



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-173974

In the matter between:

NUMSA OBO MEMBERS

Applicant

and

ARCELORMITTAL SOUTH AFRICA LTD

Respondent

Heard: 6 November 2025

Delivered: 12 November 2025.

Summary: Section 18 of the Superior Courts Act, 2013

JUDGMENT

WHITCHER J

Nature of application

[1] On 27 October 2025, Harvey AJ made the following order:

...

3. The respondent is directed to comply with a fair procedure by resuming consultations pursuant to the section 189(3) notice issued on 8 January 2025 ('the Notice').

4. The respondent is interdicted and restrained from dismissing any employee at its operations in Newcastle and Vereeniging pursuant to the Notice, and is directed to reinstate all employees whose employment at its operations in Newcastle and

Vereeniging was terminated pursuant to the Notice, pending its compliance with a fair procedure as contemplated in paragraph [3] of this Order.

5. The parties are directed to resume the consultations contemplated in paragraph [3] of this Order within ten calendar days of the date of this Order.

[2] In the present opposed application, NUMSA seeks an order in the following terms:

- (i) The order of Harvey AJ, dated 27 October 2025, ('the Order') constitutes an interlocutory order as envisaged in section 18(2) of the Superior Courts Act, 10 of 2013; and*
- (ii) The respondent's application for leave to appeal, dated 27 October 2025, does not have the effect of suspending the operation and execution of the Order.*
- (iii) In the alternative to the above that the operation and execution of the Order is not suspended pending the decision of the respondent's application for leave to appeal.*

[3] Section 18 of the Superior Courts Act ('the SCA') provides as follows:

"18. Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

Section 18(2): Nature of the Order

[4] The first issue is whether, as submitted by NUMSA, the Order constitutes an interlocutory order not having the effect of a final judgment.

[5] *Denel SOC Ltd v National Union of Metalworkers of SA on behalf of Petersen & another*¹ stated:

... In *Soltec CC v Swakopmund Super Spar*, Masuku J stated the following about interlocutory applications: 'In *Uvana v Steenkamp* (infra), the court referred, for definition of interlocutory, to the Black's Law Dictionary. There, interlocutory was defined as "interim or temporary, not constituting a final resolution of the whole controversy". I adopt the definition.'

[6] The Appellate Division, in *Cronshaw and another v Coin Security Group (Pty) Ltd*², held that where to draw the line between decisions which are 'interlocutory' and those which are 'final' is intrinsically difficult, but there has to be a rule and that rule was laid down by the Pretoria Garrison case wherein Schreiner JA stated:

...a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit", or which amounts, I think, to the same thing, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing".

[7] The Supreme Court of Appeal in *Government of the Republic of South Africa & others v Von Abo*³ held:

"It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice."

[8] The Constitutional Court in *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others*⁴ held:

¹ (2022) 43 ILJ 2303 (LC).

² 1996 (3) SA 686 (A).

³ 2011 (5) SA 262 (SCA).

⁴ 2023 (1) SA 353 (CC).

"In deciding whether an order is appealable, not only the form of the order must be considered but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect".

[9] Sutherland DJP in *K.M.R v K. R*⁵ provides the most helpful up to date guide:

The compass of an order that is final in effect was addressed in *Zweni v Minister of Law and Order* [1993 \(1\) SA 523](#) at 532J -533A:

"A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd case supra* at 586I-587B; *Marsay v Dilley* [1992 \(3\) SA 944 \(A\)](#) at 962C-F)...."

To the *Zweni* approach must be added the refinements about supposedly interim orders stated in *City of Tshwane Metropolitan Municipality v Afriforum* [2016 \(6\) SA 279](#) (CC) at [39] - [42] where the following was held:

"[39] The appealability of interim orders in terms of the common law depends on whether they are final in effect. In this connection it must be borne in mind that the effect of the restraining and mandatory order granted is to mortify and prevent Council from implementing its resolution. And this is the resolution taken in terms of its constitutional and statutory powers. To say that this amounts to an intrusion by courts into the domain reserved exclusively for the executive, would not be an overstatement.

