



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA106/24

In the matter between:

**TSOGO SUN CASINOS (PROPRIETARY)
LIMITED T/A EMNOTWENI CASINO**

Appellant

and

**SOUTH AFRICAN COMMERCIAL
CATERING AND ALLIED WORKERS UNION
(SACCAWU) OBO MAVUSO, NOHLANHLA
AND 2 OTHERS**

Respondent

Heard: 11 November 2025

Delivered: 27 November 2025

Coram: Mahalelo ADJP, Waglay et Djaje AJJA

JUDGMENT

WAGLAY, AJA

Introduction

[1] This appeal concerns the substantive and procedural fairness of the dismissal of the three individual employees (individual employees) following a

retrenchment process undertaken by the appellant which the Labour Court found to be unfair.

- [2] The appellant appeals against the whole judgment and order of the Labour Court dated 5 April 2024.
- [3] The appeal is opposed by the South African Commercial Catering and Allied Workers Union (Union), acting on behalf of the individual employees.

Background

- [4] The individual employees, along with one other employee, were hired by the appellant to work as crèche attendants responsible for the provision of childcare services at the Emnotweni Casino.
- [5] Following the declaration of the national lockdown due to the COVID-19 pandemic in March 2020, on 26 March 2020, the crèche was closed, and the employees were placed on layoff. Although the employees were not remunerated during this period, the appellant continued to pay towards their contractual benefits, including medical aid and death and disability insurance benefits.
- [6] While the casino reopened for business in July 2020, the crèche remained closed, and consequently, the employees remained on layoff.
- [7] On 27 September 2021, some 18 months after the initial closure of the crèche, the appellant issued the employees with a notice in terms of section 189(3) of the Labour Relations Act¹ (LRA). Per the notice, the employees were informed that, as it was unlikely that the crèche would be reopened at any time in the foreseeable future, the appellant proposed the closure of the facilities and the declaration that the crèche attendant positions were redundant. The employees were therefore invited to consult with the appellant on their possible retrenchments and to make proposals of alternatives to avoid same.

¹ Act 66 of 1995, as amended.

- [8] The consultations took place over the course of three months, with four consultation sessions being scheduled, commencing on 27 September 2021 and continuing to around 12 November 2021, during which the employees were given an opportunity to make representations and proposals. The consultations proceeded individually with each employee, although all consultations were scheduled on the same days. Minutes were kept by the appellant of each consultation meeting.
- [9] It is common cause that the Union was not involved in the consultation process, and the individual employees represented themselves.
- [10] During the consultation process, several alternatives had been proposed by the individual employees, the implementation of a rotational shift system when operating the crèche or the deployment of the employees to different business units, including cleaning or reception services. It was determined by the appellant that these proposals were not feasible given the impact of the COVID-19 pandemic on the business of the appellant; consequently, these proposals were rejected.
- [11] The individual employees also proposed that the creche be outsourced to them. The employer agreed to revert to them on this issue.
- [12] On or around 18 October 2021, a voluntary retrenchment package (VSP) was offered to the employees, which offer would lapse on 27 October 2021.
- [13] Only one employee accepted the VSP, while the individual employees rejected the proposal, and the consultation process continued with respect to them.
- [14] Despite consultation meetings being scheduled and/or rescheduled for 29 October, 4 November, and 12 November 2021, none of the individual employees attended these sessions. It is not known if the response to the outsourcing of the crèche was supposed to have been communicated at any of these meetings; clearly, the response would not have been positive, having regard to the further conduct of the employer.

- [15] On 17 November 2021, the individual employees were dismissed.
- [16] Following a referral of the dispute to the CCMA, resulting in the issuing of a certificate of non-resolution, the individual employees, represented by the Union, approached the Labour Court for relief.

