THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS25/22

In the matter between

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION (SACCAWU) obo MAVUSO, NONHLANHLA and 2 OTHERS **Applicant**

and

TSOGO SUN CASINOS (PROPRIETARY) LIMITED t/a EMNOTWENI CASINOS ENTERTAINMENT **Respondent**

Heard: **9 October 2023**

Delivered: **5 April 2024**

Summary: **Application to Labour Court in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995, as amended - The aggrieved employees, were purportedly dismissed based on operational requirements during COVID-19 – Court considered and fully discussed an employer's obligation to ensure that the consultation(s) held with the employees to be laid off are meaningful and are in compliance with the objectives set out in section 191(5)(b)(ii) (which are *inter alia*, ensuring a joint consensus-seeking process) and other objectives set out in the Labour Relations Act – i.e. promoting and encouraging employees' participation in workplace decision-making, especially where the decision made would adversely affect the employee.**

This judgment was handed down electronically and was circulated to the legal representatives of the parties. The date and time for hand down is deemed to be 5 April 2024, 10:00 am.

JUDGMENT

MORGAN, AJ

Introduction

[1] This application concerns the harsh and regrettable reality of our struggling economy. It concerns the attempts by a company to dismiss a portion of its workforce because of operational requirements. In other words, the company decides to shed and reduce its workforce in order to remain economically viable.

[2] Ergo, this is an application in terms of section 191(5)(b)(ii) of the Labour Relations Act[1] (LRA).[2] The aggrieved employees, Nonhlanhla Mavuso, Lorrain Mdaka and Lerato Malatji represented by the Applicant, the South African Commercial Catering and Allied Workers Union (SACCAWU) were purportedly dismissed based on operational requirements by the Respondent, Tsogo Sun Casinos (Pty) Ltd trading as Emnotweni Casinos.

[3] The Applicant challenges the dismissals of the employees on two grounds namely that, the dismissals were procedurally unfair and substantively unfair.

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[1] Act 66 of 1995, as amended.

[2] Section 191(5)(b)(ii) provides:

'(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –

…

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –

…

(ii) based on the employer's operational requirements…'

[4] The Applicant seeks the following orders: (i) an order declaring the section 189 retrenchments as procedurally and substantively unfair; and (ii) an order that the Respondent is to retrospectively reinstate the aggrieved employees from 17 November 2021 (the date of the purported dismissal) to the date of this Court's order.

[5] Therefore, the question before this Court is whether the dismissal of the employees was either procedurally unfair and/or substantively unfair, based on the requirements of section 189 of the LRA. There are more specific allegations, which I will return to shortly, but for now, it is important to set out the background facts that gave rise to this dispute.

[6] A preliminary note is necessary here. This case is a harsh reminder of the long-lasting impact of the COVID-19 pandemic. The emergence of COVID-19 in South Africa delivered a devastating blow to the nation's already fragile economy. The pandemic's impact went far beyond public health concerns, triggering a domino effect that crippled businesses and forced widespread redundancies.

[7] South Africa's response to the pandemic involved strict lockdown measures that brought economic activity to a near standstill. Sectors heavily reliant on face-to-face interaction, such as tourism, hospitality, and retail, experienced a dramatic decline in demand. Global supply chains were disrupted, impacting manufacturing and import-dependent businesses. This sudden halt in economic activity led to a sharp decline in GDP, pushing the country into recession.

[8] With revenue streams dwindling and fixed costs remaining constant, businesses faced immense financial strain. Companies were forced to deplete savings and resort to drastic measures to stay afloat. This included salary cuts, recruitment freezes, and unfortunately, redundancies.

[9] The need to reduce operational costs and adapt to a new economic landscape forced many businesses to take the difficult decision of making workers redundant. This decision was not just about financial survival; it was about ensuring long-term viability. With reduced demand and limited resources, businesses were forced to streamline their workforce, leading to widespread job losses across various sectors.

[10] The true impact of these redundancies extends far beyond cold numbers. Job losses translated to lost income, increased financial strain for families, and a rise in unemployment. This had a domino effect on consumer spending, further hindering economic recovery.

[11] While South Africa has slowly begun to ease restrictions and rebuild its economy, the scars of COVID-19 remain. Businesses continue to grapple with the aftermath of the pandemic, and the job market faces a long road to recovery.

[12] The COVID-19 pandemic exposed vulnerabilities in South Africa's economy, leaving a trail of business closures and widespread job losses. As the country navigates towards recovery, addressing these vulnerabilities and fostering a more resilient economic environment will be crucial to prevent similar devastation in the future.

