



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Case no: PA09/25

In the matter between:

EDGRAY DISTRIBUTORS (PTY) LTD

t/a JUMBO CLOTHING

Appellant

and

SOUTH AFRICAN COMMERCIAL CATERING

AND ALLIED WORKERS UNION

First Respondent

EMPLOYEES WHOSE NAMES ARE LISTED

ON ANNEXURE "A"

Second Respondent

Heard: 02 April 2026

Delivered: 14 April 2026

Coram: DJAJE AJA; COLLIS AJA and MOSHOANA AJA

JUDGMENT

MOSHOANA, AJA

Introduction

- [1] One of the primary purposes of the Labour Relations Act¹ (LRA) is to promote effective resolution of labour disputes. Procrastinating resolution of labour disputes is not only inimical to effective resolution of labour disputes but also defeats the constitutional project anticipated in section 23 of the Constitution for the Republic of South Africa, 1996². That said, this is an appeal against the order of the Labour Court delivered on 13 September 2024, in terms of which, the Labour Court dismissed an application to strike out allegations in a statement of case with no order as to costs. The appeal is with the leave of this Court granted on 06 May 2025. The respondents oppose the appeal.
- [2] It bears mentioning at this embryonic stage that the archaic main dispute – the unfair dismissal claim - between the parties pends the decision of the Labour Court in due course. One of the crucial questions to be answered in this appeal is whether the impugned order of the Labour Court of dismissing the interlocutory application to strike out is appealable or not. This being the question sharply raised by the respondents. If this Court finds that the order is not appealable, such may be dispositive of the present appeal.

Background facts pertinent to the present appeal

- [3] On 12 August 2020, the appellant, Edgray Distributors t/a Jumbo Clothing dismissed about 68 of its employees for reasons related to its operational requirements. The South African Commercial Catering and Allied Workers Union (SACCAWU), hereafter the trade union, referred for conciliation a dispute alleging unfairness of the dismissal of its member employees. After conciliation failed to resolve the dispute, the unresolved dismissal dispute was referred to the Labour Court for adjudication.

¹ Act 66 of 1995, as amended.

² See *Shoprite Checkers (Pty) Ltd v CCMA* [2009] ZASCA 24 para 34, wherein it was stated that the philosophical underpinning of the entire scheme of the LRA is easy access to dispute resolution and of its clear intentions is the speedy outcome of disciplinary processes. See also *Billiton Aluminum SA Ltd t/a Hillside Aluminum v Khanyile and others* (2010) 31 ILJ 273 (CC) where the Court was also critical of the systematic delay of resolution of labour disputes.

- [4] The trade union alleged that the dismissal was automatically unfair within the contemplation of section 187(1)(c) of the LRA. Additionally, an order was sought declaring that the dismissal was substantively unfair. In due course, the trade union amended its statement of case. In claim 2, set out in the amended statement of case, it was alleged that the dismissal was, plinthed on several grounds, not for a fair reason. Some of the grounds seeking to support an allegation that the dismissal was not for a fair reason included the following: (a) lack of transparency during the retrenchment process; (b) failure to consult in good faith and non-disclosure of material information for consultation process; (c) refusal to consult in good faith on the issue of severance pay; and (d) failure to consult properly within the contemplation of section 189 of the LRA.
- [5] The trade union specifically sought a declaration that the dismissals are substantively unfair. The primary remedy of reinstatement was sought, as an alternative remedy, compensation was sought. In responding to the case made by the trade union in its amended statement of case, the appellant raised a point *in limine* (preliminary point) and suggested that procedural challenges were impermissibly raised in the amended statement of case. The appellant prayed in the following manner:

‘5. Accordingly, the respondent [appellant before us] prays for an order striking out all procedural issues raised by the applicants [respondents before us] and in particular striking out clause 30.11(C) of the statement of case, with costs. ‘

(Own emphasis)

- [6] In clause 30.11(C), the trade union alleged the following as part of the grounds in support of the allegations of lack of a fair reason for the dismissal:

‘30.11C The respondents failed and/or refused to consult properly as contemplated by section 189 of the LRA and, more particularly, in good faith and by disclosing material and relevant information for the purposes of the consultation process thus resulting in a woefully

inadequate and tainted process thus rendering the applicant employees' dismissals substantively unfair.

