Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no's: C586/2022,
C10/2023 & C09/2023

In the matter between:

MTWU obo NDENGANE & OTHERS **Plaintiff**

and

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD **Defendant**

Date of Hearing: 10-11 February 2025, 25-26 November 2025 & 27 January 2026 (Written closing argument submitted by 6 February 2026).

Date of Judgment: 22 June 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 19 June 2026.

Summary: (Dismissals for operational requirements – rationale based on renewal of a contract on reduced terms – employees refusing to accept reduced remuneration – retrenchments substantively fair – Procedure – employer's failure to provide requested information about the company's overall financial position not unfair – requested information not relevant to the operational reasons relied on).

JUDGMENT

LESLIE AJ

Introduction

[1] In this matter, three cases were consolidated for hearing. They concern the fairness of the dismissals, for operational reasons, of the plaintiff's members.

[2] The plaintiff is the Motor Transport Workers Union ("MTWU" or "the union").

[3] Under case number C586/2022, thirteen employees are cited, namely:[1] Mafanga MS, Fortuin C, Makuleni X, Jacobs H, Hendricks MC, Ross EA, Johnson J, Pietersen D, Cloete J, Louw J, Smit R, Welkom CM and Ntengane KO.

[4] Under case number C10/2023, two employees are cited, namely Messrs Erasmus and Mark. Under case number C09/2023, Mr Jaxa is the employee party cited.

Special pleas

[5] The defendant raised special pleas disputing jurisdiction in respect of certain employees.

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[1] There were 14 employees cited but the name of J Johnson was duplicated.

[6] As regards Mr Pietersen, the defendant disputed the existence of a dismissal. Mr Chonco, the defendant's Head of Human Capital, testified that Mr Pietersen was not dismissed. On 29 June 2022, he was informed, in writing, that with effect from 1 August 2022 his Health & Safety (HSE) allowance would be reduced from R400 to R150 per shift. He was offered a "settlement package" in recognition of this change, which Mr Pietersen accepted. He thereafter resigned on 22 August 2022. He signed a document confirming that the reason for the termination of his employment was "Resignation". The plaintiff, which bore the onus of establishing that Mr Pietersen was dismissed, led no evidence to gainsay the defendant's version.

[7] Since the plaintiff failed to establish that Mr Pietersen was dismissed, the defendant's special plea falls to be upheld, for want of jurisdiction.

[8] As regards Messrs Mafanga and Ndengane, the defendant similarly reduced their HSE allowances with effect from 1 August 2022 and they were paid a "settlement package". The union, acting on behalf of a group of employees including Messrs Mafanga and Ndengane, referred a dispute to the applicable bargaining council[2] regarding an alleged unilateral change to their terms and conditions of employment. A written settlement agreement resolved that dispute on 5 September 2022. In terms of the settlement agreement, the defendant agreed to restore the HSE allowances. However, the defendant then proceeded with a retrenchment process in respect of that group of employees.

[9] For present purposes, it is clear that Messrs Mafanga and Ndengane were not dismissed by 26 July 2022 – the date on which the unfair dismissal dispute was referred to conciliation before the NBCRFI. This court accordingly does not have jurisdiction over the unfair dismissal disputes in respect of Messrs Mafanga and Ndengane.

[10] The defendant raised a separate special plea in respect of the following employees: Messrs Fortuin, Makuleni, Jacobs, Ross, Johnson, Welkom, Erasmus, Mark and Jaxa. It is common cause that these employees were

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[2] The National Bargaining Council for the Road Freight Industry ("NBCRFI" or "the bargaining council").

retrenched with effect from 31 July 2022 and that they received severance packages. With effect from 1 August 2022, they were re-employed, albeit on changed terms and conditions of employment. The defendant submits that the employees' conduct, in accepting re-employment, meant that the unfair dismissal dispute was settled.

[11] Waiver of rights is not lightly presumed. Aside from the fact that the employees accepted re-employment, there is no evidence that they waived their right to pursue an unfair dismissal dispute. The defendant did not make it a condition of re-employment that the employees waive their rights to pursue an unfair dismissal claim. Any such condition was certainly not recorded in writing, and there was no evidence that it was otherwise agreed between the parties. The defendant has not discharged its onus in this regard.

[12] Accordingly, there remains a live unfair dismissal dispute in respect of Messrs Fortuin, Makuleni, Jacobs, Ross, Johnson, Welkom, Erasmus, Mark, Jaxa, Hendricks, Cloete, Louw and Smit (13 in total) (hereinafter referred to as "the employees").

