



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 2025-162307

REPORTABLE

In the matter between:

FOOD AND ALLIED WORKERS UNION

Applicant

and

SOUTH AFRICAN BREWERIES (PTY) LTD

Respondent

Heard: 14 October 2025

Delivered: 7 November 2025

Summary: Application for relief under section 189A (13) of the LRA - requirements met - applicant's members reinstated pending further consultation.

JUDGMENT

DANIELS J

Introduction

- [1] This is an application, brought on an urgent basis, for the relief contemplated in section 189A (13) of the Labour Relations Act No. 66 of 1995 as amended (the “LRA”). In the first instance, the applicant seeks to have its members reinstated, pending a consultation process that is fair. The applicant also seeks disclosure of information. It bears remembering that section 189A (13) applications are concerned with the consultation process, and procedural fairness of that process, and not the substantive fairness of the dismissals. Accordingly, insofar as issue relating to substantive fairness are concerning, this judgment steers clear.
- [2] For ease of reference, in this judgment, the applicant is referred to as “the Union” or as “FAWU”. The respondent is referred to as “the SAB” or “the Employer”.

Urgency

- [3] It is trite¹ that a party seeking urgent relief must sufficiently, and in detail, set out the circumstances which render the matter urgent, and the reasons why it is said that substantial redress cannot be obtained at a hearing in due course. The degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency, and the applicant is not entitled to rely on urgency that is self-created when seeking deviation from the Rules. A further essential requirement is that an applicant seeking urgent relief must

¹ *Jiba v Minister: Department of Justice and Constitutional Development and Other* (2010) 31 ILJ 112 (LC) at para 18; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6; *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited* (081473/2023) [2023] ZAGPPHC 709 at para 18; *Public Servants Association of SA and Another v Minister of Home Affairs and Others* [2016] ZALCJHB 439 at paras 12 to 18; *Moyane v Ramaphosa and Others* [2019] 1 All SA 718 (GP) at para 33

approach the court with the necessary haste, or as soon as the cause of discontentment arises.² Thus, if a party is hesitant, the urgency dissipates. The more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. Equally of importance when considering whether urgent relief should be granted are the interests of the respondent and any prejudice that may be suffered should urgency be granted or refused.

- [4] In my view, the applicant cannot be criticised for first determining whether any of its members were affected by the retrenchment before launching the application. This became clear when the identity of the applicant's dismissed members was revealed, during late August, after the redeployment exercise had been completed. The respondent indicates that the redeployment process was only completed, at the earliest, by 25th August. Thereafter, the applicant would have had to consult its affected members and consult its attorneys to prepare the application. The application was launched about two weeks later, on 10 September. The application was not a straightforward application which could have been prepared overnight. After careful consideration of all the relevant facts, I believe that this application was brought with due expedition and at the appropriate time.
- [5] Importantly, applications brought in terms of section 189(13) are *sui generis* in that the LRA recognises the inherent urgency of such applications.³ This is so because substantial redress, specifically the relief contemplated in section 189A (13)(a) to (c) cannot be achieved in the normal course.
- [6] Section 189A (17) of the LRA requires that the application must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed. The Labour Court may, however, condone a failure to comply with these time limits. I accept that the application was brought within the time periods contemplated in section 189A (17). As I explain

² *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd & another* (2016) 37 ILJ 2840 (LC) at para 26

³ See Schedule 7, item 32, of the LRA.

hereafter, I do not accept that the notice to the applicant on 1 August 2025 was a notice of termination contemplated by section 189A of the LRA. In the circumstances, there was no need for condonation for the filing of the application.

- [7] I accordingly grant the relief prayed for in prayer 1 of the notice of motion and accept that the application may be heard as one of urgency in accordance with Rule 38 of the Rules of the Labour Court.
- [8] However, even if I am incorrect and the notice to the applicant on 1 August 2025 was indeed a notice of termination contemplated by section 189A of the LRA, the applicant has applied for condonation. In that event, I note that the period of delay is short, there is a satisfactory explanation, and there are reasonable prospects of success. Accordingly, in the exercise of my discretion, I believe it would be in the interests of justice that condonation be granted.

Factual matrix

- [9] The facts of this matter are largely common cause. However, where material disputes of fact do exist these are indicated below and resolved thereafter to the extent that the judgment requires this.

9.1 During a prior retrenchment exercise, during 2024, the SAB restructured the reporting lines for raw materials and logistics at its breweries. This led to many, but not all, of the employees who were employed as forklift drivers at the time being redesignated as “checker operators” and being assigned administrative duties in addition to those they already performed as forklift drivers. These individuals were granted a wage increase to compensate them for their additional duties. Their core function remained that of driving a forklift. FAWU and the SAB disagree on the extent of the administrative functions assigned to the forklift drivers, with FAWU alleging that these administrative functions

comprised between 5 and 10% of their tasks and the SAB alleging that the administrative functions comprised 37.5% of their total tasks.

