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

Signature Date

LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 2026-050046

In the matter between:

GENERAL WORKERS UNION OF SOUTH AFRICA

(GIWUSA) OBO MEMBERS **Applicant**

and

KELLOGG COMPANY OF SOUTH AFRICA (PTY) LTD

t/a KELLANOVA **First Respondent**

SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS

UNION (SACTWU) **Second Respondent**

Heard: **17 March 2026**

Delivered: **11 June 2026**

Summary: Application in terms of section 189A (13) of the LRA – decision to dismiss before commencement of consultation process – *fait accompli* scenario – does it constitutes procedural or substantive unfairness – on the facts of this case it was concluded that *fait accompli* constitutes substantive unfairness – the repealed section 189A (19) found to be of assistance in determining whether *fait accompli* in this case constitutes procedural or substantive unfairness – application dismissed – no order as to costs.

JUDGMENT

MGAGA, AJ

Introduction

[1] This is an urgent application brought in terms of section 189A (13), read with section 189A (17) of the Labour Relations Act[1] (LRA). The applicant is the General Workers Union of South Africa (GIWUSA), which brought this application in a representative capacity on behalf of its 26 members[2] who were dismissed by the first respondent based on operational requirements. For the sake of convenience, in this judgment the 26 members of GIWUSA will be referred to as the applicants, and GIWUSA as the applicant or GIWUSA.

[2] In essence, the applicant seeks an order declaring that the dismissal of the applicants was procedurally unfair and that the first respondent be ordered to reinstate the applicants and comply with a fair procedure as prescribed in section 189 (2) and (3) of the LRA, alternatively, the first respondent be ordered to pay compensation to the applicants.

[3] The application is opposed by the first respondent on various grounds which will be set out later in this judgment.

[4] The first respondent is Kellogg Company of South Africa (Pty) Ltd t/a Kellanova. The first respondent is in the business of producing breakfast cereals and snack foods, operating from its plant in Springs, with its primary place of business at Kellogg House in Sandton.

[5] The second respondent, South African Clothing and Textile Workers Union (SACTWU) is cited as an interested party because it is also organizing within

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[1] Act 66 of 1995, as amended.
[2] The list of GIWUSA members appears on annexure “AN2” to the founding affidavit – Caselines 002-30.

the first respondent and it participated on behalf of its members in some of the processes that will be discussed later in this judgment. However, the second respondent did not participate in this application despite being duly served with the papers. In any event, no relief is sought against the second respondent.

Urgency

[6] The urgency of this application is not contested. An application in terms of section 189A (13) is inherently urgent. This application was brought on or about 4 March 2026, and the notice to terminate the applicants' services had been issued by the first respondent on 16 February 2026[3]. So, the application was brought within 30 days after the issuing of the notice, in compliance with section 189A (17) of the LRA.

[7] The Court is satisfied that this application meets the requirements of Rule 38 of the Rules Regulating the Conduct of the Proceedings of the Labour Court, and it must be dealt with on urgent basis.

Relevant material facts

[8] Initially the applicants and other employees were procured by a temporary employment service (TES or labour broker), Boardroom Appointments, to render services at the first respondent's Springs plant from August 2023.

[9] On or about May 2025 the second respondent referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) seeking an order to declare the TES' employees to be deemed employees of the first respondent as envisaged in section 198A (3)(b) of the LRA. Later, GIWUSA joined the dispute on behalf of its members.

[10] The section 198A dispute was ultimately resolved on 19 November 2025 when a settlement agreement was concluded between the first respondent and the two trade unions (GIWUSA and SACTWU)[4]. There is a dispute as to

[3] The notice appears on annexure "AN9" to the founding affidavit – Caselines 002-50 to 002-54.

[4] The settlement agreement appears on annexure "AN4" to the founding affidavit – Caselines 002-35 to 002-37.

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the date from which the TES employees were deemed to be the employees of the first respondent. The applicant contends that it was from October 2023, and the first respondent contends that it was from the date of signing the settlement agreement, 19 November 2025. In determining the issues in this application, nothing much turns on the deeming date.

[11] On or about 21 August 2025 the first respondent informed Boardroom Appointment that it no longer required the services of the TES employees[5]. In turn, Boardroom Appointments informed the first respondent that it would initiate the section 189 retrenchment process and it invoiced the first respondent for the costs of retrenchment.

