



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

30 July 2026

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS 602 / 20

In the matter between:

NOMSA SHEKWAMBANE AND 4 OTHERS

Applicants

and

CURRO HOLDINGS LTD t/a

CURRO ACADEMY PRETORIA

Respondent

Heard: 16 to 18 February 2026

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 30 July 2026

Summary: Operational requirements – rationale for retrenchment – outsourcing of cleaning services – non-core function of employer – employer entitled to outsource cleaning functions – such decision rendering positions of employees redundant – employees refusing to transfer to new service provider – valid / justified operational rationale for retrenchment – retrenchment for a fair reason

Operational requirements – alternative positions – alternative positions with outsource service provider available and offered – position terms identical to positions at employer – employees refusing to accept alternative positions –

no proper / justified basis for employees refusing to accept alternative positions – employees’ retrenchment justified and fair

Operational requirements – procedural fairness – employees could have avoided retrenchment by accepting suitable alternative positions – any case of procedural fairness thus of no consequence – objectives of section 189 fulfilled – employees in any event properly consulted – employees having no intention to *bona fide* consult with employer – retrenchment of employees procedurally fair

Dismissal – operational requirements – dismissal of employees substantively and procedurally fair – claim dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] To me, it is quite tragic that in today’s economy with such a shortage of jobs, a trade union in the course of retrenchment proceedings adopts a position that in the end costs its members guaranteed alternative jobs on quite favourable employment conditions. But this is exactly what happened in this case. Was it not for a intransigent position adopted and then maintained by the employees from the outset, as they were obviously advised to do by their trade union, I am convinced we would not have been here. By saying the above I am not seeking to undermine the important and valuable role trade unions play in the employment environment in protecting the interests of employees. What I am saying is that with the duty to protect employees, comes the duty to act responsibly, even if it means some sort of compromise.

[2] The case at hand arose from the dismissal of the five applicants on 29 June 2020 by the respondent for operational requirements under section 189 of the Labour Relations Act (LRA)¹. The applicants challenged that dismissal as an unfair dismissal dispute based on operational requirements, first to the

¹ Act 66 of 1995 (as amended)

Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation, and then to this Court for adjudication in terms of section 191(5)(b) of the LRA. The dispute was referred to this Court by way of a statement of claim filed on 9 March 2021, in terms of which the applicants prayed for retrospective reinstatement as consequential relief. The claim was opposed by the respondent by way of an answering statement filed on 6 April 2021.

- [3] The matter came before me on trial over three days from 16 to 18 February 2026. Only four of the applicants attended at Court, as the second applicant, Elizabeth Seema, had become deceased, and was no longer party to the case. In the trial, the respondent called two witnesses to testify on its behalf, being Johan Goosen (Goosen), the executive head of the respondent, and Ashen Sewpersad (Sewpersad) who was employed at the time when this matter arose by Omega People Solutions, a company that provided HR services to the respondent. The applicants also called two witnesses, being Wilson Khoza (Khoza), the applicants' trade union representative from HICRAWU (he also represented the applicants at the trial), and Harry Raseroka (Raseroka), who was the fifth applicant.
- [4] At the conclusion of the trial on 18 February 2026, the applicants requested that they be afforded the opportunity to file written closing argument, to which the respondent did not object. Accordingly, I granted an order on 18 February 2026 in terms of which I afforded the respondent until 27 February 2026 to file its written submissions, the applicants until 13 March 2026 to file their answering submissions, and the respondent until 20 March 2026 to file a reply. The written submissions were filed accordingly, with the respondent electing not to file a reply. I also reserved judgment on 18 February 2026, pending receipt of these written submissions. I will now proceed to decide this matter by first setting out the relevant facts.

The relevant facts

- [5] Save for a few specific factual disputes, which will be dealt with separately in this judgment, the bulk of the evidence and what transpired in this matter were largely common cause, or undisputed. The factual matrix as set out below is

based on the evidence which I have accepted would constitute the proper factual basis on which this matter is to be decided.

- [6] But from the outset, I must say something about the testimony of Raseroka. As far as I am concerned, he was completely lacking in credibility. He raised issues in his testimony never pleaded as part of the applicants' case, one of which was that he was not aware that his conditions of employment in the alternative position offered to him would remain the same, despite this being undisputed. He often resorted to answering '*I do not remember*' when confronted with questions that did not suit him. He even on occasion disputed his own statement of claim. He contradicted himself. I have little hesitation in rejecting his testimony where it conflicts with the testimony presented by Goosen and Sewpersad.
- [7] The respondent conducts business as a private education institution (private school), and is part of the larger Curro Group of private education institutions. The respondent, in this context, operates a school campus, which requires a number of ancillary services to maintain it, such as maintenance and cleaning personnel. These staff are not core the respondent's operations. Turning then to the applicants, they were employed by the respondent as general workers, and in particular as cleaners working in the respondent's cleaner department. The respondent had no recognised trade union at the workplace, nor was it aware of any trade union membership on the part of the applicants.
- [8] Goosen, who as touched on above was the executive head at the campus, testified that towards the end of 2019, an operational decision had been taken by the respondent to outsource all its cleaning functions to a third-party service provider. Goosen further testified that in fact several of the schools in the Group were already functioning on such basis, and this decision would allow the respondent to rather focus on its core operations and leave ancillary services, with all the administrative and management burden associated with it, to specialist third party service providers. Goosen also testified that this would have a financial benefit to the respondent. In short, it made commercial sense for cleaning services to be provided by a specialist cleaning contractor. At this stage, the respondent had already identified Suburban (Pty) Ltd (Suburban) as a cleaning service provider, on the advice of the Group regional

head and other schools who was using Suburban's cleaning services. Goosen testified that, at the end of the day, he was accountable to run the respondent as a profitable business, and so the financial and operational benefits of outsourcing was an important and relevant consideration.

- [9] When the respondent made the operational decision to outsource its cleaning services to Suburban, Goosen made sure that all the cleaning personnel would be transferred to Suburban on the same terms and conditions of employment they enjoyed at the respondent. In fact, it turned out that some of the conditions of employment (the provident fund benefit) was better than that provided by the respondent. At the time, being end 2019, the respondent employed eight cleaners in the cleaning department.
- [10] When the respondent had decided to outsource the cleaning services to Suburban, it further identified that two of the cleaners had administrative capabilities and skills, and the respondent was able to utilise their services in the respondent's administration department.² It was decided to move these two employees into administrative positions, and they would thus remain in the respondent's employment in these positions. What is important to consider at this juncture is that the respondent, at this time, was never contemplating the retrenchment of any employee. In reality, what the respondent envisaged would happen is that of the eight cleaners in its employ, two employees would move to the administration department and do different jobs, whilst six employees would transfer to Suburban on the same terms and conditions of employment and still doing the same jobs. Thus, no retrenchments would be necessary.
- [11] Strictly speaking, there would be no necessity to consult the employees on the envisaged transfer to Suburban, because it constituted the outsourcing of a service which would attract the application of section 197 of the LRA. This meant that the employees would automatically transfer to Suburban, without interruption. Nonetheless, and as Goosen testified, the respondent wanted the '*buy-in*' from the employees with regard to this transfer. To this end, the

² Goosen identified the two abovementioned employees because he met with all staff members to familiarize himself with where each person came from and what particular skills and attributes they had which could contribute to the business.

respondent appointed Sewpersad, an independent consultant from Omega People Solutions who performed HR functions for the respondent, to consult with the employees and to facilitate the transfer.

