 (line 25) to p12 (line 5)

Instead, it simply advised Duverge that bumping cannot operate to displace Bouwer. At the meeting on 11 July, the applicant was explicitly informed, by Gabriels, that he was being offered the position of General Manager for Sky Villa but bumping of any other employees (such as Bouwer) would not be considered.¹⁹

18.4. The applicant was accused of obstructing the process because he questioned why the reasons, which the employer put forward during the consultations, did not match those in the section 189(3) notice. This was a legitimate question. Ultimately, the employer accepted that there was a need to correct the section 189(3) notice. In fact, later, Gabriels agreed that the issue of the second notice could be considered as the start of the consultation process.

18.5. Strydom accused Duverge of distorting the facts, and acting disingenuously, when he sought clarify as to whether his retrenchment also related to his role as a director of Raw Africa, and whether he had been officially employed as Group General Manager. This too was a legitimate question given that he had never been given an employment contract reflecting the new position.

19. The parties presented the court with an official, and agreed, transcripts of all the consultation meetings. It is apparent from the transcripts that the employer adopted a mechanistic checklist approach. The employer was uninterested in exploring alternatives, and it was uninterested in genuinely engaging on selection criteria. The employer, and its representative, quickly extinguished discussions on several issues immediately after the applicant raised them. This was not a joint consensus seeking process and, in my view, the blame for this lies with the employer. In the circumstances, the dismissal was procedurally unfair.

Alleged unreasonable refusal of alternative employment

¹⁹ Transcript of consultation meeting on 11 July 2023 at p41 lines 11 – 19

20. Section 41(2) of the Basic Conditions of Employment Act No. 75 of 1997 (the “BCEA”) requires an employer to pay its employees, who are dismissed for operational requirements, a minimum of one week’s remuneration per year of continuous service.

21. However, section 41(4) of the BCEA states that: *“An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2)”*. At first glance, the construction of section 41(4) suggests that it is only the unreasonableness of the refusal that is relevant, and not the unreasonableness of the offer. However, the Code of Good Practice on Dismissal based on Operational Requirements²⁰ clarifies that this is not the case. Item 11 provides: *“If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employee’s right to severance pay is forfeited. Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee’s refusal. In the first case, objective factors such as remuneration, status, and job security are relevant. In the second case, the employee’s personal circumstances play a greater role.”* (own emphasis)

22. I readily accept that the reasonableness of the offer and the reasonableness of the refusal are related enquiries.²¹ The financial consequences attendant upon the alternative offer are clearly relevant to both the reasonableness of the offer and the reasonableness of the refusal.

23. The applicant rejected the alternative employment primarily because this would have meant a drastic reduction of his remuneration. His remuneration, at the time of his dismissal was R80 250. 00 per month, whereas the alternative position held a package of R28 000. 00 per month. This would have meant a reduction to his remuneration of approximately 65%. In addition, as the applicant explained in his

²⁰ Published in GG 20254 GN 1517 dated 16 July 1999

²¹ This view is supported by Van Niekerk et al in Law@Work (LexisNexis) 6th Edition at p385

email dated 17 July 2023,²² he believed that the offer was made in bad faith, and it was an attempt to demote him. In the context, this belief was understandable. He was not provided with good reason why the obvious, and more suitable, alternative position (General Manager of the Bungalow) was not made available.

24. In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy Paper Printing Wood & Allied Workers Union*²³ the Labour Appeal Court held as follows:

“[25] Although it is difficult to demarcate precisely when the offer can be refused by an employee without the danger of s 41(4) of the BCEA being invoked against him or her, in my view, once an employee is faced with a wage decrease, it cannot be said that he or she should not have the choice of refusing the offer and seeking employment elsewhere, notwithstanding the extremely difficult conditions which pertain to employment in general within the South African economy.” (own emphasis)

25. In this matter, the evidence reveals the alternative offered to the applicant was not the only alternative available. Furthermore, the offer was unreasonable. The applicant could not reasonably have been expected to accept the position, which would have meant a reduction of his remuneration by approximately 65%. Our courts have recognized the centrality of remuneration, in the determination of reasonableness, for the purposes of section 41(4).

26. In the circumstances, the applicant did not unreasonably refuse an alternative offer of employment, and he is entitled to payment of the minimum severance pay in section 41(2) of the BCEA.