[40] The common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under

⁵ (44169/2019) [2021] ZAGPJHC 35 (18 March 2021).

the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the *disposition of the substantial portion of what is pending* before the review court, in determining appealability. The principle was set out in *OUTA* by Moseneke DCJ in these terms:

'This court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the interests of justice. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order *has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.*'

...

'A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever.'

[41] What the role of interests of justice is in this kind of application, again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common-law impediments might suggest. This is especially so where, as in this case, the interim order should not have been granted in the first place by reason of a failure to meet the requirements. The Constitution and our law are all about

real justice, not mere formalities. Importantly, the constitutional precepts of legality and the rule of law demand that nobody, not even a court of law, exercises powers they do not have. Where separation of powers is implicated and forbids the grant of the order sought to be appealed against, the interests of justice demand that even an order that is not of final effect or does not dispose of a substantial portion of the issues in the main application, nevertheless be appealable.

[42] Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application is not irrelevant to the determination of appealability and the grant of leave, they are in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave. The role of the final effect of an interim order recedes into the background when an interim order impermissibly trenches upon the sole terrain of the other branches of government. To arrest the execution of Council's policy decision as finally as the High Court has done before a determination of the grounds of review, is too drastic a measure to take in the circumstances. It remains the constitutional and statutory responsibility of Council to determine the fate of the street names, obviously subject to facilitation of genuine and appropriate public participation in the name-changing process. The power to determine how much of Council's budget will be used, when and for what purpose is also firmly in the hands of Council."

[10] Sutherland summarised the test as follows:

In general, the attribute of "finality" which may attach itself to a, supposedly, interim order is of course not to be equated with an order which is literally "irreversible". The point at issue is *effect* not *form*. However, even with a reversible order, the aspects of the duration that the order is to operate, the likelihood of contingent factors that might provoke a reconsideration of the order and the logistics of a reverse transition from a change brought about by a new status quo created by the implementation of the order all weigh in the assessment of the true "effect" of an order.

Moreover, especially with orders that affect human relationships, it could fairly be said that they address moving targets. The formal legal reversibility of such an order is not necessarily determined by the status quo at the time the initial order was given but may be dictated by circumstances that flow from the evolution of the conditions and circumstances brought about by the

“interim” order itself. In other words, the momentum in the tide of affairs of the affected people can be shaped by the unavoidable consequences of the changes brought about by the “interim” order. Such effects are not always capable of being undone and what in truth happens is that a fresh order is later required to manage a reverse transition, if, and only if the circumstances that prevail at that later time, are conducive to a reversal at all. The reality is that, in given circumstances, the initial order has indeed a final effect.

[11] On the day of the hearing, NUMSA brought to the attention of the court and the respondent (AMSA) the judgment in *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga & others*⁶, wherein the Constitutional Court stated the following:

“[74] Why do paras (a) to (c) share common features among themselves which they do not share with para (d)? The reason is that s 189A(13) has two purposes. The one purpose, which may be called the primary purpose, relates to orders contemplated in paras (a) to (c) but does not relate to an order contemplated in para (d). The purpose of orders contemplated in paras (a) to (c) is to ensure that the employer complies with a fair procedure before it dismisses employees for operational requirements finally. That is why the provisions of paras (a) to (c) end with the phrase ‘with a fair procedure’ and why the verb ‘comply’ appears in different forms and shapes before that phrase in these paragraphs.

[75] The order contemplated in para (a) is meant to be granted before or at the start of or during the consultation process when there has been no dismissal as yet and when there is no imminent dismissal. An order contemplated in para (a) compels the employer to comply with a fair procedure. An order contemplated in para (b) is one meant to be granted where the dismissal of an employee is imminent in circumstances where the employer has not complied with a fair procedure. That order would interdict or restrain the employer from dismissing the employee or employees before it complies with a fair procedure. The order contemplated in para (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

[76] An order contemplated in para (c) may not be appropriate if a significant time has lapsed between the date of dismissal and the date of adjudication. This is because the reinstatement under para (c) is not necessarily final. It is granted to

⁶ (2024) 45 ILJ 1723 (CC).

enable the employer's compliance with a fair procedure. The outcome of the employer's compliance with a fair procedure could be that the employees remain in the employer's employment or they could be dismissed after a fair procedure has been followed. **It is a temporary order.** In fact, the order contemplated in para (b) is also **a temporary order** in that the employer is not permanently interdicted from dismissing the employees but is interdicted until it complies with a fair procedure.