9.2 On 29 May 2025, the company sent a notice to FAWU in terms of section 189(3) of the LRA. It also applied to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for facilitation in terms of section 189A. In its section 189(3) notice, the company indicated that it employed 5400 individuals, it was contemplating the retrenchment of 233 employees, and it had retrenched 64 employees in the preceding 12 months. However, in its request for facilitation, the company stated that no employees had been retrenched during the preceding 12 months.

9.3 In its section 189(3) notice, the SAB stated:

"In line with its continuous improvement processes and a dynamic operating environment, the South African Breweries ("SAB") undertook a review exercise of its operating models across the business. The review has revealed and recommended proposed changes to Logistics Functions".

(emphasis added)

9.4 In the notice, the SAB indicated that:

"The current structure is no longer meeting the business needs and hence the proposed change in the structure would remove duplication in roles and rectifying the scope in existing roles".

9.5 The SAB further indicated through its notice that its rationale for the proposed restructuring included the streamlining of specific functions with the aim of improving warehouse productivity through improved control and accountability. The SAB indicated that the proposed method of achieving this was to remove the administrative duties of the checker operator, the creation of a new position, warehouse lead, which would take over those duties, and the declaration of the checker operator positions as redundant. The SAB further indicated that it wished to reconfigure the scope and role of (unidentified) positions to remove duplication and create more defined accountability between the logistics and raw materials function.

- 9.6 In its notice, the SAB indicated that the only alternative it considered was to maintain the status quo. The SAB proposed that the retrenchment take place on 30 August 2025, with notices of termination being issued on 1 August. It proposed essentially that the retrenchment would be implemented immediately after the 60-day minimum consultation period contemplated by section 189A. Importantly, the company indicated that the details of the employees impacted per function and job categories would only be shared with FAWU during the consultation meetings.
- 9.7 The national leadership of FAWU and the South African Federation of Trade Unions (“SAFTU”) met the Chief Executive Officer of the SAB and attempted, unsuccessfully, to persuade him to suspend or terminate the retrenchment process given the prevailing high unemployment rate in the country. The SAB contends that this, and subsequent campaigns by the Union and SAFTU to lobby the public against the retrenchment, are indicative of the applicant’s intention to delay, or derail, the retrenchment process.
- 9.8 The first facilitated consultation meeting was held on 13 June 2025, where the Union raised two preliminary issues. In this regard, the following is relevant:
- 9.8.1 The first issue was that the employees engaged through temporary employment services (known colloquially as “labour brokers”) for more than three months should form part of the consultation process because they are deemed to be employees of the company in accordance with section 198A(3)(b) of the LRA.
- 9.8.2 The second issue was that SAB was intentionally misleading the CCMA facilitator by indicating that no retrenchments had occurred within the preceding 12 months.
- 9.8.3 The facilitator proposed to the SAB that the consultation period be extended by 18 days to accommodate any delays which may result from the preliminary issue. The SAB was adamant that this was not possible. This was strange given that the SAB had not

indicated that it was restructuring for reasons related to costs or financial viability.

9.8.4 The facilitator directed the parties to make written submissions concerning the preliminary issues on specified dates. The Union delivered its submissions on 18 June, the company delivered its answering submissions on 20 June, and the Union delivered brief submissions in reply on 30 June. The Union indicates that the replying submissions were made only because it wished to clarify certain issues. It is unclear whether these dates were unilaterally determined by the facilitator. It appears that replying submissions were not contemplated by the facilitator and the Union decided to file replying submissions on its own initiative because no ruling had yet been made.

9.9 On 18 June, FAWU referred to the CCMA a dispute contemplated in terms of section 198D of the LRA. It contends that sections 198A, 198B and 198C were applicable in the context of the retrenchment.

9.10 The facilitator handed down her ruling on the preliminary issues, on 9 July. She dismissed the Union's preliminary issues. In her ruling, the facilitator set down further facilitation meetings on 15 July, 29 July and 12 August 2025. This was despite the SAB stating that it would not consult beyond the end of July 2025.

9.11 The company contends that the preliminary issues were a dilatory tactic on the part of the applicant. The applicant points out that the facilitator took between 20 June and 9 July to consider the representations and make a ruling, a period of 19 days, which was beyond its control. The applicant further indicates that it was virtually impossible to engage the company until it disclosed details of the employees to be impacted in terms of function and job categories, which information the SAB had indicated would only be shared during the consultation meetings. It was therefore difficult to constructively engage with the SAB prior to 13 June. It seems to me the responsibility for the delay between 29 May and 9 July cannot be blamed on the applicant and must be shared equally

between the parties and the facilitator. The applicant was entitled to raise the preliminary issues.

9.12 Following the ruling, the SAB did not indicate to the facilitator that the fourth facilitation meeting could not, or should not, be held on 12 August because it was not willing to extend the proposed termination date.