[12] Sewpersad convened a consultation with the employees on 13 December 2019, just before the school closed. However, and prior to this meeting, Sewpersad had first met and consulted with Suburban to confirm the employees' terms and conditions of employment and that these would remain the same. Sewpersad met with the six employees on 13 December 2019 and briefed them on the intended transfer, and the consequences thereof to their employment. He assured them that nothing would change with regard to their jobs or conditions of employment, however they would, going forward, be employed by Suburban. Sewpersad asked them to consider this over the break. On the same day, the school then closed for the holidays and was to open on 16 January 2020.

[13] The school reopened on 16 January 2020, and the applicants reported for work. They were again consulted on the immanent transfer to Suburban, and were each individually presented with transfer agreements containing the same terms, which agreements had been prepared by Sewpersad, and signed by Goosen for the respondent. The transfer agreement recorded that the transfer would be effected pursuant to section 197 of the LRA. It is further recorded that the applicants would be transferred to Suburban with effect from 1 February 2020 on the same or similar terms and conditions of employment. Further stipulations in the transfer agreement included that the applicants' benefits would remain the same, their original starting date of employment with the respondent would be recognised by Suburban and their provident fund will remain intact and be transferred to Suburban's fund as well.

[14] The applicants declined to sign the transfer agreement on 16 January 2020. Instead, they requested time to consider the agreement and revert to the respondent, which the respondent agreed to. It was contended by the applicants in their pleadings that the respondent demanded on 16 January 2020 that they sign the transfer agreement there and then, but considering what actually happened as evidenced by the facts, this clearly cannot be true.

- [15] According to the applicants, they approached Khoza with the transfer agreements and were informed by him that they should refuse to sign the transfer agreements. Khoza in his evidence confirmed that he advised the applicants accordingly. Khoza further testified that he then consulted attorneys about this. On 20 January 2020 Carrim Attorneys wrote a letter to the respondent on behalf of the applicants. The letter recorded that the respondent intended to outsource and transfer the applicants to some '*unknown labour broker*' without giving them an opportunity to respond, and they were '*vehemently opposed*' to such intention. It must be said that having regard to the actual facts summarized above, most of these allegations are simply not true. But be that as it may, and in this letter by Carrim Attorneys, the applicants made their intention of refusing to agree to any transfer quite clear. Further in the letter, it was demanded that the respondent refrain from the intended transfer, failing which the applicants would refer an unfair labour practice dispute to the CCMA.
- [16] A further meeting was held by Sewpersad with the applicants on 24 January 2020. In this meeting, the applicants indicated that they had sought advice from a lawyer.³ They stated that they had been advised by their 'lawyer', Khoza, to refuse to sign the transfer agreement and not to accept the transfer. Sewpersad confirmed this evidence. The applicants thus once again did not sign the transfer agreement.
- [17] On 31 January 2020, Goosen, Sewpersad and Khoza met at the respondent's premises in Goosen's office. Khoza indicated in this meeting he was the applicants' lawyer. During the meeting, Khoza made it clear that the applicants would not accept any transfer and that he would oppose any process designed to transfer the applicants to another service provider. During the meeting, the benefits of the transfer were explained to Khoza, and that years of service of the applicants would remain intact. However, Khoza was not interested, and remained adamant that no transfer would be accepted under any circumstances, as it negatively impacted on the applicants' job security and that Suburban was a labour broker which meant the applicants would be unemployed if Suburban loses the contract. He explained that employees are

³ According to the applicants, they informed the respondent that they had sought advice from a trade union, however I do not believe this version is true, as will be dealt with later in this judgment.

fighting to be 'insourced' and not 'outsourced'. Sewpersad explained that Suburban has a national footprint, that it had a long-standing relationship with the Group, and that the respondent had worked with it before and was satisfied with its *bona fides*. Sewpersad explained that Suburban had always protected employees' rights in the past, so the job security of the applicants was not really an issue. Khoza remained unconvinced and steadfast in his refusal to agree to the transfer.

[18] On 17 February 2020, Sewpersad called a meeting with Jonathan Webb (Webb) from Suburban, in order for Webb to personally explain to the applicants who Suburban was, how they fitted into the cleaning industry, and what the benefits of working with Suburban were. In this meeting, Webb assured the applicants that all terms and conditions of employment would remain as they were with the respondent. He also explained that the applicants would in fact enjoy better medical aid and provident fund benefits at Suburban. The applicants nonetheless still refused to sign the transfer agreement.

[19] As referred to earlier, the transfer date was envisaged to be 1 February 2020, which had now passed, with no transfer being effected, solely as a result of the attitude adopted by the applicants and Khoza to the transfer. The respondent, having due regard to all the unsuccessful efforts undertaken to get the applicants to rather agree to the transfer, then sought to implement the transfer by way of a written notice on 19 March 2020 headed '*Transfer of Employment in terms of Section 197 of the Labour Relations Act*'. The letter recorded that there were several consultations between the parties on the issue of the transfer and as far as the respondent was concerned, there was no reason not to proceed with the transfer. It was indicated in the letter that the transfer to Suburban would be effective 30 March 2020. It was further confirmed that salary, benefits and years of service of the applicants would remain intact.

[20] The applicants reacted by referring a dispute of unilateral transfer and / or change of terms and conditions of employment to the CCMA on 23 March 2020, effectively challenging the transfer of the applicants to Suburban. Khoza

confirmed in his evidence that the very purpose of this referral was to challenge the transfer.

