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

_____ _____
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS112/2021

In the matter between:

NEO MERAFI **First Plaintiff**

RUDZANI SILIGA **Second Plaintiff**

VELA BACELA **Third Plaintiff**

SIPHO MASHIGO **Fourth Plaintiff**

MUZI GREGORY SHABANGU **Fifth Plaintiff**

PRECIOUS NTOMBIZETHU MYEZA **Sixth Plaintiff**

and

ITHUBA HOLDINGS (RF) (PTY) LTD **Defendant**

Heard: **12 February 2026**

Delivered: **26 May 2026**

JUDGMENT

PHAKEDI, AJ

Introduction

[1] This opposed matter concerns an unfair dismissal claim in terms of section 191(5)(b)(ii) of the Labour Relations Act[1] (the LRA) following the retrenchment of the six Plaintiffs by the Defendant on the basis of operational requirements.

[2] The two applications under case numbers JS112/21 and JS635/21 were consolidated on 26 May 2023 per the court order of Tlhotlhalemaje J who directed that they be heard as one action. Subsequent to the exchange of pleadings, the parties signed and filed the pre-trial minutes on 9 May 2024.

[3] It is the case of the six Plaintiffs that their dismissal was both procedurally and substantively unfair due to the manner in which the retrenchment process was undertaken. They argued that the process was a *fait accompli* in that there was no meaningful consultation on the criteria to be followed during retrenchments. Furthermore, they submitted that the Defendant did not consider nor offer them reasonable alternative measures to avoid retrenchments. They submitted that they were forced to accept voluntary retrenchment packages by withholding their October salaries which were unfairly bundled into the severance package without their knowledge or consent.

[4] The Defendant submitted that the Plaintiffs were retrenched and they simultaneously accepted voluntary separation packages following the one consultation session which concluded the retrenchment process. In line with the signed voluntary separation agreements, the Defendant paid the plaintiffs the agreed *ex gratia* amounts which they duly accepted. In support of its stance, the Defendant raised a special plea that the matter was settled between the parties and the Labour Court may not adjudicate a dispute about the procedural fairness of the Plaintiffs' dismissal.

Defendant's first special plea: the dispute was settled on 28 October 2020

[1] Act 66 of 1995.

[5] The Defendant argued that the dispute was settled when the Plaintiffs signed and accepted voluntary termination notices which included the severance packages on 28 October 2020.

[6] The Defendant relies on clause 4 of the retrenchment notices signed by the parties which reads as follows:

> 'Whereas the Company gives notice as follows:
>
> 1. That the employee's services are terminated as a result of the operational requirements (retrenchment) of the company.
>
> 2. …
>
> 3. …
>
> 4. That the employee specifically agrees with his or her signature on this document that his/her termination of employment is substantively fair and that the employee agrees that he/she has no claims of any nature against the company'.

[7] The Plaintiffs do not deny having signed the retrenchment notices and having received voluntary severance packages. They, however, stated that they signed the notices due to coercion by the Defendant who withheld their October salaries in exchange for signatures. They had no choice but to sign and accept the packages because they had bills to pay and they had worked for that month.

[8] On the other hand, the Defendant stressed that this matter had already been settled by the Parties in terms of clause 4 of the termination notice which is essentially a waiver of any potential claims against the employer. What this clause records is that the employee by his signature agrees that his or her termination of employment is substantively fair and he or she has no claims of any nature against the company. The question then for this Court is to consider whether the parties settled the matter and whether the employees waived their rights to pursue other claims against their employer?

[9] As a starting point, it is important to highlight that the Defendant and Plaintiffs signed a 'retrenchment notice' and not a settlement or mutual separation agreement. The last clause of the said notice clearly states that:

> '9. This notice constitutes the statutory written notice of the termination of the employment of the employee.'

[10] In *Lufuno Mphaphuli and Associates v Andrews and Another*[2] Kroon AJ held as follows:

> 'Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.'

[11] In this matter, this Court is not satisfied that there was a mutual separation agreement signed by employees. The document presented to the Plaintiffs was a retrenchment notice which according to both parties constituted the required statutory written notice of the termination of employment. The Defendant's first special defence is therefore not upheld.

