THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JS 439/17

In the matter between:

NEHAWU obo FREDDY MASILELA AND 20 OTHERS **Applicant**

and

SOS CHILDREN'S VILLAGE SOUTH AFRICA **Respondent**

Heard: **18-20 August 2025**

Delivered: **12 September 2025**

JUDGMENT

BALOYI, AJ

Introduction

[1] Freddy Masilela and 20 others referred an unfair dismissal dispute based on operational requirements to this Court for adjudication. The defendant dismissed them on 21 December 2015. The subsequent conciliation of the unfair dismissal dispute before the CCMA resulted in the issuing of the certificate of non-resolution, hence, its referral to this Court. The defendant

maintains that their dismissal was both substantively and procedurally unfair. The defendant, on the other hand, holds a view that there was a fair reason to retrench the plaintiffs and such retrenchment was effected in accordance with fair procedures.

[2] The plaintiffs were employed by the defendant on various dates and served in various centres, referred to as villages, where the defendant carried out its operations. The plaintiffs were general workers, gardeners, handymen, etc. The defendant is a registered non-profit organisation that provides care for children who require parental care for an extended period. The defendant was receiving funding from three main sources in order to carry out its operations, namely, the government, international organisations and individual donors from the general public.

[3] Tebogo Ramela (previously Tebogo Matshwi) testified in support of the defendant's case that she was the defendant's Human Resources Manager between January 2014 and May 2016. She was involved in the processes that led to the dismissal of the plaintiffs. The process began with communication to the union representatives and village heads. A roadshow was conducted throughout nine villages under the defendant's portfolio to sensitise employees about the intended retrenchment process. This occurred after the defendant was informed that international donors were no longer willing to fund the South African operations, as South Africa is considered self-sustainable. The gap created by the withdrawal of funding led the defendant to make a difficult decision on whether to continue feeding the children or retain employees in its workforce.

<u>Background</u>

[4] On 12 June 2015, the defendant held the first meeting with union representatives at its head office, in which the issue of restructuring was communicated to the employee representatives through a pie chart presentation. They were informed that certain employees would be affected. road shows were to be conducted before the commencement of retrenchment consultations. Three meetings were held on 16 September 2015, 6 November

2015, and 9 December 2015. The union was not cooperative as it shifted the goal posts by requesting information and challenging the presence of its advisor, Mr Tony Healy. The defendant relied on the EOH report to arrive at a decision to embark on a retrenchment exercise.

[5] The new structure contained a lot of changes and job descriptions. 70 affected employees were to apply for 54 positions appearing in the new structure. In villages where union representatives did not attend consultation meetings, the defendant proceeded with individual employees after securing their consent to proceed without union representation. Only three people accepted voluntary retrenchment offers. 28 employees were ultimately retrenched, 21 of whom were NEHAWU members. The new structure was implemented in 2016, and the positions of the retrenched employees do not exist in the new structure.

[6] It came to light during cross-examination that the EOH report that the defendant referred to was, in fact, a request for proposal in terms of which the defendant was looking for service providers to assist with the re-organisation of its villages in South Africa. The actual report relevant to the restructuring was not provided to the union and does not form part of the trial bundle. Ms Ramela maintained that all the meetings constituted consultations and could not recall if the plaintiffs made proposals for an alternative to retrenchment.

[7] Freddie Laban Masilela, the plaintiff's first witness, was an admin assistant based in Mamelodi village. He was also a NEHAWU shop steward. Mr Hitler Sekgitla and the shop stewards represented NEHAWU between June and December 2015. Not all meetings resulted in an agreement between the parties, as the union representatives were at some point unable to engage with the defendant due to the absence of a mandate and inadequate information. He viewed the meetings as having collapsed. He did not apply for a job in the new structure because he did not know the reason for his retrenchment. His position and the job description still existed in the new structure, it was only the name that changed. He received a letter dated 10 December 2015, inviting him to a consultation on 18 December 2015. He went to the identified venue in Mamelodi village. He and other union

representatives arrived late, and there were employees outside the meeting venue who had already received retrenchment letters. He attended to them whilst Mr Sekgitla went inside to meet with the defendant's representatives. He was retrenched on 21 December 2015.

