(1) Reportable: NO
(2) Of interest to other Judges: Yes

Signature Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: 2026 - 0742667

In the matter between:

SASBO THE FINANCE UNION,
obo MEMBERS **APPLICANTS**

and

ACCESS BANK (SOUTH AFRICA) LIMITED **RESPONDENT**

And

Case No: 2026-074757

In the matter between:

CHAMAKE KAU & 20 OTHERS **APPLICANTS**

and

ACCESS BANK (SOUTHERN AFRICA) LIMITED **RESPONDENT**

Heard: **15 April 2026 (*via* Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 9 May 2026**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] Before the Court are two urgent applications brought separately in terms of section 189A(13) read with section 189A(17) of the Labour Relations Act (LRA)[1]. SASBO brought the first application under Case Number: 2026–0742667 (The SASBO application), whilst the second, under Case Number: 2026-074757 (The Kau application), was brought by non-unionised individual applicants. For convenience, the Court will refer to both as 'Applicants'.

[2] The applications arise from the same facts flowing from the retrenchment of individual applicants by the Respondent (The Bank). The parties at the commencement of the proceedings had consented to both matters being heard together. The relief sought is for the Bank to reinstate the individual applicants and to comply with procedural requirements under sections 189 and 189A of the LRA. In particular, it is sought that the Bank must continue a meaningful joint consensus-seeking consultation process regarding alternatives to dismissal, the selection criteria to be applied, and severance pay.

The individual applicants before the Court:

[3] Flowing from the filing of the affidavits, it transpired that the identity and number of the individual applicants in the SASBO application, as listed in its

---

[1] Act 66 of 1995 (as amended). Section 189A (13) provides:
'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.'

Annexure 'A' to the founding affidavit, were incorrect. SASBO has, with the leave of the Court, filed a Notice to Amend its Notice of Motion in terms of Rule 20 of the Rules of this Court. In addition to removing some individuals, SASBO has also added others who were not in the original list. At the end, with these amendments to the Notice of Motion, the Court will accept that SASBO represents 35 individual applicants as per its Amended Annexure 'A'.

[4] With respect to the individual applicants in the 'Kau application', the Bank had also disputed the standing of two of them, who it contended were not part of the retrenchment process, as they were fixed-term contract employees. The standing of these two individuals will be dealt with to the extent that the Court deems it appropriate to grant some relief.

The background:

[5] At a meeting held on 4 November 2025, the Bank informed SASBO of its intention to restructure for operational reasons, citing serious financial distress and regulatory pressures from the Prudential Authority (A regulatory body within the South African Reserve Bank). The Bank also made a presentation of a document titled *"Right Sizing Strategy for Access Bank South Africa"*.

[6] On 5 November 2025, the Bank issued SASBO with a notice in terms of section 189(3) of the LRA[2] (The Notice). The Notice is dated 4 November 2025 and sets out the reasons for the proposed retrenchments as indicated above, including a high cost-to-income ratio and structural inefficiencies.

---

[2] Section 189(3) provides:

> "The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-
> (a) the reasons for the proposed dismissals;
> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
> (c) the number of employees likely to be affected and the job categories in which they are employed;
> (d) the proposed method for selecting which employees to dismiss;
> (e) the time when, or the period during which, the dismissals are likely to take effect;
> (f) the severance pay proposed;
> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
> (h) the possibility of the future re-employment of the employees who are dismissed;
> (i) the number of employees employed by the employer; and
> (j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months."

Although the rationale for the retrenchments is not seriously disputed in both of the Applicants' papers, they contend that this was not an issue in determining the entire dispute between the parties or in the relief they sought in their applications. The Notice also referred to the items for discussions and consultations as set out under section 189(3) (a) – (j) of the LRA. Between 10 and 18 December 2025, similar notices were issued to the affected individual employees and those in the 'Kau application'.

[7] Section 189A(3), (4), and (5) of the LRA[3] enable consulting parties to request facilitation under the CCMA. On 11 December 2025, SASBO completed the relevant referral forms to request facilitation by the CCMA in terms of section 189A(3)(b) of the LRA. At the time that the request was made, the statutory 15 days contemplated in section 189A(7) within which such a request ought to have been made had expired. The parties then, by agreement, made a joint request to the CCMA for facilitation on 15 December 2025.

[8] On 6 January 2026, the Bank, following discussions with SASBO, issued another section 189(3) Notice. It was envisaged that 150 employees would be affected by the process. There is a dispute as to the effect of this second Notice, and the issue will be dealt with further below.

---

[3] The section provide;

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-
  (a) the employer has in its notice in terms of section 189(3) requested facilitation; or
  (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).(5) (6) (7) (8)

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.