9.13 The second facilitation meeting was held on 15 July. At the meeting, the SAB made a presentation titled "Structure Proposal". In it, the SAB indicated that certain of its dry depots and its wet depots would be affected. The presentation compared the current structure to the proposed structure indicating the positions which were not affected, the new positions, the positions where the scope would be altered, and the positions that were allegedly redundant. It must be noted that there were 23 dry depots that were not covered by the retrenchment exercise. The proposal involved declaring 62 positions redundant in the dry depots, the vast majority of which were checker operator positions. The presentation also dealt with the proposed changes at the seven breweries, so-called "wet depots". At these depots, the SAB proposed declaring 168 positions redundant, the vast majority of which were checker operator positions. In the presentation, proposals were made in respect of measures to mitigate the effects of retrenchment, proposals for redeployment, and selection criteria for the new positions created. The presentation stated that the SAB would "evaluate possible employment opportunities within third party/outsourced suppliers". Following the presentation, the FAWU and non-union representatives asked questions, but it was later agreed that they should submit their questions in writing.

9.14 The very next day, on 16 July, the applicant addressed a letter to the SAB posing several questions related to the presentation. Importantly, the applicant asked for a copy of the review document referenced in the section 189(3) notice, which had stated that the review "revealed and recommended proposed changes to Logistics Functions". The applicant also asked what business needs were referred to in the notice, and how the current structure fails to meet those needs. It asked which roles

include duplications and what those duplications were. It requested the proposed job descriptions for the current positions that were being changed and the new positions that were being introduced, such as the warehouse leads. It requested details of the functions being streamlined, how control and accountability would be improved, and how this would improve productivity. Importantly, the applicant requested clarity on who would perform the forklift functions of the checker operators (who would be declared redundant) and clarity as to whether the forklift function would be outsourced or be performed by employees of labour brokers. Furthermore, the applicant asked why the depots in the presentation had been singled out. The applicant proposed that a skills matching exercise be performed for vacant and newly created positions, instead of interviews where criteria such as performance would be assessed. The applicant indicated that the consultation process was rushed, suggesting that the consultation process should be extended.

9.15 On 18 July, the SAB responded to the request for information from the applicant. The SAB proposed to consult with the applicant outside of the facilitation process, on 24 and 25 July and suggested that it was critical that FAWU present its counter proposals at such meetings before final decisions are taken in relation to the restructuring. The SAB's response is set out below, insofar as it is relevant to this judgment.

9.16 In response to FAWU's request for the review which encompassed the recommendation for restructuring of the Logistics Function, the SAB stated:

"We believe that the information shared during the session, along with the presentation provided, is sufficient to enable constructive engagement. The company is of the view that the additional information now requested appears to fall outside of the scope of what is necessary for this process and may delay or derail progress".

9.17 Notably, in its response, the SAB did not state that the review did not exist in writing, was confidential or privileged.

9.18 In response to which positions would perform the forklift activities previously performed by the checker operators, the SAB stated that these would be sourced from service providers.

9.19 In response to the question whether labour brokers would provide forklift drivers for these functions, the SAB responded “N/A” (indicating “not applicable”). However, it also stated: “*Labour brokers are utilized when and where operational requirements justify their use*”.

9.20 In response to why certain depots were affected and others not, the SAB stated:

“We have sites with different operational requirements (amount of trucks, mix of loads, split %, imports, exports). The activity dictates and hence a blanket approach was not used. We looked at where opportunities are and what makes sense e.g. direct shipment, size of DC and etc. The impacted in the presentation are the sites where the current structure is not in alignment with the proposed structure, hence, are part of the section 189A process”.

(own emphasis)

9.21 In response to question whether the selection criteria were that the redundant employees were selected, the SAB stated: “*The company is consulting on proposed structural changes that impacted employees as per the consultation presentation presented to you.*”

9.22 The SAB stated that raw material forklift drivers at the depots in Alrode, Rosslyn and Chamdor would be unaffected by the retrenchment process.

9.23 Attached to its letter dated 18 July, the SAB provided a list identifying the affected positions, the number of affected positions, and the depot at which the affected positions were located. No names of affected employees were included.

9.24 Furthermore, the SAB stated that it would not move the implementation date.

9.25 On 23 July, the applicant replied to the SAB’s letter of 18 July. In its reply, the applicant stated that:

- 9.25.1 The SAB's responses were vague, and they failed to disclose information that was obviously relevant. It accused the SAB of conducting a tick box exercise. It stated that the SAB expected the applicant to accept its assessment of various matters without question. The applicant indicated that it has become aware of a recent advertisement, which it has in its possession, issued by O'Brien Recruitment, a labour broker used by the SAB, seeking forklift drivers for a "*well established brewery in Newlands*".⁴ Furthermore, at Prospecton, the company has requested the existing labour broker to provide an additional 20 forklift drivers. I note that, in its answering affidavit, the respondent does not contend that the advert did not relate to it, and it was not the "well established brewery" referred to.
- 9.25.2 It was impossible to constructively engage on the solution if the rationale was not fully explained and this is why FAWU required the review document. FAWU explained that the review is self-evidently necessary and relevant given that it recommended the restructuring. FAWU further explained that it cannot be expected to simply accept the employer's assessment that a problem existed and the solution was restructuring. The review was therefore critical to constructive engagement.
- 9.25.3 The company was clearly outsourcing the forklift function presently performed by the checker operators despite the protestations to the contrary by the SAB.
- 9.25.4 The reasons for identifying certain depots for restructuring were vague, confusing and contradictory.⁵ A proper response, FAWU contended, was critical for its members to understand why they were being retrenched.
- 9.25.5 For the company to suggest that certain depots were selected based on "what makes sense" was improper and irrational.