- [21] On 26 March 2020 the COVID-19 pandemic lockdown commenced, which effectively placed further dealings with this matter on hold. The applicants returned to work on 25 May 2020, at which time Suburban had now taken over the providing of cleaning services to the respondent at the campus. The applicants were afforded a last opportunity to commence working for Suburban, but they specifically refused to be transferred to Suburban or render any services under the auspices of Suburban.
- [22] Whilst section 197 of the LRA does envisage an automatic transfer, employees cannot be compelled to transfer if they refuse to do so. Because of the clear attitude adopted by the applicants, the respondent considered itself unable to proceed with the transfer in terms of section 197, because the applicants were quite adamant that they refused to be transferred to and did not want to belong to Suburban. At the time, the respondent's relationship with Suburban had strained as a result, as it impacted on Suburban's contract with the respondent because of the continued uncertainty caused by the applicants' continued employment at the respondent, whilst Suburban would be required to render those same services. The respondent was thus compelled to bring matters to a conclusion.
- [23] Consequently, and on 28 May 2020, the respondent issued notice in terms of section 189(3) of the LRA of its intention to commence restructuring / retrenchment proceedings, to the applicants (the section 189(3) notice). The notice was issued in a consultation held with the employees that same day. The notice explained that the reason for the restructuring was the decision made by the respondent to focus on its core business activities in order to ensure organisational effectiveness and providing competitive solutions. It was explained that non-core functions would be abolished, and as a result, the applicants' positions would become redundant. The notice also reflected that all cleaner positions were impacted. In particular, the notice reflected that alternatives of employment with the incoming service provider would be tabled. All the other topics as contemplated by section 189(3) were also dealt

with in the notice. And lastly, the notice reflected the proposed consultation dates, being 2, 10, 17 and 24 June 2020.

- [24] The consultation on 28 May 2020 was facilitated by Sewpersad, who explained the applicants' rights in the process and how the process would unfold. Sewpersad specifically mentioned that alternative employment at Suburban was still available and all the applicants would have to do was to accept the same and so avoid any retrenchment. The applicants did not have much to say in the consultation, and in particular, never indicated that they were members of HICRAWU and required such trade union to represent them in the consultations to follow.
- [25] According to Sewpersad, who facilitated the consultations throughout, he was not aware of any trade union's involvement and testified that although he knew of Khoza, he was not familiar with Khoza's capacity, and he thought Khoza was a lawyer. It was common cause that Khoza never approached the respondent, whether in the capacity of trade union representative or otherwise, to declare his involvement in the process and to request that he be allowed to represent the applicants in the consultations to follow.
- [26] In his evidence, Khoza explained that he did not engage with the respondent or request that he represent the applicants in the consultations, because the section 189(3) notice, which was given to him by the applicants, indicated that no outside representation will be allowed. The veracity of this explanation will be dealt with later in this judgment. But it was undisputed that after the consultation on 28 May 2020, the section 189(3) notice was given to Khoza.
- [27] It was common cause that the four proposed consultations identified in the section 189(3) notice indeed took place. This was on 2 June 2020, 10 June 2020, 17 June 2020, 24 June 2020, and then a further a last consultation 29 June 2020. Sewpersad facilitated each consultation and took handwritten minutes of each consultation, which he then used to create typewritten minutes. The contents of these minutes were not really disputed by Raseroka, who was the only witness for the applicants present in the consultations.
- [28] What the applicants did attempt to do at trial, by way of the evidence of Raseroka, was to try and diminish the consultations to what Raseroka called

'meetings'. It was alleged by Raseroka that each of these *'meetings'* were just to convey information to the applicants and nothing more. This version is highly unlikely and in fact contradicts the pleadings and pre-trial minute. It will deal with this later in this judgment, but at this juncture, I am satisfied in saying that the five *'meetings'* were actually consultations as contemplated by section 189 of the LRA.

[29] I do not intend to traverse the content of each of the consultations in detail, mainly because the applicants did not do much in the form of participating therein. Their participation was in fact informed by the approach they adopted from the outset, and they remained adamant this was their position and nothing else. In this context, they remained squarely opposed to any outsourcing and transfer, and refused to transfer to or be employed by Suburban. This was despite it being clear that the respondent would no longer employ its own cleaners, and had decided to contract with Suburban to render these services to it. The respondent sought to make it clear that it no longer had any cleaners, and there were no positions for the applicants in the respondent. In particular, and throughout the entire process, and right to the end, the respondent continued to make the alternate employment at Suburban available to the applicants. The applicants however remained steadfast in their refusal to accept it, and in fact urged the respondent to *'pull the trigger'*.

[30] There was however one development that took place in the course of the consultations. Just before the last consultation on 29 June 2020, a vacancy arose within the maintenance department. As part of the group of applicants, it was identified that two of them also had maintenance skills, and could fulfil maintenance functions. Pat Khumalo (Khumalo) was one of them, and he was offered the maintenance position vacancy based on skills and LIFO. Khumalo accepted this vacancy offered, which avoided his retrenchment.

[31] Also, and during the course of the consultations, and in particular in the consultation held on 10 June 2020, the applicants asked Sewpersad to contact Khoza to discuss the Suburban alternative with him again. Sewpersad then in fact contacted Khoza by telephone on 10 June 2020. In this conversation, Khoza made it clear to Sewpersad that he must continue with the process and that he (Khoza) would deal with it afterwards. Khoza had no intention of getting involved in the process and intended to challenge it once it

had been completed. It is so that Khoza testified that he did not receive any such telephone call from Sewpersad, however I am comfortable in rejecting his evidence in this regard, for the reasons dealt with later in this judgment.

[32] On 29 June 2020 the Respondent issued the applicants with notices of termination of employment due to operational requirements. The notice *inter alia* specifically recorded that the applicants were retrenched because they, without valid reason, refused the offer of alternative employment with Suburban. After the retrenchment, and with all cleaning services having been outsourced to and provided by Suburban, the respondent no longer employed cleaning staff.

[33] The applicant then referred an unfair dismissal dispute to the CCMA on 8 July 2020. The dispute was unsuccessfully conciliated on 5 August 2020, and then referred to the Labour Court, leading to the matter now before this Court.

Analysis: Substantive Fairness

[34] In the statement of claim, the applicants took issue with the rationale for the retrenchment. According to them, the very notion of outsourcing their positions was an '*unjustified objective*' on the part of the respondent, and thus did not constitute a valid reason for retrenchment. The applicants also contended that as they were employed as general workers, their positions were not redundant, despite their admission that they were working as cleaners in the cleaning department, which no longer existed. The applicants never disputed that that they were throughout offered alternative positions at Suburban on the same terms and conditions of employment with length of service and benefits intact, and that they refused to accept this. The aforesaid being the basis of their case in the statement of claim, and also the pre-trial minute, the applicants are bound to the case so articulated.⁴ In particular in the context of an unfair dismissal dispute based on operational requirements, the Court in *SA Breweries (Pty) Ltd v Louw*⁵ said the following:

⁴ See *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D; *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC) at paras 16 and 83; *GE Security (Africa) v Airey and Others* (2011) 32 ILJ 2078 (LAC) at para 20 – 21.

