



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS53/23

In the matter between:

SENYAMISHI A. MOJALEFA

First Plaintiff

ROSALIA J. MPHEPHETHE

Second Plaintiff

DUMISANE L. MBATSANE

Third Plaintiff

CHUENE J. THANTSHA

Fourth Plaintiff

PATRONILLA Z. NCOVOTI

Fifth Plaintiff

THALOKI J. MALEMA

Sixth Plaintiff

and

RIGHT TO CARE NPC

Defendant

Heard: 2, 3, 4 and 26 March 2026

Delivered: 1 April 2026

JUDGMENT

MAKHURA, JIntroduction

- [1] This matter concerns an opposed unfair dismissal claim brought in terms of section 191(5)(b)(ii) of the Labour Relations Act¹ (LRA). The dispute arises from the retrenchment of the six plaintiffs following a section 189 process initiated by the defendant on the basis of alleged operational requirements.
- [2] The plaintiffs contend that their dismissals were substantively unfair on the basis that the defendant did not establish a fair and rational basis for the dismissals, did not genuinely consult on measures to avoid retrenchment and failed to properly consider or offer reasonable alternatives, and that it applied unfair selection criteria. The defendant argues that the dismissals were necessitated by a reduction in donor funding, that it considered the alternatives and applied a fair selection criterion and therefore the dismissals were substantively fair.
- [3] The issues to be determined therefore is whether the defendant discharged its obligations under section 189 of the LRA and whether the plaintiffs' dismissals were substantively fair.

The defendant's purported preliminary point

- [4] The defendant argued, in its heads of argument that the third to sixth plaintiffs' case should be struck off on the basis of their non-appearance during trial. The crux of the point is whether the legal representatives are authorised to represent the third to sixth plaintiffs. The defendant was aware at all material times that all the plaintiffs were represented by the current attorneys of record.
- [5] Had the defendant harboured any doubts regarding the authority of the plaintiffs' legal representatives, it was incumbent upon it to invoke rule 7 of the Uniform

¹ Act 66 of 1995.

Rules of Court² and require the production of a power of attorney. It failed to do so. The point was therefore not properly raised before this Court and should fail on that basis. All the plaintiffs are properly before this Court represented by the current legal representatives.

Material facts and evidence

- [6] The defendant is a non-profit healthcare organisation established in 2001, operating within the public health sector. Its mandate is the delivery of public health programmes aimed at the prevention and management of infectious diseases, including HIV/AIDS and tuberculosis.
- [7] The plaintiffs, with the exception of the second plaintiff, were employed as Post-Basic Pharmacist Assistants, while the second plaintiff was employed as an Administrative Assistant. They were employed on a permanent basis with the following years of experience, six, eight, three, three, four and four years respectively. At the time of the dismissal, they were assigned to the Accelerating Program Achievements to Control the Epidemic (APACE), a programme funded by the United States Agency for International Development (USAID).
- [8] On 31 March 2022, the defendant convened a meeting described as a “performance review” with more than 500 employees in the Ehlanzeni District, Mpumalanga. The defendant’s first witness, Chukwuka Moses Onaga (Onaga), addressed the employees and commended them for their performance during the first terms of the financial year. The defendant’s financial year is from 1 October to 30 September. Although the plaintiffs contend that the employees were assured of adequate funding and informed that retrenchments were not anticipated, Onaga disputed this version, stating that he merely conveyed that USAID had promised funding at existing levels and that operations would

² Rule 7(1) provides that “Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

continue accordingly. He denied having stated that retrenchments would not occur.

[9] It is common cause that in May 2022, the defendant received communication from USAID indicating that the anticipated level of funding would be reduced from USD16.7 million to USD14.6 million.

[10] On 21 July 2022, Onaga sent an email to approximately 43 recipients, including several managers and the plaintiffs, informing them of a compulsory staff meeting scheduled for Friday, 22 July 2022.

[11] At the meeting held on 22 July 2022, the defendant issued the affected employees with a notice in terms of section 189(3) of the LRA. The notice, addressed to the employees assigned to the APACE programme, recorded that:

~~'Due to the reduction of funding in the APACE programme, you are hereby informed that your position may be potentially affected.'~~

In efforts to avoid retrenchment in this instance you are further advised that we will begin the consultation process in an attempt to reach consensus for appropriate measures such as:

- Potential ways of avoiding the retrenchment;
- Ways of changing the timing of the retrenchment;
- Ways of reducing the effects of any retrenchment;
- The method of deciding who may have to be retrenched;
- Severance pay.