…

(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3)-
  (a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and
  (b) a registered trade union or the employees who have received notice of termination may either-
    (i) give notice of a strike in terms of section 64(1)(b) or (d); or
    (ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

[9] Three facilitated meetings took place in January and February 2026, along with several unfacilitated meetings between them. The non-unionised employees had elected representatives amongst themselves to represent them at these meetings. The notices of termination were issued on 27 February 2026 to take effect at the end of March 20

The facilitated Meeting of 28 January 2026:

[10] The Facilitator had recorded the proceedings, which were devoted to the Bank once again explaining its operational rationale through a presentation of its '*Rightsizing Strategy'*. The Bank again outlined its financial position and challenges, the need for organisational restructuring, and the anticipated number of affected employees.

[11] The applicants had requested information, *inter alia*, on audited financial statements, management accounts, business strategy, organograms, and affected positions. The parties further agreed on a timeline for the disclosure of information and the submission of questions and clarifications regarding the information to be furnished. It was further agreed that future facilitation meetings would take place on 9, 16, and 24 February 2026, with 2 March 2026 being a tentative date. Effectively, no substantive outcomes emerged from the first facilitation meeting.

The Meeting of 9 February:

[12] At this facilitation meeting, the applicants complained that the Bank failed to make full and timeous disclosure, and were thus unable to engage with the issues in any meaningful manner. The Bank stated that it was unclear what was outstanding, since it had disclosed all the requested information. Again, no substantive agreement was reached. It is, however, common cause that the parties had discussed issues regarding the disclosure of information, organograms, selection criteria, strategic and financial matters, the clarity of representatives' roles, and future communications and feedback to all employees. The parties had agreed that the applicants would specify any additional information they required, with deadlines agreed upon . They further agreed to cancel the facilitation meeting scheduled for 16 February

2026, and the Facilitator had encouraged them to continue discussions outside the facilitation process, pending the next facilitation meeting.

Unfacilitated consultation meetings:

[13] Between 11 and 20 February 2026, the parties held at least four consultations on their own. Those meetings were agreed to form part of the facilitation process[4]. On 11 February 2026, the parties discussed the information provided by the Bank, to which the employees' representatives continued to object, alleging that it was insufficient. The Bank had further clarified the restructured organisational chart and reporting lines. At the conclusion of the meeting of 11 February 2026, the applicants continued to complain about the insufficiency of the information disclosed. On 13 February 2026, the parties met again. After the Bank clarified questions arising from the disclosed information, they discussed the approach to the selection criteria and issues surrounding the interviews to be conducted for the restructured positions.

On 17 February 2026, the parties discussed the affected roles and interviews to be conducted. The employees had raised objections to the parallel interviews underway during the consultation process. On 19 February 2026, the discussions again focused on disclosure, the selection criteria and alternatives to retrenchments. On 20 February 2026, they discussed severance pay, with the Bank indicating it might improve its initial offer in that regard despite its financial and regulatory constraints.

The facilitated meeting of 24 February 2026:

[14] At that meeting, the employees once again complained about insufficient information, with the Bank reiterating that all required information had been disclosed. The Applicants had tabled questions regarding incomplete organograms, unclear reporting lines, and insufficient financial details. From that meeting, it is common cause that, notwithstanding objections and complaints regarding the non-disclosure of information, the parties had

[4] Transcribed Record of Facilitation Proceedings; Lines 20-25 and page 002 – 299 - *Caselines*

discussed issues including severance pay, alternatives to retrenchments, selection criteria, and bumping.

[15] At the end of the meeting, the applicants indicated that the discussions were not finalised or fully canvassed and proposed a fourth facilitation meeting, which had previously been agreed to take place on 2 March 2026. The Bank had indicated its intention to finalise the process by the end of February 2026. At that point, the Facilitator had recorded her concerns regarding the outstanding topics for discussion and further indicated that the 60-day period only expired on 6 March 2026. The unresolved topics were selection criteria, severance, and the mitigation of the impacts of retrenchments. The Facilitator further recorded that, in her view, the facilitation process had been abandoned to the extent that the Bank was not amenable to a further facilitated session.

[16] It is further common cause, however, that at the conclusion of the last facilitated meeting, the Bank had offered to have further unfacilitated meetings on three consecutive days between 25 and 27 February 2026. The applicants, however, declined the offer, contending that they were unavailable on the proposed dates. No fourth facilitated meeting took place. The Bank subsequently issued the notices of termination on 27 February 2026.

Urgency:

[17] The Bank had disputed that the applications before the Court were urgent. Section 189A(17)[5] provides that an application under section 189A(13) *must be brought no later than 30 days after the employer has given notice of termination.* Following the termination notices issued on 27 February 2026, the SASBO application was initiated on 26 March 2026, whilst the Kau application was initiated on 29 March 2026.

[18] The basis of contesting urgency was that, notwithstanding the provisions of section 189A(17) of the LRA, this did not imply that urgency was there for the

[5] Section 189A (17) provides:

(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.

(b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).'

asking, even if the applications were within 30 days. It was submitted that those provisions merely prescribe the upper limit of the period within which the application must be brought, but that the general principles relating to urgent relief applied. To this end, the contention was that the Applicants ought to have brought the applications at the earliest opportunity, i.e., immediately after forming the view that the Bank had not followed a fair process, rather than waiting a few days before the expiry of the 30 days.