⁵ (2018) 39 ILJ 189 (LAC) at para 14

‘... the premises upon which the issues were to be advanced had been refined and limited by the terms of the minute, which is the very purpose of the minute and, more particularly, the very purpose of the directives in the Practice Manual. It was therefore inappropriate to fall back on the generalities of averments about procedural and substantive unfairness. Were that approach to be permissible, there would be no point at all to efforts to narrow issues and trim down the scope of contestations. ...’

- [35] As a point of departure in deciding whether a dismissal for operational requirements is substantively fair, it must be emphasized that this issue is ordinarily decided by way of answering two questions. The first question is often called the general question, and if this question is answered in favour of the employer, that is followed by answering a specific question. These two questions have been explained in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*⁶ as follows:

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

- [36] Starting with the general question, it is my view that there can be no doubt that there exists a fair reason for the dismissal of the applicants. In fact, and properly considered, the applicants only have themselves opt blame for being dismissed. It was entirely in their own hands to have avoided their dismissal, but they obstinately continued to pursue a course of action which placed them squarely on the road to unemployment. They did this despite the concentrated and genuine attempts by the respondent to convince them otherwise. The reasons for my views in this respect now follow.

⁶ (2006) 27 ILJ 292 (LAC) at para 55.

[37] Firstly, what was the initial cause for the applicants' ultimate dismissal? The answer is straight forward and involved a perfectly legitimate operational requirement of the respondent. On the undisputed evidence, the respondent is in the business of conducting a private school. It is not a contract cleaning business. It however employed the applicants as cleaners, to conduct cleaning services at the school. Pursuant to an evaluation of operations at the school, and in line with how such ancillary services (like cleaning) was being conducted at other schools in the Group, Goosen, as the executive head, decided that it was in the interest of operations, efficiency and profitability that the cleaning functions in the school be rather entrusted to a third-party specialist cleaning service provider. Or in simple terms, it was decided to outsource cleaning to a cleaning service provider, which in this case was Suburban.

[38] Ordinarily, such an outsourcing would attract the application of section 197 of the LRA, in the form of the transfer of a service previously rendered to the respondent by its own employees to another external party providing that same service. That would be in line with what the Court decided in *SA Municipal Workers Union and Others v Rand Airport Management Co (Pty) Ltd and Others*⁷ where it was held as follows, concerning the taking over of guarding and security functions of an employer by a third-party service provider:

'First and second respondents thus concluded an agreement in terms of which second respondent was to take over certain functions previously performed by the first respondent with effect from 1 September 2002. I am satisfied that the functions which second respondent undertook to perform in terms of their agreement fell within the ambit of 'service' as contemplated by s 197 of the Act and that this was an agreement to transfer a service within the ambit of s 197 of the Act as a going concern. Accordingly, the agreement was an agreement that, upon implementation, would have attracted the application of s 197 of the Act. If the agreement was implemented, the contracts of employment of the relevant employees would have been transferred from the first respondent to the second respondent ...'

⁷ (2005) 26 ILJ 67 (LAC) at para 35.

- [39] On the evidence, it was undeniable that the respondent indeed believed section 197 to be on the cards, and it approached the entire outsourcing on that basis. It first ensured, with Suburban, that it would take transfer of all of the applicants on their same terms and conditions of employment with their length of service intact. It was also ensured that the applicants would continue to do the same work at the school, but now under the auspices of Suburban as their employer. All this having been established, the respondent then in a *bona fide* manner engaged with the applicants to obtain their 'buy-in' to this transfer. What happened in this case shows that no such good deed goes unpunished.
- [40] The idea was that the applicants would each simply sign a transfer agreement and would move across to Suburban with everything they had at the respondent intact. That is why they were presented with the transfer agreement on 16 January 2020 which recorded this. It is also not as if the applicants were confronted with this out of the blue. They were briefed on what would happen in this regard as far back as 13 December 2019, which gave them ample time to consider their position. Also, and when the transfer agreement was given to the applicants, they were not required to sign it right there and then. They were allowed to take it away and consider it, which they did. It must however be said that it is clear from the transfer agreement that there would be no change to the applicants' conditions of employment, remuneration, duties, workplace or length of service. All considered, it was purely a change of employer to the new service provider, being Suburban.
- [41] The applicants then indeed obtained advice. This advice was given by Khoza, who took a stance on principle that any transfer to an external service provider, which he considered for some reason to be the same as a labour broker, was a bad thing, and should not be agreed to under any circumstances. He instructed the applicants not to agree to the transfer agreement. Khoza then briefed Carrim Attorneys, who conveyed this position to the respondent on 20 January 2020 in no uncertain terms. What is clear from the aforesaid is that the applicants wanted nothing to do with transferring to or with working for Suburban. From the outset, the respondent was met with unfettered opposition to the notion of transfer, *per se*. It was never even about whether there was a possible change in conditions of employment. It was

about a complete unwillingness to change employer and agree to any transfer, *per se*.

- [42] The respondent nonetheless persisted with its efforts to get the applicants to agree to transfer to Suburban. It met with Khoza on 31 January 2026 to explain the situation to him. It is clear in my mind that he was the driving force behind the applicants' refusal to accept the transfer. He viewed the transfer as the applicants being moved to some kind of labour broker where their job security would be at stake. It was however specifically explained to him that this is not the case, as Suburban is a long-standing contract cleaning service provider providing services at other schools in the Group as well. But Khoza refused to see reason and stated that he would 'fight' any transfer.
- [43] The respondent even went so far as to arrange a meeting between the applicants and Suburban, so it would be explained to them face to face by the service provider itself that their conditions of employment and length of service would not be changed. This meeting took place on 17 February 2026. Ironically, it was explained to them that some of the benefits at Suburban were even better than at the respondent. But they remained unmoved in their refusal.
- [44] The COVID-19 pandemic then intervened, but when the applicants returned to work on 25 May 2020, they were given a final opportunity to transfer to Suburban. They however still remained steadfast in their refusal and indicated an outright refusal to work for or take instructions from Suburban. That took any section 197 transfer finally off the table, at the instance of the applicants themselves.
- [45] As a result, the respondent was now left with cleaning employees (the applicants) however with no cleaning positions within which to deploy or utilize those employees, because of the outsourcing of the entire cleaning services to Suburban. The respondent was entitled, pursuant to its own operational requirements and justification, to decide the outsource its cleaning functions to a third-party cleaning service provider. As such, and because the respondent as a result simply no longer had any work for the employees, their positions were redundant and it was entitled and justified to retrench them.