In order to promote meaningful consultations on the above issues we hereby provide you with the following information and invite you to request further relevant information should this be necessary:

- The reason for the proposed retrenchments is explained in the first paragraph of this letter. Your current portfolio is thereby affected.
- There are 2 grants undergoing the retrenchment process, with potentially 101 employees likely to be retrenched...
- During the consultation period you will be made aware of all vacancies within the Right to Care as a group for your application.
- Whilst we are currently unaware of any prospects of future employment, we undertake to consider any retrenches (sic) for suitable future vacancies arising during proceeding six months after retrenchment, if applicable.
- As at the end of June 2022, the Right to Care employed 647 permanent employees.
- The number of retrenched employees during the past (12) twelve months is 11.' (Emphasis added)

[12] The meeting of 22 July 2022 was attended in person by approximately 43 employees, with others participating virtually. The presentation was led by Pappie Majuba, an executive of the defendant, and Onaga. Employees were informed that the APACE programme was in the fourth year of a five-year funding cycle and that USAID had significantly reduced the level of funding allocated to the programme. It was further explained that the contracts of fixed-term, locum and temporary employees were due to end on 30 September 2022 and that, as a result of the reduction in funding, there would be a reduced number of positions available under the APACE programme for what the defendant termed *“re-competition”*.

[13] The concept of *“re-competition”*, as explained by the defendant, entailed advertising the remaining or available posts and requiring affected employees to apply for, and compete for, those positions, including the positions they previously occupied or alternative suitable posts within the organisation.

According to Onaga, this approach had been utilised by the defendant in previous retrenchment exercises and was regarded by it as a fair selection criterion, given what he described as the “*performance-based*” nature of the defendant’s operations and the need to meet predetermined programme targets.

[14] The presentation further stated that, in the recruitment process, internal applicants who met the minimum requirements would be considered and that competency assessments could be conducted alongside interviews. In relation to the affected roles, it was recorded that the APACE programme then employed 15 Post-Basic Pharmacist Assistants, a number which would be reduced to five with effect from 1 October 2022. The position of Administrative Assistant, occupied by the second plaintiff at the time, was declared redundant. Employees were informed that, notwithstanding these reductions, there were 279 available positions across the APACE programme for the 101 affected employees, and that internal advertisements for these positions would be issued during August 2022.

[15] The presentation further indicated that a number of fixed-term contract positions were available in other programmes administered by the defendant. These included 28 Data Capturer positions in Limpopo under the Anglo-American programme, 10 Data Capturer positions in the Northern Cape, one Administrative Officer position in Gauteng, and one Administrator position in KwaZulu-Natal.

[16] The defendant’s case, as articulated by Onaga during the trial, was that the operational requirements giving rise to the retrenchments were economic in nature. He testified that the reduction in donor funding necessitated a restructuring of the organisation in order to align its staffing complement with the level of available funding.

[17] The employees subsequently elected their representatives for purposes of consultation. These included the first plaintiff, Tshegofatso Mojalefa (Mojalefa) and the second plaintiff, Rosalia Mphephethe (Mphephethe). Both employees were later retrenched and were witnesses on behalf the plaintiffs during the trial.

[18] On 29 July 2022, Mojalefa addressed an email to Rendani Mukwevho (Mukwevho), the defendant's Senior Human Resource Manager, requesting that the "*re-competition process*" which had already commenced, be halted. The email also reads that:

'Several suggestions were made to either avert retrenchments, or to utilize alternative methods for retrenchments other than the process that was presented at the first session of the consultations.'

[19] Two days later, on 31 July 2022, another employee representative, Eddy Maluka, sent an email to Mukwevho attaching a comprehensive list of proposals and questions raised by the affected employees. These included suggestions aimed at cost-saving measures, the retention of permanent Post-Basic Pharmacist Assistants, the suspension of the re-competition process to allow further consideration of alternatives, the application of LIFO as a selection criterion, the exploration of voluntary retrenchment, and the "*transition*" or placement of affected employees into positions outside the APACE programme. The employees also questioned the rationale and criteria for selecting particular positions for reduction and raised concerns about the defendant's continued recruitment for permanent senior posts during the retrenchment process.

[20] In response, Mukwevho informed the employees that a further meeting would be arranged for 4 August 2022 to clarify issues relating to the section 189 process, and that the meeting to respond to the employees' suggestions and questions would be scheduled at a later stage.