Background facts

[13] It has been held in this Court that parties in a dispute are bound by the pleadings, the pre-trial agreement and the issues set out in the pre-trial minutes.[3] This is to ensure certainty, finality and fairness. Each party knows the case before it and will be aware of the standard they have to meet. One party ought not to be blindsided or ambushed with fresh and novel arguments

[3] See: *Professional Transport & Allied Workers Union on behalf of Khoza and others v New Kleinfontein Gold Mine (Pty) Ltd* [2016] ZALCJHB 121; (2016) 37 ILJ 1728 (LC); *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd and another* [1999] ZALC 157; (2000) 21 ILJ 142 (LAC); and *Chemical, Energy, Paper, Printing, Wood & Allied Workers Union and others v CTP Ltd and another* [2012] ZALCJHB 163; [2013] 4 BLLR 378 (LC).

and issues at trial. That would undermine the fundamental tenets of finality, fairness and certainty. It is also for this same logic that courts are bound by the pleadings and pre-trial agreements.[4] This is because:

> 'The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.'[5]

[14] Against this backdrop, I set out the facts and issues as set out by the Applicant and the Respondent in their statement of claim,[6] pleadings, and pre-trial agreement.

[15] There are three employees in this case who were purportedly dismissed based on operational requirements. Nonhlanhla Mavuso was employed on 15 March 2016 as a crèche attendant. She attended the following training: firefighting, first level and basic computer literacy. She was laid off in July 2020. Lorrain Mdaka was first employed as a casual employee on 16 September 2005 and, on 1 July 2007, became a permanent employee. She was a crèche attendant from 2007 to 2014, a receptionist in March 2020, and a senior crèche attendant from 2020 to 2021. She attended training in firefighting, first level, occupational health and safety and basic computer literacy. She was laid off in July 2020. Lerato Malatji was employed on 14 March 2014 as a crèche attendant. She attended training in firefighting, first level and basic computer literacy. She was laid off in July 2020.

[16] On 23 September 2021, the Respondent called and invited the employees to attend a meeting scheduled for 27 September 2021. The meetings were scheduled at different times for the individual employees.

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[4] See: J. Jacob, I. S. Goldrein, '*Pleading: Principles and Practice'* Sweet & Maxwell at pp 8 – 9.
[5] Ibid.
[6] The purpose of a statement of claim was lucidly explained in *Candy and Others v Coca Cola Fortune (Pty) Ltd* [2014] ZALCJHB 320; (2015) 36 ILJ 677 (LC).

[17] On 27 September 2021, the Respondent issued the employees with a section189(3) notice. In this notice, it was stated that the consultations would be held on four different occasions: the first consultation would take place on 27 September 2021; the second consultation would take place on 4 October 2021; the third consultation would take place on 11 October 2021; and the fourth consultation would take place on 18 October 2021.

[18] The section 189(3) notice reads:

> ‘1. As you are aware, the outbreak of Covid-19 in South Africa in 2020 resulted in the declaration of a national state of disaster, as well as the various national lockdowns that have been implemented at different levels on an ongoing basis.
>
> 2. The stringent restrictions on various businesses has resulted in many organisations losing their ability to engage in economic activity for a lengthy period of time. This has of course [*sic*] had a severe adverse impact on numerous organisations throughout South Africa, including Emnotweni Casino (“the Casino").
>
> 3. While the Casino was allowed to reopen for business in July 2020, the Creche facilities were not reopened and the creche employees did not resume their normal duties due to the risks surrounding children being in attendance at these facilities during the pandemic.
>
> 4. Given the uncertainty of these uncontrollable factors and the ongoing impact that the pandemic has on the Casino, it is unlikely that the creche facilities will reopen [*sic*] at any time in the foreseeable future. Accordingly, the Casino proposes to close these creche facilities which are not being utilised and declaring the positions within the creche facilities redundant. If

implemented, this may lead to the dismissal of some employees employed by the Casino based on its operational requirements.

5. This notice is being given to you since the Casino proposes declaring, your position redundant. You are therefore potentially going to be affected by the proposed retrenchments and we have an obligation to consult with [you] regarding what we are proposing, as well as about the consequences of the retrenchments if they are ultimately implemented.'

[19] At this point, the crèche (child day care facility) had been closed for about 18 months. It remained closed for an additional 20 months.

[20] In terms of the section 189(3) notice, the affected employees were required and requested to consider the Respondent's proposals and attend the consultation to make representations and provide suggestions. If they needed further information, they were told that they could approach and contact Mr Mthengiseni Silaule, the Respondent's Human Resources Manager (Mr Silaule).

[21] On 4 October 2021, Mr Silaule asked the affected employees if they had given consideration and thought to possible alternatives in order to avoid retrenchment. The affected employees suggested that the operating hours of the crèche can be opened on weekends only; or that they be moved to different positions such as being cleaners or receptionists.

[22] Mr Silaule advised that this was not possible as the cleaning services were outsourced, and that the Respondent was reducing its overall staff complement. He confirmed that his seniors agreed with this view – that these were not viable alternatives for the affected employees.