[19] The Bank contended that the applicants failed to explain why the applications could not be brought sooner, and, effectively, that the urgency claimed was self-created, designed to exact maximum financial damage to the Bank by extending the reinstatement period that SASBO seeks. To this end, it was contended that the relief of reinstatement was not appropriate and that only compensation ought to be considered.

[20] The applicants' contention, on the other hand, was that applications under section 189A(13) were *sui generis,* and that section 189A(17) of the LRA created a statutory urgency regime that rendered applications launched within 30 days inherently urgent. The contention was further that, since the applications were initiated within the 30-day time frames, nothing further was required, as there was no discrete requirement that urgency be either pleaded or established in such applications[6].

[21] To the extent that the applications were enrolled on the urgent roll, it follows that ordinarily, the provisions of Rule 38 of the Rules of Court and the trite legal principles on urgency find application. It is, however, acknowledged that section 189A(13) creates a bespoke time-sensitive remedy for procedural unfairness in large-scale retrenchments. Effectively, once an application is initiated within the 30 days, the Court must assume jurisdiction and determine it on an urgent basis.

[22] A further consideration, however, is that, arising from established principles regarding urgency, it is trite that central to any urgent relief sought is the expedition with which an applicant approached the Court to interdict or

[6] In reliance on "*Labour Court Manual*", Connie Prinsloo and Andre van Niekerk, at Page 35

prevent any harm[7]. In *Steenkamp and Others v Edcon Limited*[8], although the apex court was dealing with non-compliance with the 30 days, it was emphasised that section 189A(13) of the LRA allows for the urgent intervention of this Court to correct any such irregularities as and when they arise, so that the integrity of the consultation process can be restored, and the consultation process can be forced back on track. It was added, in reference to other authorities, that intervention by the Court long after the process had been completed was often economically prohibitive and practically impossible; hence, an expedited approach to the Court was required to ensure that procedural irregularities did not undermine or derail the consultation process before it ended[9].

[23] The above principles are apposite to the facts of this case, to the extent that the applications were initiated almost four weeks after the notices of termination were issued. Effectively, and as correctly pointed out on behalf of the Bank, even if the applicants had approached the Court within the statutory 30-day time period and thus required urgent intervention of the Court, any delay between the issuing of the notices of termination and the period since terminations took effect, will in addition to other factors, be a factor when it comes to any relief under section 189A(13) of the LRA, despite the applications being treated as urgent. This is notwithstanding the fact that the Court is obliged to determine the matter on an urgent basis.

The legal framework and factual evaluation:

[24] Section 188(1) of the LRA provides that a dismissal is unfair if the employer fails to prove that it was procedurally and substantively fair. Within the context of retrenchments, section 189(1) of the LRA provides that the employer contemplating dismissal for operational requirements is obliged to consult with

[7] See *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* [2001] ZALC 223 (7 December 2001) at para 8; *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd & another* (2016) 37 ILJ 2840 (LC) at para 26; *Radebe and Others v Aurum Institute* [7](C662/2023) [2023] ZALCCT 66; (2024) 45 ILJ 876 (LC) at para 20

[8] (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC); See also *Edcon Ltd v Steenkamp and Others* (JA125/2017) [2017] ZALAC 81; [2018] 3 BLLR 230 (LAC); (2018) 39 ILJ 531 (LAC) at para 46.1

[9] At paras 52 - 54

the affected employees or their representatives. Section 189(2) of the LRA[10] requires the employer and other consulting parties to 'engage in a meaningful joint consensus-seeking process and attempt to reach consensus' on various issues listed therein.

[25] Arising from *Solidarity obo Members v Barloworld Equipment Southern Africa and Other*[11] *(Barloworld),* the purpose of consultations is to seek consensus, and there is no requirement that the parties reach an agreement[12]. The Court had further, with reference to other authorities, explained the concept of *"meaningful joint consensus-seeking process*" to mean that;

> "……for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations, and seriously consider the representations. This entails that the employer is obligated to furnish reasons for rejecting representations after careful consideration. Approaching the consultation with a pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful."[13]

[26] Similar principles were set out in *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* [14] as follows;

[10]Which provides;

> "The employer and the other consulting parties must in the consultation envisaged subsections (1)and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-
> (a) appropriate measures-
> (i) to avoid the dismissals;
> (ii) to minimise the number of dismissals;
> (iii) to change the timing of the dismissals; and
> (iv) to mitigate the adverse effects of the dismissals;
> (b) the method for selecting the employees to be dismissed; and
> (c) the severance pay for dismissed employees.