[21] On 4 August 2022, the parties convened a further meeting at which the defendant indicated that the retrenchment process would proceed under section 189A of the LRA. During this meeting, the employee representatives also requested that individual section 189(3) notices be issued to each affected employee, rather than a generic notice.

[22] On the following day, 5 August 2022, the defendant referred a request for facilitation to the Commission for Conciliation, Mediation and Arbitration (CCMA). The referral recorded that the defendant was then contemplating the retrenchment of 21 employees, as opposed to the 101 indicated in the section 189(3) notice of 22 July 2022. The affected region was identified as Mbombela, and the reason for the contemplated retrenchments remained the reduction in funding. In respect of alternatives, the defendant recorded that:

‘The reduction of funding has resulted in reduced positions, employees to reapply and re-compete for reduced positions. Affected employees are to be given preference to apply for other vacant positions in other programmes and provinces.’ (Emphasis added)

[23] On 30 August 2022, the defendant furnished a written response to the proposals and questions raised by the employees in their correspondence of 31 July 2022. In addressing the suggestion that rental costs be reduced by utilising existing premises, the defendant stated that its ACTS clinic property had already been leased out and that the terms of the lease did not permit sub-letting. In relation to the reduction of Post-Basic Pharmacy Assistant positions, the defendant stated that:

‘Executive management have reviewed all the possibilities before the finalisation of 2022/23 financial year structure. Post Basic Pharmacy Assistant has been identified as the position that will be affected due to operational requirement. The workplan and skill sets needed to execute the workplan was considered in arriving at the final structure required in MP. There are other grants currently advertising positions in excess of 650 and there are positions that these staff members can be considered.’ (Emphasis added)

[24] In response to the proposal that the re-competition and recruitment process be halted pending further engagement on alternatives to retrenchment, the defendant stated that this was not feasible due to the imminent exhaustion of funding for the affected positions. It was explained that the re-competition process was intended to enable employees who were unsuccessful within the

APACE programme to apply for positions in other programmes, including ADAPT and Anglo-American, and that alternatives short of dismissal could still be raised and discussed during the consultation process.

- [25] With regard to the employees' proposal that LIFO be applied as the selection criterion, the defendant responded that:

'In terms of the current retrenchment policy a number of criteria is used and length of service is considered and hence LIFO/FIFO is considered but not in isolation. Please refer to the retrenchment policy for the full list of the criteria used in addressing retrenchment in the organisation.'

- [26] The defendant's retrenchment policy identifies three criteria that may be applied when selecting employees for retrenchment, namely (1) LIFO, (2) conduct, and (3) efficiency, ability, skills, qualifications, capacity, experience, attitude to work and productivity. In the present matter, Mukwevho testified that the defendant applied LIFO together with the latter category of criteria. However, no evidence was placed before the Court explaining how LIFO was in fact applied, nor how the third criteria, many of which are inherently subjective, were assessed or implemented in practice.

- [27] In response to the employees' request that affected employees be "*transitioned*" or placed into positions outside the APACE programme, including within ADAPT and the Anglo-American programme, the defendant stated that this had been considered. It explained that where the number of applicants exceeded the available positions, a competitive recruitment process was followed. The defendant further noted that not all applicants could be accommodated owing to the limited number of vacancies relative to the number of employees who had applied.

- [28] By 9 September 2022, the number of employees affected by the retrenchment process had reduced to twelve. This was confirmed in an email dated 12 September 2022 from Mukwevho to, amongst others, Mojalefa and Mphephethe, in which he recorded that twelve employees under the APACE Mpumalanga

programme had not secured alternative employment since the initial consultation meeting of 22 July 2022. He further wrote that:

‘Right to Care will continue to give preference to 12 staff members who have not found alternative positions across RTC South Africa in its recruitment processes.’

[29] As already stated above, Mphephethe's position of an Administrative Assistant within the APACE programme was declared redundant. She had applied for the position of Administrator which was advertised on 25 July 2022 but was not shortlisted.

[30] Mphephethe had also applied for the position of receptionist, which was advertised on 18 August 2022, based in Gauteng. She was again not shortlisted. The defendant instead appointed Modiegi Maputla (Maputla), who at the time was employed by the defendant as a Booking Agent under the Right ePharmacy programme.

[31] Maputla had been employed by the defendant since 2009 and had previously occupied various roles, including Administrative Assistant and Data Capturer. Mphephethe, by contrast, had been employed by the defendant as an Administrative Assistant in Mpumalanga since March 2015 and had earlier experience as a human resources assistant at other companies from 2003.