[23] The affected employees also proposed that the Respondent's crèche services be outsourced to them. The Respondent said that the crèche was not

currently operating (due to COVID-19) and was of the view that the crèche would not likely open in the near future.

[24] On 11 October 2021, Mr Silaule informed the employees that the alternatives they had proposed were not viable options that the Respondent could implement.

[25] On 18 October 2021, Mr Silaule presented to the affected employees voluntary retrenchment agreements and informed them that the offer of a voluntary severance package would lapse on 27 October 2021.

[26] The affected employees asked if they could be provided with copies of these agreements so that they could consult their union representatives to obtain advice on the Respondent's offer and consider their options. However, this was rejected. Mr Silaule did not permit the affected employees to receive the offers as he stated that they were private and confidential. He told Ms Mavuso that she does have an opportunity to call whomever she wanted and to consult with them in order to seek any advice but not have the person present in the consultations.

[27] On 29 October 2021, the affected employees were invited to a consultation. Despite them agreeing to attend, they did not attend.

[28] Another meeting was scheduled for 4 November 2021. Again, none of the employees attended this meeting. Prompted by this, on 8 November 2021, Mr Silaule instructed the Respondent's security to hand deliver invitations to the affected employees to attend a consultation on 10 November 2021. Ms Malatji accepted the invitation but refused to sign for it; Ms Mdaka accepted the invitation and signed for it. Ms Mavuso was not present at her house, but she agreed that her mother could sign the letter on her behalf.

[29] Again, the employees did not attend this consultation. Mr Silaule then sent a WhatsApp message to reschedule the consultation for 12 November 2021. There was no attendance by the Applicants.

[30] From the pre-trial minute, it appears that:

30.1 The Respondent did not make proposals to the employees during the consultations of any alternatives that could avoid the need to forcibly retrench them.

30.2 The employees did not, at any stage, make a proposal that their employment be transferred to other business units as an alternative to their retrenchment.

30.3 Following the consultation process initiated on 27 September 2021, the Respondent dismissed the employees on 17 November 2021.

30.4 In the section 189(3) notice, the Respondent stated that it would not be necessary to apply a selection criteria, since all three positions were proposed to be declared redundant. At the same time, it suggested that it proposes to apply LIFO (known as the 'Last In, First Out' principle)[7] as a selection criteria subject to the skills, qualifications and experience, should the need arise.

30.5 The employees did not object to this proposal regarding the selection in the section 189(3) notice. They did not query it or raise any issues with this during the consultation process and made no representations regarding the application of selection criteria that they wanted the Respondent to consider.

[31] On or about 29 November 2021, the Applicant referred an unfair dismissal dispute based on operational requirements to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[7] The application of LIFO is generally subject to a right to retain certain special skills and expertise, which might be necessary for the continued operation of the business. See *NUM & others v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC) and *SA Breweries (Pty) Ltd v Louw* [2017] ZALAC 63; (2018) 39 ILJ 189 (LAC).

[32] On 14 December 2021, the dispute was conciliated by the CCMA and was unresolved. The CCMA thus issued a certificate of outcome reflecting that the dispute remained unresolved and should be referred to the Labour Court.

[33] The Respondent does not have any collective bargaining agreement with the Applicant, and it was not recognised as a trade union with organisational rights by the Respondent. However, the Applicant alleges that it had a long-standing relationship/recognition agreement with the Respondent, which the Respondent terminated around January 2021. The Respondent disputes this. The Respondent argues that there was never any recognition agreement or relationship between it and the Applicant.

Issues in dispute

[34] There are two issues in dispute before this Court. The Applicant alleges that the dismissal was procedurally and substantively unfair.

[35] In relation to the allegation of procedural unfairness, the Applicant argues that:

35.1 the Respondent should have consulted SACCAWU because the affected employees are its members or at least acceded to the employees request to have a union representative present in the consultations; and

35.2 the consultation process was not genuine and was not done in good faith. It was a sham aimed at just ticking the statutory boxes by the Respondent without any real interest in seeking consensus.

[36] In relation to the substantive unfairness, the Applicant argues that the Respondent did not consider any alternatives which were viable and could have avoided the retrenchment.

Legal framework

[37] Section 23(1) of the Constitution[8] provides that everyone has the right to fair labour practices. More broadly, section 23 of the Constitution pertains to labour relations and workers' rights. It outlines various rights of workers, including the right to fair labour practices, the right to form and join trade unions, and the right to participate in collective bargaining. Additionally, it prohibits unfair discrimination against workers and provides for the right to strike.[9]

[38] On the international plane, the Termination of Employment Convention, 1982, adopted by the International Labour Organisation (ILO), establishes minimum standards for justifiable reasons for employee dismissal. South Africa, along with 36 other countries, has ratified the Convention. This ratification obligates South Africa, as mandated by its Constitution, to incorporate the Convention's principles into its national labour law framework.[10]

[39] The ILO acknowledges that businesses may sometimes need to let employees go due to legitimate operational changes. However, the ILO safeguards workers by setting clear guidelines for such dismissals. These guidelines state that an employee's termination can only be justified if there's a valid reason connected to either the employee's performance or conduct or due to essential operational changes within the company.

