



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE Number: JS 447 / 20

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| (1) | REPORTABLE: YES /NO |
| (2) | OF INTEREST TO OTHER JUDGES:
YES /NO |
| (3) | REVISED: YES/ NO |

22 April 2026

In the matter between:

MMBENGENI RONALD MUTAVHATSINDI

Applicant

and

PRESTIGE PRESSINGS AND COMPONENTS (PTY) LTD

Respondent

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 22 April 2026

Summary: Settlement – employer contending dispute settled – terms of retrenchment agreement considered – no provision in agreement to settle unfair dismissal dispute – intention of agreement never to settle dispute – employee’s claim not compromised – settlement point refused

Dismissal – Operational requirements – selection of employee for retrenchment – selection of employee agreed to in retrenchment agreement with union – employee bound by agreement – dismissal substantively fair

Dismissal – operational requirements – procedural fairness – s 189A of LRA applies to process – unfair dismissal dispute referred to Court in terms of s 191(5)(b)(ii) of LRA – no section 189A(13) application brought – Court having no jurisdiction to decide procedural fairness

Operational requirements – retrenchment agreement with union – employee contends agreement concluded without his knowledge / mandate – s 200 of LRA considered – employee bound by agreement concluded with union

Operational requirements – duty to consult – employer not obliged to consult with employee individually where employee member of union

Dismissal – operational requirements – dismissal substantively fair – no jurisdiction to decide procedural fairness – claim dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an unfair dismissal dispute arising from the dismissal of the applicant by the respondent for operational requirements. The applicant contended that his dismissal by the respondent was both substantively and procedurally unfair. He brought his unfair dismissal case to this Court in terms of section 191(5)(b)(ii) of the Labour Relations Act ('LRA')¹, by way of a statement of claim filed on 12 August 2020. The applicant ultimately did not seek reinstatement, and prayed for maximum compensation as consequential relief.

[2] The respondent opposed the matter. The respondent also raised an issue *in limine*, to the effect that the unfair dismissal dispute had been fully and finally settled by way of a retrenchment agreement signed on 24 June 2020 by the applicant's trade union, UASA. On the merits, the respondent contended that it had a proper operational rationale to dismiss the applicant, there were no alternatives available, the applicant had been selected for retrenchment by

¹ Act 66 of 1995 (as amended).

agreement, and the applicant was only dismissed following a proper consultation process as contemplated by section 189 of the LRA. The respondent sought relief that the matter be dismissed.

- [3] The matter came before me on trial on 27 November 2025, and at the conclusion of the hearing I reserved judgment. I will now set out the relevant background facts as the departure point in deciding this matter.

The relevant background

- [4] Fortunately, in this matter, the bulk of the important facts turned out to be either undisputed or common cause. In particular, and despite disputing this in the pre-trial minute, the applicant conceded that he was at all relevant times a member of the trade union, UASA. It was also undisputed that section 189A applied to the retrenchment proceedings in this case.
- [5] One important issue however did remain in dispute. According to the applicant, and when he attended at the premises of the respondent on 4 June 2020, he found 15 casual employees still working there. Vuyo Skaal (Skaal), the respondent's HR manager and the witness for the respondent, testified that this allegation was false and there were no casuals working at the respondent as alleged. Skaal explained that all that happened on 4 June 2020 was that the applicant came to the premises to collect his certificate of service, which was given to him.
- [6] Insofar as I must decide which version to prefer, I have little hesitation in accepting the evidence of Skaal. Where it came to the applicant giving evidence, he was evasive and argumentative when answering questions. He also contradicted himself in material respects. Despite his admission at the start of the hearing that he was a UASA member, he later under cross-examination denied he was a UASA member and contended he resigned as a member before the retrenchment process started, an issue never raised before.² He disputed that there were any meetings he was aware of, but then

² It may be mentioned that the evidence showed that UASA membership deductions for the applicant were still being made from the applicant's salary until June 2020.

conceded he knew of a meeting on 3 June 2020 which he attended.³ He even said that he did not know why he was dismissed, when it was common cause he was retrenched due to the operational requirements of the respondent. In *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*⁴ the Court held that a witness that was argumentative and constantly asked for questions to be repeated was not credible. In *Ngozo and Others v Scorpion Legal Protection*⁵ the Court equally had regard to a witness being argumentative, but then also considered the fact that the witness was evasive in answering a number of critical questions, in rejecting the testimony of the witness. The conduct of the applicant is comparable to the following *dictum* from the judgment in *Hlongwane v Cisco Systems SA and Another*⁶ where the Court reasoned as follows in preferring the evidence of the respondent over the applicant in that case:

‘The applicant was, with due respect to him, a profoundly poor witness to say the least. It would appear he came into the witness stand having considered and strategized as to what his testimony was going to be irrespective of what questions would be put to him. His strategy seems to have been that the truth was only that which favoured his case and that he would not change his stand irrespective of questions or versions put to him. His strategic approach was to deal with difficult questions or those whose underlying purpose was to seek to undermine his case by bringing in some points unrelated to the questions. He was indeed a man loyal to his strategy but at times seems to have failed to understand the difference between strategy and tactics. He is a man not to be trusted with the truth and thus anything in his version that purports to be the truth has to be evaluated against all probabilities before it can be accepted as such. As I listened and observed his mannerisms in the witness stand, I wondered whether he seriously believed in his own story. ...’

[7] I wish to make a final reference to *Simelane and Others v Letamo Estate*⁷ where the Court in that matter was seized with an unfair retrenchment dispute

³ It is significant that this was the meeting where it was explained directly to employees how the TERS process (as an alternative) worked.

⁴ (2010) 31 ILJ 2383 (LC) at para 27.

⁵ (2008) 29 ILJ 1039 (LC) at para 48.

⁶ (2011) 32 ILJ 625 (LC) at paras 43 – 44.

⁷ (2007) 28 ILJ 2053 (LC).

and also dealt with an applicant that behaved very much in the same manner as the applicant now before me.⁸ The Court held:⁹

‘All in all, his testimony was not satisfactory and the court finds no basis upon which it can rely on such evidence. The court prefers the version of the respondent's witnesses above that of his on issues that he sought to contradict their testimony. ...’

- [8] Therefore, and when I am required have regard to disputed evidence when I decide this matter, I will only have accept the applicant's testimony that is either corroborated by or consistent with the testimony of Skaal, and what is contained in the pre-trial minute. The factual matrix summarized below is arrived at on this basis.
- [9] The business of the respondent is that of the manufacturer of aluminium components. According to the respondent, the business was suffering financial difficulties. As a result, and in order to remain competitive in a scenario where it was experiencing diminished sales, the respondent had to reduce its product prices which further compounded financial losses. In an attempt to reduce costs, some production functions had been outsourced, but this did not yield the needed result. The financial statements of the respondent, which formed part of the documentary evidence, showed an operating loss of R2 849 403.00 for the financial year ending 31 December 2019.
- [10] The restructuring process in the respondent commenced on 5 February 2020, when the respondent issued all the employees and the trade unions with membership in the respondent, with notices as contemplated by section 189(3) of the LRA. In particular, this notice was transmitted to UASA and NUMSA. The respondent at the time employed 96 employees. It was reflected in the section 189(3) notice that 33 employees had been dismissed in the preceding 12 months for operational requirements and it was contemplated that a total of 19 employees would be affected by the current restructuring. This number of affected employees however only related to one section in the respondent, and when the process started, the real number of employees

⁸ See the discussion by the Court of the applicant's evidence in that case at paras 15 – 20 of the judgment.

⁹ Id at para 21.

affected in the whole business was established to be 69 employees. In response to receiving the notice, UASA applied on 19 February 2020 in terms of section 189A(3)(b) that the retrenchment consultations be conducted by way a CCMA facilitated process.

- [11] The CCMA convened a facilitated retrenchment consultation process, under case number GAEK 2081-20. Senior commissioner Mpumelelo Nconco was appointed as facilitator. In the end, several facilitated consultations were held at the premises of the respondent, facilitated by commissioner Nconco, during the period March to June 2020. UASA fully participated in these consultations. The consultations were held on 2 and 19 March 2020, 29 May 2020, and 3, 18 and 24 June 2020. The consultations were also attended by NUMSA and elected non-unionised employee representatives. The final consultation was held on 24 June 2020. Further, and during the course of the consultations, but outside the facilitated forum, the parties continued to consult with each other on the issue of employees that wanted to accept a voluntary retrenchment package and so reduce the number of forced retrenchments.
- [12] In the last consultation on 24 June 2020, all the parties to the retrenchment process signed a memorandum of agreement, finally determining the retrenchment process (the agreement). UASA in particular also signed the agreement. In this agreement, it was accepted that there was a proper rationale for retrenchment. It was also agreed that selection for retrenchment was done on the basis of LIFO and skills retention, in that order. As to alternatives, the agreement recorded short time and the TERS training layoff as the only possible viable alternatives. The agreement further dealt with and determined all the other consultation topics in terms of section 189 of the LRA. The unions ultimately rejected the option of short time, and none of the employees opted for the TERS training layoff.
- [13] In the context of what was agreed to on the substance of the retrenchment consultation topics, and in the agreement, the parties specifically identified a list 43 employees that would be selected for retrenchment. These employees were identified by name in the agreement. It was also recorded that 11 employees, also identified by name in the agreement, had accepted voluntary retrenchment packages.