<u>Defendant's second special plea: no jurisdiction to adjudicate the procedural aspects</u>

[12] The second preliminary point raised by the Defendant is that in terms of section 189A(18) of the LRA the Labour Court may not adjudicate a dispute concerning the procedural fairness of the dismissal based on operational requirements. This section provides that:

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[2] 2009 (4) SA 529 (CC) at para 81.

'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).'

[13] The Plaintiffs' Counsel submitted that the Defendant's interpretation of the above-mentioned section is wrong and that the correct legal position was clarified by the Constitutional Court in *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others*[3] where it held as follows:

'[146] In my view, the following points must be emphasised about subsection (18), read with section 191(5)(b)(ii) and subsection (13):

(a) The Labour Court has jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which section 189A applies and which are brought to the Labour Court by way of applications in terms of subsection (13).

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

(c) The Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which section 189A does not apply and which are referred to it for adjudication in terms of section 191(5)(b)(ii) is not ousted by subsection (18). That jurisdiction remains intact and the Labour Court has jurisdiction to adjudicate such disputes.

[3] (2024) 45 ILJ 1723 (CC).

[147] If subsection (18) was a subsection of section 191, it, indeed, would have ousted the Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which section 189A does not apply and which are referred to the Labour Court in terms of section 191(5)(b)(ii) for adjudication. However, subsection (18) is not located as a subsection to section 191. It is located as a subsection of section 189A. That is not a coincidence. The reason for that is that, like all the subsections to section 189A, subsection (18) relates to dismissals for operational requirements to which section 189A applies. If it was meant to relate to dismissals for operational requirements to which section 189A does not apply, it would have been located as a subsection to section 191.

[148] The interpretation that subsection 189A(18) has ousted the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to it in terms of section 191(5)(b)(ii) is not accurate….

[206] The interpretation of subsection (18) to the effect that the latter provision hasousted the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness in dismissals for operational requirements brought before it in terms of section 191(5)(b)(ii) or in terms of subsection (13) or both is inconsistent with the right of access to courts in terms of section 34 of the Constitution and section 38 of the Constitution.'

[14] Based on the above authority, the special plea that this Court lacks jurisdiction to determine the procedural fairness of the Plaintiffs' dismissal is not upheld.

Background facts

[15] The Plaintiffs were employed by the Defendant on different days and occupying different positions. On or during June 2020, the Defendant invited all its +/- 180 employees to a meeting and they were addressed by the Group Chief Executive Officer, Ms Charmaine Mabuza. During the meeting she indicated that the business was doing well despite the Covid-19 pandemic. She indicated that the pandemic had required that the business introduces a

new shift system and at no stage did she mention that the company was intending to retrench employees.

[16] On or about 02 October 2020, twenty four employees including some of the Plaintiffs received an email from the Defendant's legal representative, Mr Arend Posthuma (Mr Posthuma) inviting them to attend a virtual meeting to discuss the Defendant's workforce model on Monday, 5 October 2020. The consultation meetings were divided into separate groups and employees were consulted on different dates in October 2020.

[17] On 5 October 2020, the Defendant's Anneke Roodman (Ms Roodman) sent an email to remind the Plaintiffs about the meeting and attached a notice in terms of section 189 addressed to each of the invited employees. The notice informed the employees that the Defendant was embarking on a restructuring process and their positions were impacted by the structural changes. The reason for restructuring was the Covid-19 pandemic and the need to sustain the longevity of the contract to operate the National Lottery.

[18] In respect of alternatives to retrenchment, the notices indicated that employees would be expected to apply for alternative positions within the new structure if such a vacancy exists and depending on their skill sets and/or qualifications. In respect of the selection criteria, it was recorded that employees will be retrenched based on skills and qualifications. In respect of the timing of the retrenchment, the process was envisaged to take a period of sixty days ending on 05 December 2020.