In the Labour Court

- [17] The respondent Union referred an unfair dismissal claim alleging that the individual employees' dismissal on the grounds of the appellant's operational requirements was both procedurally and substantively unfair in that, on procedural fairness:
- 17.1 The appellant failed or otherwise refused to consult with the Union despite a request to do so and the provisions of s 189(1)(b)(ii) or (c) of the LRA, which obliges the appellant to involve the Union in the consultation process;
 - 17.2 The decision to retrench the individual employees had already been taken, as an application to close down the crèche had been made to the gaming board before the consultation process took place, i.e. the retrenchment was a *fait accompli*;
 - 17.3 The appellant failed to make any proposals to avoid retrenchment during the consultation process;
 - 17.4 The appellant failed or otherwise refused to disclose information to the individual employees during the consultation process; and
 - 17.5 The individual employees' proposals to avoid retrenchment were rejected without proper consideration.
- [18] On substantive fairness, the Union submitted that the appellant should have absorbed the individual employees into different positions within its workplace, implemented short-time with respect to its employees or, in the alternative, the appellant should have outsourced the crèche to the individual employees.

- [19] On the selection criteria, the Union raised two impugns: (i) that there existed a discrepancy on which criteria would be used; and (ii) that there was no consultation on the selection criteria.
- [20] All in all, the Union alleged that the appellant failed to comply with s189 of the LRA in its dismissal of the individual employees.
- [21] It was the appellant's case that it did not maintain a recognition agreement or a relationship with SACCAWU or indeed any other union within its workplace, and that the consultation process was preceded by litigation and correspondence between the appellant and the Union regarding its organisational rights, which culminated in an understanding that, as the Union's constitution did not extend to the gaming and gambling industry (within which the appellant is engaged), the Union could not enjoy rights within the workplace. Thus, at the time of the consultations, the appellant was unaware that the individual employees belonged to a union. Further to this, and during consultations, the individual employees had not indicated that they sought to be represented by a union, nor did they indicate that they were members of any union. In that respect, the appellant had continued the consultation process directly with the employees.
- [22] On procedural fairness, the court *a quo* found that the appellant had undertaken a 'tick box approach' to the consultation process, having already decided to dismiss the employees and was merely going through the statutory processes to give credence to its decision to retrench the individual employees. This, according to the court *a quo*, was demonstrated by the appellant's refusal to allow the individual employees to take copies of the VSP home to read and consult over it and the failure to permit union representation during the course of the consultation process.
- [23] On substantive fairness, the court *a quo* agreed with the individual employees that the appellant had failed to seriously and genuinely consider the alternatives to retrenchment that the individual employees had proposed. This, coupled with the appellant's failure to offer available alternative

employment to the individual employees, rendered the retrenchment substantively unfair.

[24] Further, the court *a quo* held that, as it was the evidence of the appellant that the crèche attendant positions were necessary within the appellant's organisational structure due to regulatory requirements, by retrenching the employees only to later outsource these positions to third parties despite rejecting the individual employee's earlier proposal to outsource the crèche to them, the appellant's conduct could only lead to the inference that the retrenchment process was neither genuine nor in good faith.

[25] The court *a quo* thus found in favour of the individual employees and ordered their reinstatement, curiously though with full backpay.

On appeal

[26] The appellant appeals against the whole of the judgment of the court *a quo* and advances five points in support of its case: that the court *a quo*:

- 26.1 reached the wrong conclusion in the context of the evidence in relation to the genuine and *bona fide* nature of the consultation process and possible alternatives;
- 26.2 reached the wrong conclusion in relation to the appellant's involvement of the Union during the consultation process;
- 26.3 failed to consider the appellant's legal argument and failed to apply the relevant legal principles in respect of the finding of substantive unfairness;
- 26.4 failed to properly consider the evidence relating to the impracticality of reinstating the employees; and
- 26.5 reached the wrong conclusion in the context of the evidence in relation to the order of reinstatement.

