



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: 2026-013778

In the matter between:

NATIONAL UNION OF MINEWORKERS

Applicant

and

THUNGELA OPERATIONS (PTY) LTD

Respondent

Heard: 5 February 2026

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 10H00 on 10 February 2026.

JUDGMENT

LALLIE J

[1] The ever-changing economic landscape has a direct impact on employers' capacity to retain their employees. When the capacity is reduced employers may exercise their right in terms of section 189 of the Labour Relations Act¹ (the LRA) and dismiss employees for their operational requirements. The

¹ Act 66 of 1996, as amended

employees' right against unfair labour practices requires that those dismissals be substantively and procedurally fair. The respondent employed the individual applicants on behalf of whom the applicant trade union, National Union of Mineworkers (NUM), brought this application. It anticipated dismissing employees for its operational requirements, (the dismissal will be referred to as the retrenchment in this judgment) and invited the applicant to consult with it by issuing a notice in terms of section 189(3) of the LRA. As the anticipated retrenchment was a large scale one the consultation process was held in terms of section 189A of the LRA. Towards the end of the scheduled consultation the applicant, which was one of the consulting parties believed that the respondent was violating its members' right to a fair procedure. It attempted to solve the dissatisfaction by agreement with the respondent and ultimately brought this urgent application in terms of section 189A(13) of the LRA in which it seeks an order compelling the respondent to comply with a fair procedure concerning the retrenchment of the individual applicants. It also seeks an order reinstating the individual applicants until the respondent has complied with a fair procedure by consulting with it in the manner envisaged in section 189A of the LRA. The last relief the applicant seeks is an order that the respondent provides it with information relevant to the retrenchment process. The applicant delayed in filing the application and sought condonation of the lateness. The respondent opposes both the main and condonation application.

- [2] Section 189A(17)(a) requires a consulting party seeking to assert its right to a fair procedure to launch a section 189A(13) application not later than 30 days after the employer has given notice to terminate employees' services. Section

189A(17)(b) enables the Labour Court to condone non-compliance with section 189A(17)(a) on good cause shown. An application must be properly before court before it can be adjudicated. The condonation application will be determined first as it is its success that will place the main application properly before court.

[3] The factual background of this matter is largely not in dispute. It is that on 21 May 2025 the respondent which conducts business in the coal mining sector informed the applicant of its contemplation to retrench some employees by issuing a notice in terms of section 189(3) of the LRA on 21 May 2025. Part of the information the respondent disclosed in the notice was that its Goedehoop colliery was reaching the end of its economic life at the end of 2025 and its Sibonelo one was, on 31 December 2025, reaching the end of its contracted supply agreement with Sasol. Amongst the employees the respondent anticipated retrenching were about 672 from Goedehoop and 358 from Isibonelo. The applicant and the respondent held consultations between May and August 2025. During the consultation process the respondent undertook to introduce a care and maintenance structure at Isibonelo in which it would place 37 employees for a period of 2 years commencing from January 2026 until December 2027. The respondent further undertook to introduce a reclamation structure at Goedehoop in which it would place 50 employees for the whole of 2026. In August 2025 when the scheduled facilitation process ended the respondent had recruited and issued letters of appointment for the Goedehoop and Isibonelo collieries positions.

[4] The parties continued the consultation process and on 26 November 2025 the respondent informed the applicant that it had cancelled its undertaking about

Goedehoop and Isibonelo as the picture had changed. It provided reasons for the change. As a direct consequence of the change the employees who had been issued with appointment letters in August 2025 some of whom are the individual applicants in this matter, joined the group of employees who faced retrenchment. On 28 November 2025 the respondent informed the applicant of its decision to retrench the individual applicants. On 3 December 2025 the respondent issued retrenchment letters informing the individual applicants of their retrenchment with effect from 31 December 2025. The applicant launched the present application on 23 January 2026.

- [5] The test for condonation is stated as follows in *Gootboom v National Prosecuting Authority and Another*²:

“[22] ...the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

² [2014] 1 BLLR at para [22].