[12] On 9 September 2025 Boardroom Appointments issued a notice in terms of section 189 (3) of the LRA to the TES employees, including the applicants[6]. The notice, *inter alia*, sets out comprehensively the first respondent's operational and technological changes which resulted in the reduced need for temporary labour. However, the first respondent claims that it did not contribute to the contents of the notice issued by Boardroom Appointments.

[13] After the issuing of the section 189 (3) notice by Boardroom Appointments the TES employees, including the applicants, were denied access to the workplace as their access cards were deactivated, and they did not receive their weekly wages from 1 October 2025.

[14] It appears that the CCMA was requested to appoint a facilitator to facilitate the retrenchment process in terms of section 189A (3) of the LRA. On 29 October 2025 a facilitation meeting took place before the CCMA facilitator. Interestingly, the first respondent also attended the facilitation meeting despite the fact that the section 189(3) notice was issued by Boardroom Appointments. At this facilitation meeting the first respondent undertook to issue a new section 189 (3) notice under its name, to grant TES employees access to the workplace and pay their outstanding weekly wages from 1 October 2025. This was probably because it was appreciated that by then the TES employees were already deemed to be employees of the first

[5] Para 8 of the answering affidavit – Caselines 003-3.

[6] The notice appears on annexure "AN5" to the founding affidavit – Caselines 002-38 to 002-44.

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respondent, hence the subsequent settlement agreement on 19 November 2025 which confirmed this appreciation.

[15] On 31 October 2025 the first respondent issued a section 189 (3) notice to the TES employees including the applicants[7]. This notice also sets out comprehensively the first respondent's operational and technological changes which resulted in the reduced need for temporary labour. The notice further indicated that consultation period would be from 1 November to 31 December 2025 subject to extension if needed. In the notice the first respondent gave commitment to explore all reasonable alternatives to dismissal before any final decision was made regarding the proposed retrenchments.

[16] On 5 November 2025 the two trade unions requested facilitation by the CCMA.

[17] On 25 November 2025 GIWUSA wrote a letter to the first respondent contending, *inter alia*, that the section 189(3) notice was procedurally defective because it was issued only to the TES employees and not to the permanent employees. GIWUSA demanded that the notice be withdrawn and a new one be issued to all employees whose jobs might be affected by the intended retrenchment[8].

[18] Between 26 November 2025 and 16 February 2026 five consultation meetings took place between GIWUSA and the first respondent. Consultation meetings facilitated by the CCMA facilitator took place on 26 November 2025; 30 January 2026; and 16 February 2026 respectively. The unfacilitated meetings between GIWUSA and the first respondent took place on 3 December 2025 and 11 February 2026 respectively. The minutes of the consultation meetings setting out the issues discussed were not placed before the Court.

[19] On 23 December 2025 the facilitator had issued a written ruling declining to pronounce on the alleged procedural unfairness of the section 189(3) notice

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[7] The first respondent's notice appears on annexure "AN9" to the founding affidavit – Caselines 002-50 to 002-54.
[8] Annexure "AN10" to the founding affidavit – Caselines 002-55.

issued by the first respondent[9]. This followed a deadlock reached by GIWUSA and the first respondent in the unfacilitated meeting of 3 December 2025.

[20] At the facilitated meeting of 16 February 2026 the first respondent contended that the consultation had been exhausted and it would issue notices of termination the following day. Indeed, on 17 February 2026 the first respondent issued termination notices indicating that the services of the applicants would be terminated on 28 February 2026[10].

[21] As alluded to above, on 4 March 2026 the applicant brought this application and it was heard by this Court on 17 March 2026. Mr Poriazis appeared for the applicant and Mr Patel for the first respondent.

Applicant's case

[22] The applicant's main contention which was pursued in its heads of argument and during oral argument is that prior to issuing the section 189 (3) notice on 31 October 2025 the first respondent had already decided to get rid of the TES employees who were initially procured by Boardroom Appointments. Therefore, the first respondent could not and did not engage in a meaningful joint consensus-seeking process as envisaged in section 189 (3) of the LRA, so the applicant's argument goes[11].

[23] In support of its contention the applicant relies on the fact that the TES employees were denied access to the workplace and their weekly wages were stopped soon after Boardroom Appointments issued the first section 189(3) notice on 9 September 2025. The applicant contends that, effectively, the TES employees, including the applicants, were already dismissed even before the consultation started.