⁴ This advert is attached to the founding affidavit as annexure FA16.

⁵ See para 9.20

- 9.25.6 To use “etcetera” to identify which depots were selected was insufficient. FAWU stated that the response of SAB (in relation to whether redundant employees were selected) that it had selected sites where “*the current structure is not in alignment with the proposed structure*” was nonsensical, because the current structure was not aligned with the proposed structure anywhere.
- 9.25.7 The SAB’s refusal to extend the termination date to align with the fourth facilitation meeting was unreasonable.
- 9.25.8 It cannot agree to consultation meetings on 24 and 25 July because it was still considering the company’s responses and consulting members. Some of the meetings with members were arranged for 24 July.
- 9.26 On 24 July, the SAB replied to the letter from FAWU. It did not provide comprehensive responses to all the issues raised by FAWU. The SAB maintained that it had provided sufficient information to FAWU and that it need not provide the review. The SAB suggested that the union’s refusal to meet with it on 24 and 25 July was a dilatory tactic. It proposed meeting with the union on 25 and 28 July and indicated that it was also available on 26 and 27 July if FAWU and the other consulting parties were available. The SAB denied that it had commenced implementing the proposed new structure.
- 9.27 FAWU responded to the letter from SAB and raised further issues in letters to the company dated 28 and 29 July. It is unnecessary to explore the contents of such letters, though the issues raised are by no means unimportant.
- 9.28 A third facilitation meeting was held on 29 July. FAWU made a presentation, which was also recorded in writing.⁶ For the most part, the presentation dealt with disclosure of information. FAWU did not formally

⁶ A copy of which is annexed to its founding affidavit as annexure FA17

apply for disclosure of information because the facilitator made an oral ruling that the information disclosed by the SAB to date was insufficient.⁷

9.29 During the third facilitation meeting, the SAB emailed the applicant a document (attached to the founding affidavit as annexure FA18) which it contends is the review document. In its replying affidavit, the applicant denies FA18 is the review and points out that the document does not cover raw materials and does not align with the company's proposals on the new structures, changed roles, the splitting of the checker operator function, and the outsourcing of the checker operators. It is apparent that the document (attached as annexure FA18) does not recommend that the checker operator function be declared redundant, that a warehouse lead position be introduced, or that the forklift function previously performed by the checker operator be outsourced. While FA18 identifies depots which are performing certain functions well, it does not identify how to select between those depots to be restructured and those to be left alone. This apparent dispute of fact is dealt with later.

9.30 The SAB contends that FAWU, at the third facilitation meeting, requested that the company withdraw the section 189A exercise, which reflects that it did not attempt to consult meaningfully and in good faith. The applicant states that it has no recollection of making such a proposal.

9.31 On 30 July, the applicant submitted a document to the company specifying the information it sought in light of the facilitator's ruling the previous day. The union indicated that it requires all documents and reports of the company's review exercise in relation to its operating models across the business. It also requested copies of all documents and reports relating to the review of the logistics and raw materials

⁷ It is common cause that the facilitator made such a ruling, and that her written ruling on 14 August recorded this earlier ruling. The ruling is attached to the founding affidavit as annexure FA35. In the ruling the facilitator records, at para 29, that: *"In my view clearly, SAB has only partially complied with providing all relevant information during its presentation on the review exercise on the Logistics Function. Nevertheless, SAB has during the facilitation and after my ruling agreed to provide this relevant information. Therefore, there is no dispute with regards to this point. I can only direct the process on disclosure as this for me was the omission on the part of the SAB as requested by organised labour."*

function. It qualified its requests by stating that the documents and reports it required are those referred to in the section 189(3) notice.

9.32 On the same day, the SAB sent FAWU a letter titled: “*Counter proposal feedback and confirmation of proposed structure*”.⁸ In the letter, the company stated:

“Although the consultation process is still underway in respect of other consultation topics, this letter serves at this point to advise that SAB has decided, in the absence of viable counterproposals in respect of the proposed structure it presented, that the proposed structure in the Logistics Function be adopted for implementation effect 1 September 2025”.

(own emphasis)

9.33 In the same letter, the SAB advised that employees who were interested in redeployment opportunities must complete an expression of interest form by 4 August, failing which, they would automatically be placed on the list of employees to be retrenched. The company advised that redeployment and recruitment process would begin on 5 August and the selection criteria to be applied will be in accordance with that outlined in the notice issued in terms of section 189(3).

9.34 Despite the apparent finality of the letter, the SAB indicated that it was prepared to meaningfully engage at unfacilitated consultation meetings.