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[8] Constitution of the Republic of South Africa, 1996.
[9] The text of section 23 of the Constitution provides:
'23. Labour relations
(1) Everyone has the right to fair labour practices.
(2) Every worker has the right –
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.
(3) Every employer has the right –
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(4) Every trade union and every employers' organisation has the right –
(a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation.
(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1).'
[10] Section 39 of the Constitution.

[40] The LRA was enacted to fundamentally reshape the legal landscape of labour relations in the country. It superseded pre-existing laws that governed labour practices before the adoption of the Constitution. This is explicitly stated in the LRA's long title, which identifies its purpose as giving effect to section 23 of the Constitution. This focus on the Constitution is further emphasised in section 1(a) of the LRA itself. This subsection declares as one of the Act's primary objectives "*to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution"*.[11]

[41] The LRA, under section 185(a), states that every employee has the right to not be unfairly dismissed and, under section 185(b), it provides that every employee has a right not to be subjected to an unfair labour practice. Furthermore, the LRA regulates two types of dismissals: automatically unfair dismissals, which are set out in section 187 of the LRA, and unfair dismissals, which are set out in section 188 of the LRA. In this case, we are concerned with unfair dismissals, which reads:

'Section 188

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a) that the reason for dismissal is a fair reason—

[11] Section 1 of the LRA is worth reproducing here:
'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are —
(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can —
(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
(ii) formulate industrial policy; and
(d) to promote —
(i) orderly collective bargaining;
(ii) collective bargaining at sectoral level;
(iii) employee participation in decision-making in the workplace; and
(iv) the effective resolution of labour disputes.'

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.'

[42] As seen above, the LRA recognises dismissals for incapacity, misconduct and operational requirements. In addition, it also recognises that unfairness may arise from procedural and substantive issues. Dismissals on the basis of operational requirements are predicated on objective factors, whereas, misconduct and incapacity are contingent on individual conduct and capacity. The Constitutional Court in *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd and others* held:

'Misconduct, incapacity and operational requirements are the gateways to fair dismissal under the LRA. For an employer, each has its own difficulties of proof and process. Dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. Dismissal for incapacity requires proof that performance standards deal with the alleged incapacity and that alternative ways, short of dismissal, were unsuccessfully pursued before dismissal can take place. Dismissal for misconduct in circumstances where the primary misconduct is committed by one or more of a group of employees, and the exact perpetrators cannot be identified, is

complicated by the accepted principle that the misconduct must be proved against each individual employee.'[12]

[43] In *casu,* I am concerned with dismissal based on operational requirements. The LRA defines this type of dismissal as one based on the economic, technological, structural, or similar needs of a company or employer.[13] In terms of the Code of Good Practice on Dismissal Based on Operational Requirements, a dismissal based on operational requirements embraces a dismissal due to redundancy as a result of restructuring in the workplace.[14] This is a structural need for the company.

[44] The procedural requirements for operational requirements are duly set out in section 189 of the LRA. The section is dense and I will not reproduce it here but I will attempt to summarise the provision. Section 189(1) of the LRA demands that an employer contemplating dismissals based on operational requirements consult any person, including trade unions whose members may be affected by the proposed retrenchments, before carrying out dismissals. Section 189(2) of the LRA requires the employer and other consulting parties to deliberate and engage in a manner that is consensus-seeking on the issues that are explicitly listed in section 189(2)(a)-(c). For completeness, these include (i) appropriate measures to delay or amend the schedule of the dismissals, to minimise and limit the number of dismissals, to avoid the dismissals altogether, to mitigate the adverse effects of the dismissals;[15] (ii) the method or process of choosing the employees to be dismissed;[16] and (iii) the severance pay for dismissed employees.[17]

[45] Section 189(3) provides that the employer has to issue a written notice to the other consulting party, in essence, asking them to consult and furnish all the relevant information relating to the proposed dismissals. The disclosure of

[12] [2019] ZACC 25; 2019 (5) SA 354 (CC) at para 31.
[13] Section 213 of the LRA.
[14] Published under GN 1517 in GG 20254 of 16 July 1999.
[15] Section 189(2)(a) of the LRA.
[16] Section 189(2)(b) of the LRA.
[17] Section 189(2)(c) of the LRA.

information during consultation is also addressed in section 189. Section 189(4)(a) incorporates the provisions of section 16, with necessary contextual adjustments, for disclosing information stipulated in section 189(3). Section 189(4)(b) assigns the burden of proof in situations where the employer's refusal to disclose information is contested. Additionally, section 189(5) mandates that the employer grants the other consulting party the opportunity to make representations during consultation regarding any matters covered in sections 189(2), (3), and (4), along with any other issues related to the proposed dismissals. Section 189(6) further elaborates on responding to these representations. Subsection (6)(a) requires the employer to consider and respond to them, providing reasons for any disagreement. Section 189(6)(b) specifies that written responses must be provided for written representations. Finally, section 189(7) dictates the selection criteria for dismissed employees. Section 189(7)(a) and (b) establish that the criteria must be either agreed upon by both consulting parties or be demonstrably fair and objective.