[19] During the meeting, Mr Postuhuma was introduced as the Facilitator of the retrenchment process and the employees were informed that the purpose of the meeting was to discuss their possible retrenchment. One of the affected employees requested a recording of the meeting and he was told that the recording would be made available. Another employee enquired about the selection criteria followed, and the Defendant stated that this was a first consultation and that everything would be discussed during follow up consultations because the process was envisaged to be completed on 05 December 2020.

[20] The Defendant then requested the employees to sign and acknowledge receipt of the retrenchment notices and submit same on 06 October 2020.

[21] The second group of employees including the fourth Plaintiff were consulted on 08 October 2020. Mr Posthuma was still the Facilitator of the retrenchment process. Employees suggested sport-betting department as an alternative to retrenchment but this suggestion was not taken into account. It was in that meeting that the employees were informed that the Defendant had resolved to abolish the positions they were occupying in terms of its new structure.

[22] The Defendant then unilaterally made available the revised voluntary retrenchment package with a lump-sum amounts varying according to date of employment and the package of each of the employees. No further consultations took place after the first meeting with affected employees and they started engaging on the contents of the revised offers made to them.

[23] On 27 October 2020, Ms Roodman sent an email to the employees informing them that they must sign the retrenchment notices drafted by Mr Posthuma and send them back before close of business on 28 October 2020 and further that their last working day would be 30 October 2020 and further that the severance payment will be made after 14 days of obtaining the tax directive.

[24] On the morning of 28 October 2020, all employees had not received their salaries despite having worked for the month of October. Ms Roodman then informed them that their October salaries were included in the lump sum voluntary retrenchment packages in order to create a saving on the normal Pay As You Earn (PAYE) deduction. It was then made clear that payments could not be made to the employees until they handed in signed agreements.

[25] The First Plaintiff signed the retrenchment notice on 28 October 2020.

[26] The Second Plaintiff signed the retrenchment notice on 28 October 2020 and next to his signature he recorded the words '*signed under protest in relation to termination of employment clause number 4'.*

[27] The Third Plaintiff signed the retrenchment notice on 28 October 2020.

[28] The Fourth Plaintiff signed the retrenchment notice on 28 October 2020.

[29] The Fifth Plaintiff signed the retrenchment notice on 28 October 2020.

[30] The Sixth Plaintiff signed the retrenchment notice on 28 October 2020.

[31] On 30 October 2020 all employees received their exit documents and returned the property of the Defendant and that is how their employment was terminated. They are now challenging their dismissal and are seeking an order in the following terms:

> ‘a. The dismissal of the Plaintiffs was procedurally and substantively unfair;
>
> b. Cancellation and setting aside of the voluntary retrenchment packages;
>
> c. Reinstatement with full retrospective effect;
>
> d. Maximum compensation;
>
> e. Costs of suit.’

The dispute between the parties and the evidence

[32] The Defendant relied on the evidence of a single witness, Ms Anneke Wagerle (formerly Roodman). She testified that she occupied the position of Head of Human Resources at the time of retrenchments. She stated that the Defendant, Ithuba Holdings, was the operator of National Lottery and it was not permitted to have any other operations. Recently, the license to operate the National Lottery was awarded to Sizakhaya Holdings which started operating from 01 June 2025 and the Defendant will be applying for voluntary liquidation.

[33] She stated that Plaintiffs received their notices in terms of section 189 (3) between 05 and 13 October 2020. Various consultation meetings took place between the parties and no minutes were taken during such discussions.

[34] The company presented voluntary severance packages as an alternative to retrenchments and all other various elements were considered and employees' queries were all answered as and when they arose. Additionally, the affected employees were informed that they are allowed to apply for vacant positions in the company if they meet the requierements of the advertised positions. She testified that 31 employees were dismissed and 24 including the six plaintiffs accepted voluntary severance packages. The remaining seven employees who did not accept the voluntary severance packages were absorbed into some vacant positions within the company.

[35] She disputed that the Second Plaintiff, Mr Rudzani Siliga signed the retrenchment notice under duress as indicated on his notice. She testified further that none of the employees who accepted and signed retrenchment notices tendered the payments they received to the Defendant as confirmation that they were resiling from the arrangement.

