



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

Signature

Date

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: 2025-236301

In the matter between:

**NATIONAL UNION OF BEVERAGE WINE  
SPIRITS AND ALLIED WORKERS (NUFBWSAWA) obo MEMBERS**

**Applicant**

and

**COCA – COLA BEVERAGES OF SOUTH AFRICA LTD**

**First Respondent**

**FOOD AND ALLIED WORKERS OF SOUTH AFRICA**

**Second Respondent**

**Heard: 18 December 2025**

**Delivered: 19 March 2026 (This judgment was handed down electronically by emailing a copy to the parties. 19 March 2026 is deemed to be the date of delivery of this judgment).**

**JUDGMENT**

**KROON AJ**

Introduction

- [1] This is an opposed urgent application brought by the Applicant (the Union) and instituted in terms of Section 189A(13)(c) of the Labour Relations Act No. 66 of 1995 (the LRA). The Union seeks an order, *inter alia*, compelling the First Respondent (the Company), which opposed the application, to reinstate 19 of its members (the Employees) and a *mandamus* requiring it to comply with section 189(3) of the LRA. The papers were voluminous, spanning some 1000 pages.
- [2] The application's feature is that it constitutes a transparent attempt to raise issues of substantive fairness under the guise of procedural fairness. By way of amplification, the Union's application was not primarily concerned with the fairness of the consultation process. Rather, it was concerned with the fairness of the outcome or the culmination of the consultation process, i.e., the dismissal of its members.
- [3] The Union makes two broad assertions regarding substantive fairness. It alleges:
- [3.1] Firstly, the posts of the Employees were not redundant as alleged by the Company.<sup>1</sup>
- [3.2] Secondly, in selecting the Employees for retrenchment, the Company unfairly refused to implement LIFO and, in particular, unfairly refused to make use of the mechanism of "*bumping*". In this context, the Union contended, *inter alia*, that the Employees are either trained to occupy other posts or could readily be trained to do so.
- [4] As to the latter point, a central element of the Union's case is the allegation that the Company did not adopt fair selection criteria. The Union sets out its case as follows:

*"...7.1 LIFO' and bumping would have been a fair procedure. But CCBSA did not adopt that procedure in the case of these Applicants. Had CCSBA (sic) adopted that procedure the Applicants would not have been retrenched."*

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<sup>1</sup> See paragraphs 8.23 and 8.24 of the founding affidavit. See also paragraphs 9.1 to 9.31 of the founding affidavit.

[5] The Union goes on to state further as follows:

*“7.2.1 I will demonstrate, below, as I have already alluded to the fact that all the Applicants herein had the skills and the experience, which was required, and acceptable, as necessary to execute the roles to which the Applicants herein could have been transferred to avoid retrenchment had a fair procedure been adopted by CCBSA.*

*7.3 As I have said already, if the need for training had arisen then such training would have been only minimal and it would not have caused disruption of CCBSA's productivity. I am informed by the Applicants who have inside knowledge and experience – from observing, or from being trained themselves – that training in order to acquire skills in CCBSA is an inhouse on-the-job process which takes place almost daily without disrupting production.”*

[6] Regarding the issue of redundancy, the following paragraphs are contained in the founding affidavit:

*“7.8 The reasons given by CCBSA in its s189(3) notice, were all calculated to suggest, and did suggest, that the termination of the employment contracts, was based on CCBSA's operational requirements, in the sense that the roles had become **redundant** and some other similar reasons which suggested that retrenchment was necessary. But even a modicum of scrutiny suggests that, as a matter of fact, other than at the Bloemfontein plant, the roles previously occupied by the Applicants herein in acting capacities, and the roles for which the Applicants had been trained, and the roles for which employees at the grade of the Applicants for which many other employees had been trained, with no disruption of productivity, were not **redundant**, nor was there any reason to retrench the Applicants.*

*7.9 I make this submission in order to lay the foundation for the contention that the true factual matrix which is shown by the reality contradicts CCBSA's grounds for alleging that the reason for the retrenchments is the redundancy of the roles etc as stated in its s189(3) notice. The Applicant's simple contention is that the application of a fair procedure*

would have shown that it was not necessary to retrench any of the Applicants.

...