[46] For the avoidance of doubt, this case concerns section 189 of the LRA and not section 189A as it does not concern a large-scale retrenchment. In other words, section 189A relates to dismissals for operational requirements by employers with more than 50 employees.

[47] It must be remembered that the LRA clearly promotes and encourages employees' participation in workplace decision-making, especially where the decision would adversely affect the employee.[18] However, this is not merely a formality, which can be discharged by simply inviting employees to a meeting and giving them an ear without listening to them. There must be a genuine and constructive dialogue in good faith where all the parties are afforded the opportunity to make representations, and these representations must be seriously considered. Of course, they may be rejected after such consideration.

[18] *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)* [2016] ZACC 1; (2016) 37 ILJ 564 (CC) at para 27. See also, section 1(d) of the LRA.

[48] Thus, while the ultimate decision regarding retrenchment may rest with the employer, the LRA emphasises the importance of fair treatment and respect for the rights of employees throughout the process. Therefore, adherence to the principles of genuine engagement and constructive dialogue not only ensures compliance with legal obligations but also upholds the fundamental values of fairness and dignity in the workplace.

Application of the law to facts

Procedural fairness

[49] Under this challenge, there are two questions to be addressed: (a) was the consultation process a sham and mere window-dressing; and (b) should SACCAWU have been permitted to participate as representatives in the consultation process pursuant to the employees request and insistence?

Were there meaningful consultations that sought consensus between the employer and the employees?

[50] As a point of departure, section 189(1) of the LRA demands that an employer consult with certain parties when it considers dismissing employees based on operational requirements. As noted above, a notice in terms of section 189(3) must be issued, setting out the relevant information as required under that section.

[51] The consultation must be meaningful and be a joint consensus-seeking process.[19] The consultation must take place before a final decision on the retrenchment. This is because they are intended to avoid the retrenchment, to reduce the number of retrenchments and to mitigate the consequences thereof. The consultation must take place, as it is an inescapable statutory obligation on all the parties. In other words, the employer and the employees (and other relevant parties) must engage meaningfully in order to reach a

[19] Section 189(2) of the LRA.

consensus. The language used is peremptory and the engagement must be meaningful and be a joint-consensus-seeking process. Much of the language in section 189(1) of the LRA is peremptory.[20]

[52] Consultation is a two-way street.[21] The employer invites the employees (and other relevant parties) to the discussion table and lays bare their position and the rationale for the proposed retrenchment. The affected employees may then suggest alternatives and other solutions, which must be considered by the employer. Prinsloo J in this Court held:

> 'Consultation in a retrenchment process must be distinguished from negotiations during a collective bargaining process. Consultation in anticipation of retrenchment calls for a joint problem-solving approach, so that the needs of all the parties can be explored. Section 189(2) places an obligation on both parties to consult. The employer has to invite the other parties to consult, but the consultation process is a two-way street and requires engagement by all the consulting parties, with the aim to reach consensus. There is a duty on the other consulting party to put alternatives on the table and to make an effort to participate in a meaningful way. Adopting an obstructive attitude is not assisting the process.'[22] [Own emphasis added]

[53] While employers must consult with employees before retrenchment, reaching an agreement is not mandatory.[23] After proper consultation, they can proceed with retrenchment using fair and objective criteria, even without consensus. However, skipping consultation on selection criteria makes the layoff process unfair. If an agreement is not reached, using unfair or subjective criteria makes the dismissal itself unfair. This is because the wrong employees might be let go. In simpler terms, just because there was no agreement on how to

[20] *South African Municipal Workers Union Obo Madlala and Others v UGU South Coast Tourism (Pty) Ltd* [2023] ZALCD 11 (*Madlala*) at para 99.
[21] *Govind v AC Nielsen Marketing and Media (Pty) Ltd* (P 95/2020) [2020] ZALCPE 12 (*Govind*) at para 37.
[22] *Madlala* supra at para 100.
[23] Ibid at para 101.

choose who gets retrenched does not necessarily mean the chosen criteria were unfair, or that the retrenchments were unjust. This interplay between fair procedures and fair outcomes can be seen in another required consultation topic: finding alternative employment. Consulting about ways to keep employees on, even if no alternatives are ultimately found, likely avoids procedural unfairness in the dismissal process.