[6] In support of its allegation that it is in the interest of justice that condonation should be granted the applicant submitted that the delay is not inordinate. In terms of section 189A of the LAR the application should have been filed within 30 days after the retrenchment notices were issued on 3 December 2025. The 30 day period expired on 2 January 2026 but the application was filed on 23 January 2026. The delay is about 3 weeks. The respondent submitted that in light of the purpose the provisions of section 189A(13) were intended to serve, the 3 weeks' delay is excessive because section 189A(13) is primarily designed to bring parties back on track so that the consulting parties can ensure the procedural fairness a retrenchment exercise.

[7] The reasons the applicant gave for the delay are that the respondent communicated its decision to retrench the individual applicants in a letter on 2 December 2025. In the letter it further stated that it would issue the retrenchment letters on 3 December 2025 and close the Goedehoop and Isibonelo operations on 31 December 2025. After the retrenchment letters were issued, the applicant took a decision on 5 December 2025 to seek legal advice on the issue of the individual applicants' retrenchment. On 8 December 2025 the applicant sent its attorneys an e-mail in respect of the retrenchment. A consultation was arranged for 11 December 2025. It was postponed to 15 December 2025 as the applicant had decided to wait for a response to a letter it had written to the respondent regarding the retrenchment. At the consultation that was held on 15 December 2025 the applicant instructed its attorneys to issue a letter of demand. The letter was prepared and sent to the applicant for its approval on 19 December 2025. On 22 December 2025 the applicant instructed its attorney to send the letter of demand to the applicant.

The instructions were carried out the following day. The essence of the demand was that the applicant required the respondent not to deviate from a fair procedure during the consultation process. The applicant warned the respondent that it would bring an urgent application in terms of section 189A(13) if its demands to provide certain undertakings were not made within 3 days.

[8] On 23 December 2025 the applicant sent the respondent a letter in an attempt to resolve the dispute between the parties. It sought a response within 3 days. On 29 December 2025 the respondent's attorneys denied any procedural defect in the way in which the respondent participated in the consultation. They further refused to make the undertakings the applicant demanded. They also rejected the settlement proposal the applicant made. On 30 December 2025 the applicant's attorneys advised that they were in the process of drafting the urgent application which would be filed shortly. The following day the applicant instructed its attorneys to put the filing of the application on hold as the applicant intended to communicate directly with the respondent in an attempt to resolve the dispute. On 7 January 2026 Mr Mahungela of the applicant informed the applicant's attorneys that the attempt made on 3 January 2026 to resolve the dispute with the respondent had been unsuccessful. On 12 January 2026 the applicant's officials attended a consultation with its attorneys and made further attempts to resolve the dispute with the respondent between 12 and 14 January 2026. This application was launched on 23 January 2026.

[9] The respondent's main argument in support of the dismissal of the condonation application is that the applicant failed to show good cause. It was

submitted that they failed to provide a reasonable explanation for the delay. In *Grootboom (supra)* the Constitutional Court emphasized the significance of the reasonableness of the explanation for the delay and added that it must be reasonable enough to excuse the default. The detailed reasons for the delay the applicant proffered show that after the respondent had told the applicant that the plan to retain the employees who had been appointed to the positions at Goedehoop and Isibonelo had fallen through, it got the impression that the respondent was violating its right to a procedurally fair retrenchment. From 3 December 2025 when the respondent issued the notices of retrenchment the applicant made various attempts to resolve the dispute between the parties. The applicant had willing, able and available attorneys who carried out their instructions. It, however, asked them to halt the filing of this application when very little time was left as its officials insisted on settling the dispute between the parties. Even at a time the respondent had unequivocally informed the applicant of its unwillingness to have the dispute settled between the parties the applicant was relentless.

- [10] I must accept the respondent's argument that the doctrine of election applies in employment matters. The applicant was at all relevant times aware of its statutory obligation to bring the application within 30 days from 3 December 2025. It had everything it needed to bring the application including the expertise of its attorneys. It deliberately chose to pursue its efforts to reach a settlement of the dispute with the respondent over bringing the section 189A(13) application. The applicant's decision has consequences. One of them is that the prescribed time for bringing the application expired. The choice the applicant made that resulted in the delay does not constitute

explanation reasonable enough to excuse the non-compliance with section 189A(17) of the LRA.

