



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 771/20

In the matter between:

KAREN ELIZABETH VAN DER LINDE

Applicant

and

LEKWA CONSULTING ENGINEERS (PTY) LTD

Respondent

Heard: 05 June 2025

Delivered: 23 October 2025

JUDGMENT

DJAJE, AJ

Introduction

[1] This is a dispute over the unfair retrenchment of the applicant by the respondent. The applicant's claim is based on procedural fairness rather than substantive fairness. It is the applicant's case that the respondent failed to comply with the requirements of section 189 of the Labour Relations Act¹

¹ Act 66 of 1995, as amended.

(LRA) during her retrenchment. At the start of the proceedings, the parties agreed on the outstanding severance pay due to the applicant, amounting to R504,701.11. The relief sought by the applicant in this case is compensation for non-compliance with the procedural requirements for retrenchment. The respondent, on the other hand, disputes the non-compliance with section 189 of the LRA and asserts that in retrenching the applicant, proper consultation with the applicant was followed.

Evidence

- [2] The respondent's Managing Director, Mr Kibuti Ntshumaelo, testified that the applicant was employed as a design engineer with the respondent and earned a salary of R71,000.00 per month. The company was affected by the COVID pandemic, and a letter dated 23 June 2020 was sent to all employees impacted by the retrenchment process to be undertaken by the respondent. The notice of retrenchment included an invitation to consult. A notice of consultation dated 9 July 2020 was issued, and all the issues in the notice were discussed with the applicant. Ntshumaelo explained that the consultation with the applicant was conducted via telephone for twenty minutes, and she indicated that she did not have any alternatives. The applicant did not sign the termination of employment contract agreement. On 25 August 2020, a partial payment of R222 000.00 was made to the applicant.
- [3] During cross-examination, Ntshumaelo conceded that the applicant was owed outstanding severance pay of R504 701.00. It was put to him that the applicant was never informed that her position would become redundant and that the discussion with her was about the rationale of the retrenchment.
- [4] The applicant stated in her evidence that she worked for the respondent for 18 years in various roles, starting as a junior designer and progressing to a manager design engineer. She could not recall specifically receiving the notice of intention to retrench from the respondent. She did confirm that meetings were held to discuss the financial situation of the respondent, although not in great detail. She was aware that the respondent experienced financial challenges, as they would sometimes not receive their full monthly

salaries. According to the applicant, she was under the impression that the employees who would be affected by retrenchment were those whose work was not continuing in the company, and not hers. She was never informed that her position had become redundant.

- [5] The applicant denied receiving any notice of her planned retrenchment. She received an email on 31 July 2020 with an agreement for her employment termination, which was when she realised she was being retrenched. She did not sign the agreement because she was concerned about the restraint of trade and how her payment was calculated. The compensation she seeks from the respondent is for the emotional trauma caused by her retrenchment without prior consultation.
- [6] The issue to be determined in this matter is the procedural fairness of the applicant's dismissal and whether there is any outstanding severance payable with interest on the said amount.

Interest on the severance pay

- [7] The applicant argued that the respondent has acknowledged owing her severance pay and other outstanding amounts but has failed to pay them. The case is based on sections 41 and 75 of the Basic Conditions of Employment Act² (BCEA), which relates to severance pay and interest on it. It was submitted that the respondent fell into *mora* when the severance pay was due in August 2020, making it liable for interest on the amount of R504,701.11 from that date.
- [8] The applicant relied on the LAC decision in *Malatji v Minister of Home Affairs & another*³ where the court addressed the issue of interest payable in cases of default or *mora* by the debtor. In this matter, the respondent acknowledges that severance is payable to the applicant but fails to pay, resulting in interest being payable on the outstanding amount. It was submitted that the respondent is liable to pay the applicant interest on the amount of R504 701.11.

² Act 75 of 1997.

³ (2018) 39 ILJ 2684 (LAC); [2019] 1 BLLR 8 (LAC).

[9] In terms of section 41(2) of the BCEA:

‘(2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936) severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.’

[10] The respondent has acknowledged that severance pay was indeed due to the applicant. Consequently, at the commencement of the proceedings, the parties agreed that the amount payable as severance pay to the applicant by the respondent is R504,701.11. The issue in dispute is the payment of interest on the said amount. The severance due to the applicant became due on her dismissal in August 2020 and remains unpaid. It was only at the doorstep of these proceedings that the parties reached an agreement. The applicant argued that, based on section 75 of the BCEA, the respondent is liable for the interest accrued on the amount of R504 701.11.

[11] Section 75 of the BCEA provides that:

‘75. Payment of interest. - An employer must pay interest on any amount due and payable in terms of this Act or the National Minimum Wage Act, 2018, at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made.’