- [14] The agreement contained a section headed '*Parties have been unable to agree*'. This section contained a list of 15 names of employees, one of which was the applicant. The agreement recorded as follows where it came to what the parties had failed to agree on where it came to these 15 listed employees: '*Position of the following 15 employees. As it stands the respondent has paid to them their severance package. A dispute has arisen between the parties in respect of the timing in respect of the payment and retrenchments. The parties reserve their rights in respect of the 15*'.
- [15] According to Skaal, the 43 employees identified without reservation of rights, the 11 employees that accepted voluntary retrenchment packages, and the 15 employees in respect of whom rights were reserved as agreed, made up the total of 69 employees affected by the restructuring, and whose employment was ultimately terminated as a result of the restructuring. Skaal testified that in terms of the agreement, the applicant had been selected for retrenchment by agreement with UASA, as his representative trade union.
- [16] The agreement contemplated the retrenchments (termination of employment) would be effective at the end of May 2020. The agreement recorded that all termination payments, including severance pay of two weeks' salary for each completed year of service, had been paid to the employees already on 12 June 2020. It is in this context that the parties could not achieve consensus on the timing of the retrenchments, and the payment of severance pay, in respect of the 15 employees listed in the agreement. It appears the remaining issue in dispute was that the actual retrenchment of the 15 employees was premature.
- [17] As to the applicant himself, his employment was indeed terminated by way of a notice of retrenchment on 29 May 2020. He was also paid his severance package and final termination pay on 12 June 2020, and was given his certificate of service on 4 June 2020. The applicant was not assisted by UASA in pursuing his dismissal further as an unfair dismissal dispute. He referred an unfair dismissal dispute himself to the Metal and Engineering Industries Bargaining Council (MEIBC) on 12 June 2020. The dispute was unsuccessfully conciliated by the MEIBC on 8 July 2020, a certificate of failure to settle was issued on that date, and the dispute was then referred to this Court on 12 August 2020.

[18] The applicant was assisted by the SASLAW Pro Bono offices in conducting a pre-trial with the respondent, which pre-trial was held on 14 October 2020. A minute was prepared on the same date and signed by both parties. In the minute, four essential facts in dispute were identified. This was whether the applicant had been dismissed for operational requirement (this turned out later not to be disputed), whether the respondent held any consultation meetings with the applicant, whether the applicant was a member of UASA which represented him in the consultation process (which also turned out not to be disputed), and whether the applicant accepted the retrenchment. Under issues for the Court to decide, it is recorded that two main issues need to be decided, namely whether the applicant accepted the retrenchment, and whether his retrenchment was substantively and procedurally fair.

Was the dispute settled

[19] When the matter commenced on trial, Skaal, who was also representing the respondent in the trial, indicated that he wished to raise a point *in limine* to the effect that the unfair dismissal dispute of the applicant had been fully and finally settled between the respondent and UASA by way of the agreement, to which the applicant was bound. It appears that this is what was meant by the respondent when recording in the pre-trial minute that it needed to be decided whether the applicant had accepted the retrenchment.

[20] The aforesaid contention by the respondent can in my view be disposed of with relative ease. The answer lies in a proper interpretation of the agreement. The principles relating to the interpretation of agreements are by now trite. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁰ the Court decided as follows:

‘... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be

¹⁰ 2012 (4) SA 593 (SCA) at para 18.

given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[21] The approach established in *Endumeni supra* has been consistently applied since¹¹, including by the Labour Appeal Court.¹² As held in *University of Johannesburg v Auckland Park Theological Seminary and Another*¹³:

'The approach in *Endumeni* 'updated' the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract

[22] In my view, when applying the principles as aforesaid, it is clear that the agreement does not intend, nor does it serve, to fully and finally settle any

¹¹ See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12; *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) at para 21 and all the authorities cited there; *Nel v De Beer and Another* 2023 (2) SA 170 (SCA) at paras 22 – 23; *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*. 2022 (1) SA 100 (SCA) at paras 50 – 51.

¹² See for example the recent case of *Sugar Berry CC t/a Horison Staff Solutions v Motor Industry Bargaining Council and Others* (2026) 47 ILJ 188 (LAC) at para 13.