[11] (CCT 102/21) [2022] ZACC 15; (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC); 2023 (1) BCLR 51 (CC) at paragraphs 39 - 46

[12] At para 49

[13] At para 46

[14] (CCT178/19) [2020] ZACC 23; [2021] 1 BLLR 1 (CC); (2021) 42 ILJ 67 (CC); 2021 (2) BCLR 168 (CC); See also *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and* Another [2020] ZACC 23; [2021] 1 BLLR (CC); (2021) 42 ILJ 67 (CC); 2021 (2) BCLR 168 (CC) at para 40

> 'Retrenchments should not be resorted to until "certain procedural requirements intended to minimise the impact on employees" have been complied with. When employers contemplate dismissing employees for operational requirements, they must consult under section 189(1) of the LRA. The nature of such a consultation process, including "its objective and agenda", is prescribed by section 189(2) of the LRA. This consultation "requires engagement by all the consulting parties to reach consensus". It is important to note that the approach to this consultation must not merely be a checklist approach – that is, it must not be purely formalistic. There is both a procedural and substantive aspect to this consultation process. This has been clarified by the Labour Appeal Court in *Afrox* where the Court stated:
>
> > "It is implicit in the terms of section 189(2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees."'

[27] Against the above legal approach, the specific disputes are whether the consultation process was procedurally fair as contemplated in sections 189 and 189A of the LRA. Specifically, the dispute surrounds whether the consultation process and CCMA facilitation were abandoned in light of the 60 days under section 189A(7) of the LRA and the timing of the issuance of the notices of termination; and whether there were meaningful consultations on issues surrounding selection criteria, alternatives to retrenchment, and severance pay.

[28] The applicants' primary contentions were that the consultation process was fundamentally defective and that, at no stage, were the parties able to engage meaningfully, since the Bank's approach was to treat the process as a formality. The Bank's position was that the topics for consultation had been

fully canvassed and that the employees had made a concerted effort to obstruct and delay the process rather than engage on the issues in good faith.

The 60 days contemplated in section 189A(7) of the LRA and the timing of the notices of termination:

[29] The dispute related to which of the two Notices issued to SASBO triggered the beginning and the expiry of the 60-day facilitation period contemplated in section 189A (7) of the LRA. It will be recalled that the first Notice was issued to SASBO on 5 November 2025, whilst the second was issued on 6 January 2026.

[30] From the background set out elsewhere in this judgment, certain contradictions in the Bank's contentions to the extent that it insisted that the Notice of 6 January 2026 triggered the 60-day period need to be highlighted. On its own pleaded case, the 60-day period expired as early as 6 February or 16 February 2026, depending on whether the Notices were issued to SASBO or to individual employees. A second factor is that the Bank initially raised the issue at the facilitated meeting of 9 February 2026 and during the unfacilitated meetings between 11 and 19 February 2026. Notwithstanding, the parties had agreed at the first facilitated meeting on 9 February 2026 that the facilitation could extend into 2 March 2026. It is, however, a common cause that as of 24 February 2026, all the purported dates of the expiry of the 60 days had come and gone.

[31] Against the above, the Bank's *bona fides* in its contentions have to be questioned to the extent that it had participated in either the facilitated or the unfacilitated meetings, notwithstanding its stance that the 60-day period had expired. Even more worrisome, notwithstanding its contentions, is that it had issued a uniform termination notice to all affected employees, irrespective of the dates on which the section 189(3) Notices were issued, individually or collectively.

[32] The invariable conclusion to be reached in light of the above is that it is the Notice of 6 January 2026 from which the 60-day period was triggered. Even if the Bank may persist with its contentions, it is trite that the provisions of

section189A(3) and (4) ought to be read with those in 189A(5), to the extent that there is a requirement under clause 6(1) of the Regulations[15], that a facilitator *must* conduct up to four facilitation meetings with the parties, unless the dispute is settled in a lesser number of meetings or the parties agree to a lesser number of meetings. The dispute was neither settled nor was there agreement on a reduced number of meetings, despite the parties jointly requesting facilitation. In the end, the notice of termination issued on 27 February 2026 was precipitate, and flouted both the provisions of section 189A(7) and Clause 6(1) of the Regulations.

Was the consultation/facilitation abandoned?

[33] The applicants' contentions, on the other hand, that the Bank abandoned the facilitation or consultation process cannot, however, be sustained. This is so because the Facilitator noted in the facilitation record that unfacilitated meetings were part of the facilitation process. The primary role of a facilitator is to manage the consultation process, whilst the duty to consult remains primarily with the employer, and not the facilitator.

[34] It is correct, as already concluded, that only three, rather than four, facilitated meetings were held, and I have concluded on that procedural defect. However, the Facilitator's view that the facilitation process was abandoned does not, in my view, imply that the consultation process was itself abandoned. This is so in that it was undisputed that, at the conclusion of the third facilitated meeting, the Bank, notwithstanding its stance that the 60-day period had expired, offered to hold three further consultation meetings. That offer was rejected by the applicants for unclear reasons, aside from their unavailability on the proposed dates. In my view, the Bank's conduct in these circumstances cannot be said to evince an abandonment of the consultation process. In the end however, any procedural defects cannot lie in abandonment, but instead in the process leading to terminations.