[54] In *casu*, there is something rather amiss about the consultations. The Respondent, through Mr Siluale, seems to have a predisposition and was merely going through the motions. The consultations seemed to be geared towards discharging the Respondent's statutory obligations rather than carefully and seriously seeking ways to avoid the retrenchments or minimise the adverse impacts which may arise from the retrenchments.

[55] The allegation that Mr Silaule refused to provide the affected employees copies of the voluntary severance packages (VSP) offer they had requested during the consultations to allow them an opportunity to consider them at home or to submit to the union representative to consider and provide them with advice prior to them deciding whether they will accept or refuse the offer or consider other options to propose to the Respondent gives me discomfort. During cross examination, Mr Silaule conceded in the hearing that he disallowed them copies of the VSP offers and from taking them home on the basis that they were confidential and private. Mr Silaule's refusal to me, demonstrates that the Respondent had a take-it-or-leave-it approach and deprived the affected employees of the ability to apply their minds and solicit advice from their union representative or any other third party.

[56] I must also note that the election by the affected employees to not attend all the consultations was ill-advised. I understand that the affected parties were of the view that the consultations were going to lead to a foregone conclusion and that it would be a waste of time. Be that as it may, they should not take the law into their own hands by declaring the consultations a sham and withdrawing from them. This denudes the strength of their claims because they did not participate, and they frustrated the process with their absences. It

would be beneficial for them and strengthen their claim if they attended all the consultations and contributed.[24]

[57] When testifying the affected employees said that they were running out of funds and felt that the consultations were leading to a foregone conclusion. They were of the view that they were wasting their already limited funds in light of the ongoing COVID-19 pandemic; they could not afford to attend these consultations only to lose their jobs. They found that their financial predicament was untenable. However, this would have been avoided had the Respondent allowed SACCAWU to represent these workers. I turn to this issue next.

Should SACCAWU have been involved or permitted to attend as the affected employees' representatives in the consultation process?

[58] In relation to this challenge, I believe that SACCAWU should have been included in the consultation process. Mr Silaule was made aware by the affected employees that they wanted to consult someone, namely their union representative.

[59] The Respondent claims that the affected employees did not specifically indicate that they wanted to consult SACCAWU and that they were unaware that they belonged to a trade union. I find this rather unconvincing. The Respondent knew that the affected employees were paying fees to SACCAWU as this was being deducted from their salaries monthly. It is implausible that they did not know. Mr Silaule indicated that he was aware of this, whilst testifying during the hearing. Furthermore, once the affected employees stated that they would like to consult "someone", the Respondent could have asked further to find out who this "someone" was. It also seems unlikely and implausible that they would not inquire who this "someone" was. It defies logic that the affected employees would ask to have recourse to

[24] In some cases, a failure to attend consultations or the abandoning of consultations at a later stage was detrimental to the case of the affected employee. See *Govind supra* and also *SA Airways v Bogopa and Others* [2007] ZALAC 10; (2007) 28 ILJ 2718 (LAC).

someone, and Mr Silaule did not ask “who?”. It seems to me that this is a simple question that a reasonable human resources manager would ask.

[60] In my view, not allowing SACCAWU to represent the affected employees even after the affected employees had persistently requested so in the consultations, is fatal and detrimental to the Respondent’s case. It demonstrates that the Respondent was taking a hard-line approach to the consultation *ab initio*. This is further exacerbated by the fact that Mr Silaule refused to provide the affected employees with copies of the VSP offers pursuant to their request for copies so that they could take home and obtain advice thereon as stated above.

Substantive fairness

[61] The Applicant alleges that the dismissal was substantively unfair because the Respondent failed to genuinely and seriously consider alternative solutions to the retrenchments.

Were the employees’ dismissal substantively unfair?

[62] The fairness of a lay-off for operational reasons hinges on two crucial inquiries. The first question is a general question and the second is a specific question. As Zondo JP of the Labour Appeal Court (as he then was) stated in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*:

> ‘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.'[25]

[63] Thus, the question is whether there is a rationale for the dismissal of any employees. From the papers and at the hearing during the affected employees' testimony, there does not appear to be any argument by the Applicant that the dismissals were unfair and that there was no rationale for them, save to state that the Respondent required those positions in its structure in order to keep its operating license. Thus, without more, the general question is unchallenged and as such, the irresistible deduction is that the Applicant accepts the rationale for the dismissal as being based on proper business sense. The Labour Appeal Court in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* was unambiguous: *"[w]hat we have to do is to decide whether the respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry even if it might not have been the best under the circumstances"*.[26]

[64] This brings me to the crux of the Applicant's contention – the specific question. The Applicant contends that the Respondent did not seriously consider the alternative suggestions, which would have avoided the retrenchments altogether. It is contended that the process was a *fait accompli* as none of the proposals were entertained and were quickly dismissed and rejected.