[8] The plaintiff's second witness, Seleka Hitler Sekgitla, is the NEHAWU's National Organiser for the Social Development Sector. His engagement on the matter started with communication between himself and Tebogo Ramela about the defendant's intention to restructure. At the first meeting on 12 June 2015, Ms Ramela indicated that the defendant intended to undertake an organisational review, and certain employees in various villages would be affected. It was agreed that consultation would take place on a centralised basis, as it might be costly to travel from one village to another. The employee representatives were not against the road show that was intended to sensitise the employees about their future relationship with the defendant. These road shows, however, resulted in misrepresentation as he received complaints that the employees based in villages were told that the union had agreed to retrenchments, whilst it was not the case.

[9] Information was requested, including the EOH report, which the defendant relied on, and both the old and new organisational structures. Whilst awaiting receipt of the requested information, the defendant addressed notices in terms of section 189 to individual employees, dated 23 July 2015, informing them of the looming structural changes and calling for voluntary retrenchments by 31 July 2015. An invitation dated 21 August 2015 was addressed to individual employees for a consultation meeting on 24 August 2015. The defendant had not, at this point, provided the information requested by the union.

[10] On 31 August 2015, the defendant issued a communication addressed to employees informing them that consultations with the union would commence on 11 September 2015, and it was anticipated that such consultations would be completed by the end of December 2015. Things began to change when Tony Healy was brought in. The defendant disregarded the program that the union agreed to with the Human Resources department.

[11] In the meeting of 16 September 2015, the defendant appeared to have had consultation in mind. The requested information was still outstanding, and there was no agenda. The union reminded the defendant of the outstanding information, which was recorded in the minutes. The meeting was concluded on a note that the defendant would respond to the points raised and requests made by the union. The next meeting was to be co-ordinated between Ms Ramela and Mr Sekgitla.

[12] The union objected to Mr Healy's participation, which was viewed as a costly exercise amid the defendant's claims of being cash-strapped. The issue was resolved as it was clarified that Mr Sekgitla was not an advisor by a union representative. At the meeting of 6 November 2015, Mr Healy led the discussions. There was no agenda, and the information requested was not provided, most particularly the EOH report. The union reiterated its standpoint that it is unable to have a meaningful consultation in the absence of the requested information. The defendant indicated that it would review the union's request for the EOH report. The union further suggested suspending the recruitment process, which the defendant wanted to undertake while awaiting the outstanding information. The defendant rejected the idea.

[13] Another meeting was scheduled for 9 December 2015. It was in this meeting that the union learnt for the first time that the defendant had already objected to the request for the EOH report. The meeting was concluded with the employer expressing its willingness to set aside time in the coming week to provide a thorough explanation of the logic behind the restructuring, referencing the EOH report. The union welcomed the proposal and provided that the EOH report accompany the intended presentation.

[14] On 10 December 2015, the defendant invited individual employees, calling them for consultation on 18 December 2015. In Pietermaritzburg, two employees were called to two separate meetings on 14 December 2015, and Mr Healy informed them that the union failed to attend the consultation meetings. This was not true, as the union attended all the meetings and was awaiting the defendant's response, as agreed upon in the meeting of 9 December 2015. The defendant selectively dealt with the issue of disclosures.

There was no selection criterion applied. All engagements with the defendant on the matter were well-documented and are self-explanatory, indicating that the defendant failed to comply with section 189 of the Labour Relations Act[1].