[15] Regulations for the Conduct of' Facilitations in terms of Section 189a of the LRA; no. 25515 GG, 10 October 2003 no. r. 1445, 10 October 2003

Disclosure of information:

[35] The Court accepts that this issue was not specifically raised as a primary dispute. It is, however, addressed to the extent that it affected the main issues in dispute: the selection criteria, alternatives to retrenchment, and severance pay. The applicants alleged that the Bank refused to disclose information requested to enable meaningful consultations and engagements on the issues. It will be recalled that the issue was raised throughout both facilitated and unfacilitated meetings, with the Bank insisting that all necessary information was disclosed. The applicants' case was that the information disclosed was superficial, lacking in detail, or effectively insufficient.

[36] The Bank's stance was that it had disclosed sufficient and extensive information required by the applicants since the first meeting of 4 November 2025, and that any allegations of non-disclosure arose from the applicants' repeated requests for new and expanded disclosures despite set deadlines, or from their failure to specify precisely what information was outstanding. The Bank viewed the applicant's approach as merely a means of stalling consultations through belated or imprecise requests. It further contended that some of the financial information requested could not be disclosed due to regulatory and sensitivity risks.

[37] Section 189(4)(a) provides that the provisions of Section 16, read with the changes required by the context, apply to the disclosure of information in terms of this subsection. Where disputes persist regarding disclosure, Section 189(4)(b) permits an arbitrator or the Labour Court to decide whether or not any information is relevant, with the onus being on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

[38] In this case, other than the Facilitator having directed a disclosure in the first facilitated meeting, there is no evidence to demonstrate that the applicants, other than persisting with their complaints at every meeting, had ever requested arbitration over the issue, let alone approach this Court on an urgent basis under section 189A(13) of the LRA. In my view, if indeed the

alleged non-disclosure hampered any meaningful consultations, any other concrete steps ought to have been taken by the applicants in that regard, and long before 24 February 2026, in order to cure any alleged procedural defect. The applicants' decision not to take any steps in this regard and to continue with its allegations of non-disclosure throughout was ill-advised, as it clearly hampered efforts to engage seriously with the broader issues of consultation. It therefore cannot be concluded that the Bank failed altogether to disclose information sufficient to enable meaningful consultations.

Selection criteria:

[39] It was undisputed that the Bank had at all the meetings proposed and presented its own selection criteria. In both applications, the complaint was that consultations were deficient and not meaningful, and that the criteria were merely formally communicated to them on 12 February 2024. They accused the Bank of inconsistently applying the criteria across departments and of deviating from LIFO principles and the retention of skills. They also accused the Bank of relying on unverified performance appraisals and, in the process, protected certain departments or incumbents without justification. They contend that the Bank reached conclusions on the criteria without proper engagement and continued conducting interviews during the consultations.

[40] The Bank's position was that the consultations in this regard were sufficient and legally compliant. It contended that on 19 January 2026, it had communicated to all employees and the consulting parties the job profiles and its proposals for the selection criteria. It contended that alternatives were extensively canvassed, including voluntary severance packages, salary reductions (which were not ideal), redeployments, and placements in new structures. It contended that the proposed criteria included skills, qualifications, experience, and business-critical competencies, in addition to LIFO, where candidates were equally suitable. It contended that the interviews held during the consultations were part of efforts to mitigate dismissals through redeployment and to place employees in available positions, and not conducted in bad faith.

[41] The Court accepts that from the parties' various meetings, the applicants had jointly proposed LIFO as the primary criterion, and that the selection should avoid reliance on subjective performance assessments and redeployment. They had further proposed that interviews be suspended until the criteria were agreed upon..

[42] The employer's obligations under sections 189 and 189A, required transparency and responsiveness, and not necessarily to secure an agreement. In view of the Bank's engagements on the issue from the initial stages of the consultations, there is no basis for any conclusion to be reached that it failed to consult at all on the topic. The Court accepts that consultations on selection criteria did occur and that a mere rejection of counter-proposals does not equate to a failure to consult

[43] The applicants' primary complaint appears to be more about the quality of consultations and the outcome of the selection exercise, the timing of the formalisation of the Bank's criteria, and the conduct of interviews during the consultation process. Of course, the latter issue gave rise to a reasonable apprehension that the outcomes may have been predetermined. In effect, it undermined confidence in the consultation process.

[44] It is, however, accepted that the interview process (competing for posts) is fair if it was intended to avoid retrenchments rather than being part of the selection criteria[16]. It is further trite that in the absence of an agreement, an employer may implement a selection criterion that was fair and objective in light of the alternatives properly considered[17]. In this case, the Bank had implemented criteria that included skills, qualifications, experience, and business-critical requirements, together with LIFO, under which employees were suitable in the absence of an agreement. It cannot, therefore, be said that it failed to consult in good faith. Inasmuch as the timing of the interviews might have been procedurally irregular, on the Bank's version, they were directed at redeployment and placement, rather than specifically identifying

[16] *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC),
[17] *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others* (CCT 220/22) [2024] ZACC 8; 2024 (7) BCLR 901 (CC); [2024] 8 BLLR 777 (CC); (2024) 45 ILJ 1723 (CC); 2024 (5) SA 593 (CC) at paragraphs 37 - 38

employees for retrenchment. Accordingly, these procedural flaws cannot be said to be so deficient as to amount to a failure to consult.