The merits

Background

[13] The defendant carries on business in the road freight industry. This case concerns the transportation of petroleum under contract with Shell, rendered by the defendant. The employees were employed as truck drivers based at the Shell Burgan terminal, reporting to the Unitrans Killarney Depot in Cape Town.

[14] Mr Louis Steyl, a General Manager in the defendant's employ, testified that the defendant had several existing contracts, at depots around the country, to transport petroleum for Shell, including the Burgan contract. This was a five-year contract, expiring at the end of August 2021.[3]

[15] In or around May 2021, Shell put the contract out to tender. The defendant was invited to bid in a "reverse auction" process. This was essentially a live

[3] The contract had been due to end in June 2021, but had been extended on a month-to-month basis until the end of August 2021.

online auction in which a bidder can see what prices have been submitted by competitors, and adjust its bid price accordingly. The auction takes place within a matter of minutes.

[16] In respect of the Burgan contract, the defendant's opening bid was R3,821 million and its final bid was R3,392 million. The latter bid was the defendant's "walk-away" price, that is, the lowest it was prepared to go before abandoning its interest in the contract.

[17] In order to arrive at its mid-price, the defendant had cut its internal rate of return, maintenance costs and tyre cost per kilometre to a minimum. These cuts were, however, not sufficient and the defendant had to resort to its minimum auction bid. This was based on labour costs at the bargaining council's minimum rates for all drivers. Mr Steyl was subsequently required to confirm, in response to enquiries from Shell, that the labour costs were based on the NBCRFI's minimum wage rates.

[18] The defendant was not successful in retaining any of its existing contracts with Shell, except for the Burgan contract. The defendant retained the Burgan contract despite having only the fifth-lowest bid.

[19] The defendant employed around 39 drivers and 5 or 6 administrative staff in connection with the Burgan contract. Mr Chonco was tasked with determining how best to align labour costs with the new contract terms.

[20] Mr Chonco testified that there were two main categories of affected drivers: (a) the group of drivers who were on a higher rate of pay than the bargaining council minimum; and (b) the group of drivers who were on the bargaining council's minimum basic wage but who received a higher HSE allowance (than the bargaining council prescribed). As set out above, following the determination of the special pleas, this dispute primarily concerns the former group – who were ultimately retrenched with effect from 31 July 2022.

The procedure followed

[21] The defendant commenced discussions directly with the affected employees in August 2021, explaining that the terms of the Shell contract had changed and proposing revised remuneration rates. At a later follow-up session the affected employees advised that they were in the process of

joining the union. Discussions were put on hold so that the defendant could meet formally with the union.

[22] The first meeting with the union was held on 7 October 2021. Management explained the background and made a proposal that would result in all employees being placed on the bargaining council's minimum wage[4] and receiving a standard HSE allowance of R200. The employees' employment would continue uninterrupted and they would retain their length of service. To cushion the blow, employees would receive a once-off payment of R1000 per completed year of service. It was made clear, from the defendant's perspective, that this was not a section 189 consultation process as it did not envisage retrenching any employees at that stage.

[23] The union requested further information in support of the need to reduce salaries and requested time to consider the proposal.

[24] The next meeting was held on 11 January 2022. By that stage, the union had advised management that their proposal was not acceptable to their members. No counter-proposal was tabled. It was minuted that the anticipated request for information had not yet been received by management. Management indicated that a section 189 consultation process would ensue.

[25] On 25 January 2022, the defendant issued a notice in terms of section 189(3) of the Labour Relations Act 66 of 1995 ("the LRA"), spelling out the reasons for the envisaged retrenchments and reiterating the offer of continued employment on the bargaining council's minimum wage (together with a once-off payment as described above).

[26] The first section 189 consultation meeting was scheduled for 31 January 2022 but ultimately took place on 18 February 2022. Mr Chonco read the section 189(3) letter and then called for any questions with regards to the rationale, selection criteria, alternatives to avoid retrenchment and the date of implementation. Mr Vukela, the union official present, stated that the defendant needed to prove its economic non-viability. To this end, the union undertook to present a request for specific financial information, which

[4] R66.2973.

would be reviewed by the union's finance experts before reverting. The union also raised, in tentative terms, LIFO as a potential selection criterion.