Appellant's submissions

- [27] The appellant argued that it was not the respondent's pleaded case that the retrenchment of the individual employees was a sham or a foregone conclusion, in that the appellant had already decided to dismiss the employees and was simply going through the motions to complete the s189 process. Furthermore, in concluding that the appellant did not consider the alternatives proposed by the individual employees to avoid retrenchment, including their placement in alternative positions, the court *a quo* had failed to consider the evidence of the appellant, which showed a consideration and response to the alternatives proposed.
- [28] On union representation, the appellant impugned the court *a quo*'s findings that, as the appellant was deducting monthly subscription fees or union dues from the salaries of the individual employees, the court was unconvinced by the appellant's argument that it was unaware of the individual employees' membership of SACCAWU. On this finding, the appellant contends that the deduction of subscription fees was never evidence led during the hearing, and it has remained the evidence of the appellant that it did not maintain any relationship or recognition agreement with SACCAWU or any other union, and thus no subscription fees or union dues were being deducted from the individual employees' salaries.
- [29] On substantive fairness, the appellant argues that despite finding that no challenge was mounted by the respondent with respect to the rationale for the proposed retrenchment and that the crèche services were later outsourced to a third party, the court *a quo* still found that the individual employees should be reinstated despite the legal principles concerning the appropriateness of reinstatement in instances where the substantive fairness of a retrenchment is unchallenged or otherwise accepted and what remains is a procedural unfairness claim.
- [30] On the appropriateness of the reinstatement of the individual employees, the appellant argues that the court *a quo*'s finding of reinstatement and backpay is at odds with its acceptance of the appellant's evidence that the crèche positions were no longer a part of the appellant's organisational structure as the crèche function had been outsourced to a third party and thus the

individual employees could not be reinstated into these positions. Further, despite the finding that the individual employees, by failing to attend further consultations, had frustrated the process and had added to whatever perceived procedural unfairness they had suffered during the consultation process, the court still found an order of reinstatement with full salaries and employment benefits to be appropriate. Finally, and in ordering retrospective backpay in circumstances where, for nearly two years after the dismissal, the creche remained closed, this order was at odds with the facts before the judge *a quo*. Finally, the court failed to take into consideration that the individual employees had been paid severance pay at the time of their retrenchment.

Respondent's submissions

- [31] On the point that it failed to plead that the consultation process was a sham, the respondent impugns this contention, referring back to the statement of case and the pre-trial minute to demonstrate the instances in which it had referred to the consultation process being merely a tick box exercise.

- [32] The respondent submits that the consultation process was neither genuine nor *bona fide* due to the appellant's failure to propose any alternatives to retrenchments; rather, the appellant had simply made sweeping but vague statements around its consideration of alternatives without explicitly indicating what alternatives it had considered. Instead of listing alternatives considered by the appellant, the s189(3) notice merely states that the appellant was willing to consider voluntary retrenchment or mutually agreed terminations, and these did not qualify as alternatives, or so the submission goes.

- [33] Turning to the alternatives proposed by the individual employees, the respondent contends that the appellant had rejected the otherwise viable proposals made without proper investigation or consideration, where some of the reasoning provided in the rejection of the employee's proposals was nonsensical (to the employees) and proposals were rejected outright, with the exception of the proposal of placing the employees in alternative positions and the outsourcing of the creche to them. Instead, the respondent contends

that the appellant was more interested in persuading the individual employees to accept the VSP.

- [34] The respondent disputes that the appellant was not aware of the individual employees' membership with SACCAWU but contends that the appellant chose not to consult with the union because it did not recognise it, despite the provisions of s 189(1)(c) which required consultation with a union whose members were likely to be impacted by the contemplated retrenchment processes. On this point, the respondent further contends that the appellant's submission that it was not aware that the individual employees were members of the Union was at odds with its evidence at the trial, in which the late Mr Silaule (the appellant's representative during the consultation process) had indicated that (i) he was aware that at least one of the individual employees was a union member as she had previously been represented by SACCAWU during an unfair dismissal dispute and that this same employee had called a union representative, Mr David Teffo, during the consultation process to consult on the VSP; (ii) that he was aware that SACCAWU had previously sought organisational rights within the organisation; and (iii) that during the consultation process at least one employee had indicated that they wished to be assisted by 'someone', which may have been a reference to union assistance whilst another employee outright asked for union representation during the first consultation as she did not understand the contents of the s189(3) letter. On these bases, the respondent contends that the appellant knew that the individual employees were SACCAWU members and deliberately did not involve the union in the s189 process taking place.
- [35] The respondent further argues that despite the reason for the dismissals being due to the redundancy of the crèche attendant positions, these positions were not permanently redundant, and despite the individual employees' willingness to remain on layoff until the crèche reopened, they were ultimately retrenched. On this basis, the dismissals were without a legitimate reason and substantially unfair.
- [36] Turning to the relief granted by the court *a quo*, the respondent impugns the appellant's argument that, as the crèche services have since been

outsourced, the reinstatement of the individual employees was not appropriate on the grounds that the appellant failed to demonstrate how, in accordance with s193 that the reinstatement of the employees was reasonably impracticable, and without evidence that the respondent was dilatory in pursuing their case, there is no reason why the employees should not be reinstated with full salaries and benefits.