Severance pay:

[45] In *Regenesys*[18], the Court specifically held that severance pay is a mandatory topic for consultation and is intended to mitigate the adverse effects of retrenchment. The topic must address the quantum, whether the severance can and should exceed the statutory minimum, taking into account the employer's ability, which should also be the subject of engagements. The Court had added that consultations in that regard must be genuine without the outcomes being pre-determined, and further that although no agreement was required, the failure of real engagements on the topic attracted remedies under section 189A(13) of the LRA.

[46] The applicants complained that the consultations in this regard were irregular and inadequate, and that the Bank essentially treated them as *fait accompli*. In this regard, they contended that only off-the-record discussions were held internally, thus undermining transparency and accountability. They complained that there was no formal proposal from the Bank; that no clear revised proposals were tabled on record at the facilitation meeting; and that the Bank's proposal was fixed and non-negotiable, despite other alternatives, such as enhanced severance, phased payments, or differentiated treatment, being available for exploration.

[47] From the record and the pleadings, the Court accepts that proposals regarding severance pay were initially made in the section 189(3) Notices, and that at the facilitated meeting of 9 February 2026, applicants sought that the topic be deferred whilst they continued to raise concerns surrounding the ongoing interviews. The topic was discussed at the unfacilitated meetings held between 11 and 19 February 2026. At the unfacilitated meeting held on 20 February 2026, the topic was discussed again, albeit off the record. At those discussions, it is undisputed that the Bank had tabled an improved package, further submitting that the improvement was made within its

[18] At paragraphs 72 -76

financial constraints and expressing a willingness to enhance its offer beyond the statutory minimum. It contends that the improved offer was rejected.

[48] It was therefore not in dispute that, even though the topic was discussed at various unfacilitated meetings and at the facilitated meeting of 24 February 2026, those discussions were off the record, with no concrete proposals or counter-proposals recorded. The Bank had justified the off-the-record discussions as due to the sensitivity of the topic, noting that they involved direct financial concessions beyond the statutory minimum and were intended solely to enable frank discussions and the exploration of various options.

[49] The Court accepts that severance pay was one of the topics set out in the Notice, and some level of discussions took place in that regard. The enquiry, however, is whether those discussions met the standard of meaningful joint seeking engagement.

[50] Those discussions were mainly held on an off-the-record basis and were not openly canvassed at the facilitation meeting. It is further accepted that other than in the Notice and other general communications between the parties or directly from the Bank to the employees, no other written proposals or counter proposals or recorded responses were placed on record. Clearly, there was no coherent engagement on the quantum, structure or implementation of severance pay. The Bank's contention that discussions in this regard were sensitive or financially delicate could not trump transparency. Clearly, the capacity to influence the outcome was sacrificed, irrespective of whether the Bank had made an offer to improve the package. In the end, the consultation process fell short of the procedural standards set out in sections 189 and 189A of the LRA, as reinforced in *Regenyses.*

[51] Equally unsustainable is the Bank's further assertion that any consultations in that regard were overtaken by the expiry of the 60-day period or by the exigencies of time to finalise the process. This is so given the Court's conclusions on the issue of the 60 days, and its view that time considerations to finalise the consultation process cannot, by any stretch of imagination, excuse an employer from its statutory obligations. The invariable conclusion

to be reached is that the Bank failed to meaningfully consult on the topic as required in the LRA, which constituted a material procedural irregularity, and which calls for relief under section 189A(13 of the LRA.

Alternatives and measures to avoid retrenchments:

[52] Because of the no-fault nature of dismissals in retrenchments, the employer is obligated to treat such measures as a last resort[19]. This requires that the employer consult with the other parties in good faith on all proposals made and exhaust all viable, reasonable alternatives proposed during consultations. A failure by the employer to do so will result in unfairness[20]. Under section 189(6)(a) of the LRA, the employer is obliged to consider and respond to the other consulting party's representations, and to state the reason for disagreeing if it does so.

[53] The applicants' primary complaints were that the consultations regarding alternatives were incomplete and superficial, as the Bank had predetermined the outcome without seriously considering any alternatives. They alleged that their proposals included redeployment across departments, temporary or fixed-term consulting roles in specific units, salary adjustments, temporary containment measures, and deferral of retrenchments pending the completion of critical projects. The applicants further contend that their proposals were not responded to in writing, and that individual applicants were dismissed without any reasons being provided. They also complained that interviews and placements were conducted in parallel during consultations, suggesting that outcomes on the topic were predetermined.

[54] The Bank's position was that alternatives were extensively canvassed inclusive of voluntary severance packages (which were accepted by few employees), redeployment and placements (which was done flowing from the interviews) and consideration of implementation of salary deductions (which were not ideal as they required 50% to meet sustainability of capital and

[19] *Oosthuizen v Telkom SA Ltd* [2007] 11 BLLR 1013 (LAC)

[20] *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* (CCT275/17) [2018] ZACC 44; (2019) 40 ILJ 87 (CC) ; 2019 (3) BCLR 412 (CC); [2019] 4 BLLR 323 (CC); 2019 (3) SA 362 (CC)

regulatory requirements), and ultimate removal of certain number of employees on the original list of affected employees. It contends that the applicants rejected any alternatives it had proposed without explanation, and accused them of belatedly making proposals that, in most instances, were not commercially or operationally viable, or were inconsistent with its new operating model, or were impractical given its own regulatory pressures.