(Own emphasis)

- [7] The “striking out” prayer was enrolled for hearing as a preliminary point, in terms of the rules of the Labour Court. After hearing the parties, the Labour Court made the impugned order. Dissatisfied with the impugned order, the present appeal was launched.

Judgment of the Labour Court

- [8] Before dismissing the order prayed for, the Labour Court eruditely stated the following:

‘[8] The defendant provided no authority for its argument that the plaintiffs may not rely on alleged procedural irregularities in alleging that their dismissal for operational reasons was substantively unfair. I could find no reason for not following the judgments of the LAC in which it was found that procedural irregularities during a consultation may be relied upon when allegations of substantive unfairness of dismissals for operational requirements are made. The defendant provided no valid reasons why the principle should not apply to dismissals for operational requirements that are governed by section 189A of the LRA.’

(Own emphasis)

- [9] This Court fully agrees with the sentiments expressed by the Labour Court. This Court in *Woolworths (Pty) Ltd v SACCAWU and others*³ stated the following:

‘[22] The distinction between procedural and substantive fairness lies close together. It is well-known that procedural irregularities may result in substantive unfairness.’

(Own emphasis)

³ (2018) 39 ILJ 222 (LAC) at para 22.

- [10] It is indeed correct that in a case of dismissal for operational requirements, issues of procedure and substance may be inextricably intertwined⁴. There is nothing to prevent a pleader to allege any procedural irregularities – this is known as *facta probantia* (subsidiary facts, evidence to prove the primary material facts), to prove substantive unfairness as *facta probanda* (essential material facts to establish a cause of action or defence). When the statement of case is viewed holistically, the case alleged by the trade union is primarily that of automatically unfair dismissal alternatively a substantively unfair one.
- [11] No claim of procedural unfairness of the dismissal is made by the trade union. What section 189A(18) of the LRA prevents the Labour Court to adjudicate in a section 191 referral instance is the procedural unfairness as a distinct leg of unfairness contemplated in section 188(2) of the LRA. In terms of the current LRA, 1995, there is a clear bifurcation between procedural and substantive unfairness. A procedural unfairness arises if the dismissal is effected without following a fair procedure, whilst a substantive unfairness arises if there is no fair reason for the dismissal. The trade union did not in its pleadings, holistically viewed, bring a procedural unfairness as a distinct and actionable cause of action. It is correct that the Constitutional Court in its judgment of *Regenesys Management (Pty) Ltd v Ilunga and Others*⁵ confirmed that there is no distinction between procedural irregularities and procedural unfairness. However, the trade union is not claiming any relief for procedural unfairness, whether by the name procedural irregularities or not.
- [12] The preliminary point raised by the appellant was directed to a pleading and nothing more. It is a type of challenge that is directed to a pleading, and it is procedural in nature and effect. Thus, the guiding document in dealing with such a challenge is the impugned pleading or the procedural allegations made in it. In action proceedings, a pleading serves to set out the issues to be determined at the trial. It is not expected of a pleader to plead evidence. Thus, at the trial of an action, evidence in support of the pleaded allegations is

⁴ See: *NUMSA obo members and others v Bell Equipment Co SA (Pty) Ltd* (2011) 32 ILJ 382 (LC) and *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).