[27] The union appointed a firm of accountants, Lamula & Lamola, to engage with the defendant on the financial rationale underpinning the retrenchments. The accountants submitted a request for information and subsequently met with members of the defendant's management (Chonco, Steyl and Leneste Lubbe, Business Development Manager) on 1 April 2022.

[28] Mr Steyl testified as to what took place at this meeting, which took the whole day. The union did not call any witness who was present at the meeting.[5] Mr Steyl identified the documentary information that was made available to the accountants. The documents illustrated the financial impact of the revised terms of the Shell Burgan contract. For example, in June 2021, the total monthly value of the contract was R4.121 million. Following the implementation of the new contract terms, it fell to R3.665 million (effective from 1 September 2021). In short, the accountants were placed in a position to assess for themselves the adverse financial impact of the new Shell contract terms.

[29] Mr Steyl confirmed that he explained to the accountants how the bidding process had worked (i.e. the reverse auction) and how the defendant had ultimately arrived at its final "walk-away" price – which included a reduction in maintenance costs, the internal rate of return and labour costs for operational staff and drivers.

[30] Following this meeting, the accountants produced a written report to the union dated 11 April 2022. In that report, it is noted that certain information was requested from the defendant but had not been provided. This included the company's latest management accounts, its audited annual financial statements for the past two years, and the company's budget for the current financial year and reforecast.

[31] Mr Steyl testified that he explained to the accountants that the annual financial statements were at company level and were available to the public online. As regards the information relevant to the Burgan contract, the

[5] No union official attended the meeting.

accountants were provided with the general ledger up to February 2022. As regards the request for management accounts, in respect of the Burgan contract the available general ledger and income statement were provided. Mr Steyl explained that he did not have the latest management accounts at company level. Similarly, he did not have the overall company budget and reforecast and so this could not be provided.

[32] Mr Steyl testified that the accountant appeared satisfied with the information that had been provided, coupled with the explanations as to why certain information was not available, and did not raise any objection during the meeting.

[33] This is corroborated by a portion of the accountant's report which records that: *"Upon manual inspection of an Income Statement, General Ledger printouts and Shell's revised rate cards which Louis Steyl shared with us, together with management selected bid documents that Leneste Lubbe projected on the day, we are comfortable that management responded to our questions which were based on the documents tabled before us."*

[34] Despite this, the report records that the defendant's failure to provide the requested documents (largely pertaining to the company's overall financial state) *"adversely impacted on our ability to make a conclusive analysis of the company's financial position."* The report concluded that *"There is not enough financial information which justify* (sic) *the S.189 plans."* Under the heading "Recommendation", it was stated that *"Retrenchments in terms of section 189 appear to be unjustified based on non-existent financial information presented to MTWU auditors."*

[35] A follow-up consultation meeting took place on 21 April 2022. The accountants' report was presented at this meeting. On the grounds that the requested information had not been provided to the accountants, the union adopted the view that: (a) the parties were deadlocked; (b) it was unable to advance any alternatives to retrenchment; and (c) that if the defendant proceeded with the retrenchments the union would take the dispute to court. The defendant indicated that, effective 1 June 2022, the contracts would be "restructured" – every driver would be employed on the bargaining council's minimum rate, with an HSE of R150.

[36] The defendant thereafter attempted to refer the matter to the CCMA for facilitation. However, the CCMA required the consent of the union – which was not forthcoming. In an email dated 1 June 2022, the union confirmed with the CCMA that it believed that *"this process does not require facilitation"*.

[37] The union also did not pursue any dispute concerning the defendant's alleged failure to disclose relevant information under section 16 of the LRA.

[38] On 14 June 2022, the defendant addressed correspondence to the union, indicating that in order to allow for further engagement, it was extending the proposed implementation date to 1 August 2022. The defendant reiterated that it did not wish to retrench any drivers as their posts remained available – albeit on the reduced salaries.

[39] A final consultation meeting took place on 1 July 2022. The defendant's position was that, since no alternatives had been proposed by the union, the defendant's proposal would be implemented. The affected drivers would receive retrenchment notices with effect from 31 July 2022, as well as offers of employment on the revised terms with effect from 1 August 2022. The union responded that it had not proposed any alternatives because the defendant had not been transparent in providing the requested financial information. It rejected the defendant's decision to restructure and retrench and indicated that it would be taking legal action.