[36] Under cross examination, she confirmed that she regarded herself as a Human Resources expert based on her qualifications. When asked about the criteria used to select employees who were going to be retrenched, she could not give a clear answer save to state that everyone who was affected was told to apply for vacant positions. She stated that there were about seven vacancies offered as an alternative to retrenchment but employees accepted voluntary severance packages as an alternative. When asked why were employees asked to apply for vacant positions if they were offered as an alternative to dismissals, she stated that they wanted to give everyone an opportunity to apply.

[37] When asked about the reason why the Plaintiffs only signed the termination agreements on 28 October 2020, which was the day on which they ought to have received their salaries, she responded by saying that she did not know. She, however, emphasised that she did inform the affected employees that their October salary was included in the voluntary severance package and they did not receive their salaries on that day because they had missed the deadline for submission of the signed retrenchment notices.

[38] She also confirmed that all employees of the Defendant received their salaries on the 28th of every month. She further stated that the reason why she included their October salary in the voluntary severance package was to ensure that the employees get a saving on PAYE from SARS because their October salary would have attracted additional tax deductions.

[39] She was referred to a WhatsApp text from the Third Plaintiff, Vela Bacela which indicated that she was informed on 27 October 2020 that she will not be receiving her salary for the month of October. Bacela had pleaded with management to pay her salary as she had bills to pay and she was also in hospital at the time. However, the witness indicated that she was not obliged to enquire about the health of the employees and her role was to ensure that the policies of the employer are complied with.

[40] She was further referred to an email from Mr Mashigo who complained about non-payment of his salary and her response thereto. She further indicated that she received the Tax directive for all employees on the same day hence the Finance department was able to process payments on the 28th shortly after receiving signed notices. When asked about the protest by the Second Plaintiff who declared the process unfair, she indicated that she accepted his signed document and that his unhappiness did not mean that the process was not fair. She went ahead and paid his package because he had satified the requirement set by the Employer.

[41] She was referred to her email dated 20 October 2020 with the subject line 'extension of voluntary package' addressed to affected employees which reads as follows:

> 'Good day all,
>
> With the close of all the first round of consultations, a large amount of alternatives were brought forward for consideration and discussion with the Executive Committee. In conjunction, a voluntary package was made available to al for consideration after which it was requested that feedback be given on the proposed alternatives prior to the acceptance of the packages in order to make informed decisions.

As you know, the deadline for the acceptance of the voluntary package was yesterday. In saying this, we were also only able to arrange an appropriate time with the Executive Committee yesterday to discuss the alternatives and in such it was decided to once again extend the deadline for the acceptance of the voluntary package in order to accommodate the request for feedback.

Please note that the final deadline for acceptance is, Friday, the 23rd of October 2020. Arend, the facilitator who has been assisting us, will finalise the minutes to the meeting held yesterday and will circulate the decisions made regards the proposed alternatives tomorrow for all to consider. Please note that the decision regarding the alternative will be applicable to all, regardless of acceptance of the package.

We hope you find this in good faith.

Kind regaros,

Anneke Roodman | Head of Human Resources'

[42] She was also referred to another email as confirmation that employees were expecting to receive their salaries in the morning of 28 October 2020. She further conceded that her email did not indicate that the October salary was going to be included in the package. She also testified that all Plaintiffs received their salaries and packages on 28 October subsequent to submitting the signed agreements.

[43] She also stated that the position occupied by Mr Siliga, Production Manager, became redundant due to the pandemic. Then it was put to her that the same position was given to Serisha Naidoo in 2022. She then responded by saying there was a lapse of time in respect of re-employment terms and the notice in terms of section 189(3) was not binding. She also indicated that she could not have given the Plaintiffs any of the available positions as this could have prejudiced everyone and she wanted to give everyone a fair chance.

[44] During re-examination she emphasised that she included the October salary in the package in order to save on Tax costs. She was then asked what would have happened had Mr Siliga not signed the agreement, she then indicated

that his salary would have been paid and the retrenchment process would have started afresh. The Defendant then closed its case.