⁵ [2024] 8 BLLR 777 (CC).

required – *facta probantia*. The issue whether the Labour Court lacks or possesses jurisdiction was not raised by the appellant. All what the appellant raised was the relevance of the allegations to the pleaded cause of action. In considering relevance, it was not required of the Labour Court to determine whether it has the necessary jurisdiction to determine a claim for procedural unfairness. It was not further necessary for the Labour Court to even consider whether the provisions of section 189A(18) could be successfully raised. As it shall be demonstrated later in this judgment, there is no bar for the appellant at the trial of the action to object to any evidence or case seeking to prove the unpleaded case of procedural unfairness. For that reason, it is unnecessary for this Court to resolve the question whether the Constitutional Court in *Regenesys* has or has not overruled *Steenkamp and others v Edcon Limited*⁶. It will be purely academic for this Court to resolve that question.

Appealability of the order

- [13] It is rested law that an appeal lies against the order and not the reasons for the order. The order to be attacked on appeal is that of dismissing the strike out application. Indubitably, the order is interlocutory in nature and effect. Section 166(1) of the LRA specifically provides that an appeal lies against the final judgment and final order of the Labour Court. Accordingly, statutorily, no appeal should lie against an order that is not final in nature and effect⁷.
- [14] The High Court in *Pretoria High School for Girls: School Governing Body v The Gauteng Department of Education and six others*⁸ confirmed that finality contemplated in matters of this nature, is one that is dispositive of any issue or portion of the main action. In the present instance, the non-striking out does not dispose of any portion of the main action – the unfair dismissal claim. Recently the Supreme Court of Appeal (SCA) in *Taljaard and Another v Land*

⁶ (2019) 40 ILJ 1731 (CC). (*Steenkamp II*)

⁷ See: *Pretoria High School for Girls: School Governing Body v The Gauteng Department of Education and six others* [2026] 1 All SA 547 (GP).

⁸ [2026] 1 All SA 547 (GP)

*and Agricultural Development Bank of South Africa and Others*⁹, reverberated the law in the following terms:

[31] Accordingly, the first step in any appeal is to decide appealability.

[43] Upon careful consideration of the relevant circumstances, it is manifest that the order made in the interim application does not satisfy the established criteria for appealability as articulated in the longstanding principles originating from the *Zweni* judgment. Moreover, there is no justification for concluding that the interests of justice necessitate treating the impugned order as one that is appealable. The result is that the second jurisdictional fact necessary for this Court to assume jurisdiction is not present. Consequently, this Court lacks jurisdiction to hear the appeal. In the light of the foregoing, the appeal cannot proceed and must accordingly be struck from the roll.

(Own emphasis)

[15] This Court is in full agreement with the sentiments expressed above. However, this Court shall not opt for the stern approach of striking the appeal from the roll and shall, for the sake of convenience, depart from the assumption that the order is appealable. Unlike the SCA, in terms of section 167(1) of the LRA, the LAC is also a Court of equity. Section 1(d)(iv) of the LRA promotes effective resolution of labour disputes. To my mind, striking the appeal from the roll is not consistent with the effective resolution of labour disputes and most importantly with the interests of justice. In my view though, an appropriate order to make, in a situation where a court lacks jurisdiction, is

⁹ (161/2025) ZASCA 29 (17 March 2026) at paras 31 and 43.

to dismiss a matter for want of jurisdiction¹⁰. Absence of jurisdictional facts or requirements affects the exercise of power, in a sense of lack of authority¹¹.

- [16] Nevertheless, nothing much turns on this point. Where an order is not appealable, to my fervently held view, the appeal court still retains jurisdiction but may refuse to exercise it for reasons that the order it may make will be ineffective and not yield practical results. By entertaining the question of appealability, the Court of appeal would be exercising jurisdiction over the matter as contemplated in section 19 of the Superior Courts Act¹² read with section 168(3)(b)(ii) of the Constitution. Similarly, when a Court strikes the matter off the roll due to lack of urgency, the Court would have exercised its jurisdictional powers. The approach I take on this one is to exercise appeal jurisdiction and dismiss the appeal on its merits.