[40] The affected employees were thereafter issued with retrenchment notices (dated 30 June 2022) with termination dates of 31 July 2022. They received severance packages based on one week's pay per year of completed service. They were simultaneously offered, and accepted, new contracts of employment, with effect from 1 August 2022, on the revised terms and conditions.

Procedural fairness

[41] The union argues that the dismissals were procedurally unfair on the basis that the consultation process was a sham – the dismissals were a fait accompli and the defendant presented no alternative to the employees other than to accept the revised terms. Related to this, the union argues that it

was unable to consult or propose alternatives because its accountants' request for financial information had been denied.

[42] It is clear that the union viewed the defendant's failure to provide the requested financial information to its accountants as a sticking point. The conclusions reached by the accountants in their report informed the union's subsequent conduct in the consultations. Without the requested documents, it adopted the stance that it could not meaningfully engage in the consultations or propose any alternatives.

[43] In this sense, the union put all its eggs in one basket. Whether this was justified turns on whether it was provided with sufficient information to consult.

[44] Section 189(3) of the LRA imposes a duty on an employer to disclose, in writing, all relevant information (including but not limited to the information listed in subsections (a) to (j)). The question in the present matter is whether the defendant provided sufficient *relevant* information to enable the union to meaningfully consult.

[45] Relevance is determined with reference to the operational rationale underpinning the restructuring exercise.

[46] Applied here, the stated reason for the retrenchments was that the defendant could not operate the Shell Burgan contract profitably without reducing the remuneration of the affected employees.

[47] In my view, the defendant provided more than sufficient information to justify this rationale. The union's accountants were placed in a position where they could assess: (a) that the defendant had resorted to tendering at reduced remuneration costs as a last resort, only after cutting other operational costs; and (b) the impact of the revised contract terms, namely, the reduced income received by the defendant under the Shell Burgan contract.

[48] The accountants' report stated that three items had been requested but had not been received. Mr Steyl's uncontested evidence[6] in this regard was that:

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[6] Bearing in mind that no union official attended the meeting on 1 April 2022 and that the accountants were not called to testify at the trial.

48.1 The defendant's annual financial statements were at company level and were available to the public online, and this had been explained to the accountants;

48.2 As regards the request for company-level management accounts, these were not available, but in respect of the Burgan contract the available general ledger and income statement had been provided;

48.3 Mr Steyl also did not have the overall company budget and "reforecast" which had been requested.

[49] In short, the existing information regarding company-level finances had been made available, in addition to all relevant information pertaining to the stated reason for the retrenchments, i.e. the reduced economic terms of the Shell Burgan contract.

[50] In any event, given that the defendant did not rely on its overall financial state as a reason for retrenching the affected employees, the requested information pertaining to the company's finances was not required for the union to meaningfully engage on the question at hand.

[51] When pressed in cross-examination why he regarded the information that had been provided as insufficient, Mr Vukela was unable to answer. He merely stated that the union was guided by the accountants (who were not called to give evidence).

[52] Consultation is a two-way street. If the union felt hamstrung in its ability to meaningfully consult, it had remedies available to it. It could have pursued a section 16 application before the CCMA. Alternatively, it could have taken up the defendant's invitation to engage in a facilitated process under the auspices of the CCMA. It did neither.

[53] Ultimately, the union had more than sufficient information to consult on the stated rationale for the retrenchments. In these circumstances, the union's failure to engage or advance any alternatives[7] belies its argument that the defendant conducted a sham process.

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[7] There is a reference to LIFO being touted by the union as an alternative selection criteria in the minutes of the consultation meeting held on 18 February 2022. However, read in context it is clear that this was not seriously persisted with by the union. The union's position was that it was unable to propose any alternatives until such time as it had been furnished with the requested

[54] The defendant was entitled to take a view on the impact of the reduced terms of the Shell contract and the need for retrenchments. The only option it could envisage to save jobs was the one it tabled, namely, the continuation of the drivers' employment on reduced remuneration rates. In the absence of any alternatives proposed by the union, the defendant was not obliged to propose additional alternatives from its side. Its failure to do so does not mean that the consultation process was a sham or that the dismissals were a fait accompli.

[55] I accordingly conclude that there is no merit to the union's complaint of procedural unfairness. The dismissals were procedurally fair.

Substantive fairness

[56] The crux of the union's argument on substantive fairness is that the reduced terms of the Shell Burgan contract was not a fair reason to retrench the affected employees, in the absence of proof of the defendant's overall financial position. In other words, the union's position is that the defendant was only permitted to retrench if it could show, at company level, that it was in financial difficulty.