[24] The applicant buttresses its argument by pointing out that the section 189(3) notices were issued to the TES employees only, whereas permanent

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[9] Annexure "AN11" to the founding affidavit – Caselines 002-56 to 002-59.
[10] Samples of notices appear on annexure "AN16" to the founding affidavit – Caselines 002-124 to 002-129. These notices are incorrectly referred to as 'Involuntary Retrenchment Agreement'. There was no agreement regarding this retrenchment.
[11] The procedural challenges raised by the applicant are summarized succinctly in paragraphs 25 to 33 of the first respondent's heads of argument. Except paragraph 31, those are clearly substantive issues, hence Mr *Poriazis* did not pursue them in his heads of argument and oral arguments.

employees could also have been affected by the operational and technological changes introduced by the first respondent. Reliance is also placed on the first respondent's admission that it informed Boardroom Appointments that TES employees were no longer required.

[25] In advancing its argument further, the applicant submitted that the approval of the restructuring plan at the end of 2024 clearly shows that the first respondent intended to '*remove or release*' all '*labour broker temps'*.

[26] In a nutshell, the applicant's contention is that by the time the consultation started the horse had already bolted, so to speak, because the first respondent had already decided the fate of the applicants. This contention is normally referred to as *fait accompli*, and this nomenclature will be adopted in this judgment henceforth. On the basis of *fait accompli*, the applicant submits that the eventual dismissal of the applicants with effect from 28 February 2026 was procedurally unfair.

First respondent's case

[27] The first respondent vehemently disputes that the dismissal of the applicants was procedurally unfair. The first respondent denies that it took a final decision to retrench the applicants before the consultation started.

[28] In support of its case and its *bona fides* the first respondent refers to its willingness to start the retrenchment process afresh when it was directed to do so by the CCMA facilitator, reinstating applicants' access to the workplace and paying their outstanding wages from 1 October 2025.

[29] The first respondent also relies on the fact that the consultation took place over a period of 105 days whereas it was allowed to issue termination notices after 60 days. The prolonged consultation period is indicative of the first respondent's intention to meaningfully engage the applicant, not a predetermined decision.

[30] The first respondent contends that it embarked on a genuine meaningful consultation on alternatives to avoid dismissal, timing of dismissal, selection

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criteria and severance pay. The fact that an agreement could not be reached on these issues does not mean that there was no compliance with section 189(3) of the LRA. Reaching an agreement during consultation is not a statutory requirement, so the first respondent contends.

[31] The first respondent disputes the *fait accompli* contention, and argues that, in any event established *fait accompli* constitutes substantive unfairness, not procedural unfairness.

[32] In their heads of argument and during oral arguments both parties relied on case law in support of their diverse contentions.

Issue to be decided

[33] In determining whether the applicant has made out a case that the dismissal of the applicants was procedurally unfair, the main issue to be decided first is whether the alleged *fait accompli* constitutes procedural unfairness in this case. Put differently, if it is established that the first respondent decided to dismiss the applicants before the consultation process started, does that render the dismissal procedurally unfair, as submitted by the applicant, or substantively unfair, as submitted by the first respondent? If *fait accompli* does constitute procedural unfairness in this case, the next question to be determined would be whether *fait accompli* has been established on the facts of this case having regard to the *Plascon-Evans* rule[12]. If *fait accompli* does not constitute procedural unfairness, this application cannot succeed because section 189A (13) concerns itself with procedural unfairness only.

Legal framework and relevant case law

Legislation

[34] In a large scale retrenchment if an employer does not comply with a fair procedure, based on section 189A (13) read with section 189A (17) of the LRA, a consulting party may approach this Court for an order aimed at compelling the employer to comply with a fair procedure.

[12] *Plascon-Evans Paints (Ltd) v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

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[35] Section 189(2) of the LRA provides:

> 'The employer and the other consulting parties must in the consultation envisaged by 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.'

[36] Section 189A(13) and related sections provide:

> '(13) 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.
>
> (14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158 (1) (a).
>
> (15) An award of compensation made to an employee in terms of subsection (14) must comply with section 194.

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> (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189 (4) that has been the subject of an arbitration award in terms of section 16.
>
> (17) (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).
>
> (18) 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).'

[37] Section 189A (19) was repealed in 2014 by section 33 (b) of the Labour Relations Amendment Act[13]. Prior to being repealed, section 189A (19) provided:

> 'In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if –
>
> (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
>
> (b) the dismissal was operationally justifiable on rational grounds;
>
> (c) there was a proper consideration of alternatives; and
>
> (d) selection criteria were fair and objective.'