[32] In an internal email explaining the reason why Mphephethe was not shortlisted for the receptionist position, the defendant recorded that:

‘she did not meet the minimum requirements, consequently she was not shortlisted for the role ... Modiegi was appointed for the Receptionist position and she was on a Fixed Term contract which was ending in December 2022, note that Modiegi has been with RTC since 2009 and she met the requirements of the position.’ (Own emphasis)

[33] During the meeting held on 28 October 2022, Mukwevho expanded on the reasons for Mphephethe's non-appointment. He said that the position:

‘needed someone with Grade 12 and someone with Reception or an Administration qualification course in switchboard operation, a good clinical practice and two years’ experience as a Switchboard Operator and Office Management.

Indeed Rosalia’s CV was received and in terms of the CV that was received Rosalia does have Grade 12 but Rosalia does not have a Reception or Administration qualification. What has been noted on the CV is that Rosalia has a qualification in Human Resources Management and she is an Administrator currently at Right to Care. Candidates that have been interviewed are people with Grade 12 who ticked all the four boxes which we see on the minimum required qualifications and experience.’

[34] A further explanation emerged in Mukwevho’s testimony when the Court questioned him on the appointment of Maputla, particularly given that she was employed under the Right ePharmacy programme, which had not been identified as affected by the retrenchment process. Mukwevho testified that the Right ePharmacy fell under a further grant or programme funded by the United States Centers for Disease Control (CDC), which, he claimed, became subject to a retrenchment process around September 2022. This evidence stood in contrast to the section 189(3) notice, which referred only to two grants undergoing retrenchment, as well as to Onaga’s evidence.

[35] After the five Post-Basic Pharmacy Assistant positions had been filled prior to September 2022, and following the early voluntary departure of Abrina Nkosi (Nkosi) at the commencement of the retrenchment process, one of the five successful and appointed Pharmacy Assistants resigned in October 2022. This created a further vacancy. The remaining Pharmacy Assistants who were still affected by the retrenchment recommended that Dumisani Mbatsane (Mbatsane) be appointed to the position. The defendant rejected this recommendation.

[36] Instead, the defendant advertised the vacant position and conducted interviews. Mbatsane, Mojalefa and Thantsha were interviewed and scored 9, 10 and 6 out of 25 points respectively. Nkosi, who was no longer employed by the defendant

at the time, also applied for the position, was interviewed, scored 19 out of 25, and was appointed. Although the defendant produced the interview records or scoresheets by the panellists, none of the panellists who conducted the interviews testified.

- [37] The plaintiffs were ultimately dismissed following the conclusion of the retrenchment process. They now challenge the substantive fairness of their dismissals before this Court and seek compensation.

The dispute

- [38] The plaintiffs' case is that their retrenchment was a *fait accompli*. They contend that the defendant had already taken the decision to retrench prior to the commencement of the consultation process and that the process was therefore rendered a formality. They further submit that the defendant failed to demonstrate that the reduction in donor funding in fact necessitated their dismissal.

- [39] The plaintiffs pleaded that the defendant did not consider or engage on measures to avoid retrenchment, that is, alternatives. They allege that, notwithstanding the existence of at least 279 vacant positions at the commencement of the section 189 process on 22 July 2022, no alternative positions were offered to them. They further assert that they did not reject any reasonable alternative employment. In their evidence, they said that they did not apply for certain positions which were outside their base province in Mpumalanga mainly because of the limited duration of the contracts – six months – which would have necessitated their relocation for that limited period.

- [40] The plaintiffs also contend that the defendant proceeded with retrenchments while simultaneously advertising posts, calling upon affected employees to apply for those posts, and applying the so-called re-competition process as a selection criterion. They are further critical of the defendant's decision to appoint Nkosi to a Pharmacy Assistant position ahead of employees who remained affected by the

retrenchment, despite Nkosi being an external candidate at the time of appointment, and the decision to appoint Maputla over Mphephethe. The plaintiffs therefore contend that the selection criteria applied by the defendant were unfair and that the appropriate criterion in the circumstances was LIFO.

- [41] The defendant, by contrast, argued that the reduction in donor funding was a valid rationale for the retrenchment and that the plaintiffs have in fact accepted that there was a valid reason for the retrenchment. It contends that it had considered the alternatives and has applied a fair selection criterion. Onaga's evidence was that because of performance-driven model of the business, LIFO was not in its best interest and that re-competition was a fair selection criterion, whereas Mukwevho added that LIFO was also applied.