[45] Mr Rudzani Siliga (Siliga) testified as the only witness on behalf of the Plaintiffs. He testified that he was employed as a Product Manager since June 2016 and the company was performing well and met all its delivarables and target goals. He was surprised when he got the retrenchment notice because as a Product Manager he had set new objectives for the duration of the contract with National Lottery.

[46] He testified that employees received a letter titled '*intention to retrench'* and they were not consulted on the appointment of Mr Posthuma as the Facilitator. He informed them that the process will entail many consultations as it was going to take a period of sixty days concluding on 05 December 2020. There was no trade union in the workplace as such they relied on the expertise of Mr Posthuma who was supposed to discuss alternatives and be impartial throughout the process. However, he did not ensure that the procedure adopted was fair and catered for the interests of the workers as well. Siliga complained about the fairness of the process because their views and inputs were not taken into account. The fact that Mr Posthuma is now before court representing the Defendant is confirmation that he was not an independent facilitator.

[47] He further testified that his October salary ought not to have been included in the voluntary severance package as he had worked for the month of October. He then referred to an email dated 20 October 2020 which he wrote to Ms Roodman and it read as follows:

'Good morning Anneke

Thanks for the update. Any feedback on the issues raised in my previous mail?

Note

This morning during our Marketing Team Meeting our HOD announced that there was a board meeting yesterday and everyone was happy that we are

currently ahead in terms of the NLC and Business financial targets. Why is the company continuing with retrenchments if the aftermath of Covid-19 is not the reason?

About the mental health challenge

Don't you think more focus should be on helping those employees that are faced with retrenchment deal with the challenge? The mental challenge is great under normal circumstances but these are hard times for all retrenchment candidates and their families. The mental health of all employees is important but there's a greater need and urgency to help the employees whose services the company no longer requires.

Thanks'

[48] While he was still expecting meaningful engagement with the Defendant, he received a revised offer which was done unilaterally without his inputs. There were also few advertised positions on the intranet which were not within his qualifications as such he did not apply. None of the affected employees were offered any position in order to avoid dismissals. On 22 October he received the following email from Ms Roodman:

'Good day Rudzani,

As per the email sent on Tuesday, the 20th of October, please note that the following revised voluntary package has been suggested after the Executive Committee has taken into consideration the alternatives proposed by all possibly affected. Please note that despite perhaps having accepted the prior offer, this new offer will still be available to you for consideration:

1. The voluntary retrenchment package available to you is a lump-sum of R348 831,26 and includes the following:

    a. 3 Months' Salary - October, November and January additionally

    b. 1 Months' Notice Pay

    c. Severance pay to the value of 4 weeks which totals to R59 208,12.

d. Leave pay to the value of 7,92 days which totals to R23 015,14. Any negative leave balances will be absorbed by the company.

e. Remaining Data relief pay-out of 10 months (on the proviso that you complied with the requirement)

f. The Laptop that you have been issued with by the company to the value of R6 164.00. Please note that the awarding of the laptop will necessitate the company to deduct Fringe Benefit Tax as prescribed by legislation. Note that Fringe Benefit Tax is calculated on the value of the benefit (as stipulated above) at the tax bracket that you currently subscribe to. It will therefore be your choice as to whether you would like to accept the laptop and the associated Fringe Benefit tax or not. In considering the package, please indicate this so that we can take this into account when projecting a settlement.

2. Kindly note that the date of acceptance of such voluntary package is the 23rd of October. Thereafter the package will no longer be available as an alternative to retrenchment.

3. Kindly note that Mr. Arend Posthuma, the retrenchment facilitator, will be sharing comments on other alternatives raised with you.

If you have any further questions in this regard, please do not hesitate to contact me. All additional questions will be addressed in the following consultation.

Kind regards

Anneke Roodman | Head of Human Resources'

[49] He did not accept the revised offer as he was still of the view that the process will run until 05 December 2020 and the Employer was still considering other alternatives seeing that the business was in a good financial position.