Procedural fairness

[12] As mentioned earlier, the applicant claims the respondent failed to follow the procedure outlined in section 189 of the LRA, which would have ensured a fair process for her retrenchment. The applicant argues that her retrenchment was procedurally unfair because the notice of intention to retrench issued on 23 June 2020 did not provide enough information to allow her to have a meaningful consultation with the respondent. Specifically, the selection criteria only mentioned ‘redundancy’, but no specific position was identified as being

redundant, including that of the applicant. Regarding consultation, the parties agreed that their only consultation meeting took place on 16 July 2020.

- [13] The applicant argued that the notice of intention to retrench issued on 9 July 2020 mentioned a discussion about jobs that would be affected if no alternatives to retrenchment were found. However, after the meeting on 16 July 2020, no further consultation meetings were held to inform employees which jobs were redundant and would be affected by retrenchment. After the 16 July meeting, she was served with a termination of the employment contract.
- [14] In contention, the respondent argued that it had followed the procedure outlined in section 189 of the LRA when retrenching the applicant. The respondent further contended that the applicant was aware of its financial difficulties, to the extent that the applicant's salary was reduced before the respondent initiated the retrenchment process. Additionally, meetings were held with employees to explain that the respondent would be engaging in a retrenchment process. Thereafter, a notice to retrench was sent to the applicant, requesting that she make representations on any issue discussed during the consultation process.
- [15] According to the respondent, a consultation meeting was held with the applicant on 16 July 2020, during which she was invited to propose alternatives. During that meeting, the respondent followed the provisions of section 189(2) of the LRA by addressing all issues listed in the section, but the applicant did not engage with the respondent. The applicant was later served with the termination of service letter on 31 July 2020. The respondent argued that the notice from 9 July 2020 confirmed that if no alternatives to retrenchment were found during the consultation process, the employees would be engaged based on the selection criteria. There was a discussion with the applicant regarding these criteria, and she was aware that her position was redundant.
- [16] In terms of the LRA, dismissals based on operational requirements are dealt with under section 189. Importantly, section 189(2) and (3) provides that:

'189 Dismissals based on operational requirements.-

- (1) ...
- (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-
 - (a) appropriate measures -
 - (i) to avoid dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;
 - (b) the method for selecting the employees to be dismissed; and
 - (c) the severance pay for dismissed employees.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to -
 - (a) the reasons for the proposed dismissals;
 - (b) the alternative that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
 - (c) the number of employees likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which employees to dismiss;
 - (e) the time when, or the period during which, the dismissals are likely to take effect;
 - (f) the severance pay proposed;

- (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and
- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.'

[17] The Constitutional Court in *Solidarity obo Members v Barloworld Equipment Southern Africa and others*⁴ highlighted the employer's duty to provide a written notice to consulting parties, inviting them to engage and disclosing all relevant information in writing, as set out in section 189(3) (a) to (j) of the LRA.

[18] Both sections 189(2) and (3) require an employer to consult employees when planning to dismiss them due to operational needs. This is in keeping with the constitutional provision of section 23 of the Constitution⁵, that "*Everyone has the right to fair labour practices*".

[19] Section 189 refers to consultation with employees that the employer contemplates dismissing. This makes it clear that the affected employees should have been informed of the possibility of dismissal based on operational requirements. The applicant correctly referred to the decision of *Duverge v Spanish Farm Guest Lodge CC ta Sky Villa Boutique Hotel*⁶, which dealt with the obligations on the employer in terms of section 189 of the LRA, stated that the purpose of consultation is to achieve a joint consensus-seeking process.

[20] The applicant herein challenges the procedural aspect of her dismissal. That is the issue to be determined. In the notice to retrench dated 23 June 2020, the following is stated:

⁴ [2022] 9 BLLR 779 (CC); (2022) 43 ILJ 1757 (CC).

⁵ Act 108 of 1996.

⁶ [2025] ZALCCT 24.

'CONTEMPLATED RETRENCHMENT

We refer to the above

After careful consideration, Lekwa Consulting Engineers (Pty) Ltd is contemplating embarking upon a retrenchment process which may lead to the possible termination of an employee's services; accordingly, it is necessary in such circumstances to consult with you regarding the contemplated retrenchment, on issues as detailed below. We wish to confirm that none of these issues have been finally determined. The Company's final decision would depend on such representations you may make.

In order for you to have full appreciation of the Company's vision in principle, we provide you with the following information, which information you will be required to respond upon in due course if necessary.

1. Why the Company is contemplating retrenchments:

The Company has found that the employees's salary is placing an undue financial burden on them and therefore the reason for the contemplated retrenchment is economic in nature.

2. Alternative to retrenchment

The Company has no proposals with regards to alternatives at this point in time but it will also consider any proposed alternatives that you may table during the consultation process.

3. How many employees may be affected:

The contemplated retrenchment shall effect up to 50% the total workforce, should it take place.