Analysis

- [42] Operational requirements are defined in the LRA as "*requirements based on the economic, technological, structural or similar needs of an employer*".³ Section 189(3) of the LRA obliges an employer contemplating dismissals for operational requirements to disclose, in writing, all relevant information necessary to enable meaningful consultation. This includes, at a minimum, the reasons for the proposed retrenchments, the alternatives considered before proposing dismissal, and the method by which employees are to be selected.
- [43] Based on the case presented before Court, the central issues for determination are whether the defendant established a fair and rational basis for the retrenchments, whether it complied with its obligations to meaningfully consult on alternatives to dismissal, and whether it applied the selection criteria that were fair.

Rationale

³ Section 213 of the LRA.

- [44] In assessing whether an employer has established a valid rationale for retrenchment, the Court should not accept, at face value, the reason stated by the employer. As the Labour Appeal Court (LAC) said in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*⁴, the court is entitled to examine whether a reasonable basis exists for the decision to dismiss for operational requirements and whether that decision was taken in a manner that is fair to the affected employees.⁵
- [45] The defendant's case is that the retrenchments were necessitated by the reduction in donor funding. It is not disputed that USAID reduced its funding to the defendant by approximately R32 million for the 2022/23 financial year, nor that this reduction was communicated to employees at the meeting held on 22 July 2022. On this basis, the defendant contended that the plaintiffs accepted the rationale advanced for the retrenchments.
- [46] I do not agree that the mere communication of a reason for contemplated retrenchments equates to an acceptance that such reason constituted a valid or sufficient justification for the employer to retrench. Similarly, the absence of a challenge by employees to the fact of the funding reduction does not translate into an agreement that the reduction necessarily caused their dismissal.
- [47] The defendant's case rests on an artificial distinction drawn between the employer as a single legal entity and the various programmes or funding streams under which it operates. By treating employees as though they were employed by discrete programmes, such as APACE, the defendant sought to justify retrenchments arising from reduced funding under one programme notwithstanding the existence of other programmes with staffing needs. This distinction is wrong in law. The defendant remains a single employer operating multiple programmes, and the reduction of funding under one programme cannot, without more, justify retrenchment where the organisation as a whole is not shown to be financially constrained.

⁴ [2001] 8 BLLR 705 (LAC); (2001) 22 ILJ 2264 (LAC).

⁵ Ibid at para 19.

- [48] The plaintiffs were employed on a permanent basis by the defendant and were not employed by APACE as a purported separate entity. Their duties were, from time to time, performed within specific programmes administered by the defendant, including APACE. The APACE programme commenced in 2018, after Mphephethe and Mojalefa had already been employed by the defendant in 2015 and 2016 respectively.
- [49] The defendant's alleged rationale for the retrenchments, namely, the reduction in donor funding, related solely to the APACE programme. There was, however, no evidence that the defendant, as an organisation, faced financial distress or uncertainty as a consequence of that reduction. Nor was there any evidence that the defendant's overall operations were rendered unsustainable by the reduced APACE funding.
- [50] On the contrary, the evidence shows that at the time the retrenchment process commenced in July 2022, the defendant had approximately 279 vacant positions across its programme. By September 2022, the defendant had more than 650 vacancies. There was no evidence that the plaintiffs were incapable of performing any of these roles, nor that the defendant was unable to accommodate them within its broader organisational structure.
- [51] Accordingly, while the defendant did receive reduced funding from USAID in respect of the APACE programme, it was not shown to have faced overall financial difficulty that necessitated the retrenchment of the plaintiffs. The presence of numerous funded programmes with substantial vacancies undermines the contention that the defendant was compelled, as an employer, to resort to retrenchments. There was no evidence that the plaintiffs were unsuitable for any of the available positions within the organisation or that it was not reasonably possible to redeploy them.
- [52] The plaintiffs' contention that their retrenchment was a *fait accompli* is supported by the evidentiary record. The defendant had, by 22 July 2022, effectively taken the decision to retrench employees under the APACE programme, as

demonstrated by the fact that posts were advertised and recruitment processes commenced almost immediately thereafter. The consultation process that followed was not characterised by meaningful engagement aimed at avoiding dismissals, but rather by the implementation of a predetermined decision. No genuine attempt was made to reach consensus on alternatives to retrenchment or on fair selection criteria.