[50] On 28 October 2020, all employees were expecting to receive their salaries but this did not happen. He was never informed that his October salary was bundled into the package and he was not prepared to accept the

retrenchment notice and waive his claims against the company as he did not agree that his position had become dormant and the process followed was fair. He then wrote the following email to Ms Roodman, Finance, EXCO, and Mr Posthuma:

> 'Hi Anneke
>
> Thank you for the kind words. My salary for October was not paid, why? I did render my services for October and duly deserve to get paid. Tell me how is this fair.
>
> Please explain what constitutes a 'substantively fair' retrenchment process. I did not particularly experience the fairness you are referring to so I cannot vouch for what I did not feel.
>
> The reason I am accepting the offer is the understanding that my services are no longer needed by the company. If you are sure that everything was done by the book then you do not require this clause, your process should speak for itself.
>
> You promised to send minutes of a meeting that was held on Monday, 19 October but I am yet to receive the minutes. I couldn't access the recording of the first group consultation, Arend please assist.
>
> Please remove this clause so I can sign
>
> TERMINATION OF EMPLOYMENT
>
> '1. That the employee's services are terminated as a result of the operationa; requirements (retrenchment) of the company.
>
> 2. That the position of Product Manager has become redundant in the structure of the company and that the position therefore ceases to exist.
>
> 3. That the employee's employment in the capacity of Product Manager terminates with immediate effect and that his/her last working day will be 30/10/2020.

4. That the employee specifically agrees with his or her signature on this document that his/her termination of employment is substantively fair and that the employee agrees that he/she has no claims of any nature against the company'.

[51] In response to his email, Mr Posthuma indicated that they will consider withdrawing the voluntary severance package offered to him in light of the fact that he did not wish to sign the notice presented by employer but no clause shall be removed. He stressed that the Employer would not be paying severance package and still be faced with legal action by aggrieved employees. He further offered to restart the consultation sessions to ensure that the process is both procedurally and substantively fair.

[52] He indicated that the package was never withdrawn as suggested by Mr Posthuma. The Defendant refused to engage meaningfully and disclose the selection criteria followed and information any alternative measures to avoid dismissals. Mr Posthuma and Ms Roodman had informed him that he could only be paid once he has signed the notice. He inserted the words '*signed under protest in relation to termination of employment clause number 4'* on his retrenchment notice and he received his package on the same day.

[53] Under cross examination he confirmed that he knew who Mr Posthuma was and he understood the retrenchment process since he had been retrenched before. He was also asked if he knew that the Labour Court did not have jurisdiction to determine the procedural fairness of a section 189A process and he answered in the negative. He further stated that he was only consulted once and thereafter he was offered a severance package. He was referred to an email on page 27 dated 14 October 2020 which reads as follows:

'Good morning Arend

Thanks for the feedback. I'll accept the voluntary retrenchment offer.

Do I really have to leave with immediate effect? I took three days leave from 19 to 21 October 2020 – system approved but not taken yet. What happenes to those three leave days if I leave the company with immediate effect?

Please advise

Kind regards'

[54] He, however, stated that he did not have sufficient time to consider the offer. he further denied that the revised offer included an additional month as it included his salary for the month of October 2020. He further confirmed that he did receive an amount of R348 831.26 but reiterated that he signed under duress and he recorded his protest on the signed retrenchment notice. It was further put to him that he was consulted and the process needed not to continue for a full period of 60 days due to the parties reaching an agreement.

[55] He, however, stressed that it was made clear that if they do not sign the retrenchment agreements they will not be paid since their October salaries which were bundled into the voluntary severance packages. He referred to the following email exchange on 28 October 2020 between herself and Ms Roodman:

'Hi Rudzani

Unfortunately policy is written for the many and not for the few and it is for those reasons that we have to have some regulations within our organisation. At this point, Finance is happy to make payments today, with the condition that a signed agreement by both parties are in hand…

…'

A few minutes later he responded as follows:

'Hi Anneke

I do understand. I am asking questions so I walk away knowing that the process was fully transparent. So if I sign the retrenchment notice today, my October salary will be paid today?

Thanks

He then signed the agreement but omitted the attachment in his email. Ms Roodman then responded by stating:

'Hi Rudzani

I would love to release the payments. Can you please resend soonest.'