[65] The Applicant asserts that there were several options available to the Respondent by way of alternative employment/positions, which would have avoided retrenchments. It argued that the three affected employees could have been placed in these positions:

a. Receptionist;
b. Waitresses;

[25] [2005] ZALAC 14; (2006) 27 ILJ 292 (LAC) at para 55.
[26] [1999] ZALAC 25 at para 36.

c. Scullery, or washing dishes;
d. Admin;
e. Cash desk;
f. Slot attendants;
g. Transfer to other business units; or
h. Implement short (part time) or reduced working hours to all employees.

[66] Not only this, but the Applicant alleges that the affected employees also proposed the crèche being outsourced to them. Moreover, it is alleged that the wrong selection criteria was used and that the Respondent should have used a different criteria such as LIFO throughout the whole business structure.

[67] The Respondent argued that the Applicant did not plead that the Respondent did not consider alternatives before commencing the section 189 process. The Respondent contends that this approach is essentially litigation by ambush and that thus inadmissible. Moreover, the Respondent further contends that there were no alternative positions available in any case. The thrust of this submission is that the Respondent did indeed consider the alternative positions suggested but that due to the harsh reality of the COVID-19, the Respondent had not, and has not, financially recovered and therefore had embarked on a lay-off process, which made it unfeasible and commercial unviable to move the applicants to a different position.

[68] The Respondent testified that it was retrenching in other departments and that it was limiting its staff complement. There was an overall reduction. This is because the Respondent's business was harshly hit by the national lockdown announced after the COVID-19 breakout. Mr Silaule testified that the Respondent has reduced the number of slot machines and gambling tables it operated and reduced its business trading hours.

[69] Davis AJA in *Enterprise Foods (Pty) Ltd v Allen and Others*[27] referred to the following extract from *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd*[28] with approval:

> 'When either the Labour Court or the Labour Appeal Court is seized [sic] with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair.'

And further held that:

> 'The Court must examine whether there is a fair reason to dismiss. If, as Zondo JP noted in *Algorax*, there are two rational solutions, one of which preserves jobs, fairness as mandated by the Labour Relations Act 66 of 1995 (the Act) dictates that this is the solution that must be adopted by the employer...'[29]

[70] It is trite that an employer has an obligation to consider any alternatives suggested and satisfy itself that there were no other alternative employment positions or solutions available. The Respondent here had this obligation.

[71] I am not convinced that the Respondent seriously and genuinely considered the alternative solutions provided by the affected employees. I accept that operational requirements are not to be treated as a measure of last resort. The dismissals must have been avoidable.[30] However, failing to offer <u>available</u> alternative employment would be substantively unfair.[31]

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[27] [2004] ZALAC 5; (2004) 25 ILJ 1251 (LAC) (*Enterprise Foods*) at para 17.
[28] (2003) 24 ILJ 1917 (LAC) at para 69.
[29] *Enterprise Foods supra* at para 17.
[30] See *Mamabolo and Others v Manchu Consulting CC* [1999] ZALC 40.
[31] R. Le Roux, '*Double Trouble: Consulting for a Fair Retrenchment*' (2017) 4 *Revue de droit comparé du travail et de la sécurité sociale* at pp 154 - 161.

[72] In *Van Rooyen and Others v Blue Financial Services (SA) (Pty) Ltd*[32], the Labour Court noted that this enquiry of substantive fairness is objective. The court quoted with approval from *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*[33] which held thus:

> 'the starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential, and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

[73] Murphy AJ further iterated this in *SATAWU v Old Mutual Life Assurance Company South Africa Ltd*:

> 'The test formulated by the legislature in the 2002 amendments harkens back to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Such deference does not amount to an abdication and, as stated in *BMD Knitting Mills (Pty) Ltd* (supra), the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed

[32] [2010] ZALC 80; (2010) 31 ILJ 2735 (LC) at para 15.
[33] (2001) 22 ILJ 2264 (LAC) at para 19.

aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employee in the exercise of its managerial prerogative.'[34] [Own emphasis added]

[74] Moreover, Mr Silaule testified that even after the Covid-19 pandemic restrictions were lifted and the Respondent continued to trade normally, it did not do away with the positions of affected employees its structure instead, it re opened the crèche and outsourced the functions of the affected employees to a third-party service provider.

[75] Mr Silaule further testified that the Respondent's business required the crèche attendant positions in its organisational structure as one of the requirements for it to keep its trading/operating license. He further confirmed that prior to the closure of the crèche in 2021 and after it had reopened after the Covid-19 restrictions were lifted, he had addressed notice letters of these developments to the industry regulator (Mpumalanga Economic Regulator) advising of the closure of and reopening of the crèche in order to comply with the Respondent's trading license obligations. This conduct corroborates his testimony regarding the necessity of the positions in the Respondent's business structure. Therefore, it is difficult for me to find that the crèche attendant positions in the organisational structure ever became redundant if on his own version, they are required to be in the company structure in order for the Respondent to keep its trading license.