- [53] In these circumstances, the defendant failed to establish a fair and rational basis for the retrenchments. For this reason alone, the dismissals of the plaintiffs were therefore substantively unfair.

Alternatives

- [54] Section 189(2)(a)(i) of the LRA requires the employer and affected employees to engage in a meaningful, joint consensus-seeking process and to attempt to reach agreement on measures to avoid dismissal. Central to this obligation is a genuine consideration of alternatives to retrenchment, including the placement of affected employees into suitable existing positions where such positions are available.

- [55] In *Kotze v Rebel Discount Liquor Group (Pty) Ltd*⁶, the LAC held that:

‘The failure to consult the appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It only affects his selection. The selection of an employee for retrenchment does not only impact on the procedural purpose of consultation but also on its substantive purpose. This is so because failure to consult on known alternatives leaves open a possibility that the affected employee might, contrary to the employer's belief, have accepted the undisclosed alternative to his or her retrenchment. If he or she would have, then it follows that he or she would not have been retrenched and the decision to retrench him or her would therefore be both procedurally and substantively unfair notwithstanding the existence of a genuine business rationale therefor.’⁷

⁶ [1999] ZALAC 25; (2000) 21 ILJ 129 (LAC).

⁷ Ibid at para 37.

- [56] Similarly, in *Super Group Supply Chain Partners v Dlamini and Another*⁸ (*Super Group*), the LAC reiterated that section 189 imposes a positive duty on employers not merely to consult, but also to take appropriate measures on their own initiative to avoid dismissals or to mitigate their effects. Consultation is therefore not a passive exercise, but one that requires an employer to actively engage with and, where reasonably possible, implement alternatives to retrenchment.⁹
- [57] In this case, the affected employees were merely informed of the existence of alternative positions and advised that they could apply for them. There was no meaningful engagement to determine which of the affected employees were suitable for those positions, which might become suitable with minimal training, or whether such training could reasonably be provided. There was simply no substantive consultation directed at matching employees to available 279 and later 650 available positions as an alternative to dismissal.
- [58] Therefore, even if the defendant had established a valid and fair operational rationale, it nevertheless failed to meaningfully consider alternatives to retrenchment prior to embarking on the retrenchment process. The section 189(3) notice is conspicuously silent on the alternatives considered, if any. The defendant did not offer the plaintiffs any suitable alternative positions, despite the existence of numerous vacancies, and instead required them to participate in a re-competition process, which is a new recruitment process where they apply for the positions they either occupied or were suitable for.
- [59] Requiring affected employees to apply for their own positions, or for other suitable positions within the organisation, does not amount to a genuine consideration of alternatives to dismissal. Rather, it constitutes the initiation of a fresh recruitment process at the expense of existing employees facing retrenchment. The fact that some of the available posts were fixed-term in nature did not render them irrelevant as potential alternatives. The defendant's approach requiring affected employees to apply for positions through standard

⁸ [2012] ZALAC 25; (2013) 34 ILJ 108 (LAC).

⁹ Ibid at para 24.

recruitment processes, without any preferential placement or targeted redeployment, does not amount genuine consideration of alternatives to dismissal. For these reasons, the defendant's failure to meaningfully consider or offer alternative employment renders the dismissals substantively unfair.

The selection criteria

[60] Where all reasonable measures to avoid dismissal have been exhausted, section 189(2)(b) of the LRA requires the parties to engage meaningfully and, where possible, reach agreement on the criteria to be applied in selecting employees for retrenchment. In the absence of agreement, the employer must apply selection criteria that are fair and objective. In *Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd*¹⁰, the LAC said that:

'Section 189(7) makes provision for what happens at the end of the process of consultation. Where attempts at finding measures that would avoid the dismissal of employees have failed, the end of the consultation process is the selection of the employees to be dismissed and then, finally, the dismissal. With regard to what selection criteria an employer must use when selecting employees to be dismissed, counsel for the appellants submitted that, where the employer and the union have not agreed upon the selection criteria, the employer is obliged in terms of s 189(7)(b) to use fair and objective selection criteria. I agree. Section 189(7) of the Act contemplates two types of selection criteria that may be used in the selection of employees to be dismissed. The one type is provided for in s 189(7)(a) and the other in s 189(7)(b)...'¹¹

[61] In *Umicore Catalyst SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*¹², the LAC reaffirmed that the onus rests on the employer to establish that the selection of employees for dismissal was fair. While criteria such as length of service, skills and qualifications are generally accepted as fair, deviations from commonly-accepted standards such as LIFO must be justified

¹⁰ [2006] 2 BLLR 142 (LAC); (2006) 27 ILJ 292 (LAC).