[56] He also referred to an email correspondence which confirmed that the Defendant was not prepared to pay their October salaries unless they signed and submitted retrenchment notices. This was supported by an email from Nimee Dhuloo at 13:37 with the subject line *'Processing of Voluntary Retrenchment packages'* which read as follows:

'Dear All

I trust that everyone is doing well

Kindly be advised that HR is awaiting some of the signed agreements in order to release your respective payments. In the absence of a signed agreement, we will unfortunately not be able to make your payments.

Please prioritize this so that you do not compromise your payment which is scheduled as per the normal pay date the 28' October.

Thank you Best Regards

Nimee'

At 01h47 she sent a follow up email which read:

'Dear All

Finance has just alerted me to the fact that the agreements need to be in by the latest 3 pm in order to meet the payments date of the 28th.

Thank you

Regards

Nimee'

[57] The Plaintiffs then closed their case without calling other witnesses. The Parties were directed to file closing submissions and I am indebted to both of them for their compliance with the directive.

Evaluation

[58] Section 189 (3) of the LRA deals with dismissals based on operational requirements and provides that:

> '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 operational requirements in the preceding 12 months.'

[59] Section 213 of the LRA provides that 'operational requirements' means requirements based on the economic, technological, structural or similar needs of an employer. The retrenchment notices issued by the Defendant and signed by the Plaintiffs clearly records that '*the employee's services are*

terminated as a result of the operational requirements (retrenchment) of the company.'

[60] Based on the case presented before Court, the central issues for determination are whether the Defendant established a fair and rational basis for the retrenchments, whether it complied with its obligations to meaningfully consult on alternatives to dismissal, and whether it applied the fair selection criteria when selecting employees for dismissal.

The consultation and rationale for dismissal

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

[62] In *Super Group Supply Chain Partners v Dlamini and Another*[4] *(Super Group)*, the LAC reiterated that section 189 imposes a positive duty on employers not merely to consult, but also to take appropriate measures on their own initiative to avoid dismissals or to mitigate their effects. Consultation is therefore not a passive exercise, but one that requires an employer to actively engage with and, where reasonably possible, implement alternatives to retrenchment.

[63] In *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[5], the LAC held that:

> 'The failure to consult the appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It only affects his selection. The selection of an employee for retrenchment does not only impact on the procedural purpose of consultation but also on its substantive purpose. This is so because failure to consult on known alternatives leaves open a possibility that the affected employee might, contrary to the employer's belief, have accepted the undisclosed alternative to his or her retrenchment. If he or she would have, then it follows that he or she

[4] [2012] ZALAC 25; (2013) 34 ILJ 108 (LAC) at para 24.
[5] [1999] ZALAC 25; (2000) 21 ILJ 129 (LAC) at para 37.

> would not have been retrenched and the decision to retrench him or her would therefore be both procedurally and substantively unfair notwithstanding the existence of a genuine business rationale therefor.'

[64] In this case, the only alternative given to Plaintiffs according to the evidence of the Defendant was the voluntary severance package. Plaintiffs complained about not being consulted and the Defendant's defence is that there was no need to engage in further consultations since the voluntary severance packages were already accepted. This is contrary to the evidence of the Plaintiffs supported by email correspondence that they were coerced into signing retrenchment notices since their October salaries were not paid and there was no intention to release such salaries unless the agreements had been signed and submitted before 15h00 on 28 October 2020 which was the day they ought to have received their salaries.

Alternatives and selection criteria

[65] It was not disputed that none of the dismissed employees were offered alternative positions. Instead, the Defendant availed seven positions and advertised them at higher qualifications to exclude the Plaintiffs. This requirement that affected employees ought to have reapplied for positions which were in essence introduced to phase out their positions does not amount to an alternative to dismissal. It was an attempt by Defendant to initiate a fresh recruitment process with a clear target to get rid of the majority of the affected employees.