[13] Act 6 of 2014

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[38] The relevance of referring to the repealed section 189A(19) will become clearer later in this judgment.

Case law

[39] In a plethora of judgments it has been held that the main purpose of section 189A (13) is to allow early intervention by this Court in large scale retrenchments where it has become clear that the employer is not following a fair procedure during a retrenchment process. The intervention is aimed at directing the employer to follow a fair procedure before retrenching the employees. The procedural flaws must be of a kind that can be corrected by resetting the process[14].

[40] In *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others*[15] (*Regenesys*) the Constitutional Court confirmed that competent orders (a) to (c) in section 189A (13) serve the primary purpose of section 189A (13), which is to compel the employer to comply with a fair procedure before finally dismissing the employees, whereas the compensation order (d) serves the secondary purpose, which is to compensate the dismissed employees for failing to comply with a fair procedure. Compensation is appropriate for procedural unfairness in circumstances where the fair process can no longer be restored. The orders contemplated in (a) to (c) are the preferred orders as they fulfil the primary purpose of section 189A (13)[16].

[41] In elucidating the role played by this Court's intervention in terms of section 189A(13), the Constitutional Court in *Steenkamp and others v Edcon Ltd*[17] *(Steenkamp II)* put it thus:

> 'In exercising its powers in terms of s 189A(13) of the LRA, the Labour Court thus acts "as the guardian of the process" and exercises a "degree of judicial" management or oversight over the process. The aim is to proactively foster the consultation process by allowing parties to seek the intervention of the

[14] In *National Union of Mineworkers v Anglo American Platinum Ltd and others* [2013] 12 BLLR 1253 (LC) paras 19 to 25, Van Niekerk J (as he then was) dealt extensively with the purpose and scope of section 189A(13), quoted with approval by the Constitutional Court in *Solidarity on behalf of Members v Barloworld Equipment Southern Africa and Others* (2022) 43 ILJ 1757 (CC) (*Barloworld*) at para 57.
[15] (2024) 45 ILJ 1723 (CC)
[16] *Regenesys* paras 74 to 77 and 140.
[17] (2019) 40 ILJ 1731 (CC) at para 54.

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> Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the consultation process before it ends.'

[42] Regarding the concept of '*meaningful joint-consensus seeking process*' envisaged in section 189 (2), in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metal Workers of South Africa*[18], the following was stated:

> 'The latter approach requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached. It proceeds on the premise that consultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management only after there has been consultation in good faith. . . ." (My emphasis)

Discussion and evaluation

[43] Having regard to the relevant facts and the legal framework set out above, the Court now turns to consider the first issue to be decided, namely, whether a *fait accompli* in the context of this case constitutes procedural unfairness.

[44] If it is so that the first respondent had already decided to get rid of the applicants even before the section 189 (3) notices were issued, it would mean that the first respondent could not embark on a meaningful joint-consensus seeking process aimed at reaching consensus on the appropriate means to avoid the dismissals. It follows that, practically, it would not be possible for the first respondent to genuinely explore alternatives geared towards preventing the dismissals. With a decision to dismiss already made, any attempt at consulting about alternatives to avoid the dismissals would be a charade aimed at deceiving the other consulting party to think that it was being genuinely consulted on alternatives. The vexed question is whether this constitutes procedural unfairness or substantive unfairness.

[45] It has been recognized that in dismissals based on operational requirements there is often an overlap or a blurred distinction between procedural and

[18] (1994) 15 ILJ 1247 (A) at 1252G – 1253A. This passage was referred to with approval by the Constitutional Court in *Barloworld*.

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substantive issues.[19] However, section 189A (13) calls for a clear distinction to be made between procedural and substantive issues because the section concerns itself with procedural issues only.

[46] Mr *Poriazis*, for the applicant, relied heavily on *National Union of Metal Workers of SA and Others v Dorbyl Ltd and Another*[20] (*Dorbyl*) where, in discussing procedural fairness of retrenchment, the following was stated:

> '…This court and the Labour Appeal Court have on many occasions emphasized that consultation in the context of a retrenchment exercise means a 'joint problem-solving' or a 'joint consensus seeking' exercise. If an employer makes a decision to retrench employees before consultation has been completed it essentially presents employees with a fait accompli and that is fatal to the procedural fairness of the retrenchments.' [21]

[47] Two things can be said about *Dorbyl*. Firstly, it refers to a situation where a decision to retrench employees is made before completion of the consultation process, not before commencement of the consultation process. Secondly, *Dorbyl* was decided before the promulgation of section 189A(13) when the need for a distinction between procedure and substance was not as pronounced as it became thereafter.