¹¹ Ibid at para 84.

¹² [2024] ZALAC 37; (2024) 45 ILJ 2545 (LAC).

and supported by evidence demonstrating their necessity for the effective operation of the business.¹³

- [62] Notwithstanding Mukwevho's assertion that LIFO was applied together with the "*re-competition*", the evidence demonstrates that LIFO was in fact not applied. It is immaterial to speculate who would have been dismissed first or last had LIFO been applied. The only selection criterion applied by the defendant is the so-called "*re-competition*".
- [63] Requiring affected employees to apply for their own positions, or for positions for which they met the minimum requirements, does not constitute a selection criterion, nor does it amount to the offer of alternative employment, as envisaged by section 189. Even if the re-competition process were to be characterised as a form of a selection criterion, it was neither fair nor objectively and fairly applied.
- [64] Further, the re-competition criterion was implemented as early as 25 July 2022 when the defendant started advertising the positions. Notwithstanding repeated requests from employees to suspend the re-competition process, the defendant remained resolute and unequivocal in its decision to proceed. This conduct justified the plaintiffs' argument that the decision to retrench had already been taken.
- [65] In this case, the re-competition process operated as follows. The defendant employed 15 permanent Post-Basic Pharmacy Assistants and resolved to reduce that number to five. All 15 employees were required to apply and compete for the five remaining positions because, according to the defendant, LIFO was not aligned with its interests and that, given its performance-driven operational model, it sought to retain employees with the strongest technical competencies.
- [66] The affected employees were subjected to interviews and/or competency assessments, purportedly as part of identifying employees with the strongest technical competencies. The defendant has however not produced the

¹³ Ibid at para 19.

assessment or interview records in respect of all the employees who competed for the five positions, including those who were ultimately appointed. In the absence of such records, the Court is unable to evaluate either the basis upon which the assessments were conducted or the fairness and consistency with which the re-competition process was applied.

[67] While it is self-evident that employers are entitled to require their employees to perform their duties effectively, there was no evidence that any of the affected Post-Basic Pharmacy Assistants lacked the technical skills necessary to perform the work, or that the five who were appointed were technically better than the five plaintiffs before Court. Nor was there any evidence that the reduction in funding altered the scope or substance of their duties. Further, there was no evidence that the five plaintiffs before this Court were poor performers and that those who were appointed had performed to the employer's standard prior to the retrenchment process.

[68] Accordingly, the defendant's contention that the re-competition process constituted a fair selection criterion cannot be sustained. This re-competition evidently did not amount to a selection criterion but rather to a standard recruitment exercise imposed upon employees whose continued employment was already at risk.

[69] There is an additional basis upon which the dismissals of the Post-Basic Pharmacy Assistants were rendered unfair. It is common cause that one of the five successful Pharmacy Assistants resigned in October 2022, which created a further vacancy. The remaining employees who had been affected by the retrenchment proposed that Mbatsane be appointed to the post. Although Mojalefa had longer service, she testified that she supported this collective recommendation. The defendant rejected the recommendation and instead elected to advertise the position.

[70] The defendant thereafter conducted interviews and appointed Nkosi, who had at that stage voluntarily left the defendant's employ at the start of the retrenchment

process. In seeking to justify this decision, the defendant relied, firstly, on its retrenchment policy, which provides that where similar vacancies arise within six months of retrenchment, previously retrenched employees should be informed and given preference, subject to the normal recruitment process being followed.

[71] It is common cause that Nkosi was no longer an employee of the defendant at the time the vacancy arose. Whether her departure is characterised as a resignation (per Mojalefa's evidence) or as an early retrenchment (per Mukwevho's evidence) is immaterial. She was, at the relevant time, an external candidate. Her appointment happened at the time when the defendant was still engaged in the retrenchment process. Her appointment must also be contrasted with the defendant's undertaking, communicated on 12 September 2022, that preference would be afforded to the 12 employees who remained affected by the retrenchment.

[72] The defendant further sought to justify the appointment of Nkosi on the basis of the interview scores, contending that she scored 19 out of 25, while Mojalefa, Mbatsane and Thantsha scored 10 or less. None of the interview panellists testified before this Court, and Mukwevho, who was not part of the panel, could not testify about the allocated scores. In the absence of credible evidence regarding the conduct and content of the interviews, the scoresheets carry little if not zero evidentiary weight and do not assist the defendant's case.