[46] An example in point comes in the form of the judgment in *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union and Another*⁸. On the facts in that case, the Court identified the reason for the retrenchment of the employees as being:⁹ ‘... The second and further respondents were dismissed because the appellant had decided to run the Fauna business in a certain way that was different from the way that the Fauna operation had been run before. That way of running the business was one in terms of which the appellant did not employ drivers, did not own its own carriers, did not operate a workshop, had to transport Daimler Chrysler's vehicles transported 'off wheels' as required by Daimler Chrysler and used labour brokers and subcontractors to run the business. As the vehicles were to be transported off-wheels, convoy drivers were to have no future in the Fauna operation as convoy drivers’. The comparisons to the respondent's decision *in casu* is clearly apparent. Having so identified the reason for the dismissal of the employees, the Court in *Forecourt Express supra* then held:¹⁰

‘I have in effect said above that the appellant was entitled to choose the manner in which it would run its business provided that it did not change the terms and conditions of employment of the employees without their consent, and provided that, if it contemplated the dismissal of the employees, it complied with its obligations provided for in s 189 of the Act. If it is accepted that the appellant was entitled to decide to run the Fauna operation in a way that was different from the manner in which the Krugers had run it and was entitled to insist on running it in the way it proposed to run it, then there can be no doubt that a necessary consequence of such decision or choice was that it had no work for the second and further respondents. In this case the reason why the appellant had no work for the second and further respondents was that its preferred way of running a car ferrying business necessarily entailed that it would not employ drivers, would not own or keep carriers and would not run a workshop. Its way of running that business entailed the use of labour brokers, subcontractors and certain specially designed carriers which were able, after delivering cars to their destinations, eg dealers, to collapse and carry freight on their return trip. This way of running the appellant's business left the second and further respondents with no work. Incontestably the fact

⁸ (2006) 27 ILJ 2537 (LAC).

⁹ Id at para 36.

¹⁰ Id at para 39.

that an employer has no work itself to give to workers to perform is a fair reason to dismiss.'

[47] The reason advanced by the applicants why any transfer was not palatable to them was because, according to them, it was a bad thing and in essence placed their job security at risk. It was suggested that a service provider like Suburban could easily declare them redundant and dismiss them, and they also did not know Suburban. But none of these considerations, even considered as they stand, can mitigate against the respondent's right to structure and operate its business in the manner it believes to be operationally most favourable to it, and then change accordingly. It was never suggested that the respondent's decision to outsource cleaning functions was motivated by malice or an attempt to rid itself of the applicants. No case was made out that this was anything else other than a genuine operational decision on the part of the respondent, which, all considered, the applicants and Khoza were simply unwilling to accept.

[48] This same issue was also dealt with in *National Union of Mineworkers and Others v WBHO Construction (Pty) Ltd*¹¹ where the employer had decided, where it came to general labour deployed on projects, to rather use TES service providers than having a permanent general labour workforce, as it made operational sense and was financially more prudent. The Court had the following to say in this respect:¹²

'In the end, Smit's explanation as to why it would be prudent to use TES employees where it came to general labour was never contradicted and as I have already said, made sound business sense. The TES positions were temporary and served to cater for a specific, and legitimate, business need. This cannot serve as a legitimate basis upon which to contend that the dismissal of the individual applicants was not for a proper reason. This ground of substantive fairness raised by the applicants thus cannot be sustained.'

[49] In *Khanyile and Others v Air Chefs (Pty) Ltd*¹³ the Court was specifically seized with a situation where the employer had decided to outsource its

¹¹ [2017] ZALCJHB 512 (13 December 2017).

¹² Id at para 54.

¹³ [2015] ZALCJHB 238 (4 August 2015).

cleaning functions, as is exactly the case *in casu*. The decision to outsource these functions by the employer was motivated by the fact that its cleaning unit did not form the core of its business and outsourcing was necessary to meet the standards set by its clients. The Court concluded:¹⁴

‘In this case therefore, in these circumstances, it is concluded that there was a sound and valid commercial and business rationale to effect restructuring. The outsourcing was meant for the respondent to realise the need to meet its clients’ obligations. There is therefore no merit in the applicants’ contention that there was no need in general, to restructure or that the respondent was motivated by other extraneous reasons to outsource.’

[50] Two last comparative examples bear mention. In *National Union of Metalworkers of SA and Others v John Thompson Africa*¹⁵, the nature of the employer’s business was such that its labour requirements fluctuated in quality and quantity. It then decided to rather outsource its labour to a labour brokerage which was more efficient than having its own workforce that was fixed.¹⁶ In this context, the Court concluded that:¹⁷ ‘... I find that there was a commercial rationale for the outsourcing of labour. The respondent’s use of labour brokers was therefore not unfair ...’. Similarly, and in *Chester Wholesale Meats (Pty) Ltd v National Industrial Workers Union of SA and Others*¹⁸ the Court considered a case where the employer decided to close its wholesale department, however despite this, some wholesale work would always remain unavoidable, and for this purpose the employer would use a labour broker. It was argued by the trade union that this was unfair, as the employer was replacing employees with labour broker employees.¹⁹ The Court *inter alia* said, in finding a fair reason for retrenchment to exist:²⁰ ‘... the allegation is simply untrue. Some wholesale work remained unavoidable, and the company resolved to continue using Teamsters on an ‘as and when required’ basis’.

¹⁴ Id at para 48.

¹⁵ (2002) 23 ILJ 1839 (LC).

¹⁶ See paras 304 – 305 of the judgment.

¹⁷ Id at para 310.

¹⁸ (2006) 27 ILJ 915 (LAC).

¹⁹ See para 16 of the judgment.

²⁰ Id at para 17.

- [51] It follows that the decision by the respondent to outsource its cleaning services and thus its cleaning department to Suburban constituted a valid and fair commercial rationale justifying the retrenchment of the applicants. This led to the applicant's positions as cleaners in the respondent becoming redundant. The retrenchment of the applicants was thus for a fair reason relating to the respondent's operational requirements, and this this part of the general question must be answered in favour of the respondent.
- [52] In addition, answering the general question has a further facet. This is found in the requirement of considering alternatives to retrenchment, even if it is accepted that the positions of the applicants as cleaners have become redundant. And in this regard, as touched on above, a suitable alternative was made available to the applicants. Not only was the alternative made available to the applicants, but the respondent in fact implored them to accept the alternative. This alternative, in the first instance, entailed that the applicants' positions, work, conditions of employment, remuneration and length of service would remain the same. In fact, the alternative even involved some better benefits. The only change occasioned by this alternative, which is why it had to be accepted by the applicants, is that the identity of their employer would change. They would no longer be employed by the respondent, but they would be employed by Suburban going forward. From the very onset of the retrenchment process, and throughout all the consultations, the respondent kept urging the applicants to accept this alternative which would have avoided their retrenchment in its entirety.
- [53] But how did the applicants act where it came to this alternative? The answer is hard to fathom. They steadfastly refused to accept it. They clearly understood, in my view, that if they refused to accept it, they would be retrenched. But they pushed on, nonetheless. In adopting this course of action, the applicants acted on the advice and instigation of Khoza. He was opposed to any notion of transfer, *per se*, and made it clear that the applicants would not accept it. Khoza and the applicants effectively urged the respondent to get on with the process and retrench them, so that they could challenge the whole issue of outsourcing and transfer as a legitimate reason in Court. This was an ill-advised and patently wrong approach to have adopted.