7.17 *The basis for the dismissal as stated by CCBSA is a deliberate misrepresentation, and therefore fraud. It follows further, in the circumstances, that a procedure whether seemingly fair, if the underlying ground is false, cannot be said to be fair. This is not to suggest that there is any semblance of fairness in CCBSA's procedure, because the procedure was just unfair.*

7.18 *It would be idle to talk of a fair procedure where the reason for the dismissal, although made by the CCBSA to appear like redundancy, and also to appear like other reasons acceptable to justify retrenchment, is, in fact, not redundancy, or any of these legally acceptable reasons but an act, which I am informed, in the circumstances is in fraudem legis".*

[7] Without wishing to belabour the point, the above-described issues, as raised by the Union, are self-evidently quintessentially and intrinsically issues which bear on the substantive fairness of the dismissal of the Employees. It is thus unsurprising that, when the Union resorts, in its founding affidavit, to reliance on jurisprudence, it refers the Court to case law which may be relevant when and if a Court is tasked with adjudicating on the substantive fairness of the dismissals.<sup>2</sup>

[8] It is neither necessary nor proper for this Court to express a view on any complaints pursued by the Union that relate to substantive fairness of the dismissals for the obvious reason that these are complaints which may come before another Court should unfair dismissal disputes be pursued. This Court would not want to risk pre-judging the outcome of any such litigation.

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<sup>2</sup> *Fischer Tube Technik SA v Bayene & Anor* [2024] 9 BLLR 917 (LAC) (As referred to by the union in its papers)

### Factual matrix

- [9] The Company embarked upon a retrenchment exercise as a result of the closure of the Bloemfontein manufacturing site (which affected one of the Employees), as well as the outsourcing of the cleaning services, which is not part of the core business of the Company, resulting in the posts of the remainder of the Employees being made redundant.
- [10] The process commenced with a Section 189(3) notice dated 2 September 2025. There was a virtual meeting on 12 September 2025 before the commencement of the facilitated process. The conventional issues that pertain to any retrenchment exercise were discussed, such as the operational rationale, the proposed restructuring, the identification of persons affected by the proposal, and the proposed alternatives to retrenchment. The main issue at this meeting revolved around a proposed voluntary severance package. The Company agreed to extend the time for the Employees to accept the VSP.
- [11] There were four facilitated consultation meetings. The first facilitated meeting was held on 19 September 2025. The Company made a presentation. The Union requested to be placed in possession of the organograms for the Bloemfontein manufacturing site and other manufacturing sites. The Company subsequently furnished the requisite organogram (see below).
- [12] On 2 October 2025, the second facilitated meeting took place. At that meeting, there was a further presentation. The Union proposed bumping for the first time. As FAWU did not align itself with this proposal, a decision was made to meet separately with the Union to ventilate this issue.
- [13] The meeting with the Union took place on 7 October 2025. A follow-up meeting was held on 10 October 2025. I quote from the answering affidavit:

*“16. This meeting with the union took place on 7 October 2025. The union presented its proposal of bumping. They had prepared a list of employees who they contended should be bumped in favour of their members. Significantly none of the Employees who they proposed*

*should be bumped were members of the union. The union also provided us with a list of members who were potentially impacted, who according to the union, were not cleaners as they had been acting in other roles. The union argued that these employees should be removed from the list of impacted employees. Although we considered the requested organograms to be irrelevant, we nevertheless shared with them the requested information at the meeting by way of a presentation (annexures 005 to the founding affidavit). The information was also emailed to the union on 12 October 2025.*

17. *On 10 October 2025, we had a follow up meeting with the union. We gave a detailed response to the union on all the proposals that they had made at the 7 October 2025 meeting. A copy of the slide presentation that was made is attached hereto as annexure 'MJP6'. We explained to them why bumping made no operational sense to CCBSA and that we did not agree with their proposal. We told them that we had identified 18 employees from the list which they had provided to us who were currently acting in roles other than Cleaner/General Worker and that these employees had been removed from the list of impacted employees (these employees would continue in the roles that they were acting in). We gave them a documents which addressed this issue, a copy of which is attached hereto as annexure 'MJP7'."*

[14] The third facilitated meeting took place on 13 October 2025. The Company provided feedback on the non-facilitated meetings that had taken place. The main issue raised by the Union at this meeting was its unhappiness that the Company had not accepted its bumping proposal. According to the Company's answering affidavit, which I must accept,<sup>3</sup> the facilitating Commissioner made it clear to the Union that the Company could not be compelled to agree to the proposal, as its only obligation was to consult on the proposal (not to negotiate over it), and this had been done.