9.35 On 30 July, the SAB sent FAWU three detailed and information packed documents containing its responses to what it titled “counter proposals from FAWU”. On 31 July, the SAB sent FAWU a further three documents of a similar nature. On 1 August, the SAB sent a further four documents of a similar nature. These documents contained a vast amount of information and detail. The SAB states that this information was, for the most part, in response to the earlier requests for information made by FAWU. It is appropriate to mention at this point that, in my view, this information would have best assisted the consulting parties at the start of the consultation process, rather than at its conclusion.

⁸ The very subject / title of the letter suggests that the company had finally decided to implement the proposed restructuring contemplated in the section 189(3) notice.

9.36 On 1 August 2025, the SAB sent to FAWU a notice of retrenchment, which purported to be a notice of termination of certain unidentified members of the union. The notice identified those sites where the notice period would run from 1 to 31 August and those where the notice period would run from 1 to 30 September. The notice further advised that the redeployment process would be completed by 22 August. It advised that the: *“company would endeavour to also send the termination letters to all the individual employees through their line management and People Business Partners”* (own emphasis). Importantly, the notice stated as follows:

“However, recognizing that some impacted employees may not be placed on the new structure, as there are more impacted employees than the available positions on the new structure, this letter serves as formal contractual notice of the impending termination of the contracts of employment for those impacted employees who will not be placed on the new structure”.

(own emphasis)

9.37 On 2 August, FAWU sent a letter to the SAB stating that the notion that further genuine consultations could occur where the company had already decided to implement its proposal and was forging ahead belied belief. It further stated that the notice of termination to employees, who were awaiting the outcome of their request for redeployment, was invalid.

9.38 On 8 and 9 August, the SAB sent to FAWU further documents relating to the Prospecton and Alrode Breweries.

9.39 On 12 August, the fourth and final facilitation meeting took place. Much of the discussion revolved around how genuine consultation could occur where the “horse had bolted” and the SAB was in the process of implementing its proposals. FAWU and the SAB could not agree on whether the company had made disclosure as required by the facilitator’s ruling on 29 July. Accordingly, FAWU asked the facilitator to record her ruling in writing.

9.40 On 14 August, the facilitator issued her ruling. It recorded that “...*the complete relevant information on the review exercise of the Logistics Function departments must be made available by SAB to all consulting parties*”.

9.41 According to the respondent, by the end of August, it had implemented the dismissal of 159 employees at the following warehouses or depots: Rosslyn (55), Alrode (69), Chamdor (13), Port Elizabeth (15), Polokwane (3), and Prospecton (4). It is common cause many of these employees were previously engaged as checker operators. The 159 employees who were retrenched at the end of August became aware of their impending dismissal on 25 August.

9.42 As of 4 September, a further 29 employees faced possible termination if they failed to secure alternative employment before 30 September. It is common cause that many of these employees were previously engaged as checker operators.

9.43 On 10 September, FAWU referred a dispute to conciliation concerning the procedural and substantive fairness of the retrenchment.

9.44 The application was launched on 10 September and enrolled for hearing on 30 September. On that date the matter was removed from the roll. It fully argued on 14 October and judgment was reserved.

Legal issues

Amendment to the notice of motion

[10] In its answering affidavit, the respondent complained that the relief sought by the applicant did not clarify in what respects it would be required to consult with the applicant, should the applicant be successful. This led the applicant, on 26 September, to give notice of an amendment to its notice of motion to clarify in what respects the respondent would be required to consult with it. In

the amendment, the applicant also seeks disclosure of relevant information which it required to constructively engage in the consultation process. The respondent objected on the basis that the respondent would not have a proper opportunity to address the new relief sought.

- [11] As a result of the application to amend the notice of motion, the application was not heard on 30 September but only enrolled on 14 October. The applicant tendered to the respondent an opportunity to file a supplementary answering affidavit should it wish to do so. Clearly, the respondent was not prejudiced by the amendment. *Mr. Orr*, on behalf of the respondent, clarified that the respondent no longer opposes the amendment.
- [12] In the circumstances, it is appropriate that the amendment to the notice of motion is granted.

Notice of termination

- [13] Section 37(4) of the Basic Conditions of Employment Act No. 75 of 1997 (the “BCEA”) suggests that notice of termination of a contract of employment must be given to the affected employee, by his or her employer. Section 189A(2)(a) of the LRA states that in respect of any dismissal covered by section 189A an employer must give notice of termination of employment “in accordance with” the provisions of section 189A.⁹ *Mr. Orr* argued that notice of termination under section 189A differs from that contemplated by section 37(4) of the BCEA.
- [14] The purpose of giving notice of termination is to give the affected employees an opportunity to seek alternative employment, and to take steps to deal with the difficulties likely to ensue when they find themselves unemployed. In the context of section 189A, however, the purpose is also to give effect to the rights acquired by a union (under that section) to which that member belongs. This includes the right to engage in protected strike action, and the right to