[77] **The order contemplated in para (d) is not temporary. It is final.** Paragraph (d) does not say that the payment of compensation by the employer must be made until the employer has complied with a fair procedure. The order in para (d) is made on the acceptance that the employer has failed to comply with a fair procedure and the employer is not given another chance to comply with a fair procedure. The order contemplated in para (d) is made to ensure two objectives, namely to hold the employer accountable for its failure to comply with a fair procedure by ensuring that there are consequences visited upon the employer for such unacceptable conduct and to compensate the employee for the infringement by the employer of his or her right not to be dismissed in a procedurally unfair manner.”⁷

...

“[100] When one considers how much time should elapse before it can be said that an order contemplated in para (c) would not be appropriate, one should remember that provisions in labour legislation that grant a court the power to order **a status quo order pending some processes are not new in our labour law.** Under the 1956 LRA as amended, two sections gave the Industrial Court such powers. The one was s 17(11)(a) and the other s 43(4). For purposes of this matter it is only necessary to say something about s 43. Under that section the Industrial Court had powers to order the **temporary reinstatement** of an employee whose dismissal it found to prima facie constitute an unfair labour practice. That order of reinstatement was popularly known as a status quo order. Such an order of reinstatement endured for 90 days or until one of certain events stipulated in that provision occurred but the court could extend the operation of that order beyond 90 days.

[101] The purpose of such a reinstatement was to place the employee in the position that he or she was in before the prima facie unfair labour practice was committed by the employer to enable the parties to try to settle the dispute. **In the case of a dismissal for operational requirements — which is what we are dealing with in the present case — the basis of the conclusion that the**

⁷ NUMSA's emphasis.

dismissal prima facie constituted an unfair labour practice could be that the employer had not complied with a fair procedure in the sense that there was no consultation or because, although there was consultation, such consultation was not a proper consultation.”⁸

[12] NUMSA contends that the question whether section 189A(13)(a) to (c) orders are interlocutory orders, has been emphatically settled by *Regenesys*. The judgment confirms that there is a distinct difference between an order for compensation in terms of Section 189A(13)(d) of the LRA (which is a final order) and an order in terms of Sections 189A(13)(a) to (c) of the LRA (which orders are not final but interim or temporary); and that orders in terms of sections 189A(13)(a) to (c) are comparable to **the previous status quo orders** issued by the erstwhile Industrial Court, which orders were **temporary/interlocutory** in nature.

[13] I am not persuaded by this interpretation. The CC is referring to the potential consequences / effects of the orders. In respect of orders under s189A(13)(c), the Court is saying that the effect of the order is or may be *temporary* in the sense that **the reinstatement** under para (c) is not necessarily final. The outcome of the employer’s compliance with a fair procedure could be that the employees remain in the employer’s employment **or they could be dismissed after a fair procedure has been followed**.

[14] There is a conceptual difference between the potential effects of an order under s189A(13)(c) as described and an interlocutory order not having the effect of a final judgment.

[15] On my interpretation, the Order is not an interlocutory order not having the effect of a final judgment. While it restores the status quo ante and may potentially have a temporary effect (as described above), the decision constitutes a final resolution of the whole controversy that came before the court; it is a once-off order that stands on its own merits; the order will remain wholly unaffected by any subsequent consultations and/or dismissals; and the order is not subject to revisitation by the court that gave the order.

[16] As aptly articulated by AMSA:

⁸ NUMSA’s emphasis.

Having regard to the effect of the Order and the Court's reasons, the Order is final in effect (has the effect of a final judgment) in that:

It is definitive of the rights of the parties, particularly whether the dismissals effected in September 2025 were procedurally fair and whether reinstatement was an appropriate remedy.

It definitively determines the parties' rights and obligations vis-s-vis the procedural fairness remedy under section 189A(13) of the LRA on the facts before the Court.

It interdicts dismissals and mandates reinstatement and directs a particular procedural course (resumption of consultation) pending compliance. That is not case-management housekeeping.

The fact that section 189A(13) of the LRA relief is supervisory in nature does not transmute a binding final order into an interlocutory ruling. Nor does the theoretical possibility of future applications under section 189A(13) of the LRA concerning later conduct render the present order provisional.