[15] Thereafter, on 20 October 2025, the Company received an email from the Union complaining that the organogram information initially transmitted to it in

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<sup>3</sup> *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620

the context of discussions concerning bumping lacks detail. More detail was requested. I quote from the letter as follows:

***"Re: ORGANOGRAM DISCLOSURE***

*The union have requested that the employer provides the union with amongst other things the company's organogram as follows:*

*"Organisation's organogram for the Bloemfontein Manufacturing site and also to those other workplaces within the Republic of South Africa that operates similar to the Bloemfontein Manufacturing site within CCBSA. This organogram should also include the employee manning in those workplaces and also of the employee manning for following position within the entire CCBSA, 1. PPCs, 2. Forklift Operator, 3. Cleaner, 4. Raw materials, 5. QCs, 6. Utilities / Processing, 7. Logistics, 8. Warehouse operators, 9. Store Clerk, 10. Artisans, 11. Syrup Maker 12. Sorters and 13 Warehouse Clerk. Applicant to further provide, third party employees (Labour Broker and Temporary) and positions occupied by same within the workplace."*

*The information provided by the employer as its organogram as provided does not assist the process. The provided information only provides only show numbers per department and position, it does not indicate for example the following: 1. Number of vacant positions per department and/ or in a position, 2. Same does not provide for the positions occupied by learners per department and / or position, 3. Same does not provide for the positions occupied by fixed term employees per department and/ or position, 4. Same does not provide for the positions occupied by labour broker employees per department and/ or position.*

*The information omitted and not reflected on the organogram impedes the engagement on meaningful engagement on this consultative process. The union therefore request that the Company makes that information available to enable progressive engagement in this regard and further that, should the Company fear of certain sensitive information to be disclosed, the union would then suggest and propose for a meeting that will facilitate for the sharing of this information internally. This will enable the Company to project the requested information without having to share it to the union. The union proposes either the 23<sup>rd</sup> and/ or the 24<sup>th</sup> of October 2025 at 10H00am for this process.*

*We hope and trust you will be in order.*

*Yours faithfully*

***National Union of Food Beverage Wine Spirits and Allied Workers***

- [16] If I understood it correctly, it was submitted, on behalf of the Union at the hearing that, regarding the communication of 20 October 2025, it in fact pertained to an issue other than bumping, which had been the contentious issue up until that point. It was submitted that the information was requested because the Union wanted to determine whether any of the Employees could fill those vacancies (as an alternative to this dismissal). There is no merit in this contention. I say so for three self-standing reasons.
- [17] The first is that this allegation has no foundation in the papers. The submission was made for the first time in argument. It was untethered and unmoored from the case contained in the founding affidavit. It is trite that a representative is not permitted to give evidence from the Bar. In fact, the answering papers expressly state that the request was for the same purpose that underpinned the request on 19 September 2025<sup>4</sup>, and that request was for the purpose of addressing the question of bumping.
- [18] The second is that, seen in its proper context, this contention is not credible. In response to the communication from the Union and on the same day, namely 20 October 2025, the Company transmitted an email to the Union which reads as follows:

*"We have considered your request and have already responded to you and our response that was given is our full and final position. We will not change our position on bumping as we have given the union our reasons for rejecting bumping and we stand by organogram that was shared with you. We articulated our position in the presentation that was shared with you and reiterated the same message in our email that was shared with you, and we said the same thing at the CCMA during our last meeting."*

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<sup>4</sup> Para 8.9 of the answering affidavit

*We do not agree to meet with the union to discuss the request that we have rejected on many occasions, but we are prepared to meet to discuss new matters if any exist.*

*There is not employee/individual of any nature that will be retrenched to make a space for your member that is impacted."*