¹³ 2021 (6) SA 1 (CC) at para 66.

unfair dismissal dispute between the applicant and the respondent. This is apparent from the wording of the agreement, the nature of the agreement and the context in which it was concluded. It is clear that the agreement was concluded in the context of a facilitated consultation process under section 189A and then, pursuant to such process, serves to record the terms of the consensus achieved by the parties pursuant to such process which ended on 24 June 2020 with the conclusion of the agreement. In short, the agreement never sought to settle any dispute relating to the dismissal of employees for operational requirements. It sought to record the terms of the consensus achieved where it came to the retrenchment topics to be consulted upon in terms of section 189 of the LRA. And at the time of it being concluded, there was simply no contemplated or envisaged unfair dismissal dispute(s) between any of the parties that would be compromised by way of a settlement recorded in the agreement. In *South African Football Association v Fli-Afrika Travel (Pty) Limited*¹⁴ the Court held as follows:

‘I have sketched, in some detail, the background to and context in which the settlement agreement came to be concluded. That background and context is important for purposes of interpreting the agreement and determining its scope and purpose. ...’

- [23] The wording of the agreement in itself works against the notion that it sought to settle any unfair dismissal dispute. The agreement records, as set out earlier, that a list of 15 employees still disputed aspects of their retrenchment, being the timing of the retrenchment and severance packages. The rights of these 15 employees were reserved. This included the applicant. Further, nothing is said about any party to the agreement not being entitled to pursue an unfair dismissal dispute, which would be expected, especially where trade unions are involved. A comparable illustration of the point can be found in *Masinga v Almar Investments (Pty) Ltd*¹⁵ where it was held as follows in the Court finding that there was no settlement:

‘The applicant stated expressly that an amount of R550,000 ‘will be accepted provided you apply for tax (sic) directive and see how much is due and payable after deductions’. Nothing in this statement evidences the final

¹⁴ 2020 JDR 0306 (SCA) at para 45.

¹⁵ (2025) 46 ILJ 379 (LC) at paras 18 – 19.

conclusion of an agreement; it was dependent on determining what amount the applicant would receive after tax had been deducted. This is consistent with Advocate Serogole's statement in the email above that he would 'still have to see after the tax directive, how much is payable to our client'.

The applicant was clear in his view, namely that he would consider a settlement of R550,000 which was dependent on understanding what he would have to pay in tax. This, in the view of the court, is not an unequivocal acceptance of an offer previously made or an unequivocal offer made in response thereto. ...'

- [24] In any event, I believe that where it comes to compromising an employee's right to pursue an unfair dismissal dispute to this Court, it is not something that would be lightly inferred. It is my view that any agreement concluded between an employee and an employer that seeks to compromise this right must specifically say so. It must contain a reference, for example, that any dispute between the employer and the employee with regard to the termination of the employee's employment with the employer is fully and finally settled.¹⁶ As said in *Fli-Afrika Travel supra*¹⁷:

'As important, however, are the words used by the parties. The agreement described itself as an agreement in full and final settlement. ...'

- [25] In sum, the agreement does not serve to establish that the applicant accepted his retrenchment. Certainly, the agreement does not settle the unfair dismissal dispute he could pursue against the respondent. The purpose of the agreement was only to record the consensus that had been achieved where it came to the topics to be dealt with in the retrenchment consultations. Of importance *in casu*, it recorded who had been selected for retrenchment, thus applying what can be said to be agreed retrenchment criteria, and this indeed included the applicant. But there is nothing to indicate that an individual employee so selected for retrenchment, such as the applicant, would be deprived of the right to still pursue an unfair dismissal dispute in terms of the LRA. Whilst the applicant being an agreed candidate selected for retrenchment would be a formidable obstacle for the applicant to overcome

¹⁶ Compare *Fleet Africa (Pty) Ltd v Nijs* (2017) 38 ILJ 1059 (LAC) at paras 28 and 32; *Buthelezi v Liberty Group Ltd* (2012) 33 ILJ 607 (LC) at para 9.

¹⁷ Id at para 46.

when challenging the substantive fairness of his dismissal, it cannot mean that his right to pursue that dispute had been compromised. I am thus not convinced that the respondent's contention that the applicant has accepted his retrenchment and / or that the applicant's unfair dismissal dispute has been settled, has any substance. This contention raised by the respondent is thus rejected, and I will now turn to deciding whether the applicant's dismissal was substantively fair.

Was the dismissal substantively fair?