Analysis

- [17] In seeking to strike out the allegations made in the statement of case; the appellant did not use any specific rule in the Rules Regulating the Conduct of the Proceedings of the Labour Court (old rules). The new Labour Court Rules came into effect on 17 July 2024. At the time when the application to strike out was launched – 06 December 2021 – the Rules had not yet come into effect. However, Rule 23(2) of the Uniform Rules of the High Court was available for adoption by the Labour Court in terms of rule 11 of its old Rules. Rule 23(2) provides as follows:

‘(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period

¹⁰ In *Evans v Oregon Short R.R. Co* [1915] 51 Mont 107, the following was stated: “If a court has no jurisdiction of the subject of an action, a judgment rendered therein does not adjudicate anything. It does not bind the parties, nor can it thereafter be made the foundation of any right. It is a mere nullity without life or vigour. The infirmity appearing on its face, its invalidity can be assailed on appeal or by motion to set it aside in the court which rendered it, or by objection to it when an effort is made to use it as evidence in any other proceedings to establish a right.”

¹¹ See for instance *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme and Others* 2026 (4) BCLR 291 (CC), where the Court found that where there is no exercise of public power, a Court lacks jurisdiction to entertain a review in terms of PAJA as well as a rule 53(1)(b) record request.

¹² Act No 10 of 2013.

allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter...

- (2)(b) The court shall not grant the application unless satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.

(Own emphasis)

[18] For reasons that are not altogether clear, the new Rules having adopted Rule 23(2), word for word omitted to adopt the text in Rule 23(2)(b). This is a *lacuna* which may be an oversight on the part of the drafters of the new Rules. That notwithstanding, any Court dealing with a strike out application is to be guided by the vista shared by the SCA in *Beinash v Wixely*¹³. The vista is that there are two requirements that are to be satisfied before an application to strike out a matter from a pleading or affidavit can succeed. Those requirements are that (a) the matter sought to be struck out must indeed be scandalous, vexatious, or irrelevant; and (b) the Court must be satisfied that if such a matter was not struck out the party seeking a relief will be prejudiced. It has been held that the striking out procedure is not intended to be utilised to make technical objections which merely serve to increase costs and are of no advantage to the litigating parties¹⁴.

[19] Although the Labour Court did not concern itself with the presence of the two requirements to be met for a strike out, its order dismissing the strike out application is correct for the reasons it advanced in its support. Regard being had to the statement of response, it is apparent that the appellant takes a view that the allegations are irrelevant for reasons that their presence leads to the Labour Court lacking jurisdiction in terms of section 189A(18) of the LRA. The appellant is wrong in this regard. As stated before, given the inextricable intertwine between substance and procedure, allegations of procedural unfairness (irregularity) are still relevant to sustain a substantively unfair

¹³ 1997 (3) SA 721 (SCA).

¹⁴ See: *Anderson and Another v Port Elizabeth Municipality* 1954 (2) SA 299 (E).

dismissal claim for reasons related to operational requirements, better still an alleged automatically unfair dismissal claim.

- [20] Taking into account the totality of the allegations and the case put forward by the trade union, it can hardly be said that the appellant will be prejudiced by the allegations not being struck out. For automatically unfair dismissal, the trade union will be required to show credible evidence that shows the possibility that the dismissal was for a proscribed reason¹⁵. For a substantively unfair dismissal, the onus¹⁶ is on the appellant to show that the established dismissal it effected was for a fair reason related to its operational requirements. Therefore, there is no demonstrable or palpable prejudice to be suffered by the appellant if the allegations are not struck out.
- [21] Consequently, the appellant failed to establish the necessary two requirements in order to succeed for a struck-out order. Accordingly, the Labour Court did not err when it dismissed the application. It is clear to this Court that when the statement of case is considered as a whole, seeking to strike out the allegations is nothing but a technical manoeuvre, which increased the costs of litigation unnecessarily and actually delayed the effective resolution of the underlying and unresolved unfair dismissal dispute. In my view, a cost order was warranted at the Labour Court. However, since there is no cross-appeal on the issue of costs, this Court cannot disturb the cost order of the Labour Court.
- [22] Regarding the costs of this appeal, this Court takes a firm view that the dictates of law and fairness¹⁷ are such that the appellant must be mulcted with the costs of this appeal. In the first instance, the order appealed against was interlocutory in nature and thus non-appealable, this despite this Court's departure point stated above. Secondly, it is clear to this Court that the appellant was advancing technical defences, which have no place in labour litigation because they are inimical to the effective resolution of labour

¹⁵ See: *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) per Davis AJA at para 28.