[66] In the event that dismissals cannot be avoided, section 189(2)(b) of the LRA requires the parties to engage meaningfully and, where possible, reach agreement on the criteria to be applied in selecting employees for retrenchment. In the absence of agreement, the employer must apply a fair and objective selection criteria. In this matter, the Defendant refused to disclose the selection criteria followed in retrenching the Plaintiffs. The section 189(3) notice clearly states that:

> 'The selection criteria that the company proposes to implement to determine who are candidates for possible retrenchments will be skills and qualifications.'

[67] In *Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd*[6], the LAC said that:

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

[68] In *Umicore Catalyst SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*[7], the LAC reaffirmed that the onus rests on the employer to establish that the selection of employees for dismissal was fair. While criteria such as length of service, skills and qualifications are generally accepted as fair, deviations from commonly-accepted standards such as LIFO must be justified and supported by evidence demonstrating their necessity for the effective operation of the business.

[69] The evidence presented before this Court supports the case of the Plaintiffs that they were pushed out of work and there was no meaningful consensus-seeking engagement between them and their employer. The Defendant's reliance on signed notices of termination is misplaced as the notices were merely signed to cater for the termination arrangements. All that the

[6] (2006) 27 ILJ 292 (LAC) at para 84.
[7] (2024) 45 ILJ 2545 (LAC) at para 19.

Defendant sought to achieve with the signed notices of termination was to try to undermine the Plaintiffs' rights to fair labour practices. The notice itself records that it is meant as a statutory notice of termination of employment and not a settlement or mutual separation agreement.

[70] The other issue of concern is that the Plaintiffs had worked for the month of October 2020 but they were not paid their salaries at the end of the month. various correspondence has been quoted above demonstrating that the Defendant pushed the Plaintiffs out of work by withholding their salaries and bundling them into the severance payments. All employees had raised the same issues of non-payment of their salaries and it was clear that the only way they could be paid their salaries was if they signed and submitted the retrenchment notices and there were no other alternatives.

Conclusion and remedy

[71] The Defendant failed to establish a fair and rational basis for the retrenchments in that it did not demonstrate that the Covid-19 pandemic had affected its operations and there was a need to retrench employees and re-advertise some of the positions on higher qualifications. The witness testified that the seven employees who rejected the voluntary severance packages were absorbed into the vacant positions which were never offered to the Plaintiffs.

[72] Furthermore, the section 189(3) notice issued by the Defendant failed to disclose the alternatives considered prior to the decision to retrench and the criteria to be followed. The process was also not allowed to run for a period of sixty days but it was cut short in order to force the Plaintiffs to sign retrenchment notices. The effect of the failures to establish a valid rationale and/or meaningful consideration of alternatives and/or application of fair selection criteria inevitably leads to the conclusion that the Plaintiffs' dismissals were substantively unfair.

[73] The Plaintiffs sought maximum compensation in the event that the Court finds in their favour. Section 194 of the LRA governs the award of compensation for substantively unfair dismissals and requires that such compensation be just

and equitable, subject to the statutory maximum of twelve months' remuneration. The Defendant has indicated that the license to operate the National Lottery was awarded to another company and this creates doubt as to whether it will be in a position to satisfy an award of maximum compensation. However, I have taken into account the fact that they did not pay the employees their salaries for the month of October although they had rendered their services and the manner in which dismissals were effected was harsh and unfair.

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

Costs

[75] Costs in the Labour Court are regulated in terms of section 162(1) of the LRA, which provides that the Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness. Although the Plaintiff was greatly failed by the poor legal strategy employed by her counsel, this did not demonstrate any conduct warranting chastity from this Court. As a general proposition and considering the dictates of fairness, the Court sees no legitimate reason to depart from the general principle that costs do not follow the result in employment disputes.

[76] Accordingly, the following order is made:

Order

1. The dismissal of the Plaintiffs is declared to be procedurally and substantively unfair.

2. The defendant is ordered to pay each of the six plaintiffs compensation equal to eight (8) months' remuneration, calculated at the rate applicable at the time of their dismissal.

3. The compensation referred to above must be paid within 15 court days of receipt of this judgment and order.

4. There is no order as to costs.

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G. C. Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff:	Adv N Tshisevhe
Instructed by:	Thabethe FF Attorneys
For the Defendant:	A Posthuma of Snyman Attorneys