[37] I turn now to consider the grounds of appeal.

Evaluation

Substantive fairness

[38] The court *a quo* found that no challenge had been brought with respect to the substantive fairness of the retrenchment process insofar as it relates to the rationale for the retrenchment process, in that no outright challenge to the reason for retrenchment is mounted by the respondent during the Labour Court proceedings. The respondent now, in its submissions before this Court, seeks to raise the issue of substantive fairness, arguing that the dismissal of the individual employees was without a legitimate reason, as evidenced by the fact that the crèche positions were not permanently redundant, as, about two years after the dismissal, these positions were outsourced to a third-party service provider.

[39] While I agree with the respondent that there is a fair amount of overlap between the concepts of substantive and procedural fairness within our law in that, elements pertaining to procedural fairness may implicate the substantive fairness of the dismissal, with specific focus on the challenge of there being no legitimate *reason* for the redundancy of the individual employees, and without a cross-review challenging the court *a quo*'s finding in this respect, it is not open to this Court to entertain this point.

[40] The appellant submits that in finding that the retrenchment process was a sham, despite the respondent's failure to plead same, the court *a quo* had

erred. The respondent disputes this, providing documented instances within its papers in which it had pleaded that the retrenchment process was a sham and dismissal was a predetermined decision. On a reading of the statement of case, it is clear that the respondent alleges that, by failing to provide or to consider the alternatives proposed by the individual employees, the appellant had conducted the consultation process as a mere formality or in a tick box manner, and that the dismissal of the employees was a predetermined conclusion. On this point, it cannot be said that the respondent had not pleaded or otherwise led evidence on this point.

[41] However, it is simply not enough to allege that a consultation process was a sham; rather, the evidence must show that the employees' dismissals were indeed a foregone conclusion. The court *a quo*'s finding that the dismissals constituted a *fait accompli* appears to rest on three considerations: (i) the appellant's refusal to allow employees to take the VSPs home to consult and reflect upon it; (ii) the exclusion of the union from the process; and (iii) the appellant's failure to 'genuinely' consider the alternatives proposed by the individual employees.

[42] An accusation of a disingenuous consultation process strikes at the heart of s189(2), which requires that consulting parties engage in a meaningful joint consensus-seeking process. As held by the Constitutional Court in *Solidarity obo Members v Barloworld Equipment Southern Africa and others*²:

'... for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations, and seriously consider the representations. This entails that the employer is under an obligation to furnish reasons for rejecting representations after it has considered them carefully. Approaching the consultation with a predetermined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful.'

[43] Can it be said that by refusing to allow the individual employees to take home copies of the VSP that the appellant failed to meaningfully consult? Although

² 2023 (1) BCLR 51 (CC) (*Barloworld*) at para 46.

the appellant refused to allow the individual employees to take the document home under the banner of confidentiality, it was the evidence of the appellant that during the consultation, it was open to the employees to discuss and consult with anyone regarding the content of the VSP and such an opportunity was taken up by Ms Mavuso who was allowed to privately, telephonically speak to one David of the Union to discuss the document, resulting in her returning with a decision to not sign it. Ms Mavuso, in her evidence, indicated that she had read the VSP to David Teffo, a union representative from SACCAWU, who advised her not to sign the document, and it is based on this advice that she acted.

- [44] For reasons unknown, none of this evidence appears to have been considered within the judgment of the court *a quo* of whether the consultation process fell within s189(2), rather the court holds that, by refusing the employees to take the VSP home and to consult on it, the appellant had adopted a 'take it or leave it' approach to the consultation process and *'deprived the affected employees of the ability to apply their minds and solicit advice from their union representatives or any other third party'*. This finding is clearly at odds with the evidence presented by both parties where it was clear that although the VSPs remained in the appellant's possession, the employees were given a period of approximately 10 days to consider the document and were given an opportunity to consult any third party as to its content, and that in the case of Ms Mavuso, she had used this opportunity to consult with her union representative who advised her not to sign the document and she acted in accordance with this advice.

