(1) Reportable: Yes/No (2) Of interest to other Judges: Yes/No (3) Revised Signature Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JA 124/24

In the matter between:

WBHO CONSTRUCTION (PTY) LIMITED **Appellant**

and

DIDA MASENYE N. O **First Respondent**

THE BARGAINING COUNCIL FOR THE CIVIL ENGINEERING INDUSTRY (BCCEI) **Second Respondent**

MASWANGWANDILE MDAYI **Third Respondent**

This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Labour Appeal Court website, and released to SAFLII. The date and time for hand-down is deemed to be on

26 February 2026

Heard: **13 November 2025**

Coram: **Mahalelo ADJP and Waglay AJA *et* Djaje AJA**

JUDGMENT

DJAJE, AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court, where the appellant's review application was dismissed. The appellant filed a review challenging the arbitration award issued by the second respondent, which determined that the appellant had unfairly dismissed the third respondent. The court ordered the appellant to reinstate the third respondent.

Background Facts

[2] The third respondent started working with the appellant on 18 April 2018, as a Final Level Grader Operator. In November 2020, Mr Peter Gray (Gray), the appellant's Operator Training Manager, approached the third respondent. Their discussion involved the appellant's operational needs and the possibility of transferring the third respondent to Postmansburg in the Northern Cape, where his skills were needed. The third respondent declined the transfer because he did not want to be away from his family. He testified at arbitration that Gray told him the appellant intended to retrench him, and that if he refused the retrenchment, he would be dismissed. In contrast, Gray, testified that the third respondent asked to be retrenched due to financial difficulties at home. What happened after this discussion is significant. On 3 December 2020, the parties signed a document titled "Mutual Separation Agreement," and the third respondent received a severance pay of R181,541.75.

[3] The third respondent referred an unfair dismissal dispute to the second respondent, culminating in an arbitration award dated 28 May 2021, which found that the agreement was not a Mutual Separation Agreement but that the appellant retrenched the third respondent and failed to comply with the requirements of section 189 of the Labour Relations Act[1] (LRA). An order reinstating the third respondent was issued.

[1] Act 66 of 1995, as amended.

Arbitration Award

[4] The issue before the second respondent was whether the third respondent had been dismissed and whether the dismissal was fair. The remedy sought was retrospective reinstatement. Upon analysing the evidence, the arbitrator determined that the document signed by both parties was more of a retrenchment letter outlining the retrenchment package to be received by the third respondent. He found that although the document was titled "Mutual Separation Agreement," its contents focused solely on retrenchment and the benefits associated with it. He based his decision on the document's wording, stating that the third respondent's retrenchment package would include severance pay, bonus pay, and leave pay, and that the date of retrenchment would be 18 December 2020. The final page of the document indicated that the third respondent was retrenched.

[5] The arbitrator determined that no retrenchment process occurred despite the parties signing a document stating that the third respondent had been retrenched. The version of Gray that the third respondent intended to resign or be retrenched was dismissed. It was concluded that the third respondent was coerced into leaving. The dismissal was found to be both procedurally and substantively unfair because no retrenchment process was followed. The appellant was ordered to reinstate the third respondent and pay him R181,541.75.

Labour Court

[6] Dissatisfied/aggrieved with the award, the appellant brought a review application under section 145 of the LRA to have the arbitration award reviewed and set aside. The issues that the Labour Court had to decide were as follows:

> "1. Whether the first respondent's finding that there was no procedure followed for the third respondent's retrenchment was reasonable;

2. Whether, given the existence of a mutual separation agreement, the first respondent’s decision that the third respondent had been unfairly retrenched was irregular; and

3. Whether an employer may circumvent the retrenchment procedure in section 189 of the LRA by signing a retrenchment document disguised as a mutual separation agreement.”

[7] On the first issue, the court *a quo* found that the parties signed a mutual separation agreement to end their employment relationship due to operational requirements, but that the LRA requirements for retrenchment had to be complied with. The court *a quo* held that the appellant's failure to comply with the provisions of section 189 of the LRA was fatal and made the third respondent's dismissal unfair. In that case, the decision of the first respondent was found to be reasonable.

[8] The court *a quo* concluded that the discussion on operational requirements before signing the mutual separation agreement showed that the appellant was required to comply with section 189 of the LRA before the third respondent could be retrenched.

[9] The court relied on the wording of the mutual separation agreement, which specified the terms of a retrenchment package, indicating that the appellant intended to retrench the third respondent. In the agreement, the following was recorded: *“We confirm recent consultations held and wish to inform you that your retrenchment will be on December 1, 2020.”*

<u>Appeal</u>

[10] The appellant challenges the judgment of the Labour Court on several grounds which are:

“ 1. The court a quo erred in concluding that the appellant and the third respondent had not concluded a mutual separation agreement which terminated the third respondent’s employment with the appellant.