[26] In deciding whether a dismissal is substantively fair, the Court must decide whether in general there was a proper rationale for the retrenchment, and if so, whether the retrenchment of the particular employee concerned was fair. This is often referred to as the general question and the specific question. As said in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*¹⁸:

'Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place.'

[27] *In casu*, the rationale / reason for retrenchment was not really in dispute. In his statement of claim, the pleaded case of the applicant was that he was not consulted by the respondent at all, that the selection criteria was not transparent, and the retrenchment procedure was '*not fair and just*'. And in the pre-trial minute, the applicant records that the reason why he disputes the rationale for retrenchment is because when he went to the respondent's premises on 4 June 2020, he found 15 casuals working here, which in my view really alludes to an issue of selection. It thus appears that the applicant himself

¹⁸ (2006) 27 ILJ 292 (LAC) at para 55.

did not really challenge the rationale for retrenchment. In any event, and in the agreement, UASA agreed that there was a proper rationale for retrenchment. The general question must therefore be answered in favour of the respondent.

- [28] I believe that deciding substantive fairness in this case turns on answering the specific question, meaning the selection of the applicant for retrenchment. It is clear that the applicant is dissatisfied with being selected for retrenchment. He in essence raised two causes of complaint in this respect. The first is that objective selection criteria was not applied to him. The second is that he was not consulted in any way about being selected for retrenchment, and was simply informed of his retrenchment.
- [29] Dealing first with the issue of the applicant's contention of finding 15 casuals employed at the respondent when he attended at the premises of the respondent on 4 June 2020, which he did raise in the pre-trial minute, this was pertinently disputed by Skaal for the respondent, who testified that no such casuals were employed or could be found at the respondent's premises on 4 June 2020. For the reasons dealt with earlier in this judgment, the evidence by Skaal is to be preferred over that of the applicant. I also consider that the applicant failed to provide any particularity in this regard, other than bald statement. And considering what actually happened in the course of the retrenchment process, I find it unlikely that consensus could ever have been achieved between the parties on selecting employees for retrenchment if there were casuals still employed at the respondent. I thus reject this part of the applicant's case.
- [30] I will deal with the issue of the applicant's assertion that no objective selection criteria was applied. The difficulty that faces the applicant where it comes to this part of his case is that the LRA specifically provides for agreed selection criteria in section 189(7), which reads: *'The employer must select the employees to be dismissed according to selection criteria – (a) that have been agreed to by the consulting parties; or (b) if no criteria have been agreed, criteria that are fair and objective'*. Therefore, fair and objective criteria is only

required to be applied if there is no agreed criteria. The Court in *Gijima AST (Pty) Ltd v Hopley*¹⁹ held as follows in this respect:

‘It would not make sense to declare a selection criterion agreed to by the parties unfair only because it was agreed to and that it does not comply with the requirement of being fair and objective as stipulated in s 189A. If the consulting parties are precluded from agreeing on selection criteria it would mean that it shall be in the prerogative of the employer in all mass dismissals under s 189A to decide on selection criteria and his or her selection would be insulated if it is found to be fair and objective. That in my view cannot be the object of the Act which seeks to encourage, inter alia, consultation, fairness, participatory engagement and openness. The same test that applies in assessing the fairness or otherwise of a retrenchment under s 189 should not be different from the retrenchments under s 189A except in terms of the additional obligations imposed by s 189A. In my view, the court a quo erred insofar as it may have found that s 189A should be interpreted to limit the method for selection to criteria that are fair and objective only.’

[31] *In casu*, the agreement establishes what can be said to be agreed selection criteria. The employees that fell to be retrenched was identified and listed in the agreement in terms of these agreed selection criteria. This establishes, as held in *Hopley supra*²⁰: ‘*Having found that nothing prevented the parties from agreeing to selection criteria as they did in this case what needs to be determined is whether the agreed selection criteria were applied ...*’, the application of the agreed criteria on a consensus basis. The applicant was one of the employees so identified for retrenchment in terms of the agreed criteria. The applicant was a member of UASA, and as such, would be bound by the terms of the agreement. It follows that the applicant was selected for retrenchment by agreement pursuant to agreed selection criteria.

[32] The next complaint to be considered would be the issue of the applicant not being consulted by the respondent at all. This is of course true, as it is

¹⁹ (2014) 35 ILJ 2115 (LAC) at para 35. In *Latex Surgical Products (supra)* at para 85, the Court held that agreed selection criteria may even be subjective, reasoning as follows: ‘... *An employer and a union are free to agree upon selection criteria that are or may be subjective. When the agreed selection criteria are subjective, the employer does not act unfairly in using such selection criteria to select the employees to be dismissed. Indeed, he may be acting unfairly if he departed from the agreed selection criteria simply because they are or may be subjective or may include a certain element of subjectivity ...*’.