[55] From the pleadings, I did not understand the applicants' case to be that alternatives and measures to avoid retrenchments were not discussed in either the facilitated or unfacilitated meetings. The Court accepts that the qualitative nature of consultations cannot be determined solely by the number of meetings held. The dispute ultimately concerns the quality and sufficiency of the consultations, not that consultations were not held or that there was a total lack of engagement on any of these issues. Thus, the ultimate enquiry regarding this topic is not whether there was merely an exchange of proposals and counter-proposals between the parties. It is whether the Bank had consulted meaningfully and in good faith on the alternatives before implementing the dismissals of the individual applicants.

[56] It would be recalled that, when the section 189(3) Notices were issued and during the first facilitated meeting, the Bank had consistently outlined its proposals and invited the applicants to consult on those issues. From the pleadings, it is accepted that the applicants had made written submissions and proposals and equally raised a variety of objections on the topics. This took the form of emails, letters, and memoranda, without any consolidated, formal written counter-proposals that could be accepted or rejected.

[57] It is trite that more than mere allegations are required to establish that the employer's engagement on consultation topics was perfunctory. In *National Union of Mineworkers v Anglo American Platinum Ltd and Others*[21], it was held that, generally, employees cannot claim unfairness in retrenchments solely on the basis that the employer rejected their counter-proposals.

[21] [2013] ZALCJHB 262; (2014) 35 ILJ 1024 (LC); [2013] 12 BLLR 1253 (LC) at para 24.

[58] The Court accepts that the Bank's responses to counter-proposals were not always formalised in writing or structured. This, however, does not evince wholesale failures to engage. Equally accepted is that the parallel process of redeployment and interviews reasonably raised perceptions of predetermined outcomes and undermined confidence in the consultation process. It is, however, accepted that these measures are considered fair if they are demonstrably aimed at avoiding retrenchments. This approach was endorsed in *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another*[22], with reference to *Afrox*. Thus, the Bank was entitled to take substantive steps and appropriate measures on its own initiative to avoid dismissals and minimise the number of dismissals.

[59] These being motion proceedings, and even on the application of the *Plascon-Evans*[23] principles, the Court accepts that consultations were indeed held between the parties on alternatives and measures to avoid retrenchments. The record reflects that the Bank had consistently articulated its operational rationale, financial constraints and regulatory obligations as primary reasons for rejecting counter-proposals, albeit the responses were unstructured. The rejection of the counter-proposals did not render the consultation process procedurally unfair.

[60] In the end, and having regard to the totality of the evidence, the Court is satisfied that consultations on alternatives and measures to avoid retrenchments did take place as contemplated in section 189(2)(a) of the LRA, which measures in the end led to the reduction of the number of the original number of employees contemplated to be affected by restructuring. Any procedural shortcoming in the manner in which the Bank responded to the counter-proposals does not imply a complete absence of engagement with alternatives or measures to avoid retrenchments.

[22] *supra*
[23] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A

Summary and any relief:

[61] The essential conclusions reached in this judgment are that indeed the applications ought to be treated as urgent. The Bank had, however, regarding the facilitation process, not complied with the provisions of section 189A(7) of the LRA to the extent that the notices of termination were issued in haste and before the expiry of the 60 days, and further to the extent that there was non-compliance with the provisions of Regulation 6(1) of the Regulations.

[62] The Court accepts that the Bank had complied with its obligations to disclose the relevant information for meaningful consultations, and had engaged with and consulted the applicants on the selection criteria, alternatives, and measures to avoid retrenchments. The Bank, however, failed to engage meaningfully with the applicants regarding severance pay. Other than the procedural flaws pointed out, on a holistic level, they do not lead to the conclusion that the Bank totally failed to discharge its obligations under sections 189 and 189A of the LRA. However, the limited procedural flaws call for some relief.

[63] Elsewhere in this judgment, it was pointed out that, flowing from *Steenkamp*[24], section 189A(13) of the LRA is designed to allow this Court to intervene before or during the consultation process to cure any procedural defects in real time, and that once a dismissal has taken place, restorative relief may become impractical or economically disruptive. In *Regenyses*[25], it was held that the object of section 189A(13) is corrective, restorative, and discretionary, rather than compensatory in a delictual or contractual sense. Those provisions, however, are not meant for this Court to micromanage employers' restructuring.

[64] It was added in *Regenyses* that this Court enjoys a wide discretion when determining a remedy under section 189A(13), to be exercised judicially and proportionately, taking into account a variety of considerations such as legitimate managerial prerogatives, the nature of the procedural defects, the

[24] At paragraphs 52-54
[25] At paragraphs 72 - 76

point in consultations when the defect occurred, whether the defects are capable of being cured, and the harm caused by the defect.