NUMSA's submission that section 189A(13)(a)-(c) orders are inherently interlocutory disregards the fact that the statutory remedy is designed to yield final, executable directions concerning any procedural defect in real time.

Even if a supervisory label is applied, the order possesses the trapping of finality relevant to section 18(2) of the SCA: it is definitive of the issues before the Court, not susceptible to alteration by the same court on the same facts; and dispositive of the urgent relief sought under section 189A(13) of the LRA.

Section 18(3) application

[17] NUMSA also seeks an order in terms of section 18 of the Superior Courts Act to put the Order into operation pending the outcome of the respondent's leave to appeal/appeal.

[18] The test is now well established. In *University of the Free state v Afriforum* 2018 (3) SA 428 (SCA) Burton Fourie AJA summed up the approach to be applied:

“[9] ...What is immediately discernible upon perusing s 18(1) and (3) is that the legislature has proceeded from the well-established premise of the common

law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted 'under exceptional circumstances'....

[10] It is further apparent that the requirements introduced by s 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and, where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted, and conversely that the respondent will not if the order is granted.

[11] In *Incubeta Holdings* supra [8] para 24 Sutherland J aptly commented as follows on s 18(3):

'A hierarchy of entitlement has been created, absent from the *South Cape* [Corporation] test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a preponderance of equities.'

DE van Loggerenberg & E Bertelsmann Erasmus: Superior Court Practice vol I 2 ed (service issue 2) correctly conclude that s 18(3) 'is a novel provision and places a heavy onus on the applicant'. On a proper construction of s 18, it is clear that it does not merely purport to codify the common-law practice, but rather to introduce more onerous requirements...

[12] ...

[13] Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings* supra [8] para 22 Sutherland J put it as follows:

'Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be exceptional must be derived from the actual predicaments in which the given litigants find themselves.'

I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.

- [14] A question that arises in the context of an application under s 18 is whether the prospects of success in the pending appeal should play a role in this analysis. In *Incubeta Holdings* Sutherland J was of the view that the prospects of success in the appeal played no role at all. In *Liviero Wilge Joint Venture* supra [8] [para 30] Satchwell J, Moshidi J concurring, was of the same view. However, in *Justice Alliance* supra [8] para 27 Binns-Ward J (Fortuin and Boqwana JJ concurring) was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore —

'the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3).'

- [15] I am in agreement with the approach of Binns-Ward J. In fact, *Justice Alliance* serves as a prime example of why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief. Binns-Ward J concluded that the prospects of success on appeal were so poor that they ought to have precluded a finding of a sufficient degree of exceptionality to justify an order in terms of s 18 of the Act. This conclusion was subsequently proven to be justified when this court upheld the main appeal in *Justice Alliance*. However, in the present appeal, the appeal record in the review application was not before us. The prospects of success shall therefore not feature in our consideration whether or not the order of the Full Court should be upheld."

- [19] From the above authorities, the following is evident.

- (i) The relief sought by NUMSA constitutes an extraordinary deviation from the norm and any order granted in terms of section 18 of the Superior Courts Act not only has been described as exceptional but requires the existence of "truly exceptional" circumstances.

- (ii) NUMSA bears a heavy onus and must satisfy equally onerous requirements, being the establishment of distinct findings of fact: that exceptional circumstances exist that justify the Order being put into operation; proof on a balance of probabilities that it will suffer irreparable harm if the Order is not put into operation; and, proof on a balance of probabilities that the respondent (AMSA) will not suffer irreparable harm should the execution order be granted.
- (iii) If NUMSA fails to prove any one requirement, the application must fail.
- (iv) The SCA emphasized that “exceptionality” is fact specific and the circumstances which must be exceptional must be derived from the actual predicaments in which the parties find themselves.
- (v) The prospects of success on appeal are a factor to be taken into account in the overall discretion which the Court must exercise when determining whether exceptional circumstances exist.

[20] NUMSA contends that the entire purpose of the Order and the underlying statutory design will be undermined, should the Order be suspended. NUMSA and its affected members will suffer irreparable harm in that they will irretrievably lose *the opportunity to potentially save jobs* by way of engaging in meaningful joint-consensus seeking consultations; and on the other hand, AMSA, will suffer no harm, let alone irreparable harm in that financial losses are not considered to constitute irreparable harm and AMSA indicates that it will simply place workers on short-time should they be reinstated.