[57] The defendant, on the other hand, did not rely on the company's overall financial state to justify the retrenchments. Its case was that it could not profitably operate the Shell Burgan contract if the affected employees remained on their existing salaries.

[58] The defendant presented evidence showing that, in order to succeed in retaining the Shell Burgan contract through the reverse auction process, it had been required to reduce all operating costs associated with the contract. As a last resort, its "walk-away" price had required it to reduce drivers' salaries and HSE allowances. Mr Steyl testified that, due to the substantial drop in the contract price, it was not viable for the business to continue operating the Shell Burgan contract on the terms that had previously pertained. He stated that, if the defendant had continued on the old terms, the contract would have been shut down because it would have been

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financial information. In the same meeting, Mr Chonco stated that if the union regarded the selection criteria as unfair, they needed to propose alternatives. This invitation was not taken up in any subsequent meeting or item of correspondence.

unprofitable – in which case all of the employees engaged on the Shell Burgan contract would have lost their jobs. The union was not in a position to refute this evidence, which must accordingly be accepted.

[59] Substantive fairness therefore turns on this crisp issue – was it competent for the defendant to rely on the viability or profitability of the Shell Burgan contract alone, as opposed to the overall financial health of the company, to justify the retrenchments?

[60] It is well-established that employers are entitled to reduce staff for a variety of reasons, including pursuing what they consider to be a better cost structure.[8] Retrenchments are not only justified when they are necessary to ensure the survival of a business. A profit-making business may retrench in order to make greater profits.

[61] Applied here, the evidence established that, following the renewal of the Shell Burgan contract on lesser terms, it was no longer viable or profitable for the defendant to operate that contract on the same basis as before. The defendant had been constrained to bid allowing for labour costs at the bargaining council's minimum rates. It had lost several other Shell contracts and had not succeeded in its bids for additional Shell contracts at new sites.

[62] Having shown this, it was not necessary for the defendant to go further and also establish that the company as a whole was in financial difficulty. An employer is not required to operate a specific contract at a loss, even if it is otherwise solvent, in order to retain jobs. The employees selected for retrenchment were those earning salaries above the bargaining council minimum rates of pay. In my view this was a rational and fair approach that was tailored to the specific operational reasons relied on by the defendant.

[63] I accordingly find that the dismissals were substantively fair.

[64] As regards costs, I am mindful that costs do not necessarily follow the result in this court and that a fair balance must be struck between not unduly discouraging litigants from approaching this court, on the one hand, and

[8] See *General Food Industries Ltd v FAWU* [2004] 7 BLLR 667 (LAC) paras 52 and 62, citing *NUMSA v Fry's Metals* [2003] 2 BLLR 140 (LAC).

preventing vexatious and frivolous litigation, on the other.[9] The litigation brought by the union, although unsuccessful, was not frivolous or vexatious. There is an ongoing relationship between the union and the defendant. I therefore decline to award costs against the union.

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

Order

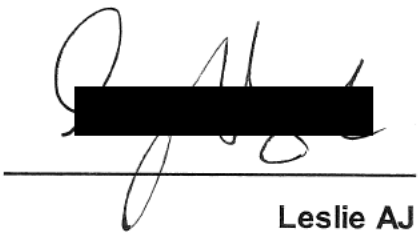
[1] The defendant's special plea in respect of Messrs Pietersen, Mafanga and Ndengane is upheld. The court does not have jurisdiction in respect of their alleged unfair dismissal claims;

[2] The defendant's special plea in respect Messrs Fortuin, Makuleni, Jacobs, Ross, Johnson, Welkom, Erasmus, Mark and Jaxa is dismissed. The court does have jurisdiction in respect of their unfair dismissal claims;

[3] The unfair dismissal claims under the above case numbers are dismissed;

[4] The dismissals of Messrs Fortuin, Makuleni, Jacobs, Ross, Johnson, Welkom, Erasmus, Mark, Jaxa, Hendricks, Cloete, Louw and Smit were substantively and procedurally fair;

[5] There is no order as to costs.



Leslie AJ
Acting Judge of the Labour Court of South Africa

Representatives –

For the plaintiff: **L Mosala,** instructed by Matlatle Attorneys
For the defendant: **G M Viljoen,** instructed by Thomson Wilks

[9] *Zungu v Premier of the Province of KwaZulu-Natal* (2018) 39 ILJ 523 (CC) para 24.