[54] It was thus entirely in the applicants' own hands to have avoided their retrenchment. All they needed to do was accept employment at Suburban. Even right at the end, and when they returned to work after the COVID-19 lockdown ended, they were requested to take up the offered employment with Suburban and start working for it. They persisted in their refusal and spurned the last opportunity afforded to them. This left the respondent with no alternative but to retrench them. In the end, the applicants were the authors of their own misfortune. The conduct of the applicants in this case is comparable to the following *dictum* in *Viljoen v Johannesburg Stock Exchange Ltd*²¹:

'In the end, the applicant should have applied for the new positions of marketing manager or brand manager, or even both in an order of preference. At the very least, she should have taken up the position of brand manager in which she was ultimately placed as a basis of compromise by the respondent. Her failure to do so must be fatal to her case of substantive unfairness. She left the respondent with no choice but to retrench her, despite being in a risk-free position to have avoided her own retrenchment.'

[55] Therefore, and because the applicants deliberately decided to refuse to accept the positions offered to them at Suburban, especially considering that they were advised by Khoza throughout that this was the appropriate position to adopt, the respondent was in my view entitled to accept, as of the last consultation on 24 June 2020, that the applicants had finally refused to accept offers of alternative employment. And once that is so, they only have themselves to blame for finding themselves unemployed. As was said in *Freshmark (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²²:

'... an employee who unreasonably refuses an offer of alternative employment is not without fault. He has himself to blame if he subsequently finds himself without employment and, therefore, does not deserve to be treated on the same basis as the employee who finds himself without employment due to no fault on his part Where the employer offers to continue to employ the employee - whether in the same position but on different terms or on the same terms but in a different position or in the same position and on the same terms

²¹ (2017) 38 ILJ 671 (LC) at para 84. See also *Mineworkers Union/Solidarity on behalf of MacGregor v SA National Parks* (2006) 27 ILJ 818 (LC) at para 39.

²² (2003) 24 ILJ 373 (LAC) at para 24.

but in a different place, that is still alternative employment. It is an offer of an alternative contract of employment

[56] The same sentiment was echoed in *Latex Surgical supra*²³ where the Court said:

‘ ... Accordingly, when an employer's operational requirements dictate that its workforce should work in accordance with certain terms and conditions by which such workforce is not bound, the employer should convey this to the workforce and ask them to agree to work according to such terms and conditions, negotiate with them and warn them that, if they reject such terms and conditions, he will have to terminate their contracts of employment and employ new employees in their place, who will accept such terms and conditions. ... If the employees reject such proposals and the employer terminates their services, the employees cannot complain that they were not given a chance to avoid their dismissal by accepting the new terms and conditions of employment.’

And in *Entertainment Catering Commercial and Allied Workers Union of SA and Others v Shoprite Checkers t/a OK Krugersdorp*²⁴ it was held as follows:

‘... where the amendment to terms and conditions of employment is proffered by an employer as an alternative to dismissal during a bona fide retrenchment exercise and it is a reasonable alternative based upon the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer.’

[57] Considering the argument by the applicants *in casu*, being that the alternative positions offered to the applicants would be at another employer, which they considered to be less attractive than remaining employed at the respondent, especially where it comes to their own articulated concerns about job security, the judgment in *Forecourt Express supra* again comes into play. The facts in that judgment have been set out earlier, and the Court ultimately decided, in circumstances where it was argued that the alternative positions at a third party were less attractive to the employees, as follows:²⁵

²³ Id at para 69.

²⁴ (2000) 21 ILJ 1347 (LC) at para 28.

²⁵ Id at para 41.

'There was an attempt to say that an offer of employment with a labour broker was not such an attractive idea because the employment would have entailed that the employees work only on the days when the labour broker had work for them. It was suggested by Monyela that employment by a labour broker would have meant that employees would on some days have spent money to travel from the townships to work and found that they were turned away on the basis that there was no work on those days. This may well have been so but the fact of the matter is that, if the appellant was in law entitled to use a labour broker - and it was not the respondents' case that the use of a labour broker in this case was unfair - there is nothing that could be done about such an eventuality. It is interesting that Monyela testified as he did in regard to the second and respondents' attitude to employment by the labour brokers and subcontractors and yet in their letter of 17 September 1999 addressed to the appellant the second and further respondents' attorneys actually wrote, among other things, that the second and further respondents were entitled to be transferred to the employment of the labour brokers and, I assume, subcontractors. In my view the second and further respondents' loss of income arose out of their refusal of the offer of employment by the subcontractor and labour broker and not from their dismissal. It seems to me that the second and further respondents are, in this regard, the authors of their own misfortune ...'

[58] The judgment in *Khanyile supra* is equally apposite where it comes to the facts *in casu*. Again, and as already summarized above, the employees concerned refused to accept alternative positions with a contract cleaning service provider, when that function had been outsourced.²⁶ The Court had the following to say in this respect:²⁷

'In the light of the consultations with UPUSA and the employees, the various alternatives offered to the employees, and further in the light of the unreasonable rejection of each and every alternative that the respondent had come up with, it cannot in these circumstances be said that the retrenchments as a consequence of outsourcing of the cleaning unit were substantively unfair. It is trite that an employee who unreasonably refuses to consider available options to a retrenchment cannot claim unfair treatment if the employer ultimately retrenches him or her. In the end the decision to dismiss

²⁶ See para 60 of the judgment.

²⁷ *Id* at para 61.

the applicants was operationally justifiable on rational grounds as it was suitably linked to the respondent's achievement of the end goal for rational reasons.'

[59] In summary, the applicants were offered suitable alternative positions with Suburban, on the same terms and conditions of employment and doing the same work. They deliberately refused to accept such alternatives. As such, they exposed themselves to retrenchment, and this part of the general questions falls to be decided in favour of the respondent as well.

[60] Having proper consideration to the aforesaid, answering the specific question in reality does not even come into play. This is because the entire cleaning department was outsourced, and there was no selection between employees that would remain employed. The process adopted by the respondent sought to avoid retrenchment in the form of providing alternatives. Selection would only really come into the equation if all the affected employees cannot be accommodated in alternative positions, and a selection exercise must be carried out between them to decide who should be retrenched. In this case, this was not an issue as all the applicants would be placed in employment at Suburban. As explained in *Louw supra*²⁸: '*... Being required to compete for such a post is not a method of selecting for dismissal; rather it is a legitimate method of seeking to avoid the need to dismiss a dislocated employee ...*'. Because of this, the issue of fair selection criteria cannot be in issue. In simple terms, the very objective was to avoid the dismissal of all the cleaning department employees whose positions had become redundant due to the outsourcing of the cleaning services to Suburban, and that selection for retrenchment would only be considered once this avenue was unsuccessfully exhausted. In this context, the Court in *Louw supra*²⁹ had the following to say:

'... Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed ...'