⁹ Note however that section 189A (7) and (8) both refer to the employer giving notice in terms of section 37(1) of the BCEA. These subsections also refer to the employees having received notice of their termination.

approach this court on an expedited basis in relation to procedural fairness. Furthermore, one must take into consideration that, in the consultation process, members are represented by their union and would have given them a mandate to represent them. For these reasons, our apex court appeared to recognize that notice of termination under section 189A may not be identical to notice of termination under the BCEA. In para 166 of *Steenkamp and others v Edcon Limited*¹⁰ writing on behalf of the majority, Zondo J (as he then was) stated: “*I referred earlier to the fact that section 189A (8) gives employees and a registered trade union a right to strike as one of the ‘weapons’ they may use when they have received notices of the termination of contracts of employment of the employees” (own emphasis). This suggests that the notices of termination may be given to the union on behalf of its members, but it does not suggest that the notices may be given to the union alone.*

- [15] In my view, even if one accepts that effective notice can be given to the union on behalf of its members, notice of termination cannot be given on behalf of unidentified individuals. This would defeat one of the main purposes of the notice, to allow the affected employees to prepare for unemployment. Absent identification, the union would be unable to inform its affected members of their impending dismissal. The union would also be unable to consult the affected employees on which of the rights under section 189A to exercise. In addition, in my view, notice of termination cannot be given on a conditional basis. It cannot be that the notice of termination is given before the employer has taken a final decision to terminate the employee’s service. In this instance, the notices of termination were issued on 1 August, but the redeployment process would not have been completed before 25 August. In the circumstances, the notice was issued before a final decision to terminate the affected employees’ service was taken. For these reasons, the notice issued on 1 August did not constitute notice of termination contemplated in section 189A (2)(a) of the LRA.

¹⁰ (2016) 37 ILJ 564 (CC)

Disputes of fact

- [16] Mr. Orr argued that because the *Plascon Evans*¹¹ rule applies, any disputes of fact in the papers must be resolved in the respondent's favour. In *Banks & another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd*¹² the court expressed concern that application of the *Plascon Evans* rule could be used by unscrupulous employers to frustrate the use of section 189A, but the court nevertheless accepted that *Plascon Evans* does apply. I agree.
- [17] In essence, *Plascon Evans* holds that where applicants seek final relief on application they must, in the event of conflicting versions, accept the version put up by their opponents unless those allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers.
- [18] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*¹³ the Supreme Court of Appeal held:

"A real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously address the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing) evidence is they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied." (own emphasis)

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C

¹² (2007) 28 ILJ 2748 (LC)

¹³ 2008 (3) SA 371 (SCA)

[19] The respondent disputes the allegation that it has not provided the applicant with the review referred to in its section 189(3) notice. The respondent contends that the document sent to the union on 29 July is the review. I note that the respondent does not say that the document formed part of the review, but that it is *the* review. It is clear however that the document does not align with the manner that the respondent earlier described it. Most starkly, the document provided to the applicant on 29 July, which the respondent alleges is the review, does not make any recommendations at all. The section 189(3) notice was very clear that the review revealed certain problems and made certain recommendations. Further, in its reply, the applicant also points out certain other discrepancies.¹⁴ The respondent necessarily possesses knowledge of the facts related to these discrepancies, but it does not take the court into its confidence by providing a complete explanation as to why the document provided does not align with the manner it had described it. It provides no explanation why, for example, the document contains no recommendations when it had informed the union that the review made recommendations. In these circumstances, where a full explanation is required but not given, the court is entitled to take a robust view. In the circumstances, I find that the respondent's denial of the allegation (that it has not provided the applicant with the review) does not raise real, genuine and bona fide dispute of fact. Accordingly, I accept that the respondent failed to provide the applicant with the review, or the complete review document, despite its undertaking to do so in the facilitated consultation.

[20] The applicant alleges that the administrative functions of the checker operators constitute between 5 and 10% of their job. The respondent contends that these administrative functions constitute a higher percentage. The issue may be relevant to selection criteria used, and possible alternatives to dismissal. It relates to the substantive fairness of the dismissals, not procedural fairness. Accordingly, there is no need for the court to resolve this dispute.

¹⁴ See para 9.29 above

- [21] In its letter dated 23 July, the applicant stated that the respondent began to implement its proposals as suggested by the advertisement issued by O'Brien Recruitment relating to positions at a "well established brewery in Newlands". The applicant indicated that it became aware of the advertisement on 17 July. For this reason, among others, the applicant suggested that the respondent was not consulting in good faith, the consultation was a tick box exercise and a *fait accompli*. Notably, the respondent does not deny that the advert was issued by O'Brien Recruitment on its behalf but nevertheless denied that it began implementing the new structure during July. The respondent stated that forklift drivers are not affected by the retrenchment, but it did not address the fact that absent administrative functions, the checker operators perform only forklift driving functions.