Procedurally unfairness

- [45] Turning to the question of whether the appellant genuinely considered the alternative proposals made by the individual employees, it was the evidence of the respondent that during the consultation process, various alternatives were proposed by the employees, including their re-deployment to other departments within the organisation, the outsourcing of the crèche to the individual employees, the implementation of a rotational shift system to stagger crèche employees or the continued layoff of the employees until the

crèche reopened, however as all but one of these proposals were immediately rejected during the consultation meetings, it was clear, so the respondent's submission goes, that the appellant had already decided on the dismissal of the individual employees.

[46] The appellant's response to the alternatives proposed was unequivocal: they were simply not viable. Most, if not all, of the appellant's departments were limping, given the impact of the pandemic on the business's operations. There was also uncertainty as to when or whether the crèche would reopen. Accordingly, the options of either continued layoff, a shift system or outsourcing the crèche operations to the individual employees made little sense where the future of the crèche itself was unclear. Moreover, in relation to outsourcing, the appellant is correct in its submission that this proposal would not have avoided the retrenchment of the employees, as they would first need to be dismissed before being re-engaged as service providers anyway. It also bears noting that the crèche had remained closed for approximately 18 months prior to the contemplated retrenchment and for a further two years thereafter. In such circumstances, it would have made little sense to outsource an operation when its reopening was so uncertain. This uncertainty extended beyond the crèche to other business units of the appellant, where similar restructuring processes were under consideration, leaving no alternative positions into which the affected employees could be redeployed, as possible downsizing or short-time measures were also being contemplated.

[47] It seems the respondent's impugn on the appellant's treatment of the individual employee's alternatives to retrenchment is centred around the point that all but one of the alternatives proposed were rejected as soon as they were raised during the consultation meetings, thus none of the alternatives were carefully considered; however, it cannot be said that there is no meaningful consultation process undertaken simply because an employer presents answers to questions as and when they are raised. This is even more so where such reasons or responses are directly linked and based on the rationale for the retrenchment process as communicated to the employees

in the notice and during the consultations (and not challenged by the respondent during the trial).

- [48] As held by this Court in *TWK Agri (Pty) Ltd v Wagner & others*³, the consultation process requires that the parties engage with each other meaningfully to find appropriate solutions and alternatives where they exist, and where no alternatives exist, it does not mean the consultation process was a sham, but rather that retrenchment had become unavoidable. It bears repeating that a retrenchment process is not unfair simply because the proposals of the affected employees are rejected, nor is there a statutory requirement for consulting parties to reach an agreement during the consultation process.⁴
- [49] On consultations during retrenchment processes, s189(1) establishes a strict hierarchy of parties to be consulted with in the event of contemplated retrenchment. Where no collective agreement is in place, and no workplace forum exists, the Act requires an employer, in terms of s189(1)(c), to consult with any registered trade union whose members are likely to be affected by the proposed retrenchments and where there is no such trade union, only then can an employer consult directly with the employees likely to be affected or their representatives. Thus, it is not open to an employer to circumvent this hierarchy when consulting on possible retrenchments.
- [50] It was the evidence of the respondent that all three of the employees were members of the Union and that they had all requested union representation during the consultation process. In contrast, it was the evidence of the appellant that the individual employees did not request union representation and, instead, had made vague utterances of wishing to consult with or otherwise speak to 'someone' regarding the contents of the VSP. On that basis, the appellant contends that at the time of the consultation (i) it was not aware that the individual employees wanted to consult a trade union about the proposed retrenchments; (ii) the individual employees did not indicate that

³ (2018) 39 ILJ 797 (LAC) at para 24.

⁴ *Barloworld supra*.

they were members of a trade union; and (iii) the appellant was unaware that the employees belonged to a trade union.