²⁸ Id at para 22.

²⁹ Id at para 19.

[61] In sum, there can be little doubt that the dismissal of the applicants was substantively fair. This is because it is founded upon the proper and legitimate operational requirements of the respondent, and was thus for a fair reason. The entire cleaning department in the respondent was outsourced to a third-party specialist service provider, being Suburban, which led to the cleaning department in the respondent itself ceasing to exist and the applicants' positions as cleaners becoming redundant as a result. Despite this, the respondent had secured that all the applicants be transferred to Suburban on the same terms and conditions of employment with length of service intact, which was on multiple occasions throughout the process made available to the applicants to accept. The applicants continuously and deliberately refused to accept the alternatives, without proper and justified reason, despite clearly knowing what the consequences thereof would be to their continued employment with the respondent. In the end, they invited retrenchment, which must be substantively fair.

Analysis: Procedural Fairness

[62] In the statement of claim, the applicants raised a number of grounds upon which it was said that their dismissal was procedurally unfair. It is contended that the respondent was aware that they were members of HICRAWU, however the respondent failed to notify such union of the retrenchment process and invite it to the consultations. It is also said that the applicants were only orally informed of further meeting dates and received no written invitations. They also take issue with selection criteria, however this appears to rather be an issue of substantive unfairness, and has been dealt with above.

[63] Despite all the applicant's procedural complaints, there is however in my view a simple and straight forward answer to any complaint by the applicants of procedural unfairness. This answer is found in the fact that the applicants could have avoided their retrenchment by simply accepting the alternative positions that were actually available to them. As fully discussed above, these were proper alternative positions which the applicants could readily and without reservation fill, and would leave their salary, benefits and length of service unchanged. All this being so, any case of procedural unfairness is of

no consequence, even if it existed, as the applicants could and should have avoided their own retrenchment.

- [64] In *Arthur Kaplan Jewellery (Pty) Ltd v Van De Venter*³⁰ the LAC dealt with an appeal against a finding of procedural unfairness by the Labour Court in an instance where the employer indeed failed to consult as contemplated by Section 189. The Court said:³¹ '*Appellant's failure to so consult is not, however, determinative of the dispute. The key issue concerns appellant's subsequent conduct. ...*'. The Court concluded as follows, in finding the dismissal to be nonetheless fair:³²

'In my view, the evidence is compelling that the alternatives which were proposed to respondent were reasonable and that she did not provide sufficient justification as to the reasons for refusing to accept one of these alternative positions. Accordingly, appellant acted neither substantively nor procedurally unfairly in the manner in which respondent was ultimately retrenched. On these facts it is therefore clear that even though the appellant may have acted unfairly in not consulting respondent about the closing down of the training department, such unfairness did not lead to her losing employment with appellant. She lost employment with appellant because she failed, without any justification, to accept one of the jobs offered to her by appellant and for that, she only has herself to blame.'

- [65] In *Fidelity Springbok Security Services (Pty) Ltd v SATAWU obo Chabalala and 7 Others*³³ the LAC adopted a similar view and said the following, specifically referring to the refusal of an offer of alternative employment in the context of an allegation of unfair retrenchment:

'... the dismissed employees did not accept this offer. If they had accepted it, the dismissed employees would not have been dismissed and there would have been no claim for unfair dismissal. They are the authors of their own misfortune and should not complain. Even if there may have been unfairness in the way in which the appellant handled the consultation process or any

³⁰ [2006] ZALAC 7 (21 February 2006).

³¹ Id at para 11.

³² Id at para 18.

³³ Unreported LAC case no JA 14 / 2004 dated 28 February 2006.

aspect of the matter prior to that offer, such unfairness would not have been in issue if they accepted the job offer.”

[66] The Court in *SA Transport and Allied Workers Union on behalf of Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*³⁴ specifically applied what had been said in *Arthur Kaplan supra* and *Chabalala supra*, and held:

‘... When the respondent considered the alternatives, and an opportunity was offered to her, Dube never applied for a position under the new Wits contract and instead sought and pursued a disability benefit. I find that Dube could have avoided her own dismissal by applying for a position as supervisor on the new Wits contract. In this regard, the undisputed evidence of Croukamp was that if Dube had applied for a position, Croukamp would have given her a position. In fact, Croukamp pursued Dube to enquire why she had not applied for a position, and it was then that Dube expressed her wish to seek a disability benefit. Because of these critical considerations, the issue of procedural fairness is actually of no consequence, as the respondent did not want to dismiss Dube and it was within her own power to avoid her dismissal.’

And in *Viljoen supra* the Court applied the same approach, and decided:³⁵

‘Accordingly, and because the applicant could have avoided her own retrenchment by simply accepting what was on the table or applying for the positions she could have been placed in, she simply cannot be seen to now complain about procedural unfairness, even if it is accepted that the respondent did not properly consult with her on the basis she is contending to be the case. Her retrenchment must nonetheless be considered to be fair. That should be the end of the case of procedural unfairness raised by the applicant.’

[67] Even considering the case as pleaded by the applicants, there is no contention that the applicants were not properly consulted as contemplated by the LRA in the consultations that were held on 2, 10, 17 and 24 June 2020. But when giving evidence, Raseroka sought to suggest that the consultations were not consultations at all, but simply informative meetings. I have earlier

³⁴ (2015) 36 ILJ 1923 (LC) at para 60. See also *Schatz v Elliott International (Pty) Ltd and Another* (2008) 29 ILJ 2286 (LC) at para 56.