- [19] It is common cause that there was no response to this communication. Whilst not every communication exchanged between parties necessarily requires a response, this was, par excellence, a communication that cried out for a response. When the Union received the correspondence quoted above, its response was not to contact the Company to explain that the Company had misunderstood its request and that the Company's request had nothing to do with bumping. No satisfactory explanation was given in the papers why this was not done.
- [20] The decision to allow the Company to labour under the impression that it had correctly recorded that the request related to the question of bumping and then, belatedly, after the fact, in argument, challenge the interpretation of the Company does not leave a good impression. As has often been said, litigation is not a game. In my view, this maxim can be applied with equal force to retrenchment consultations. If indeed the Union was of the view that the Company had misinterpreted its letter (I have reservations as to whether this is true), then it was reckless of it not to have immediately taken steps to set the record straight and thereby to protect its members' interests.
- [21] The third is that, even if the Court is wrong and the Union is *bona fide* when it contends that the information was requested for a purpose other than to address the topic of bumping, I cannot see how, as a matter of either law or fairness, the Company should be penalised because it, in good faith, relied on the representations made by the Union, albeit through its conduct in not challenging its letter. Representations can be made both by way of commission and omission. In this matter, given the silence of the Union, the Company was entitled to accept that it had no issue with its response.

- [22] On 27 October 2025, the final facilitated meeting took place. No new issues arose at the meeting, and on 3 November 2025, dismissal letters were issued.

The procedural issues raised by the Union

- [23] The evidence before the Court indicates that there was proper and meaningful consultation over the main bone of contention, namely that of bumping. It is further clear that the Union had ample opportunity to make representations regarding the proposals made by the Company and any issues relevant to the retrenchment exercise.

- [24] As to the only true procedural issues, the Union raised the following:

[24.1] There was a complaint that the Company had consulted with the other Union, FAWU, first.

[24.2] There was a complaint that the Company did not disclose sufficient information to render the consultation process meaningful.

[24.3] There was a complaint regarding a Mr Kenneth Ngubane.

- [25] I deal with these complaints individually below.

- [26] In my view, the complaint that the procedure was unfair because one Union was consulted before another needs only to be stated to be rejected. The time between the two consultations was minimal, and there was, correctly so, no suggestion of any ensuing prejudice. There is no obligation on an employer to consult with all Unions simultaneously. It is the prerogative of an employer to consult with Unions separately should it so wish, provided that this does not result in any prejudice, and, as mentioned, no prejudice resulted in this matter.

- [27] As to the alleged failure to disclose information, the only information requested by the Union which was allegedly not disclosed was the details of the individuals who occupied posts in the organogram, which had been provided to the Union. The information was, however, irrelevant because it concerned the identities of persons who would have been affected by the

bumping had this proposal been accepted by the Company. Once the company, after due consultation, had refused to accept the proposal of bumping, no purpose could have been served in providing further information on this issue in the same way, for example, that no purpose could be served in providing information about alternatives which have been the subject of proper consultation but which have been rejected by an employer. The information sought was the type that could be placed before the Labour Court in support of an unfair dismissal claim based on an allegation that the company unfairly refused to implement bumping. The other point is that when the Company explained that the information was not relevant, the Union did not join issue with, or otherwise reject, the explanation. Through its conduct, it accepted the explanation. Having accepted the explanation, there can be little scope to raise a complaint about it *ex post facto* in Court papers.

[28] Regarding Kenneth Ngubane, the Company acknowledged that it was unfortunate that his name was initially omitted from the list of employees who were not affected by the retrenchment exercise. However, in my view, as submitted on behalf of the Company, the omission was timeously remedied in that by the time that the facilitated process commenced, the confusion regarding Mr Ngubane had been clarified. The Union provided no basis why the consultative process which was thereafter followed resulted in prejudice or unfairness to Mr Ngubane whose issue appeared also to be one concerning bumping, something which was addressed by the Company as part of the consultation process.

[29] In conclusion, no purpose would be served in reopening the consultation process. The Court would venture to suggest that, were this course to be followed, what would happen is that the Union would seek to resurrect the issue of the merits of bumping, to traverse again the *minutiae* of the evidence surrounding this issue and to hang onto it in terrier-esque vein as it had done in the first round of consultations. Without wishing to repeat myself, consultations on this aspect have been exhausted, and the place to challenge the fairness of the decision of the Company not to embark on an exercise of

bumping will be in the course of litigation which attacks the substantive fairness of the dismissals.

### The formulation of the claim

*What about the fact that the employees have pleaded procedural unfairness?*

[30] It is necessary to say something about how the claim has been pleaded. The founding affidavit is replete with contentions that the consultation process was procedurally unfair, notwithstanding that the application is, in substance, aimed at attacking the substantive fairness of the decision to dismiss the Employees.