[73] Turning to the second plaintiff, Mphephethe, it is common cause that the position of Administrative Assistant within the APACE programme was declared redundant. During the retrenchment process, she applied for two alternative positions, namely an administrator position based in Mpumalanga and a receptionist position based in Centurion. She was not shortlisted for either post.

[74] The defendant's explanation for not shortlisting Mphephethe for the receptionist position was that, notwithstanding her qualifications and experience in human resources, personnel administration and office management, she did not meet the minimum requirements for the role. The defendant maintained that the

successful applicant, Maputla, satisfied all the prescribed requirements for the position.

[75] Maputla was however employed on a fixed-term contract that was due to expire at the end of December 2022. The defendant nevertheless preferred her over Mphephethe, who was a permanent employee. In substance, the defendant thus favoured a fixed-term employee nearing the end of her contract over a permanently employed employee who was facing retrenchment.

[76] In seeking to further justify this decision, Mukwevho testified, for the first time and only in response to the questions from the Court, that the Right ePharmacy programme under which Maputla was employed was itself affected by a retrenchment process which commenced around September 2022. This explanation was not supported by any documentary evidence and was inconsistent with both the section 189(3) notice, which identified only two grants undergoing retrenchment, and the evidence of Onaga. Mojalefa was likewise unaware of any retrenchment process affecting Right ePharmacy. Mukwevho's version is rejected as an unsubstantiated afterthought.

[77] There was no evidence that the Right ePharmacy programme was undergoing retrenchment at the relevant time, and even if it were, Maputla was a fixed-term contract employee. In these circumstances, the decision to appoint Maputla over Mphephethe constituted a further instance of the unfair application of the re-competition process, rendering Mphephethe's dismissal substantively unfair.

Conclusion and remedy

[78] In summary, the defendant failed to establish a fair and rational basis for the retrenchments. It did not demonstrate that the reduction in funding necessitated dismissals in circumstances where other programmes continued to operate with substantial vacancies. Nor was there any evidence that the defendant's overall financial position had been materially compromised. Additionally, the defendant embarked on recruitment and filled positions as early as 25 July 2022, shortly

after issuing the section 189(3) notice. This conduct supports the conclusion that the decision to retrench had effectively been taken before any consultations occurred. The consultation process that followed after 22 July 2022 was superficial, and the plaintiffs' dismissals were substantively unfair.

[79] The section 189(3) notice issued by the defendant failed to disclose the alternatives considered prior to the decision to retrench. The reliance on re-competition as a selection criterion against LIFO which was also proposed by the employees constituted a fresh recruitment process of the affected employees. The effect of the failures to establish a valid rationale and/or meaningful consideration of alternatives and/or application of fair selection criteria inevitably leads to the conclusion that the plaintiffs' dismissals were substantively unfair.

[80] The plaintiffs sought an award of maximum compensation. At the commencement of the trial, the second plaintiff, Mphephethe, initially pursued reinstatement. She has since abandoned that claim in favour of compensation.

[81] Section 194 of the LRA governs the award of compensation for substantively unfair dismissals and requires that such compensation be just and equitable in all the circumstances, subject to the statutory maximum of twelve months' remuneration. There was no evidence before the Court to suggest that the defendant would be unable to satisfy an award of maximum compensation, but there was similarly no evidence advanced by the plaintiffs to justify an award of maximum compensation.

[82] Having regard to the nature of the dispute, including the manner in which the retrenchment process was conducted and the impact on the plaintiffs, I am of the view that an award of compensation equivalent to six months' remuneration for each plaintiff is just and equitable.

[83] The parties agreed that there should be no order as to costs. This dispute arises from the operation and application of the LRA, and there is nothing in the manner

in which the parties conducted the litigation that warrants a departure from the general principle that each party should bear its own costs.

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

Order

1. The dismissal of the plaintiffs is declared to have been substantively unfair.
2. The defendant is ordered to pay each of the plaintiffs compensation equivalent to six months' remuneration, calculated at the rate applicable at the time of their dismissal.
3. The compensation referred to above must be paid within 15 court days of receipt of this judgment and order
4. There is no order as to costs.

LABOUR
COURT

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiffs: Mr M. Sithole

Instructed by: Gardee Godrich Attorneys

For the Defendant: Mr D.O. Pretorius

c/o Fluxmans Inc.

LABOUR COURT