²⁰ *Id* at para 36.

undeniable that the applicant himself was never consulted by the respondent. The applicant, personally, was not party to any of the consultations held under the auspices of the CCMA. He was also not personally invited to any of the consultations, and as indicated in the pre-trial minute, he was not aware of any of them. But he was not able to dispute that these consultations were held and that UASA was a party to and participant in the consultations. Where it comes to this cause of complaint raised by the applicant, it is yet again his membership of UASA that completely scuppers his case in this regard. Because the applicant is a member of UASA, which is a registered trade union recognised in the respondent, there is simply no duty or obligation on the respondent to also consult with the applicant personally or individually. It only needs to consult with UASA on his behalf.

- [33] The reality that the respondent was only required to consult with UASA and not also with the applicant individually, is made clear by way of the following *dictum* in *Baloyi v M & P Manufacturing*²¹:

‘In keeping with a premise of the Act, s 189(1) envisages that the collectivities of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented. To interpret the section so as to allow an employee represented by a union to engage in a parallel process of consultation would undermine the very purpose of the section. ...’

Further, in *Mbombo and Others v Rennies Bulk Terminals*²² the Court said:

‘The respondent was obviously not obliged to consult with the applicants directly. That is because they were members of the union and in terms of s 189(1) of the LRA, the respondent was obliged to consult with the union only ...’

And recently, the LAC in *Tsogo Sun Casinos (Pty) Ltd t/a Emnotweni Casino v SA Commercial Catering and Allied Workers Union on behalf of Mavuso and Others*²³ decided:

²¹ (2001) 22 ILJ 391 (LAC) at para 23.

²² (2002) 23 ILJ 1587 (LC) at para 15.

²³ (2026) 47 ILJ 947 (LAC) at para 49.

'On consultations during retrenchment processes, s 189(1) establishes a strict hierarchy of parties to be consulted with in the event of contemplated retrenchment. Where no collective agreement is in place, and no workplace forum exists, the Act requires an employer, in terms of s 189(1)(c), to consult with any registered trade union whose members are likely to be affected by the proposed retrenchments and where there is no such trade union, only then can an employer consult directly with the employees likely to be affected or their representatives. Thus, it is not open to an employer to circumvent this hierarchy when consulting on possible retrenchments.'

[34] The applicant, upon being confronted with the reality that he was member of UASA and that the respondent is only obliged to consult with UASA on his behalf, sought to escape the consequences of this by contending that he was dissatisfied with UASA because UASA never briefed him on the restructuring and consultations and never obtained his mandate. He even suggests that UASA mislead him about what was happening, and the first he knew of anything was when he received a retrenchment notice. There is once again a simple answer to this cause of complaint, which I will deal with next.

[35] When a trade union represents or acts on behalf of its members under the LRA, it does not do so as an agent. It does so in its own name and in place and instead of its members in order to protect their interests.²⁴ As such, agreements concluded between a trade union and an employer cannot be contradicted or assailed based on a case that the members of the trade union did not mandate or approve the agreement. If a trade union, acting in its own name and representing it is doing so on behalf of its members, fails to obtain a proper mandate for its conduct from its members, that is a matter between the trade union and its members and does not concern the employer. This flows from section 200(1) of the LRA, which reads:

'A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party —

²⁴ In *Blyvooruitzicht Gold Mining Co Ltd v Pretorius* [2000] 7 BLLR 751 (LAC) at para 12, the Court said: '... There is no merit in the point that the union representative who conducted the discussion on behalf of UASA had not been mandated by the respondent. When a trade union conducts negotiations of this kind, it represents the interests of employees. It acts as their spokesperson. It does not act as the agent of any one of them ...'.

- (a) in its own interest;
- (b) on behalf of any of its members;
- (c) in the interest of any of its members.'

[36] In *Fakude and Others v Kwikot (Pty) Ltd*²⁵ the Court pertinently dealt with the basis upon which a trade union acts, with specific reference to section 200 of the LRA, and held as follows:

'... a trade union is entitled to take any decision on behalf of either the majority or the minority of its members without necessarily having to obtain the members' consent, even if such a decision is to adversely affect those members. In other words, members affected by a decision taken by a union without their consent are bound by such a decision and are unable as a matter of principle to withdraw from such an agreement. Any decision taken by a trade union either detrimental or beneficial to some of its members cannot be said to be unconstitutional because the trade union would have derived the power to act in that particular manner in terms of the provisions of s 200 of the LRA which in turn has its basis in terms of s 23 of the Constitution.'