[31] As the Constitutional Court held in *Gcaba*,<sup>5</sup> jurisdiction is determined with reference to the pleadings. It is up to the *dominus litis* to choose its cause of action. To make use of a metaphor, when a litigant leaves the safety of the harbour to embark on a journey of litigation, it is entitled, as of right by virtue of its constitutional right to access to justice<sup>6</sup>, to set its own sails and charter its own course. It may do this irrespective of menacing skies on the horizon and the shoals and unforgiving rock which may lie beyond the breakwater. It does so by choosing its cause of action and outlining that cause of action through its pleadings. There is, however, an important proviso. The pleadings must be "*properly interpreted*".<sup>7</sup> What this means is that it is not open to a litigant to mischaracterise a claim through wrong-labelling or sleight of hand. As the crude adage goes, a pig with lipstick remains a pig.

[32] Post *Gcaba*, the Constitutional Court elaborated further on the approach to be taken by a Court when ascertaining the true or real nature of a dispute in *Tshivhulana Royal Family v Netshivhulana*<sup>8</sup>. The Court held that the pleadings must be read together with, *inter alia*, the facts underpinning the claim, explaining that the characterisation of a claim by a party is not definitive:

<sup>5</sup> *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC)

<sup>6</sup> Section 34 of the Constitution

<sup>7</sup> *Gcaba* at para [75]

<sup>8</sup> 2017 (6) BCLR 800 (CC)

*"[36] It is the Court's duty to ascertain the real or true nature of the dispute between the parties. In conducting the inquiry the Court must look at the substance of the dispute. The Court would have regard to various factors including the pleadings, the facts and the relief sought. The characterisation of a dispute by a party is not necessarily conclusive. Ascertaining the true nature of the dispute would assist to determine whether the dispute is within or between a traditional community and a customary institution."*<sup>9</sup> (own emphasis)

[33] Our Courts have long since recognised a duty to guard against the mischaracterisation of claims. In *Nimrod Llewellyn Mortimer v Municipality of Stellenbosch*,<sup>10</sup> as approved by the Labour Appeal Court in *Booyesen v the SAPS*,<sup>11</sup> the Court, per Gauntlett AJ, stated that the formulation of a claim must, on an objective conspectus, be "genuine".<sup>12</sup> In that matter, the applicant had sought to formulate the claim in a contrived fashion so that it would fall within the ambit of the jurisdiction of the High Court. The Court commented that, when determining whether the High Court or a specialised labour forum has jurisdiction, it will:

*"... have to put substance over form, bear in mind the danger of tactical contrivance in the presentation of cases, and apply, if necessary, the criterion of substantiality to matters where certain facts may point in one direction and others in another."*<sup>13</sup> (own emphasis)

[34] In *Motloung v Department of Health: Free State*<sup>14</sup>, which followed the Labour Appeal Court decision of *Ekurhuleni Metropolitan Municipality v South African Municipal Workers' Union*<sup>15</sup>, the Court held as follows:

*"[15] As a point of departure, jurisdiction is determined on the basis of the case as pleaded by the litigant. In this regard, the Court only has to consider the facts and legal grounds that support the case, as it is pleaded. Nonetheless, it still remains the duty of the Court to*

<sup>9</sup> Footnotes omitted

<sup>10</sup> An unreported judgment of WCD (Case No 18243/2008) delivered on 27 November 2008

<sup>11</sup> [2011] 1 BLLR 83 (LAC) at para [52]

<sup>12</sup> At page 20, lines 5 to 6

<sup>13</sup> At page 15, lines 15 to 20

<sup>14</sup> (JS 309 / 21) [2022] ZALCJHB 343

<sup>15</sup> [2015] 1 BLLR 34 (LAC); (2015) 36 ILJ 624 (LAC)

determine the true or real nature of the dispute it is called on to decide, as it may emerge from the pleaded case. In this regard, the Court would consider the dispute as it emerges from the pleadings as a whole, no matter how it is labelled when pleaded. In *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* it was held:

*'It is trite that the jurisdiction of the Labour Court (and the CCMA or a council) to entertain a matter is determined from the pleadings in the matter. It is also an established principle that in application proceedings, the affidavits constitute the pleadings and the evidence. While the issues between parties generally emerge from the pleadings, it may not be readily possible to determine what the true nature of those issues are, or what the true nature of the dispute is, because of the manner in which the pleadings are drafted. Therefore, the true nature of the dispute is to be determined from an analysis of the facts and not from the parties' characterisation of the dispute.'* (own emphasis)