4. Selection criteria:

Should the Company have no alternative but to proceed with terminating the employees' services, it proposes that it will use "redundancy" as the selection criteria, considering the fact that the certain positions will no longer be needed.'

[21] The above notice, as argued by the applicant, did not specify any positions that would be affected by the retrenchment, but only stated that the retrenchment “*will affect up to 50% of the total workforce, should it occur*”. According to the selection criteria, if no alternatives are found, redundancy would be used as the basis for selection without specifying which positions would become redundant. On 9 July 2020, the respondent sent another notice to the applicant stating the following:

‘LEKWA CONSULTING ENGINEERS (PTY) LTD- Notice of Consultation

The Company has been running at a loss, necessitating some form of restructuring in an attempt to rectify the situation. Circumstances are such that management is obliged to give consideration to possible alternatives to retrenchment, and in the absence of alternatives, to the implementation of retrenchments.

Since you are likely to be affected by the retrenchment process, a consultation meeting is scheduled with on the following:

Date :16 July 2020

Time :15h30

Venue :Virtual Meeting (Telephonically or Microsoft Teams)

The following items will be discussed and consulted on:

- the current financial position of the company;
- the reasons for the proposed retrenchments;
- alternatives to avoid retrenchment;
- number of employees to be affected;
- selection criteria;
- date of terminations;
- severance pay;
- assistance to employees;
- re-employment.

At the meeting the following alternatives to retrenchment will be considered in consultation with yourselves:

- a moratorium on recruitment and appointment of new staff;
- a freeze on overtime work;
- a reduction in administrative expenses;
- early retirement;
- voluntary retrenchment;
- institution of short-time;
- mitigation factors;
- short-time/reducing shifts.

Should our consultations prove that no alternative to retrenchment can be implemented with success, retrenchments of the number of employees and their job categories likely to be affected will be discussed. During these discussions, consideration will be given to the following:

- Method used for selection;
- Severance pay;
- Notice pay;
- Possible re-employment at a later stage;
- Any assistance offered.'

[22] The above notice again did not speak to the retrenchment of the applicant. It provides that she was likely to be affected by the retrenchment process. At the end of the notice, the following appears: *"Should our consultations prove that no alternative to retrenchment can be implemented with success, retrenchments of the number of employees and their job categories likely to be affected will be discussed"*.

[23] On 16 July 2020, a phone consultation was conducted with the applicant, during which the parties explored alternatives to retrenchment, but nothing was mentioned about whether her position was earmarked for redundancy. She was only given a letter of termination after the meeting of 16 July 2020. In essence, the applicant testified that the respondent never discussed with her that her position was redundant or the reasons for it, as stated in the notice of 9 July 2020.

[24] Section 189(3) of the LRA requires the employer to disclose in writing the reasons for the proposed dismissal and the method used to select which

employees are affected. This was clearly not done by the respondent herein, rendering the dismissal of the applicant unfair.

- [25] In terms of section 194(1) of the LRA, the following is provided in relation to compensation for unfair dismissal:

'Limits on compensation – (1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

- [26] The applicant argued that the respondent's failure to comply with section 189 of the LRA was a direct violation of its statutory obligation, justifying compensation. The respondent had employed the applicant for several years and should have given a reason for her retrenchment. It is indeed correct that the respondent had an obligation to follow the statutory requirements for retrenchment, and failure to do so justifies an order for compensation. I agree that the just and equitable compensation in this instance is four months' remuneration to the applicant.

Costs

- [27] In terms of section 162 of the LRA, the court may consider the conduct of the parties when deciding whether to award costs. The respondent forced the applicant to go to court to recover payment of the severance pay, which the respondent was aware of. Compliance with section 189 of the LRA is mandatory for any employer contemplating retrenchments, and the respondent should have complied. It was this non-compliance that led the applicant to seek legal action. It is this conduct of the respondent that was considered when awarding costs in favour of the applicant.

- [28] Consequently, the following order is made:

Order

1. The applicant's retrenchment was procedurally unfair.
2. The respondent is ordered to pay four months' remuneration as compensation to the applicant, the amount of which shall be calculated at the rate of salary the applicant was earning at the time of the retrenchment.
3. The respondent is ordered to pay the applicant her outstanding severance pay and notice pay in the amount of R504 701.11 plus interest thereon from 31 August 2020.
4. The respondent is ordered to pay the costs of suit.

J. T. Djaje

Acting Judge of the Labour Court

Appearances

For the Applicant: Adv D Groenewald, Club Advocates' Chambers, Pretoria

Instructed by: Serfortein, Viljoen & Swart Attorneys

For the Respondent: Adv L Cook, Chambers, Protea Group

Instructed by: Tshiqi Zebediela Attorneys

LABOUR COURT