Disclosure of information

- [22] Section 189(3) identifies the information which the employer must provide to the consulting parties. The list is not a closed one. If additional information and documents are required for the purposes of consultation, these must be disclosed as well, subject of course to the proviso that an employer may resist disclosure on the basis *inter alia* of confidentiality or privilege.
- [23] In the words of one of our eminent jurists and scholars, the "*requirement of disclosure is fundamental to the consultation process since the role of the consulting parties in joint consensus-seeking would be meaningless if they were not able to participate on an informed basis*".¹⁵ These sentiments have repeatedly been echoed by our courts, most recently in *Solidarity obo Members v Barloworld Equipment Southern Africa and others*¹⁶ where the Constitutional Court held:

"Sufficient information must be disclosed to make the process of consultation meaningful. This includes information concerning the need for retrenchment,

¹⁵ Van Niekerk et al *Law @ Work* 5th Ed. at pg353

¹⁶ (2022) 43 ILJ 1757 (CC) at para [44]

as well as information that will assist the employees or trade union, as the case may be, in making contributions about ways of avoiding retrenchment.”

(own emphasis)

Fair consultation process?

[24] The purpose of section 189A (13) of the LRA is to “provide a convenient and expedient mechanism to ensure that a fair procedure is followed”¹⁷ during consultations concerning large scale retrenchments. The Legislature enacted section 189A to give special protection in this context to the rights of employees and to protect the integrity of the procedural requirements envisaged in section 189 and 189A.

[25] As I already indicated, the respondent failed to disclose the review to the applicant. This refusal occurred relatively early during the consultation process. In these proceedings, the respondent does not allege that the review is irrelevant to the retrenchment. In my view, it is clearly relevant to both the rationale for the retrenchment, and possibly also alternatives to the retrenchment. This is the reason the facilitator ordered that it be disclosed, and the respondent volunteered to do so. In this regard, it seems clear that by failing to disclose relevant information the respondent failed to comply with the procedural requirements of section 189 and 189A. Failure to disclose relevant information breeds distrust which undermines the objective of meaningful engagement.¹⁸

[26] Though it is arguable that the respondent began implementing its proposals during July, when it began sourcing forklift drivers through its labour brokers, it

¹⁷ *Solidarity obo Members v Barloworld Equipment Southern Africa and others* at para 59

¹⁸ See Lagrange R “Consultation over retrenchments after ADE – a stronger sense of purpose?” (1995) 16 ILJ 509 at p525; See also *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare Cleaning* [2005] 6 BLLR 588 (LC); (2005) 26 ILJ 889 (LC) (20 April 2005) where Murphy AJ (as he then was) stated in relation to a failure to disclose sufficient information, the “failure of employers to fulfil this obligation meaningfully invariably leads to disputes, misconceptions, a break down in trust and the delegitimizing of the joint consensus process mandated by the statute”.

is at least clear that, with effect from 1 August, the respondent began implementing the restructuring while also inviting consultation.

- [27] The respondent's invitation to the applicant to continue consulting after 1 August suggests that the respondent accepted that further consultation was necessary. That the respondent made disclosure of vast amounts of information on 30 July, 31 July and 1 August also suggests that the respondent was aware that further consultation was necessary. The applicant could not possibly have earlier considered, or consulted on, the large volume of information submitted to it on these three days.
- [28] On behalf of the applicant, *Mr. Roskam* submitted that to expect the union to consult while the retrenchment was being implemented is bizarre. The respondent required the union to accept that it was amenable to reversing the process being implemented. I accept the submission. The LRA does not expect a union or its members to consult while an employer is implementing its proposals, in the hope that the process can be reversed. The LRA envisages a meaningful consensus seeking process with the primary object being to find ways to *avoid* dismissals. In *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa*¹⁹ the Appellate Division suggested that the consultation process should begin "... once the possible need for retrenchment is identified and before a final decision to retrench is reached".
- [29] *Mr. Orr* submitted that the applicant is not deserving of relief because it did not engage in good faith and sought to delay and frustrate the consultation process. It is trite that all the consulting parties bear a duty to participate constructively and engage in good faith during the consultation process.²⁰ In this matter, the respondent alleges that the applicant raised preliminary issues designed to delay the consultation process and later, through its conduct, it admitted that it was incorrect in respect of its allegation the employees of labour brokers must form part of the consultation process. I do not accept this. That the applicant appears to have accepted that it must make a referral to

¹⁹ 1995 (3) SA 22 (AD)

²⁰ *Communication Workers Union v Telkom SA SOC Ltd & others* (2017) 38 ILJ 360 (LC) at para 52

the CCMA in terms of section 198D of the LRA is no indication of its lack of bona fides. The applicant made the referral without unnecessary delay. The fact that the referral was made suggests that the applicant is firm in its belief that the respondent does indeed use employees engaged through or by labour brokers in affected positions, and the respondent ought to have included those employees in the retrenchment exercise as a result of the application of section 198A(3)(b) of the LRA. Furthermore, as indicated earlier, I do not accept that the applicant was the cause of the delay between 13 June and 9 July. More importantly, a meaningful consultation process could not begin until the respondent had made disclosure of all the relevant information. It must be noted that the applicant requested the review as early as 16 July.