- [35] In *Makhanya v University of Zululand*,<sup>16</sup> a case often relied upon by litigants to contend that because they are *domini litus* and the masters of their destinies, it is up to them to formulate whichever case they may wish to pursue, the Supreme Court of Appeal, with reference to the factual substratum upon which a claim is grounded, made it clear that, although it is the prerogative of the parties to choose their respective causes of action, parties are not permitted to change the nature of their claims through inaccurate descriptors. That would be for the tail to wag the proverbial dog. The Court explained as follows:

*"...[72] The second observation is that a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language. Yet that is often what is sought to be done under the guise of what is called "characterising" the claim. Where that word is used to mean "describing the distinctive character of" the claim that is before the court, as a*

<sup>16</sup> [2009] ZASCA 69; 2010 (1) SA 62 (SCA)

*fact, then its use is unexceptionable. But when it is used to describe an alchemical process that purports to convert the claim into a claim of another kind then the word is abused. What then occurs, in truth, is not that the claim is converted, but only that the claimant is denied the right to assert it." (own emphasis)*

[36] Applying the above *dicta*, the Court finds itself driven to conclude that the case presented on behalf of the Union is, to a large extent, contrived and the Union has made itself guilty of wrong labelling and mischaracterisation. There has been a thinly veiled attempt to disguise the true nature of the claim. What the Union has done, for the most part, is to dress up a claim concerning alleged substantive unfairness as one concerning alleged procedural unfairness. As a result, there has been an attempt to defeat the purpose of section 189A(13) of the LRA.

[37] The Union was clearly alive to the challenge which it has in this regard. To meet it, it has contended, through the vehicle of torturous reasoning and in Alice in Wonderland-Esque<sup>17</sup> vein, that because there is an overlap between procedural and substantive unfairness, it follows that substantive unfairness may result in procedural unfairness.

[38] The founding affidavit provides, *inter alia*, as follows:

*"7.16 In this case the questions of substantive and procedural fairness are intertwined because, as shall be shown below, the ground upon which CCBSA alleges that the Applicants' roles have become redundant are demonstrably untrue. That reality 'contaminates' the procedure as unfair. A procedure meant to further a cause based on false allegations cannot escape the 'contaminative' effect of the true intention."*

[39] The heads of argument provide, *inter alia*, as follows:

*"3.2 It is submitted that CCBSA has misdirected itself on a point of law. As the Courts acknowledge, **it is often difficult to separate substantive***

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<sup>17</sup> In Lewis Carroll's *Through the Looking Glass*, published by Macmillan and Co. on 27 December 1871, everything is inverted, including logic and where, for example, walking away from something brings one towards it.

*fairness from procedural fairness which is governed by s189A. It will be unavoidable in some aspects to touch on what may appear to be substantive merits in order to show that the procedure applied to retrench the Applicants was unfair.”*

[40] The paragraphs quoted above reveal an ouroboros of deduction characterised by dizzying circular reasoning. The submission that substantive unfairness can result in procedural unfairness is, to put it euphemistically, a novel proposition. Whether a dismissal is procedurally or substantively unfair involves discrete enquiries into fairness: one into the reason for the dismissal and the other into the process leading up to the dismissal. It is true that a procedure may be so fundamentally defective that it renders a dismissal substantively unfair because, for example, the Court is not in a position to determine whether, had a fair procedure been followed, the employees in question would have been dismissed<sup>18</sup>. In that sense, procedural unfairness may result in substantive unfairness. But the converse is not true. In a sense, there is then what may be perceived as an asymmetry. It is that procedure can be instrumental in testing substantive fairness, whereas substance is not instrumental in determining whether a procedure was fair. Profound procedural unfairness may undermine the substantive fairness of a dismissal, but there is no reciprocal principle holding that, if a dismissal is substantively unfair, it may, for this reason, render it procedurally unfair. If the argument presented on behalf of the Union were to be accepted, it would mean that two different Courts could, in the same matter, pronounce on the question of substantive fairness and there would then be scope for conflicting judgments on the same issue between the same parties.

### Costs

[41] The Company, understandably so, sought to persuade the Court, as a mark of its displeasure, to order costs on a punitive scale. In essence, the contention was that there had been an abuse of the Course process. What constitutes an abuse of process has been the subject of much debate in our jurisprudence.