- [11] The applicant submitted that it has reasonable prospects of success in the main application in that the respondent failed to consult with it in respect of major developments concerning its members. It further failed to provide relevant information for purposes of meaningfully engaging with it about the developments.
- [12] The applicant submitted that its members will suffer severe prejudice should this application be refused as 40 of them will be deprived of the opportunity to exercise their constitutional right to fair labour practices. The prejudice will also affect their dependents. The applicant added that the respondent will not suffer any prejudice should condonation be granted. It was alternatively argued that the prejudice the union and its members stand to suffer outweighs any prejudice the respondent will suffer as result of its own conduct.
- [13] The relief the applicant seeks is mainly an order reinstating the individual applicants until the respondent has complied with a fair procedure by consulting with the applicant as envisaged in sections 189 and 189A of the LRA. The respondent denied that the applicant showed reasonable prospects of success in the main application. The applicant correctly submitted that the test for prospects of success is whether it has set out facts which would result in its success if established. Both parties relied on *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others*³ where the Constitutional Court expressed the view that section 189A(13) serves 2 purposes. The first is to

³ (2024) 45 ILJ 1723 CC at paras [74] – [77].

put an unfairly conducted consultation process back on track and the other is to compensate an employee who has been dismissed following an unfair consultation procedure. The individual applicants have already been dismissed. The applicant therefore seeks the relief based on the alternative purpose of the relief in section 189A(13).

- [14] A reading of section 189A(13) reveals that the range of relief it provides for is directly related to the stage of the consultation process. While the consultation is in progress and before employees are dismissed the relief in section 189A(13)(a) may be granted. During the consultation process and when the threat of dismissal is imminent the relief in section 189A(13)(b) may be sought and granted. The applicant seeks the relief in section 189A(13)(c) which is available to employees who have been dismissed. Compensation is generally granted when the employer is at fault. The applicant presented no facts which will lead to its success should they be proved. Time is of the essence when the right in section 189A(13) of the LRA is exercised. In the absence of a reasonable explanation for the delay the applicant has no reasonable prospects to be reinstated so that the consultation process can be revived. The process no longer exists and can therefore not be put back on track. The relief of reinstatement was not intended to benefit an employee party who, for no cogent reasons failed to seek the primary relief in section 189A(13)(a) of the LRA.

- [15] I accept the respondent's submission that it will suffer more prejudice than the applicant should this application be granted because the individual applicants have been dismissed because their jobs no longer exist. There are therefore no jobs to reinstate them in. The applicant may not be opportunistic and rely

on the individual applicants' constitutional right to fair labour practices. No right is absolute and as a trade union it had the obligation to ensure that the right was protected. The applicant may not benefit from its decision not to exercise the section 189A(13), right appropriately. It took the decision not to exercise the right at the correct time and may not blame the respondent for its omission. The applicant did not prove that it and its members will suffer more prejudice than the respondent should this application be refused. Any prejudice they may suffer is self-created.

[16] As stated in *Grootboom v NPA (supra)* condonation cannot be had for the mere asking. The applicant did not make out a case entitling it to have its non-compliance with the provisions of a statute condoned. It is not in the interest of justice to require the respondent to reinstate the individual applicants and reopen the consultation process. The respondent informed the applicant in time and in clear terms that it would not reach a settlement with it on the issue of the individual applicants' retrenchment. The respondent's refusal was a clear signal for the applicant to launch the present application. The applicant delayed despite having all the necessary resources at its disposal. When regard is had to the statutory requirement that the application should have been brought within 30 days, the delay of 3 weeks is substantial. Lack of prospects of success and an attempt to rely on prejudice that resulted from the applicant's conduct point to the conclusion that the applicant has not show good cause to have the non-compliance with section 189A(17) of the LRA condoned.

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

1. The application for condonation of the late filing of this application is dismissed.
2. The application in terms of section 189A(13) of the LRA is not properly before court.
3. There is no order as to costs.

MZN Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Savant of Cheadle Thompson & Haysom Inc

For the Respondent: Advocate Redding SC

Instructed by Pinsent Masons South Africa Inc

LABOUR COURT