- [51] Before the court *a quo* were two mutually destructive versions concerning what occurred during the consultation process with respect to whether union representation was sought and refused, while the appellant asserts that it was unaware of the employees' membership, the respondent assert that not only was the employer aware of this, but it had prevented the individual employees from obtaining union representation under the guise that the union was not recognised within the workplace. Despite this, the court *a quo* did not undertake an analysis to test the versions before accepting that of the respondent.⁵ Rather, the court focused its attention on the assumption that, as the individual employees claimed that their salaries were subjected to deductions with respect to union subscriptions or dues, the appellant was aware that they were SACCAWU members, despite no evidence being led in this respect.
- [52] On a proper analysis, the court would have picked up on the contradictions in the individual employees' oral evidence versus what was contained in the respondent's statement of case which states that the issue of union representation was discussed as early as the first consultation meeting of 27 September 2021 when the employees' requested union representation and were told that the consultation process was private, confidential, between employer and employee and that the union was not recognised in the gaming industry.
- [53] It was the evidence of Ms Mavuso that no mention of the union was made during the first consultation meeting and that her first mention of trade union representation was made at a later meeting of November 2021 when she indicated that she was unwilling to sign the VSP and that she be given an opportunity to consult with someone called 'David', who, as stated earlier, was her trade union representative, with regards to the content of the document and later, following consultation, she continued in her refusal to sign the

⁵ *Stellenbosch Farmers' Winery Group Ltd And Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

document. This point is corroborated by the minutes of the consultation meeting of 10 November 2021, where it is recorded that *[Ms Mavusa] said she consulted SACCAWU union official, David and advised her not to sign but to take the agreement to him to read and refused to give her the document*.

- [54] Further, it was the evidence of Ms Mdaka that, during the first consultation meeting, she had requested to have 'someone' who could sit with her during the consultation; however, no explicit reference to a union representative or legal representation is made in her request. While in the case of Ms Malatji, she indicates in testimony that she had outright requested union assistance at the first consultation meeting and was told that she was not allowed assistance as the s189(3) notice and indeed the whole retrenchment process, was confidential. These exchanges do not appear in the minutes of the consultation process.
- [55] The probity of Ms Mdaka and Malatji's evidence is questioned when consideration is given to the letter from SACCAWU dated 2 February 2021. In the letter, the union, writing to the appellant, listed the names of 37 of its members within the workplace as an indication of their membership and to bolster its claim for organisational rights. While Ms Mavuso's name appears on the list, both Ms Mdaka's and Malatji's do not. On cross-examination, when asked about their omission from this list, both employees indicated that they had joined the union on 22 December 2020, Mdaka adding that she did not know why her name had been left off the list, while Ms Malatji had indicated that she had joined the union after the list of 37 members had been compiled and sent to the union for inclusion in the letter of 2 February 2021. If I understand her evidence correctly, it is that the letter of 2 February 2021 contained an outdated list of SACCAWU members. This, I do not accept.
- [56] The respondent contends, and the court *a quo* agreed, that the appellant was aware of the individual employees' membership to SACCAWU; however, the evidence does not support this finding, as, at the start of the consultations, no explicit request or reference to union representation was made or sought by the individual employees, at least with respect to Ms Mavuso and Mdaka. Rather, they make vague references seeking assistance during the process

by 'someone' and only later does Ms Mavuso indicate her intention to discuss the contents of the VSP with David from SACCAWU. Ms Malatji testified that she had requested union assistance at the outset of the consultation process and that this was refused, I fail to understand why, as a SACCAWU member, she had not, like Ms Mavuso, independently contacted the union or sought its advice on the process especially if her colleague was doing the same thing.

[57] Although it is accepted, on both parties' evidence, that the late Mr Silaule had previously dealt with Mr David Teffo of SACCAWU during Ms Mavuso's earlier CCMA proceedings, and that he had received the letter of 2 February 2021 requesting organisational rights for SACCAWU, it cannot reasonably be expected of the appellant to have pieced together, from vague references, earlier correspondence, and litigation more than 18 months prior, that *all* the individual employees were SACCAWU members. This is particularly so where no union enjoyed organisational rights within the workplace and where, at the commencement of the consultation process, it was not apparent to the appellant that the contemplated retrenchments were likely to affect members of a trade union so as to trigger s189(1)(c). To my mind, it would be different if, in the circumstances, a union were indeed active within the workplace, that the employer was aware of this, and still chose not to consult with the union, flagrantly bypassing the hierarchy imposed by the Act.