[15] He maintained that the reason for restructuring was, according to the defendant, an organisational review as per the EOH report. They never emphasised a point of finance. He emphasised that there is nothing wrong with an employer embarking on retrenchment due to financial difficulties. In this matter, they were told about the organisational review, and the defendant failed to provide information that triggered the organisational review. He was not aware of the letters sent to individual employees. He disputed that the meeting of 16 September 2015 was a consultation. He disputed that the defendant attempted to consult, but the union impeded it by objecting to the presence of Tony Healy. In fact, the defendant committed itself on 9 December 2015 to make a presentation and never fulfilled its promise. The union did not make any input as it was not invited to do so. He disputed that the meeting of 9 December 2015 was a consultation. The defendant did not bring what it undertook to provide. The proposal to suspend the recruitment process was justified.

[16] Avhudzheni Ronald Modzanani was the plaintiff's third witness and a gardener based in Ennerdale village for 6 years. There was a meeting sometime in September 2015. They were not given a reason for the restructuring. They were told that retrenchment would happen whether they liked it or not. The last meeting was on 18 December 2015. When they were told about the defendant's final decision to retrench. He could not remember the discussions being translated to him.

<u>The arguments</u>

[17] The defendant argued for the dismissal of the plaintiffs' case and emphasised the role of the pre-trial minute, which in this matter did not call upon the Court to decide whether there was a need to retrench. The defendant posted an alternative argument that there was a need to retrench should its principal

[1] Act 66 of 1995, as amended.

argument not be upheld in this regard, and has complied with the requisite procedures. Furthermore, the defendant argued that it was entitled to cross-examine the plaintiff's witnesses on issues that did not form part of the evidence tendered by the defendant's witnesses. The defendant further argued the impossibility of reinstatement in view of the plaintiffs' positions no longer existing in its structures.

[18] The plaintiffs' argument reiterated its position that the defendant had no reason to dismiss them, as there was no need to retrench. The decision to retrench was not effected in accordance with fair procedures. It would be prejudicial for them if the defendant were allowed to rely on evidence extracted from the cross-examination of the plaintiff's witnesses that was not advanced during the testimony of their witnesses. The plaintiffs are seeking reinstatement with back pay.

<u>Analysis</u>

[19] It is a settled principle that the dismissal based on operational requirement is a 'no-fault' dismissal. Mr Sekgitla was spot-on that there is nothing wrong with the employer embarking on a retrenchment process due to financial difficulties. In this dispute, both the substance and procedure are challenged. The restructuring forms the core of the reason for dismissal. This certainly goes into substance. Evidence presented to this Court reveals a dispute over the origin of the restructuring. The much-talked-about EOH report takes centre stage. A 55-page document titled 'Organisational Review of the SOS Children's Villages' generated by EOH is, according to the defendant, the actual EOH report that informed the restructuring. The plaintiffs dispute this, as the purpose of the document in paragraph 1 reads as follows:

> 'SOS Children's Villages International requires professional services to assist with an organisational review of one of its National Associations – SOS Children's Villages of South Africa.'

[20] The document calls for submission of a proposal from the interested service providers by no later than 5 pm on 14 November 2015. The defendant relied on the second part of paragraph 2 of the document, which reads as follows:

> 'In October 2012, the International Senate of the SOS Children's Villages International adopted a "Sustainable Path" strategy aimed at stabilising the Federation's finances as well as ensuring sustainable growth in the long term. The Sustainable Path strategy would include reallocation and redirecting international subsidies to the least developed countries and would also see the reduction, closure and/or handing over some programmes (non-core/non-sustainable) as part of a long-term international funding exit programme. 35 countries including SOS Children's Villages South Africa were identified to have the potential to increase local income and achieve self-sufficiency status by 2016. In order to fully achieve this there is need to align the organisation towards increased fundraising and income growth investment as well as changes to our programmes and service delivery strategies to more effectively and efficiently reach targeted programme participants.'

[21] Although the above reveals a plan on how to operate in 2016 in view of the South African villages standing a good chance of self-sufficiency, the document's purpose leaned towards calling for proposals to assist with organisational review. There is no restructuring put forward, or if any, how it was to be implemented. The defendant relied on the pie charts that were presented to the plaintiffs and their representatives to suggest that a new structure had been designed, as nothing appears in the document. The EOH report that was viewed as a relevant source for the new structure was promised to the employee representatives, and it never came forth until 6 November 2015, when they were told that the request for the said EOH report had already been objected to.