[37] Next, in *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others*²⁶ the Court pertinently decided:

'In my view, the court a quo correctly held in respect of this point that SALGA could bind its members by entering into the settlement agreement even though individual members, including the second appellant and the intervening party, did not give it a specific mandate to do so.

It is well established that an employers' organisation, like a trade union, does not act as an agent of its individual members but represents the body of its members. It acts in the place of its members, representing their interests and it decides how best to do so ...'

And lastly, the position was made quite clear in *Mhlongo and Others v Food and Allied Workers Union and Another*²⁷ where the Court had the following to say:

²⁵ (2013) 34 ILJ 2024 (LC) at para 29.

²⁶ (2017) 38 ILJ 2695 (LAC) at paras 60 – 61.

²⁷ 2007) 28 ILJ 397 (LC) at para 14. See also *SA Post Office Ltd v Communication Workers Union and Others* (2010) 31 ILJ 997 (LC) at para 23.

'The union was not an agent of the applicants as one would terminate the authority of an attorney. The union representation is based on the principle of majoritarianism. The employer negotiates with the majority union. If employees are members of the union, the employer is not required to negotiate with individual employees in addition to negotiating with the union. The applicants now want the company to deal directly with them whilst they remain members of the union. The employer is entitled to refuse to deal with them directly.'

- [38] Two specific authorities decided in the context of an agreement between a trade union and an employer in the case of an operational requirements consultation process bear specific mention. First, and in *Mbombo and Others v Rennies Bulk Terminals*²⁸ the Court held as follows, having decided on the facts (similar to what the applicant is complaining of *in casu*) that the union never informed its members about the selection criteria to be utilized:

'The respondent was obviously not obliged to consult with the applicants directly. That is because they were members of the union and in terms of s 189(1) of the LRA, the respondent was obliged to consult with the union only ...'

Secondly, and in a case also involving UASA, the Court in *National Union of Mineworkers and Others v Geffens Diamond Cutting Works (Pty) Ltd*²⁹ said:

'The fact is that an agreement was reached between UASA and the respondent with regard to the substantive and procedural aspects of the retrenchment in question and should there have been any defects, surely UASA should then declare a dispute and not the applicants as represented by the first respondent. Further it is submitted that, should there be any irregularity that took place detrimental to the individual applicants' interest, then the only recourse in this regard would be against UASA. The applicants' relationship with UASA has nothing to do with the respondent. ...'

Whether the respondent had a legal duty to consult with NUM or individual applicants individually was another issue in dispute between the parties. There is simply no basis in law why the respondent should consult NUM as a

²⁸ (2002) 23 ILJ 1587 (LC) at para 15.

²⁹ (2008) 29 ILJ 1227 (LC) at paras 41 and 43.

minority union or with the individual applicants individually despite the individual applicants being members of UASA and the latter being the majority union at the time. ...'

[39] It follows that the applicant's complaint about not been individually consulted by the respondent and that UASA acted without his knowledge or mandate, does not substantiate his case of substantive unfairness. In summary, selection criteria had been agreed to with UASA, which is a registered trade union of which the applicant was at all relevant times a member. The applicant was selected for retrenchment by agreement in terms of these criteria. Even if it is accepted that UASA acted without the knowledge or mandate of the applicant in agreeing to him being selected for retrenchment, that simply does not matter, and he remains bound to what UASA had agreed to. His complaint in this respect is a matter between himself, and UASA, and does not concern the respondent. Ultimately, the specific question must also be answered in favour of the respondent, and the selection of the applicant for retrenchment was fair.

[40] Therefore, considering the respondent has succeeded in answering both the general and specific questions in its favour, as I have found to be the case above, it must follow that the dismissal of the applicant by the respondent was substantively fair.

Was the dismissal procedurally fair?