[58] Something is also to be said about SACCAWU's inaction following its discovery that its member, in the case of Ms Mavuso, had been issued a VSP in a retrenchment process. In my view, s189 does not place the entire burden of ensuring proper consultation on the employer alone. The duty to consult is a shared one, and the Act contemplates a participatory process in which both parties bear responsibility for ensuring that consultation occurs meaningfully and with the appropriate representatives. If the union was aware, as the evidence suggests, that its members were being consulted directly despite the provisions of s189(1)(c), nothing prevented it from approaching the appellant to assert its right to be included. The fact that Mr Teffo knew of the retrenchment process at the latest by 10 November 2021, prior to the issuing of the termination letters, yet took no steps to intervene or engage the

appellant, is significant. The respondent's position appears to suggest that the appellant should have divined the union's involvement with the individual employees, at least with respect to Ms Mdaka and Malatji, and engaged it in the consultation process without any initiative from the union itself. To my mind, this is inconsistent with the mutual and cooperative consultation framework envisioned by s189, and the union's inaction in this regard cannot be overlooked.

- [59] What remains when all of the evidence is considered is that: in the case of Ms Mavuso, not only had she (albeit belatedly) notified that appellant that she had consulted with SACCAWU on her signature of the VSP and acted on this advice by refusing to sign the document, the late Mr Silaule was aware that she had previously been represented by the union during an unfair dismissal dispute that occurred some 18 months earlier and that on this basis, it would have become necessary for the appellant to engage the union with respect to Mavuso as of 10 November 2021, especially as the consultation process had not yet been concluded. The same, however, cannot be said with respect to the remaining individual employees, particularly as there was no other evidence, outside of bald statements, to corroborate their union membership. This, coupled with SACCAWU's awareness of its members undergoing a s189 process and its decision not to intervene can only lead to the inference that Ms Mdaka and Malatji were not union members at the time of the s189 process and thus it cannot be said that the appellant flouted its responsibilities in terms of s 189(1)(c) with respect to the two employees and on this basis I am not satisfied that their dismissal as a whole was unfair.

Relief

- [60] What remains then is the question of what relief Ms Mavuso is entitled to on a finding that her dismissal, though substantively fair, was procedurally unfair for lack of union consultation, bearing in mind that the relief can only be one of compensation.
- [61] In considering the nature and degree of the deviation from the procedural requirement to consult with the union together with the conduct of the parties

during the consultation process, it is relevant that Ms Mavuso had only raised the issue of union involvement in November 2021, and that, at that point, the parties were already more than a month into the consultation process where all employees proposals had been received and considered and the appellant was now awaiting feedback on the signature of the VSP. Adding to this and detailed above, the Union, at least by 10 November 2021, was aware of the consultation process which impacted its member, Ms Mavuso, and chose not to intervene despite being aware of its right to do so.

[62] It cannot be said that the appellant, in not involving the Union, had totally failed to meaningfully consult with the employees, because as the evidence demonstrates, Ms Mavuso clearly understood the process that was taking place, had participated in it by giving her own proposals and receiving feedback on same and had even gone on her own to seek union advice on the signing of the VSP. In that case, it seems that the procedural deviation, although relevant, was minor in light of the purpose of s189 still being served, despite the procedural failing.

[63] Thus, taking into account that Ms Mavuso received her statutory severance pay; that she raised the issue of union consultation only at the third consultation meeting, that she failed to attend any further consultations despite indicating an intention to do so; and further, that the union itself made no attempt to approach the appellant to seek inclusion in the retrenchment process, I consider an award of three months' compensation to be just and equitable in the circumstances.

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

Order

1. The appeal is upheld, in part, with no order as to costs.
2. The order of the court *a quo* is set aside and substituted with an order that:

- '(1) the applicant's application is granted in part, and the dismissal of the individual affected employees is found to be substantively and procedurally fair, save for the dismissal of Ms Nonhlanhla Mavuso, whose dismissal is found only to be procedurally unfair.
- (2) The appellant is to pay Ms Nonhlanhla Mavuso compensation in an amount equivalent to 3 (three) months' remuneration calculated at her rate of remuneration at the date of dismissal.
- (3) There is no order as to costs.'

WAGLAY AJA

Mahalelo ADJP *et* Djaje AJJA concur.

APPEARANCES:

FOR THE APPELLANT: V Mndebele

Instructed by Edward Nathan Sonnenbergs Inc

FOR THE RESPONDENT: A Roskam of Haffegée Roskam Savage Attorneys
Inc