Alleged Loan Agreement and Set off

27. It was common cause that certain statutory monies²⁴ due to the applicant, in the amount of R249 083. 65, were not paid. These monies are, at least in part,

²² See para 5.25 above

²³ (2014) 35 ILJ 140 (LAC) at para 25

provided for by statute to tide over employees who have just lost their employment, until they can secure alternative employment. The employer contends that these monies were set off against the alleged loan made by Saper Investments to the applicant. The applicant contends that the applicant's employment contract only permits deductions in respect of loans *by his employer*.

28. Considering my approach to the employment contract,²⁵ as explained below, it is unnecessary for me to decide if the alleged loan by Saper Investments to the applicant, was in fact concluded.

29. Clause 11 of the applicant's employment contract reads:

"The Employee agrees that the Employer may make deductions with regard to any loans or monies advanced to the Employee. However, the granting of any such loans for whatsoever reason is at the Employer's discretion. The Employee consents that in the event that her services terminate for whatsoever reason, the Employer may deduct from her statutory due monies any outstanding amounts owed by the Employee to the Employer..." (own emphasis)

30. The terms of the employment contract are clear and require no interpretative exercise. The terms must be understood by reference to the plain language.²⁶ The contract permits deductions in respect of loans made to the applicant *by his employer*. However, here, the employer was the second respondent and the alleged loan was made by a different entity, Saper Investments. There can be no set off by means of the employment contract. Strydom testified that the Group treats the

²⁴ Severance pay, leave pay and notice pay

²⁵ Note that the court raised, with the respondents' representative, whether the alleged loan was consistent with section 6(1)(e) of the Alienation of Land Act 68 of 1981, as amended, which requires the purchase price to be set out in the written contract of sale.

²⁶ It is only where the language admits of more than one meaning that resort must be had to the interpretative triad of language, context and purpose. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* the *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

various companies within the Group as “the same.” This approach ignores the separate juristic personality of each entity and is improper.

31. In the circumstances, in this matter, there can be no set off because it is not mandated by the employment contract. In addition, in my view, section 34 of the BCEA finds no application.²⁷

Remedy

32. For the reasons set out above, the dismissal of the applicant was procedurally and substantively unfair. The next issue is the remedy. This is not straightforward, particularly given that the applicant does not seek reinstatement or re-employment. Section 193(1)(c) of the LRA provides that this court may award compensation where reinstatement or re-employment is not applicable. Section 194(1) states that the compensation must be just and equitable in all the circumstances, but it may not exceed 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal. The court must exercise its discretion judicially, upon a consideration of all the relevant facts.

33. Our courts have set out various guidelines and principles, to be applied in the exercise of the discretion, to determine what is just and equitable:

33.1. Firstly, compensation for the loss of a procedural right²⁸ is in the form of a solatium²⁹ and it does not relate to patrimonial loss. However, when substantive unfairness is involved, the patrimonial loss does play a role.³⁰

²⁷ Assuming the statutory monies due to the applicant can be equated to remuneration, section 34 of the BCEA only permits deductions from remuneration in limited circumstances including a debt specified in a written agreement.

²⁸ *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* (2020) 41 ILJ 1360 (LAC) at para 50

²⁹ *Johnson and Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at para 41

³⁰ *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at para 20; *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others* (2007) 28 ILJ 2238 (LAC) at para 30

33.2. Compensation constitutes relief for the humiliation suffered by the employee, and the impairment of his or her dignity.³¹

33.3. Compensation relates to the loss of the constitutionally protected right against unfair dismissal.³²

33.4. Compensation does not assume a punitive character.³³

34. In *Kemp t/a Centralmed v Rawlins*³⁴ the Labour Appeal Court articulated other factors, some of which are relevant: (a) the nature of the reason for dismissal; (b) whether the unfairness of the dismissal is based on substantive or procedural grounds or both; (c) if the dismissal is only procedurally unfair, the nature and extent of the deviation from the requirements; (d) (e) the consequences to the parties if compensation is, or is not awarded; (f) the need for the courts, generally speaking, to provide a remedy where a wrong has been committed - though there are cases where no remedy should be provided, despite a wrong having been committed; (g) whether the employee committed a wrong which gave rise to his dismissal; (h) any conduct by either party that promotes or undermines any of the objects of the LRA, for example, the effective resolution of disputes.