[22] The organisational review document does not contain the breakdown of numbers, which the defendant was canvassing in the meeting, that 54 out of 70 positions existed in the new structure. It should be remembered that the union was consistent with its request for the report and the reason attached thereto, which is to make a meaningful contribution in the consultation. The evidence of Ms Ramela rested heavily on financial difficulties arising out of the withdrawal of funding by the international funders. However, the defendant's pleaded case is essentially based on restructuring as a catalyst for the

retrenchment, rather than financial difficulties, and this was further elaborated upon in the pre-trial minute.

[23] When parties narrowed the issues through the pre-trial process regarding whether there was a need to retrench, the following was recorded in the pre-trial minute:

> ‘<u>The Applicant's factual basis to deny the need for retrenchment</u>
>
> 35. The applicant's submission:
>
> 35.1 The Applicant records that the Respondent's financial position was sound at the time of the alleged retrenchment.
>
> <u>The Respondent's factual basis to admit the need to retrench</u>
>
> 36. The Respondent's submission:
>
> 36.1 The Respondent records that the retrenchments were necessitated by the structural needs and not economic needs.’

[24] The evidence tendered by Ms Ramela in this respect does not support the pleaded case. It raises a question regarding the real reason for the dismissal of the plaintiffs based on operational requirements. The absence of the restructuring content, as stated in the EOH report that was never tabled, has realistically left the plaintiffs in the dark about the reason for their dismissal.

[25] The agreement on the selection criteria could have probably been reached had the defendant presented relevant information to enable the plaintiffs to provide a meaningful contribution. The absence of the agreement on criteria does not necessarily render the dismissal unfair, as section 189(7)(b) provides that in the absence of the agreement, the employer must apply the criteria that are fair and objective. The defendant appeared to have regarded the recruitment process as a selection criterion, meaning that the affected employees were to apply for vacant positions in the new structure. The difficulty with this approach is that the defendant had already declared in the meeting of 9 December 2015 that some employees did not have the skills required in the vacant positions. That was before they could even apply. By

construction, they were already excluded from the system before the retrenchment process could commence. On this note, it cannot be said that the selection criteria were fair and objective.

[26] The absence of a fair reason for the operational requirement within the defendant and the lack of evidence that the defendant applied a selection criteria that are fair result in the defendant's failure to demonstrate the existence of a fair reason for the dismissal of the plaintiffs. Their dismissal is accordingly substantively unfair.

[27] The provisions for procedures in dismissal based on operational requirements start at section 189(1)[2], which identifies the parties the employer must consult with. It cannot be disputed that NEHAWU was a trade union with organisational rights and was accordingly invited to participate in such consultations. Whilst on build-up for such consultations, specifically through the meetings held with the trade union on 12 June 2015, 16 September 2015, 06 November 2025, and 9 December 2015, the defendant issued notices to consult with individual employees, the majority of whom were NEHAWU members. The last meetings the employer held with individual employees in exclusion of the union on 14 and 18 December 2015 resulted in the dismissal of the plaintiffs. This, without any doubt, brings about the defendant's failure to comply with section 189(1)(d) of the Labour Relations Act by failing to consult with the right party for consultation.

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'(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation—

  (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

  (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

[28] It has been established from the minutes of the two meetings held with individual employees that the defendant alleged that the trade union failed to attend all the consultation meetings.

[29] Based on undisputable evidence before this court, the trade union attended four meetings, and all were concluded with a consensus that the defendant would provide information or outstanding information requested by the trade union in order to make a meaningful contribution during consultation. This renders the defendant's assertion that it was always willing to consult, but the trade union was counterproductive, to be meritless. This, in any event, appears to be an afterthought in view of the defendant's persistence in its pleadings that it has complied with the provisions of section 189 in all respects. This was repeated in the pre-trial minute.