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<sup>18</sup> *SACTWU and Others v Discreto* (a division of Trump & Springbok Holdings) (1998) 19 ILJ 1451 (LAC) at para [15]

In *Zuma*<sup>19</sup>, the High Court, in a decision which was confirmed on appeal, dealt extensively with what constitutes an abuse of the Court process.

[42] The Court made the following observations:

*“[70] Our courts have not attempted to have an all-encompassing definition of what is meant by an abuse of process. Over the years there have been a number of instances in which the courts have deemed it appropriate to intervene and arrest an abuse of process which include those instances where proceedings have been instituted for an ulterior and/or improper purpose and for an improper and/or ulterior motive.”*

*[71] In Lawyers for Human Rights v Minister in the Presidency and Others, the following was said:*

*‘In Beinash, Mahomed CJ stated that there could not be an all-encompassing definition of ‘abuse of process’ but that it could be said in general terms “that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.” The court held:*

*“There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in Hudson v Hudson and Another 1927 AD 259 at 268:*

*“When...the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.”*

*...It can be said in general terms...that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”*

*[72] Our courts have an inherent power to prevent an abuse of court process. Initially the courts intervened to prevent an abuse of process in*

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<sup>19</sup>*Maughan v Zuma and Others* (12770/22P;13062/22P) [2023] ZAKZPHC 59; [2023] 3 All SA 484 (KZP); 2023 (5) SA 467 (KZP); 2023 (2) SACR 435 (KZP) (7 June 2023)

*circumstances where the power to do so was exercised with the greatest caution and only in a clear case. De Villiers JA writing for a Full Court in Hudson v Hudson and Another held the following:*

*‘That every court has the inherent power to prevent an abuse of the machinery provided for the purpose of expediting the business of the Court admits of no doubt....’ (own emphasis)*

- [43] If this Court was to endorse the Union's litigation plan, it would be giving its blessing to a strategy which is calculated to defeat the purpose of section 189A(13) which is to empower the Court to play a supervisory role when it comes to material questions of procedural fairness in the context of a retrenchment exercise. It would effectively afford the Union and its members the right to challenge the substantive fairness of their dismissals on an urgent basis, which would, in turn, *inter alia*, raise the spectre of *res judicata* and/or issue estoppel should a dispute about the fairness of the dismissal subsequently be referred for adjudication.
- [44] In my view, the conduct of the Union, if it does not rise to the level of an abuse of the process, comes perilously close to doing so. Given the calculated manner in which the affidavit was formulated, I find it difficult to accept that this was a case of mere muddled thinking. It seems to me that the Union has employed section 189A(13) for an ulterior purpose, i.e., to impugn the substantive fairness of the Employees' dismissals, and thus to prosecute, for the most part, a case that was obviously unsustainable. Another way of putting it is that the case presented on behalf of the Employees was, save for a handful of relatively inconsequential points regarding procedural fairness, legally untenable and, in that sense, hopeless.<sup>20</sup> The matter came before the Court on a crowded urgent Roll in the December 2025 recess. The application, which took the form of a legal juggernaut, was the type of application which, owing to its volume and lack of merit, has the potential to

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<sup>20</sup> *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) at para [35]

destroy the utility of the urgent Roll. For these reasons, a costs order should be made.

[45] I am aware of the ongoing relationship between the Union and the Company. However, having reflected on the matter, in my view, this factor is outweighed by the circumstance that the Union has litigated disingenuously in prosecuting the application. Expressed differently, this is not a case where the existence of an ongoing relationship can be utilised as a shield against a costs order. The Court has further given serious consideration to awarding a punitive costs order, but has ultimately decided against this. Other litigants who institute litigation along the lines of that pursued by the Union may not be so fortunate. Given, *inter alia*, the importance and volume of the matter, in my view, the costs should be awarded on Scale C.

#### Order

1. The application is urgent and any non-compliance with the Rules is condoned.
2. The application is dismissed.
3. The Applicant is to pay the costs associated with the bringing of the application on Scale C.

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P N KROON

Acting Judge of the Labour Court of South Africa

#### Appearances:

For the Applicant:

V M G Ndiweni

Instructed by:

AMN Attorneys Inc

For the First Respondent: C Orr SC

Instructed by: Bowman Gilfillan Incorporated

LABOUR COURT