¹⁶ See: Section 192(2) of the LRA.

¹⁷ See: section 179(1) and (2) of the LRA.

disputes. Perplexingly, before us, Mr Kirchmann, appearing for the appellant, submitted that the prayer of striking out was inelegantly pleaded.

[23] This was truly perplexing, owing to the fact that this matter was before us because of that very gauchely pleaded case. In an attempt to obfuscate issues, Mr Kirchmann submitted that the true gripe, ostensibly, the elegant case, was whether a Court may adjudicate procedural unfairness claim at the section 191 of the LRA referral stage. This kind is ordinarily raised as a jurisdictional attack. It was not raised as such before the Labour Court. Therefore, it is patently incorrect to submit before us that the true gripe was in the nature of a jurisdictional attack. The order prayed for was made lucid and clear – strike out the offending paragraphs in the statement of case. Even if that was the elegant case gauchely couched, as it is now submitted to be the case, then, the Labour Court did not squarely deal with such a case and it cannot find its way to the Court of appeal. I emphatically state that such a case did not even obliquely lie at the Labour Court. A striking out of allegations was loudly prayed for and nothing more.

[24] Mr Kirchmann, with considerable regret, wrongly submitted that the Labour Court ordered that it may adjudicate procedural unfairness claim at the trial of the action. No such order was made by the Labour Court. Mr Kirchmann ambivalently and ebulliently crossed path with a clear procedural submission dexterously made by Mr Euijen, appearing for the respondents, that at the trial, where evidence is led seeking to advance a procedural unfairness claim, an objection may be raised. This Court was and still is unable to understand Mr Kirchmann's objection to such an elementary procedural submission. Mr Euijen is pitch-perfectly correct that such an objection may be raised. For two obvious reasons, such an objection, if raised at the trial, is sustainable in law; because; (a) it is not part of the trade union's pleaded case; and (b) section 189A(18) precludes adjudication on such a claim at the section 191 referral stage. It is however wrong for this Court to prejudge the outcome of the objection, if so raised. It remains squarely within the remit of the trial Court.

[25] Mr Kirchmann conceded that the striking out had nothing to do with the main claim of automatically unfair dismissal, yet the entire case was set back five years because of the striking out quest. This, as correctly submitted by Mr Euijen, was a delaying tactic, suggesting that the appellant is litigating in a frivolous and vexatious manner. Forging ahead with an appeal against an interlocutory order was another foray or delaying tactic demonstrating vexatiousness and frivolity. The fact that a leave to appeal was granted is no answer to the non-appealability of an interlocutory order. Had it not been for this patently vexatious and frivolous appeal, the main dispute could have long been disposed of by now. As a sign of displeasure for all the above conducts displayed by the appellant and its legal team, this Court is minded to making an order of costs, which costs include the costs of employing two counsel, against the appellant.

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

Order

1. The appeal is dismissed with costs, which include the costs of employing two counsel. The costs of the senior counsel are to be taxed or settled at scale C and those of a junior counsel at scale B.

G. N. Moshwana

Acting Judge of the Labour Appeal Court of South Africa

Djaje AJA and Collis AJA concurring.

APPEARANCES:

For the Appellant : Mr MC Kirchmann

Instructed by: Kirchmanns Inc, East London.

For the Respondents : Mr TMG Euijen SC and Mr L Voultzos

Instructed by: Wesley Pretorius and
Associates Inc, East London.

LABOUR APPEAL COURT