[30] A claim by the defendant that the meetings of 16 September 2015 and 9 December 2015 constituted consultation is contradicted by the recorded purposes of the meetings and the conclusions thereof. Regarding the meeting of 16 September 2015, the purpose was:

> 'To address the concerns as raised by Union Representation regarding Change process in SOS.
>
> In the absence of an agenda, the meeting is aimed at achieving an understanding, by the employer, of issues pertaining the change process from the Union's side.'

[31] The aims and objectives were recorded as follows:

> 'Proper and effective consultation.
>
> From the union side: to make meaningful contributions towards alternatives. (Union may require certain change process from the Union's side).'

[32] The conclusion and way forward were recorded as follows:

> 'Minutes will be drafted by TM and share with all in the meeting by (date/time unspecified but agreed to be as soon as possible).

Employer will respond to the union on points raised and requests made by (time/date unspecified but agreed to be as soon as possible).

Next meeting will be coordinated by TM and HS by (Time/date unspecified but agreed to be as soon as possible).'

[33] The meeting of 9 December 2015 appeared not to be structured and the defendant bemoaned the absence of an agenda. The defendant presented the figures on the number of vacancies confirmed, amongst others, that the request for the EOH report was objected to. The meeting was eventually closed on the understanding that the defendant would set time for the following week to make a presentation based on the content of the EOH report. The trade union agreed and impressed upon the defendant to ensure that the EOH report accompanies the presentation.

[34] No further meeting was held with the trade union after 9 December 2015. What happened was the dismissal of the employees following the defendant's individual invitations to meetings, which the defendant referred to as consultation. Based on section 189(1)(d), these meetings with individual employees cannot constitute consultation, whilst the plaintiffs had NEHAWU as a consulting party on their behalf. It therefore follows that the defendant has failed to comply with section 189 of the Labour Relations Act, which required it to consult with a consulting party on all aspects listed therein. A finding that the plaintiffs' dismissal is procedurally unfair is unassailable.

Relief

[35] In view of the finding above, the Plaintiffs are in no doubt entitled to relief. The plaintiffs are seeking the primary relief of reinstatement. In terms of section 193(2)(d) of the Labour Relations Act, the Court or Arbitrator may not award reinstatement if it is not reasonably practicable for the employer to reinstate or re-employ the employee. It is not in dispute that the plaintiffs' positions no longer exist in the respondent's structure. This state of affairs is different from when the positions exist but are occupied by newly hired employees. The Court has to take note that whichever situation the respondent finds itself in, came as a result of the implementation of its own decisions, and it has not

been frank with the employees and the trade union. Clearly, from the evidence of Mr Sekgitla, there was a chance of finding a solution as the union approached the engagements with the understanding that it happens a lot that employers genuinely embark on retrenchment due to financial difficulties. The defendant, however, took pride in the fact that the retrenchment was not about finances but restructuring, whilst it was in fact not true.

[36] In view of the plaintiffs' positions not being available any longer, the Court is loath to award reinstatement. The most appropriate relief under the circumstances is compensation. There is no reason militating against the award of maximum compensation and should accordingly be awarded.

<u>Costs</u>

[37] This Court does not find exceptional circumstances calling for the making of a cost order. It will therefore be within the requirements of law and fairness that each party pays its own costs.

[38] In the premises, the following order is made:

<u>Order</u>

1. The dismissal of the plaintiffs is found to be substantively and procedurally unfair.

2. The defendant is ordered to pay each plaintiff an equivalent of 12 months' remuneration, calculated at the rate that was applicable at the time of their dismissal within 14 days of this order.

3. There is no order as to costs.

MM Baloyi

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Adv. K Pooe

Instructed by: Mdluli, Pearce, Mdzikwa and Associates Inc.

For the Third Respondent: Mr M De Villiers of De Villiers & Du Plessis Attorneys