[21] I am not persuaded that NUMSA has discharged the heavy onus required under section 18(3) to justify enforcement pending appeal.

[22] The critical facts, gleaned in terms of the *Plascon Evans* rule, are that:

- (i) All production facilities at the Newcastle plant are shut down, with no steel output currently taking place; the blast furnace has been deactivated, the coke batteries have been hot idled. There is therefore no functional workplace to return to, and as set out in AMSA’s letter of 28 October 2025, should reinstatement be physically implemented, AMSA will be forced to place the employees on short-time with no remuneration benefits to the employees.

- (ii) Severance pay has been paid out with no tender to repay.
- (iii) The structural and macro-economic constraints which led to the decision to close the company and retrench have not changed: *inter alia* weak domestic demand, import pressures and circumvention, uncompetitive rail and port costs, electricity price and scrap advantage distorting competition, and no market for Longs steel.
- (iv) Despite being directly challenged, NUMSA has failed, in its reply, to identify any viable alternative that remains open for consultations or any credible option capable of preserving jobs or supporting the re-opening of the plant.⁹ NUMSA merely asserts in reply, in speculative terms, that the acceptance of an offer to purchase is a distinct possibility. However, no evidence has been placed before court that indicates there is an imminent viable offer that could immediately reverse the situation.
- (v) The replying affidavit claims the respondent is silent about electricity pricing and agreements, but the answering affidavit addresses the point: eligibility for a pricing agreement was confirmed but no reduced tariff agreement exists.
- (vi) It was mutually recognised at the consultation process that only massive external intervention could avert closure. That intervention has not materialised.
- (vii) Matters regarding TERS, IDC facilitation, government support, and NERSA/Eskom engagement were canvassed during consultation. NUMSA has not shown that any of these factors (alternatives) are presently viable or even available.
- (viii) The alleged developments NUMSA invokes (IDC facility, TERS, and NERSA's threshold eligibility decision) do not constitute material change to the rationale. The IDC deferral facility was expressly time-bound and did not extend beyond September 2025. TERS assistance

⁹ Given the time from instituting the s189A(13) application to date, NUMSA had sufficient time to apply its mind to same, so it was not unreasonable for the respondent to require NUMSA in this application to identify options.

was approved/communicated but on AMSA's version no TERS monies were received. No reduced tariff agreement exists.

- [23] Essentially, AMSA is faced with a situation where it could suffer real, immediate and irreparable prejudice if compelled to reverse operational decisions midstream and reinstate employees into shuttered operations placed under care and maintenance, with it appears no foreseeable change in the status based on the above facts.
- [24] Reinstatement would expose it to significant operational, financial and safety risks that are not merely inconvenient they are irreparable in nature.
- [25] AMSA cannot derive any benefit from reinstated employees because the plant has fully shut down, with no functional workplace to return to.
- [26] Short-time is not a statutory mechanism for consultation under section 189 of the LRA, and commercially irrational under the circumstances.
- [27] Workers who are reinstated following a section 189A(13) order must tender back any severance packages they received upon retrenchment. This principle is rooted in the notion that reinstatement restores the employment relationship retrospectively, nullifying the basis for severance pay. No tender back has occurred and its neither possible nor practicable to recover same.
- [28] NUMSA argues reinstatement purely in service of consultation, but if there is no viable operational environment, no concrete proposal to make consultations meaningful reinstatement is not a workable or legally coherent remedy.
- [29] Reinstatement coupled with short-time also does not benefit the employees. Moreover, any separation payments already made would either be withheld or subject to recovery.
- [30] As to the argument that the entire purpose of the Order will be undermined, the members' position is indistinguishable from that of any reinstated worker: the judgment's benefits are deferred until the appeal process is concluded.
- [31] Future consultations will not be academic if an appeal is unsuccessful and can easily resume after the conclusion of an appeal process. In *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty)*

*Limited*¹⁰ the Constitutional Court delivered judgment on November 2018 in respect of dismissals that took place during 4 November 2021. Bearing in mind that the below dicta was based on the availability of work, whereas in this case there is no availability of work, the court held that consultations were still possible after the delivery of the judgment by the Constitutional Court, seven years later:

“[56] Although the respondent knows now that it had misunderstood the applicants’ last proposal, there is nothing on record that suggests that it has, in the meantime, accepted that proposal as it was. They may have wanted to discuss it further with the applicants. Accordingly, we do not know what agreement the two sides could have ultimately agreed upon. That means that we do not know the terms and conditions under which the applicants would have continued to work for the respondent if they had never been dismissed. In these circumstances it seems to me that we should revive the contracts of employment which existed between the applicants and the respondent at the time of dismissal on the basis that as soon as possible after this judgment has been handed down the parties may resume the consultation process which ended when the dismissal took place and the applicants may then revive their proposal or make another proposal aimed at the parties reaching an agreement on the issue of them working flexitime. Accordingly, Woolworths has not shown that reinstatement is not reasonably practicable”.

[32] This principle applies squarely here. If the appeal is unsuccessful, the parties can resume consultations from the point at which they were unfairly interrupted. That is not academic. It is the very purpose of reinstatement.

[33] In addition, AMSA has tendered in its papers to consult about alternatives without reinstating workers. None were forthcoming. This is not extraordinary or unfair. In *Semenya and Others v Commission for Conciliation Mediation and Arbitration and Others*¹¹ the court approved the principle in *Johnson & Johnson (Pty)Ltd v Chemical Workers Industrial Union* a case dealing with retrenchment (where at conciliation the employer again undertook to consider alternatives, but none were forthcoming from the union or the employees)¹² and held thus –

¹⁰ 1 (CCT275/17) [2018] ZACC 44; (2019) 40 ILJ 87 (CC); 2019 (3) BCLR 412 (CC).

¹¹ (JA26/2003) [2006] ZALAC 2; [2006] 6 BLLR 521 (LAC); (2006) 27 ILJ 1627 (LAC) (23 March 2006).

¹² (1999) 20 ILJ 89 (LAC).

“While dealing with the issue of whether the absence of a pre-dismissal hearing or opportunity to be heard can be cured by a later hearing or later opportunity to be heard that comes after the decision has been taken, it is worth noting what was said by both the Labour Court, in *Chemical Workers Industrial Union v Johnson & Johnson (Pty)Ltd* [1997] 9 BLLR 1186 (LC) at 1198 E-H), and, this Court, in *Johnson & Johnson (Pty)Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at paras 49-51. The latter decision was an appeal from the former decision. One of the features of that case was that the employer had initially failed to offer female employees the opportunity to try certain jobs before dismissing them for operational requirements but had later offered them that opportunity and they did not accept it. Both the Labour Court and this Court on appeal held that the dismissal of such female employees was not by reason of such failure on the part of the employer unfair because it was the employees who had prevented the employer from remedying the initial defect when they did.

Both in *Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A) at 379 F-G and in *Administrator, Transvaal and others v Traub & others* 1989 (4) 8A 731(A) at 748 G-I and 750 B-F the Appellate Division (now Supreme Court of Appeal) acknowledged that there are circumstances where it is acceptable for the audi alteram partem rule to be observed after the decision has been taken. not accept the employer’s later offer.”

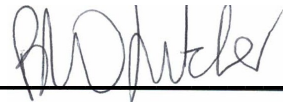
[34] Further if the appeal is unsuccessful, the order of reinstatement would remain in place. There is no prejudice to workers in allowing the appeal to run its course, as their rights remain protected and enforceable. Further, in such event (if AMSA was unsuccessful), given the closure of the plant, the remedy if any will have to be confined to compensation, which is a financial remedy under 189A(13)(d).

[35] As to prospects of success on appeal, AMSA’s extensive submissions on the matter demonstrate it is a highly relevant issue in this application and should count as a factor that weighs against granting the application.

[36] As to costs, fairness dictates that each party bears its own costs.

Order

The application is dismissed, with no order as to costs.



Benita Witcher

Judge of the Labour Court of South

Africa

APPEARANCES:

For the Applicant: Minnaar Niehaus Attorneys

For the Respondent: F A Boda SC, instructed by Cliffe Dekker Hofmeyr
Incorporated

Labour Court