35. In *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*³⁵ at para 35 the Constitutional Court stated: *“It is true that generally speaking, procedural unfairness in a dismissal is not insignificant and invites compensation to ensure that dismissals take place with the ‘sensitivity and care’ properly required when the fate of people’s livelihoods is at stake. The rationale behind an award of compensation is to give meaning to the right not to be unfairly dismissed; to discourage a ‘shotgun approach’ to dismissals; and, as Dr McGregor avers, ‘to recognise the right of an employee to be heard before action is taken*

³¹ *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC) at paras 22 and 23

³² *Ibid.*

³³ *Maroveke v Talane NO & others* (2021) 42 ILJ 1871 (CC) at para 27

³⁴ See fn. 30

³⁵ (2021) 42 ILJ 1643 (CC)

against them. It is an acknowledgment of an employee's worth as a person." (own emphasis)

36. In the exercise of my discretion, an award of compensation in an amount equal to eight months' remuneration is just and equitable in all the circumstances. In arriving at this conclusion, I considered all the relevant factors but the following resonated most strongly:

36.1. The dismissal was both substantively and procedurally unfair.

36.2. Though the applicant was unemployed for only a brief period, he has only managed to secure alternative employment at a significantly reduced salary. Since his dismissal in August 2023, his salary is R20 000, 00 less per month. His intended career path has been severely disrupted.

36.3. The applicant was humiliated, and insulted, during the consultation process. Duverge testified that he felt attacked and ambushed. He testified that the consultation process was a checklist exercise and not a meaningful process.

36.4. The applicant had worked, loyally, for the employer for five and half years.

36.5. The deviations from the norms and standards of procedural and substantive fairness are extensive. It is fair and just to award compensation to the applicant as a solatium for the loss of these rights.

36.6. The impact of the dismissal on the applicant, and his hurt feelings, was apparent when he broke down in court while explaining the difficulties resulting from his dismissal.

36.7. The employer did not treat the applicant with any measure of kindness or sensitivity after his retrenchment which is, of course, a no-fault

dismissal. Instead, the employer behaved in a somewhat callous fashion – it attempted to evict the applicant from his home, it attempted to liquidate his company, and it refused to provide him with a reference letter. The employer did not explain why this conduct was at all necessary.

37. For these reasons, the applicant is awarded compensation equivalent to eight months' remuneration, calculated at the rate applicable at the time of his dismissal, namely R80 250, 00 per month.³⁶ Of the eight months compensation awarded, three months relates to procedural unfairness, and the other five months relates to substantive unfairness.

Costs

38. The respondent agreed to pay for the transcription of the court proceedings, and the various consultation meetings, provided such costs constituted costs in the trial. The parties agreed that costs of the trial would be argued after the court had determined the merits. The respondent informed the court that it had made a settlement offer (would be revealed before costs is argued) which had been declined, and the offer was relevant to costs. Costs are therefore reserved.

Conclusion

39. Accordingly, for the reasons set out above, I find that the dismissal of the applicant, by the second respondent, was procedurally and substantively unfair and awarded the applicant compensation equal to eight months' remuneration. The second respondent is ordered to make payment of the compensation, to the applicant, less any deductions required by the South African Revenue Service ("SARS") within thirty days. The second respondent is ordered to pay, to the applicant, the outstanding statutory monies, in the amount of R249 083, 65. The employer is not entitled to set off monies allegedly loaned to the applicant by Saper Investments. Costs are reserved and will be argued in due course.

³⁶ Annexure A to the Notice of Termination dated 19 July, Pleadings Bundle p79

Court Order

40. In the circumstances, the following order is made:

40.1. The dismissal of the applicant, by the second respondent, on 18 August 2023, is declared to be procedurally and substantively unfair;

40.2. The second respondent is ordered, within thirty days, to pay the applicant, compensation equal to eight months' remuneration, a total of R 642 000, 00 less any deductions required by SARS;

40.3. The second respondent is ordered to pay, to the applicant, within thirty days, the outstanding statutory monies in the amount of R249 083, 65;

40.4. Costs of the trial, including the costs of the transcriptions, will be enrolled for argument by arrangement with the Registrar.

Reynaud Daniels
Judge of the Labour Court of South Africa

For the Applicant:

Adv Craig Bosch

Instructed by: Africa & Associates

For the First and Second Respondents:

Adv Joseph Whitaker

Instructed by: Werksmans Attorneys