- [30] In the circumstances, the respondent has not complied with the procedural requirements of section 189 and 189A. Most importantly, the respondent failed to disclose information that was critical to meaningful consultation in a joint consensus seeking exercise. The applicant could not be expected to constructively engage on the rationale, or alternatives to retrenchment, when they could not do so on an informed basis. Furthermore, the consultation was rushed in circumstances where there appeared to be no urgent situation that required remedy. The respondent did not contend that retrenchment was necessary to save costs, nor did it contend that its viability was at stake. In fact, the respondent never explained why it could not extend the consultation as requested by both the applicant and the facilitator. That the respondent disclosed extensive information over the three days immediately before implementing its new structure is a further indication that the respondent failed to engage in good faith in a meaningful consensus seeking exercise.

Remedy

[31] In *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and others*²¹ the Constitutional Court, per Zondo CJ clarified that the primary purpose of section 189A (13) applications is the relief contemplated in section 189A (13) (a) to (c). In *Regenesys*, the Constitutional Court held as follows:

31.1 The relief contemplated in section 189A (d) is only appropriate where the relief in subsections (a) to (c) is inappropriate.

31.2 At para [75] the Court stated: “*The order contemplated in paragraph (c) applies when a dismissal has happened without compliance with a fair procedure when it is still appropriate to reverse the dismissal and put the consultation process back on track.*” (own emphasis)

31.3 It may not be appropriate to issue an order in terms of subsections (a) to (c) if a significant period has lapsed between the date of the dismissal and the date of adjudication, where an employer cannot reasonably be expected to resume the consultation process. Changes in the operations of the employer may also make it inappropriate to make an order in terms of subsections (a) to (c).

31.4 The employer bears the onus of placing evidence before the court showing that it is inappropriate to make an order in terms of subsections (a) to (c).²²

31.5 While it is difficult to state, in the abstract, what length of time may make it inappropriate to make an order under subsections (a) to (c), it may be perfectly appropriate to make such an order if only three months have lapsed since the dismissal.²³

[32] In this matter, the respondent has placed no evidence before the court demonstrating that the relief in subsection (c) is inappropriate. It therefore failed to discharge the onus. The period between the dismissal is not so

²¹ (2024) 45 ILJ 1723 CC

²² See para [80]

²³ See para [83]

significant that an order under subsection (c) would be inappropriate. Just over two months have passed since the first tranche of dismissals were implemented, and just over one month has passed since the later dismissals were implemented. In the circumstances, it is not unreasonable to expect the employer to resume the consultation process.

- [33] Given that the relief in section 189A (13) (a) to (c) constitutes the primary and preferred relief, I intend to make an order contemplated by subsection (c) coupled with an order that the respondent make disclosure of relevant information.

Costs

- [34] It is trite that, in this court, costs do not follow the result, and close attention must be paid to whether the requirements of law and fairness require a cost order. In this matter, neither party sought costs. In any event, costs can only bedevil further constructive engagement between the parties. Accordingly, I make no order as to costs.

Conclusion

- [35] For the reasons set out above, the respondent has not complied with a fair procedure as contemplated by section 189 and 189A before dismissing.

- [36] In the result, the following order is made:

1. The application to amend the notice of motion is granted,
2. Non-compliance with forms and service provided for by the Rules of the Labour Court is condoned and the application may be heard and determined on an urgent basis in accordance with Rule 38,
3. Directing the respondent to reinstate, with effect from the date of their dismissal, those of the applicant's members who have been dismissed

for the reasons contemplated by the section 189(3) notice issued by the respondent,

4. Compelling the respondent to comply with a fair procedure concerning the dismissal of the applicant's members for operational reasons by consulting with the applicant in the manner envisaged by section 189 and 189A of the Labour Relations Act No. 66 of 1995, regarding:
 - 4.1. The reasons for dismissing the checker operators at the sites identified by the respondent and having their forklift driver functions performed by third party suppliers,
 - 4.2. Alternatives to, and ways to avoid, the dismissal of the checker operators at the sites identified by the respondent,
 - 4.3. The timing of the dismissal, if any, of the checker operators,
 - 4.4. The selection criteria for the dismissal, if any, of the checker operators,
 - 4.5. Ways to ameliorate the adverse effects of the dismissals, if any, of the checker operators,
5. Directing the respondent to disclose all documents and reports pertaining to the review of the logistics and raw materials operating functions, which is referred to in the section 189(3) notice, including:
 - 5.1. The terms of reference of the review exercise, the methodology, proposed KPIs and metrics,
 - 5.2. The reasons why those KPIs and metrics were adopted,
 - 5.3. The review's factual findings and the reasons for those findings,
 - 5.4. The review exercise's proposed solutions to the problems identified, including that the forklift driver functions performed by the checker operators should be provided by third party suppliers.

R Daniels

Judge of the Labour Court of South Africa

For the Applicant

A Roskam, Haffegée Roskam & Savage

For the Respondent

Adv C Orr SC

Bowmans Attorneys

LABOUR COURT