[34] [2005] 4 BLLR 378 (LC) at para 85.

[76] The outsourcing of the affected employees' jobs to a third-party service provider, is not only contradictory to the reason he advanced to the affected employees during the consultations for rejecting their proposal but also indicates that an intention to deliberately sideline the affected employees when the opportunity they proposed arose and out rightly refuse them the opportunity to pursue the alternative option to save their jobs. It boggles my mind why the affected employees were not offered the opportunity they proposed first as would have been the case of an employer who decided to re-employ in a position once declared redundant or laid off an employee for financial reasons, but later implemented revived the position. This leads to an irresistible inference that the affected employees lay-off was not genuine and in good faith.

[77] Whilst there is no obligation on the Respondent to take up the suggestions and implement them, it is incumbent on the Respondent to apply its mind to them in good faith. It was apparent from the evidence led by the affected employees and the evidence Mr Silaule led in chief and in cross examination that the purported consultations were a sham from the outset, and the Respondent had already made up its mind prior to engaging in them. In my view, the outcome was predetermined, and the consultations were a tick box exercise aimed at creating the impression that the dictates of section 189 of the LRA were taken seriously.

[78] This is evinced by the fact that Mr Silaule conceded during cross examination that he did not allow the affected employees to take the proposed VSP offers home and solicit the views of their union representatives. He stated that these documents were confidential and private. However, it cannot be gainsaid that the VSP offers are confidential and private towards the affected employees or their chosen union representatives. If the consultations were genuinely aimed at achieving meaningful engagement, the affected employees should have been given sufficient opportunity to consider the contents of the VSPs and solicit the views of their representatives. This would have enriched the consultations as the affected employees would have been better informed and

better advised. The Respondent, through the Human Resource Manager, created an artificial barrier by barring the affected employees from being able to take the documents home to consider and obtain advice thereon.

[79] The affected parties recommended several positions within the Respondent's business, which were promptly rejected. In relation to the option of outsourcing the business to the affected parties, this was not properly considered and was rejected equally as quickly. The proposal of working on a part-time basis was also rejected. The affected employees also testified that after they had proposed the outsourcing of the crèche to them Mr Silaule decidedly rejected this proposal advising them that it was not permissible to outsource the service in terms of the gambling license. This statement was not challenged or denied by Mr Silaule but contradictory with the Respondent's subsequent actions.

[80] I am cognisant of the principle in *General Foods Industries Ltd v FAWU*, where the Labour Appeal Court held:

> 'After consultations have been exhausted the employer must decide whether to proceed with the retrenchment or not. The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that – even though reasons to retrench employees may exist – they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum.'[35]

[81] On a careful review of the evidence, I am not convinced by the Respondent's submissions that it was meaningfully engaged in a consensus-seeking consultation process. The affected employees suggested alternative positions and options during the consultations, and they were decidedly rejected by Mr Silaule.

[35] [2004] 7 BLLR 667 (LAC) at para 55.

[82] I must not be misunderstood. It is neither my suggestion nor my finding that the affected employees should not have been dismissed for operational reasons. I am neither contending that the Respondent has no commercial basis to embark on a retrenchment process. This Court does not have the evidence or expertise to make such a determination and it was not properly put before me or challenged in any event. My finding is simply this: the Respondent failed to comply with the procedural and substantive dictates of section 189 of the LRA. The Respondent did not afford the affected employees the requisite fairness that was expected of it during the retrenchment process. Thus, the retrenchments can be proverbially characterised as fruits of a poisoned tree.

Relief sought

[83] The Applicant seeks reinstatement with full salaries and employment benefits of the affected employees effective from the date of dismissal. In the absence of any evidence by the Respondent to indicate that the Applicant's reinstatement would not be reasonably practicable, I am inclined to order reinstatement since it is the primary statutory remedy in unfair dismissal disputes. Further, that the affected employees be paid their full salaries from their date of dismissal (17 November 2021).

Costs

[84] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162(1) of the LRA to make any order for costs according to the requirements of the law and fairness. An official of SACCAWU (the Applicant) represented the affected employees in these proceedings. Therefore, the Applicants did not incur any costs associated with their legal representation before this Court, thus it would in my view be inappropriate to order costs in this case.

[85] In the circumstances, the following order is made:

Order

1. The dismissal of the individual affected employees namely, Nonhlanhla Mavuso, Lorrain Mdaka and Lerato Malatjie based on the Respondent's purported operational requirements is substantively and procedurally unfair.

2. The individual affected employees stated above, are reinstated with full salaries and employment benefits effective from the date of dismissal (17 November 2021).

3. There is no order as to costs.

[Electronically signed PDF]

L.M Morgan
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr P Ngoato

Instructed by: Trade Union: SACCAWU

For the Respondent: V.M. Mndebele

Instructed by: Edward Nathan Sonnenbergs Inc