[48] In reaching the conclusion that the *fait accompli* in the context of this case constitutes substantive unfairness as opposed to procedural unfairness, this Court relies heavily on *South African Commercial, Catering and Allied Workers Union and others v Woolworths (Pty) Ltd*[22] (*Woolworths*), where it was concluded that the failure to properly consider alternatives to dismissal rendered the dismissals substantively unfair:

> '[37] None of the above alternatives were considered or attempted by Woolworths. Woolworths has also offered no tenable reasons for this failure, when it bears the onus to show that it had considered all possible alternatives in this regard. On the evidence before us,

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[19] See: *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2018) 39 ILJ 222 (LAC) at para 22.
[20] (2004) 25 ILJ 1300 (LC).
[21] Id para 4.2.1.
[22] [2019] 4 BLLR 323 (CC).

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Woolworths has not shown that it properly considered these alternatives. This constitutes a breach of section 189A(19)(c) of the LRA.

[38] It therefore follows that the dismissal of the individual applicants was substantively unfair because Woolworths has failed to prove that it complied with section 189A(19)(b) or (c). In other words, Woolworths failed to prove that the retrenchments were operationally justifiable on rational grounds or that it properly considered alternatives to retrenchments." (My emphasis)

[49] This Court is mindful of the fact that *Woolworths* was decided on the basis of the now repealed section 189A(19) of the LRA. However, the repeal of section 189A(19) did not obliterate the failure to properly consider alternatives to dismissal as one of the reasons for a substantively unfair dismissal. This is so because section 189A(19) was repealed in order to allow the courts to freely develop jurisprudence regarding large-scale retrenchments, and not to be straightjacketed to the four items listed in section 189A(19) as possible reasons for a substantively unfair dismissal. The memorandum of objects to the Labour Relations Amendment Bill stated:

> 'Specifying the test to be applied in section 189A retrenchments has lead (sic) to uncertainty about whether and to what extent this should apply to cases of retrenchment where section 189 applies. The courts should retain their discretion to develop the jurisprudence in this area in the light of the circumstances and facts of each case and to articulate general principles applicable to all retrenchment cases.'

[50] Section 189A (13) is designed to deal with genuine and clear cut procedural flaws which are capable of being corrected by compelling the employer to reset the process and comply with a fair procedure. In a *fait accompli* scenario it is not possible to achieve the primary purpose of section 189A (13). Once an employer has decided to dismiss the employees even before the commencement of the consultation process, it is no longer possible to embark

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on a genuine and meaningful joint-consensus seeking process with a view to reach consensus on alternatives to avoid dismissal.

[51] Having concluded that the *fait accompli* scenario in this case constitutes substantive unfairness, it is no longer necessary for this Court to consider the second issue, namely, whether *fait accompli* has indeed been established on the facts of this case. Also due to material disputes of facts in this regard it is more desirable that this issue be determined by the trial court should the applicants challenge the substantive fairness of their dismissal.

[52] In conclusion, this Court finds that this application cannot succeed because the pleaded case of *fait accompli* constitutes substantive unfairness which falls outside of the scope of section 189A (13) of the LRA.

Costs

[53] In terms of section 162 of the LRA, this Court may make an order for payment of costs in accordance with the requirements of law and fairness. It is trite that in labour matters costs do not necessarily follow the results. Something more is required for litigants in this Court to be mulcted with costs when the outcome is not in their favour.

[54] Mr *Patel* submitted that the applicant should be ordered to pay costs because this application constitutes an abuse of court process. This Court does not agree. It is clear from the above discussion and evaluation that the applicant brought before this Court a genuine matter worthy of the Court's consideration.

[55] In the result, the Court makes the following order:

Order

1. Non-compliance with the timeframes in the Rules is condoned and the matter is treated as urgent.

2. The application is dismissed.

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3. There is no order as to costs.

S.B. Mgaga

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Mr K. Poriazis of GIWUSA

For the First Respondent: Mr A. Patel of Cliffe Dekker Hofmeyr Inc.

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