2. The court erred in finding that the appellant had instead unfairly retrenched the third respondent.

3. The court erred in applying the reasonableness test instead of the legal correctness test in determining whether the appellant and the third respondent had concluded a mutual separation agreement.

4. The court a quo erred in concluding that the appellant and the third respondent were precluded in law from negotiating and/or concluding a mutual separation agreement after the commencement of consultations alternatively putative consultations about the possible retrenchment of the third respondent.

5. The court a quo misconstrued alternatively failed to apply its mind to the grounds of review raised by the appellant and instead identified and dismissed grounds of review which were not apparent from the papers and were not advanced during the argument of the review application."

<u>Submissions</u>

[11] The appellant argued that, during the section 189 process, the parties are not barred from signing a mutual separation agreement, and that the court a quo erred in concluding that, after discussing operational requirements, the appellant was required to comply with section 189 of the LRA. In any case, if the court found that the third respondent was retrenched, there must have been a valid operational reason. Gray testified that when he told the third respondent about the possibility of working in the Northern Cape, the third respondent said that he did not want to be far from his family. It was clear that there was no longer work for the third respondent at the Motheo site, and the move to the Northern Cape was an option the third respondent declined. Therefore, if the court found that the third respondent was retrenched, the retrenchment was substantively fair.

[12] According to the appellant, the court a *quo* erred in applying the reasonableness test, as the issue was whether the agreement between the appellant and the third respondent was valid and enforceable.

[13] The third respondent in opposition argued that no meeting of the minds occurred when the agreement was signed because the mutual separation

agreement mentions a retrenchment process. This is also supported by the parties' discussions before signing the agreement. The discussions centered on the appellant's operational needs, which required it to follow the section 189 process. It was claimed that the third respondent was unlawfully dismissed because, according to him, there was still work at the Motheo site during the discussion. The move to the Northern Cape was uncertain, and Gray was unsure when the third respondent would move there, meaning it could not be considered an alternative for the purpose of retrenchment under section 189 of the LRA.

[14] According to the third respondent, the correctness test would only apply if the court a *quo* had determined that there was no dismissal. However, in this case, the court needed to assess the validity of a mutual separation agreement, which requires a reasonableness test rather than a correctness test, and it found the dismissal unfair.

<u>Applicable Legal Principles</u>

[15] Section 189 of the LRA outlines the process an employer must follow when considering dismissing an employee for operational reasons. Failure to comply with the requirements outlined in section 189 of the LRA renders the dismissal unfair. Specifically, section 189(2) and (3) of the LRA specify that:

> '189. Dismissals based on operational requirements.
>
> (1) …
>
> (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on—
>
> (*a*) appropriate measures—
>
> (i) to avoid the *dismissals*;
>
> (ii) to minimise the number of *dismissals*;
>
> (iii) to change the timing of the *dismissals*; and

(iv) to mitigate the adverse effects of the *dismissals*;

(*b*) the method for selecting the *employees* to be dismissed; and

(*c*) the severance pay for dismissed *employees*.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—

(*a*) the reasons for the proposed *dismissals*;

(*b*) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;

(*c*) the number of *employees* likely to be affected and the job categories in which they are employed;

(*d*) the proposed method for selecting which *employees* to dismiss;

(*e*) the time when, or the period during which, the *dismissals* are likely to take effect;

(*f*) the severance pay proposed;

(*g*) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;

(*h*) the possibility of the future re-employment of the *employees* who are dismissed;

(*i*) the number of *employees* employed by the employer; and

(*j*) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.'

[16] In dealing with the privity and sanctity of a contract, the Supreme Court of Appeal in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotels Interests (Pty) Ltd*[2] stated that:

> '[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into consideration the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract'

[17] Again, in *Wells v South African Alumenite Company*[3] the court held that:

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

<u>Analysis</u>

[18] It is well established that the third respondent and Mr. Gray discussed the appellant's operational needs during the site visit. Additionally, following that discussion, the third respondent and the appellant entered into a mutual separation agreement. The agreement outlines the payment of severance pay to the third respondent, along with a bonus, leave pay, travel expenses, payout of shares if applicable, and the transfer or payout of the Provident fund. The third respondent acknowledged and accepted the terms of the agreement in full and final settlement of '*all or any claims*' against the appellant.