[41] Where it comes to the applicant's complaint relating to procedural fairness, there is a simple answer, founded on the undisputed fact that section 189A applies in this case. Once section 189A applies, this has an important consequence where it comes to the issue of this Court determining the fairness of any dismissals emanating from this section. This consequence is that substantive and procedural fairness are separated. In the case of substantive fairness, this is dealt with in the ordinary course by way of an unfair dismissal dispute referred to this Court in terms of section 191(5)(b)(ii) as read with section 191(11)(a) of the LRA.³⁰ But where it comes to procedural fairness, and should there be any issue or dispute about whether the restructuring / retrenchment process is being dealt with by the employer in a

³⁰ See sections 189A(7)(b)(ii) and 189A(8)(b)(ii)(bb).

procedurally fair manner, this must be pro-actively pursued to this Court by way of an application in terms of section 189A(13) of the LRA.³¹ The idea is to have expeditious and pro-active judicial intervention to ensure compliance with a fair process, and so avoid an *ex post facto* autopsy on a point by point basis of the retrenchment exercise, long after the fact, to decide whether it was procedurally fair,³² and if found to be unfair, awarding some compensation as a result, instead of remedying what was wrong to possibly avoid dismissal.³³ The point is that the Court in a section 189A(13) application, acting pro-actively, can reverse or stop any unfair process to ensure that it is done properly, and even reinstate dismissed employees to ensure that they are consulted properly.

- [42] Because of this separation of processes relating to determining substantive and procedural fairness where it comes to dismissals under section 189A of the LRA, the Labour Court is deprived of jurisdiction to entertain a dispute concerning the procedural fairness of a dismissal, where the unfair dismissal dispute is brought before the Court in terms of section 191(5)(b)(ii) as read with section 191(11) of the LRA. The Court can only consider substantive fairness. This is evident from Section 189A (18), which provides: '*The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).*' The Constitutional Court in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*³⁴ said the following where it comes to section 189A(18):

'... only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the

³¹ The section reads: '*If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order- (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate*'.

³² See *Forbes and Others v SA Municipal Workers Union* (2014) 35 ILJ 687 (LC) at para 20; *SA Society of Bank Officials v Standard Bank of SA* (2011) 32 ILJ 1236 (LC) para 29; *Insurance and Banking Staff Association and Another v Old Mutual Services and Technology Administration and Another* (2006) 27 ILJ 1026 (LC) at para 9; *National Union of Metalworkers of SA v General Motors of SA (Pty) Ltd* (2004) 25 ILJ 2358 (LC) at paras 34 and 35.

³³ Ordinarily, only compensation can be awarded for a procedurally unfair dismissal – see section 193(2)(d). But section 189A(13) changes this..

³⁴ (2016) 37 ILJ 564 (CC) at para 158.

procedural fairness of a dismissal for operational requirements referred to it in terms of s 191(5)(b)(ii). ... Subsection (18) may seem very drastic and harsh on employees who may be having a dispute with their employer concerning the procedural fairness of their dismissal. However, it will be seen that, when read with subsection (13), it is not harsh at all. Subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure.'

[43] Recently, the Constitutional Court in *Regenesys Management (Pty) Ltd v Ilunga and Others*³⁵ dealt with this issue again, and decided:

'By virtue of ss 18, the Labour Court has no jurisdiction to adjudicate in terms of s 191(5)(b)(ii) a dispute about the procedural fairness of a dismissal for operational requirements to which s 189A applies, because the LRA provides a special procedure and special remedies in ss 13 for such disputes. In other words, such disputes cannot competently be referred to the Labour Court in terms of s 191(5)(b)(ii) for adjudication because the LRA has a special procedure and special remedies for such disputes in ss 13 in terms of which they can be adjudicated by the Labour Court.'

[44] *In casu*, the applicant's unfair dismissal dispute was referred to this Court in terms of section 191(5)(b)(ii) of the LRA, and as such, the applicant simply cannot challenge the procedural fairness of his dismissal in these proceedings, by virtue of the application of section 189A(18) of the LRA. The applicant never brought any application in terms of section 189A(13) to challenge procedural fairness. As such, the applicant's procedural fairness challenge must fail, for the simple reason that this Court has no jurisdiction to decide it.

Conclusion

[45] In conclusion, the applicant's dismissal by the respondent for operational requirements must be held to be substantively fair. Where it comes to procedural fairness, the Labour Court has no jurisdiction to consider the procedural fairness of the applicant's dismissal by virtue of the application of section 189A. The applicant's claim thus falls to be dismissed.

³⁵ 2024 (5) SA 593 (CC) at para 146(b).

Costs

[46] Both parties were unrepresented. As such, the issue of costs does not arise. In any event, and exercising the wide discretion I have in terms of section 162(1) of the LRA, I would consider it fair and appropriate that no order be made as to costs in this instance.

[47] For all of the reasons as set out above, I make the following order:

Order

1. The applicant's dismissal by the respondent is substantively fair.
2. The 'Labour Court has no jurisdiction to entertain the applicant's claim relating to procedural unfairness.
3. The applicant's claim is consequently dismissed.
4. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: Mr Vuyo Skaal – HR Manager