³⁵ *Id* at para 96.

indicated my doubts as to Raseroka's credibility. Nonetheless, the difficulty with advancing such a case in evidence is that the case was never pleaded, nor raised as a ground of unfairness, either in the statement of claim or in the pre-trial minute. It is thus not permissible for the applicants to raise such a case in evidence. In any event, this contention by the applicants flies in the face of the effectively undisputed minutes prepared by Sewpersad, and I find no reason not to accept the evidence by Sewpersad about what transpired in the consultations and that these were proper consultations under the LRA. In fact, and when Sewpersad was cross examined, he was not challenged on the contents of the minutes he had made.³⁶

[68] But one important fact did emerge from the undisputed evidence about what featured in each and every consultation. That feature was that the applicants were pertinently asked to accept the alternative positions at Suburban and they consistently refused to do so as a matter of principle. There was in reality thus nothing else to discuss. The respondent made an entirely suitable option available to the applicants to avoid their retrenchment, the terms of which they were fully aware of. Considering the clear position adopted by the applicants, no amount of consultation on the core decision of the respondent was going to change their mind. They were informed in their decision making by the direct advice from Khoza as their union representative. Once all of this is the case, it simply cannot be said that the applicants were not fairly consulted. I again refer to *Khanyile supra* where it comes to the conduct of the applicants (as advised by Khoza) as summarized as aforesaid, and I consider the following *dicta* from that judgment to be quite apposite *in casu*:³⁷

'An employer cannot be held to have acted unfairly in circumstances where the employees and the union's approach to the consultation process is erratic, unreasonable and not in the spirit of finding common solutions. In these circumstances, where the purpose of section 189 of the LRA, which is a joint consensus-seeking process has not been achieved, this cannot be blamed on the respondent. In the light of the dictum in *Johnson & Johnson*, if the employer was not at fault and did all it could, from its side, to achieve

³⁶ I may add that in his testimony, Raseroka was asked if the minutes of Sewpersad was a true reflection of what transpired in the consultations, and he answered that he could not remember.

³⁷ *Id* at paras 71 – 72.

consensus seeking, the purpose of the section would also have been achieved.

UPUSA's approach to the consultation process was detrimental to the applicants, and I have no hesitation in concluding that it simply went through the entire process with no intention whatsoever of ever genuinely reaching agreement on the issues discussed with the respondent ...'

[69] I will also touch on the applicants' ground of procedural unfairness that their trade union was not notified of nor invited to the consultations. First and foremost, in this regard, and at trial, it was not even proven that the applicants were members of HICRAWU at the time when the events in this matter took place. No trade union membership forms were produced. Goosen's evidence that there were no records at the respondent indicating the applicants were union members was not contradicted. And when the applicants themselves were presented with the section 189(3) notice on 28 May 2020, they never claimed that they were union members and their union needed to be consulted.

[70] Nonetheless, and on the evidence, it appears undisputed that the applicants did immediately take the section 189(3) notice to Khoza, who was then familiar with the contents thereof. But still Khoza made no attempt to engage the respondent. As touched on earlier, Khoza explained this by saying that the section 189(3) notice recorded that no outside representation would be allowed, and thus he accepted that the trade union would be excluded. Whilst it is true that the notice records '*... this is an internal matter and thus no external representation will be allowed ...*', I have little hesitation in rejecting this purported justification by Khoza for not becoming involved in the consultation process as being contrived. Surely Khoza, as a union official, would know that a union is entitled to represent employees that are its members in retrenchment consultations, by virtue of section 189(1) of the LRA, and I find it quite bizarre that he would simply receive the section 189(3) notice and then decide to not even try and contact the respondent based on what he purportedly reads in the notice. I would have expected him to announce himself to the respondent, claim representation of the applicants, and demand that he be consulted. My experience is that this is exactly what unions almost always do. Further, and when contriving this explanation, Khoza

does not read the whole section 189(3) notice, which further records: ‘... *It should be emphasized that no final decision has been taken in this regard nor will any final decision be taken in absence of full and proper consultation with you and / or you Union representative (if applicable) ...*’ (emphasis added)’.

- [71] I believe that Khoza deliberately decided not to participate in the proceedings. The reason for this is quite clear, in that there was already a meeting between himself, Sewpersad and Goosen on 31 January 2020, before the retrenchment process even started, in which meeting he made it clear that he and the applicants were never going to agree to and accept the outsourcing as a matter of principle, the applicants would never transfer to Suburban, and that they would challenge this decision. He had no intention of consulting with the respondent. It was either insourcing, as he called it, or bust.
- [72] Then there is the evidence of Sewpersad, which I believe should be preferred. He made it clear that he was not aware that the applicants were members of any trade union. It was common cause that there was no trade union recognised in the respondent beforehand. Sewpersad explained that he thought Khoza was a lawyer, which seems to be confirmed by the fact that the only formal opposition to the proposed transfer ever received by the respondent emanated from attorneys, and not any trade union. Sewpersad, who drafted the section 189(3) notice, explained that the reference to external representation meant legal representation, and not union representation. Raseroka on his own version never testified that the applicants had at any stage indicated to Sewpersad that they were members of HICRAWU and required the respondent to consult with such union on their behalf. However, Sewpersad actually called Khoza due to the request made by the applicants in the consultation on 10 June 2020, and Khoza stated that he had no intention of participating in the process and would challenge it later. Khoza denied this telephone call from Sewpersad, but I do not believe this denial is truthful. Generally, Khoza was not a credible witness and Raseroka confirmed that the applicants did ask Sewpersad to call Khoza, as testified by Sewpersad to be the case. So why would Sewpersad, who was specifically tasked to facilitate the process, not oblige.

[73] All the above being the case, can it be said that the respondent's decision, and subsequent course of action, was genuine and pursuant to proper operational reasons? In my view, no doubt, considering what happened in the consultation process as a whole. As the Court said in *Latex Surgical*:³⁸

'The function of the court in scrutinizing the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.'

[74] For all the reasons as set out above, I am satisfied that the dismissal of the applicants by the respondent was also procedurally fair. This is because any contention of an unfair consultation process has no consequence, as the respondent throughout the entire process sought to impress on the applicants that proper and suitable alternative positions were available, however they simply without proper cause or reason refused to accept the same. They were poorly advised by Khoza in this respect. There would never have been any retrenchment if these alternatives were accepted. As such, the objectives of section 189 were met.

Conclusion

[75] In conclusion, it is my view that the applicants' dismissal by the respondent for operational requirements is both substantively and procedurally fair. The applicants' unfair dismissal claim thus falls to be dismissed.

Costs

[76] As to costs, I accept that in terms of section 162(1) of the LRA I have a wide discretion in this regard. I must say that I believe the applicants have been poorly advised and let down by Khoza. However, it must also be considered that they only have themselves to blame for having been left unemployed. But

³⁸ Id at para 18(i). See also *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings* (1998) 19 ILJ 1451 (LAC) at para 8.

I do not believe the applicants themselves were malicious or *mala fide* in pursuing this matter or acting as they did. The reality is that they lost their jobs due to circumstances beyond their control in an environment where jobs are already scarce. It is my view that a costs order against the applicants, all considered, would not be appropriate. I consider it fair and justified that no order as to costs be made.

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

Order

1. The applicants' dismissal by the respondent is substantively and procedurally fair.
2. The applicants' claim is consequently dismissed.
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr W Khoza of HICRAWU (Trade Union)

For the Respondent: Advocate T Odendaal

Instructed by: Couzyn Hertzog & Horak Attorneys