[19] In his testimony, Mr. Gray stated that during a site visit to see the third respondent, they had an informal discussion about the operational needs of the appellant. He also mentioned a project in the Northern Cape where the third respondent could be assigned. The third respondent indicated that he

[2] 2018 (2) SA 314 (SCA).
[3] 1927 AD 69 at p. 73.

could not go to the Northern Cape; it would be better for him to be retrenched, as he was busy with a home construction project and preferred not to be away from home. This conversation led to the agreement between the appellant and the third respondent. (to terminate the employment)

[20] As stated in *Universal Church of the Kingdom of God v Myeni and Others*[4] that :

> "…….For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the animus contrahendi. The parties must also be ad idem (or have the meeting of the minds), as to the terms of the agreement. Obviously, absent the animus contrahendi between the parties or from either of them, no contractual obligation can be said to exist and be capable of legal enforcement."

[21] In the agreement between the appellant and the third respondent, an offer was made to the third respondent. The third respondent accepted the offer voluntarily in full and final settlement of all or any claims that he may have against the appellant in the future. The appellant submitted that the arbitrator's award is unreasonable and should have been reviewed and set aside by the Labour Court. On the issue of reasonable awards, the Labour Appeal Court in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*[5] held that:

> 'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare

[4] (2015) 36 ILJ 2832 (LAC) at para 44.
[5] (2008) 29 ILJ 964 (LAC) at para 100.

> that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached.'

[22] The award found that there was no mutual separation agreement; instead, a letter of retrenchment was issued to the third respondent. The court a *quo*, however, held that a mutual separation agreement existed, with terms of retrenchment, and that by signing the agreement, the appellant avoided the objectives of section 189 of the LRA. The court a *quo* held that:

> "[39] In my view, the applicant cannot use a mutual separation agreement to circumvent the procedure set out in section 189 of the LRA and therefore, the first respondent's decision, that the procedure for retrenchment was not followed and that the dismissal was procedurally and substantively unfair, is one that a reasonable decision maker would have arrived at."

[23] Regarding the applicable test during arbitration, the arbitrator had to determine whether the parties' agreement was properly entered into and enforceable. This would be the determining factor in whether the third respondent was dismissed and whether it was unfair. In *Johnson Uniform Solutions (Pty) Ltd v Brown and Others*[6] the Labour Appeal Court, in addressing the applicable test in disputes, held that:

> "[34] In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the dispute. See *SARPA v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*.
>
> [35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will,

[6] (DA10/2012) [2014] ZALCJHB 32 (13 February 2014) at paras 34 to 36.

however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.

[36] It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court a quo, as both parties agreed, applied the wrong standard."

[24] The dispute in this case concerned the validity of the agreement between the parties. The question was whether the court a *quo's* reasonableness test should have been applied. The validity of an agreement is a legal matter that does not require a reasonableness test as established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[7], but rather a correctness test. Therefore, the arbitrator lacked the necessary jurisdiction, and the court a *quo* should have reviewed the award and set it aside.

[25] There was no finding that the third respondent was coerced into signing the agreement. It is a fact that both parties entered into and signed the agreement voluntarily. The third respondent received his severance package as agreed. The conclusion that the appellant avoided the section 189 processes is unfounded, as there is nothing preventing parties from entering into a mutual separation agreement at any time when operational requirements are discussed. The parties' agreement was consensual, and there is no evidence of coercion; therefore, the mutual separation agreement is valid and enforceable. The agreement being valid, there is no question of dismissal, and as such, the first respondent had no jurisdiction to entertain the dispute.

[7] (2007) 28 ILJ 2405 (CC).

[26] Even if the unfairness of the dismissal were to be considered, the appellant's operational requirements were discussed with the third respondent, *albeit* informally. An alternative, his relocation to the Northern Cape, was considered but found unsuitable by the third respondent. Additionally, this does not make the dismissal procedurally or substantively unfair.

Costs

[27] Labour courts are courts of equity and costs do not ordinarily follow the result. Nothing in *casu* warrants a departure from that principle. Accordingly, there will be no order as to costs in this appeal.

[28] In the premise the following order is made:

Order

1. The appeal is upheld.

2. The judgment of the Labour Court delivered on 30 July 2024 is set aside and substituted with:

   "(a) The arbitration award dated 28 May 2021 is reviewed and set aside.

   (b) The appellant did not dismiss the third respondent;

   (c) There is no order as to costs."

3. There is no order as to costs in this appeal.

J. T. Djaje

Acting Judge of the Labour Appeal Court of South Africa

Mahalelo ADJP and Waglay AJA concur.

APPEARANCES:

For the Appellant: Adv M J Van As

Instructed by: Fluxmans Attorneys

For the Third Respondent: Mr L Sebako

Instructed by: Sebako Attorneys