[65] In this case, it has already been indicated under the topic of urgency that the applicants' lack of haste in approaching the Court after the notices of termination were issued was a factor to be taken into account when determining relief. Effectively, the applicants did not do themselves any favours by being supine until just before the expiry of the 30 days contemplated in section 189A(17) of the LRA.

[66] In addition, the termination notices took effect on 1 March 2026. In light of the procedural defects highlighted in this judgment, these are not of such a nature that they caused any harm to the applicants to call for restoration to cure them. The dismissals have taken effect, and the process has concluded. (Bearing in mind that the applicants rejected three further days for consultations). In these circumstances, restorative orders compelling further consultations are not appropriate. It follows that the only remedy available to the applicants is compensation, which, in accordance with *Regenyses*, will serve to vindicate the right to a fair procedure, and not to penalise the Bank or second-guess its operational rationale.

[67] Accordingly, in the light of the procedural defects highlighted and which are not egregious, the applicants' own lack of haste in approaching the Court for intervention, their persistence during consultations in unreasonably complaining about disclosure and or seeking it on a fragmented basis, the Bank's mitigation efforts, and its lack of bad faith, it is deemed that one month's salary to each of the individual applicants is appropriate.

[68] Regarding two individuals in the Kau application, viz., Ms Emily Jiyane and Ms Busiwa Ngcobo, the Bank contended that they were employed on fixed-term contracts that expired by effluxion of time and were thus neither dismissed nor affected by the section 189A process. In this regard, reference was made to copies of their individual contracts of employment annexed to the answering affidavit, which reflected their defined periods, had clear termination dates, and contained no provision for automatic renewal.

Furthermore, no notices of termination were issued to them nor were they identified in the section 189(3) Notices.

[69] The submissions made in the Kau application were that there was a link between non-renewal and restructuring, and that the Bank merely relied on substance over form, as the fixed-term label was not determinative. It was added that the concerned individual applicants also had a reasonable expectation of a renewal, and that excluding them from the consultation process undermined the fairness of the overall section 189 process.

[70] It is trite that a fixed-term contract terminates either by effluxion of time or by an occurrence, such as the completion of a task or project. The termination does not require any notice as it is automatic. This implies that in such instances, there can be no dismissal as contemplated under section 186(1) of the LRA. The exception, of course, would be where the contract specifies that the employee may be retrenched before its expiry date.

[71] The submissions made in the Kau application that the two individual applicants had a reasonable expectation of the continuation of their contracts of employment are misplaced, especially for the purposes of relief under section 189A(13) of the LRA. A dispute about a reasonable expectation of a fixed-term contract falls within the ambit of section 186(1)(b)(i) or (ii) of the LRA, which is ordinarily arbitrable under section 191 (5)(a)(iii) of the LRA. As of 27 February 2026, the fixed-term contracts of the two individuals were due to expire, and there is therefore no basis for them to have been covered under the section 189A process for any relief.

Costs:

[72] The Court, further having regard to the nature of the applications and the conclusions reached in this judgment, further deems it appropriate, upon a consideration of law and fairness, to order that each party be burdened with its own costs.

[73] Accordingly, the following order is made;

Order:

1. The application to amend the Notice of Motion under Case No: 2026 – 074266 is granted.

2. The non-compliance with the Rules of this Court in respect of the time frames in both applications under case Numbers: 2026 - 0742667 and 2026-074757 is condoned, and the applications are heard as urgent in accordance with Rule 38 of the Rules of this Court.

3. The applications under both Case numbers for relief under section 189A(13)(a), (b) and (c) of the Labour Relations Act (LRA) are dismissed, and relief is only to be granted under section 189A(13)(d) of the LRA.

4. The Respondent is ordered to pay to each of the individual applicants identified in the Amended Annexure “A” to the SASBO’s Notice of Motion under Case No: 2026-072667, compensation equal to one month’s salary, calculated at their rate of remuneration as at 27 February 2026.

5. The Respondent is ordered to pay each of the individual applicants listed in Annexure ‘CK1’ to the founding affidavit under Case No. 2026 – 074757, compensation equal to one month’s salary calculated at their rate of remuneration as at 27 February 2026.

6. The individual applicants listed at 6 and 12 in Annexure ‘CK1’ to the founding affidavit under Case No: 2026 – 074757, viz, Ms Emily Jiyane and Ms Busiwa Ngcobo, are not entitled to any relief.

7. There is no order as to costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

<u>Appearances</u>

Under Case No: 2026-072667.

For the Applicants:	Advocate G. Fourie SC, instructed by BJ Erasmus Pieterse Attorneys
For the Respondent:	Adv. A Redding SC, instructed by Solomon Holmes Attorneys Incorporated.

Under Case No: 2026-074757

For the Applicants:	Mr B Luthuli of Bongani Khanyile Ka Luthuli Attorneys Inc
For the Respondent:	Adv. A Redding SC, instructed by Solomon Holmes Attorneys Incorporated.