IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: CCT 42 / 21
LAC CASE NO: JA 102 / 20
LC CASE NO: J 913 / 20

In the matter between:

SOLIDARITY obo MEMBERS	**APPLICANT/ PETITIONER**

and

BARLOWORLD EQUIPMENT SOUTHERN AFRICA	**1ST RESPONDENT**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**2ND RESPONDENT**
NATIONAL ASSOCIATION OF SOUTH AFRICAN WORKERS (NASA)	**3RD RESPONDENT**
ASSOCIATION OF CONSTRUCTION AND MINE WORKERS UNION (AMCU)	**4TH RESPONDENT**
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA)	**5TH RESPONDENT**
UASA - THE UNION	**6TH RESPONDENT**

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION:

1. This matter relates to the question as to whether the Applicant trade union's members have been procedurally unfairly dismissed by the First Respondent (hereinafter referred to as "Barloworld") and whether the dismissal the Court *a quo* of an application in terms of Section 189A(13) was correct seeking, *inter alia,* to correct procedural irregularities at the time. This is in the context of a large-scale retrenchment regulated by Section 189A of the LRA[1], and the judgment of the Labour Court (as per Moshoana J) after the Applicant and the 5th Respondent (NUMSA) brought urgent applications in terms of Section 189A(13)[2].

2. The Applicant's members retrenchment during August 2020 was as a result of Barloworld's alleged operational requirements, but the Applicant and NUMSA were of the view that there were procedurally shortcomings in the process justifying the Labour Court's intervention. The Labour Court differed and dismissed both trade unions' applications (that were heard simultaneously) with costs, including the costs consequent upon the employment of two counsel. That judgment is the subject-matter of the current process.

BACKGROUND AND THE COURTS *A QUO*:

3. On 27 April 2020 Barloworld sent out a notice in terms of Section 189(3) of the LRA.[3]

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1 Labour Relations Act 66 of 1995. Unless otherwise stated, all references to Sections are to the LRA.
2 LC Judgment dated 2 October 2020: **Vol 4** pp. 381 - 395
3 **Vol 1** Annexure "FA2" pp. 51 - 56

4. In the notice of contemplated restructuring, it was held that the Covid-19 pandemic has had and will have an effect on Barloworld.

5. Correspondence was exchanged between the Applicant and Barloworld on numerous occasions during the consultation process[4].

6. Commissioner M Ally was appointed by the CCMA to facilitate the large-scale retrenchment. A number of consultations sessions took place in the period up to August 2020. Initially it was envisaged that 750 employees would be affected by the restructuring. With regard to selection criteria, the following was proposed by Barloworld in the Section 189(3) notice:

> *"15.5 Where there are more associates to positions or there are vacant positions, the positions will be filled applying lifo, subject to skills, qualifications and experience and in compliance with our employment equity plan."*[5]

7. It was further envisaged that the consultation process be finalised by 1 July 2020 since that would be the date of notice of termination[6].

8. The Third Respondent (NASA) displayed an obstructive attitude during the facilitated consultation sessions, causing Commissioner M Ally to withdraw from the process. He, however, re-entered the arena and extended the facilitation process further beyond the 60 days which had expired on 3 August 2020 in an attempt to see if an agreement could be reached. Barloworld then arranged two further meetings on 7 and 11 August 2020 to discuss outstanding issues from what it termed an "*agreed agenda"*.[7]

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4 **Vol 1** FA par 19 – 30 pp. 19 - 24
5 **Vol 1** Annexure "FA2" p. 54
6 **Vol 1** Annexure "FA2" par 17 p. 54
7 **Vol 1** FA par 27 p. 22 and Annexure "F9" pp. 89 - 95

9. In the agenda, Barloworld dealt with the proposed filling of vacancies and the selection approach. This followed on Barloworld's decision to adopt a process where certain jobs and job categories were listed in four separate sections, being Red 1, Red 2, Green and Amber, with Red 1 being absolutely redundant, Red 2 being more employees than positions, Green being not affected (no selection criteria applied and positions not affected) and Amber being new positions for which employees who found themselves in the Red 1 or Red 2 were supposed to apply and compete for[8].

10. Returning to the agenda of 7 August 2020, there was now another change to the initial position adopted by Barloworld. Instead of employees filling positions via an interview process and competitive placement process as alluded to during the initial stages of the consultation process, this approach now suddenly changed and positions were made redundant and where there were more employees than positions and/or those positions are vacant, "*employees currently doing the job will be considered to fill the positions using the agreed selection criteria"*. Furthermore, Barloworld stated that any new positions will be filled through a "*ringfenced recruitment process and all affected associates (save for associates already placed as above) may apply"*. Lastly, it was stated that a structured panel interview process will be followed to ensure objectivity and fairness[9].

11. Up and until 7 August 2020, there has been no meaningful consultation on the issue of selection criteria. In the notice of 7 August 2020, the proposed selection criteria differed from that what was proposed initially when the 189(3) notice was issued. Whereas notice was initially given that the proposed selection criteria would be lifo subject to skills, qualifications and experience and in compliance with Barloworld's employment equity plan, it was now described as follows:

    "Selection criteria

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8 **Vol 1** FA par 41 p. 29
9 **Vol 1** Annexure "FA9" p. 90

> *BWE proposes the following as the selection criteria mix. The order as listed below does not indicate the preference as a mix of the criteria will be used in the approach:*
> - *Lifo (last in first out);*
> - *Skills and qualifications;*
> - *Transformation targets (EEA targets, diversity and localisation).”*[10]

12. The interviews for the positions also never took place and there was thus no situation where selection criteria may have been applied in the event of equal scores, as initially set out by Barloworld. Where interviews were supposed to be scheduled, was in a situation where employees had to compete for available positions. The interviews that were indeed scheduled were cancelled on short notice and this process was abandoned by Barloworld. Employees were then retrenched with open positions being available after the consultation process was prematurely terminated by Barloworld.[11]

13. Since the Third Respondent disrupted the consultation process of 3 August 2020, the parties have not been able to consult on the issue of selection criteria in order to attempt to seek an agreement thereon[12].

14. The position of the Applicant was clear from the outset in responding to the invitation to consult. The Applicant proposed lifo, subject to skills and qualification as selection criteria that they were amenable to agree on. On 28 July 2020, in a letter directed to Barloworld by the Applicant, the following is stated:

> *“Where there are more associates to positions or there is vacant positions, the positions will be filled applying lifo subject to skills and qualifications as the agreed selection criteria. Solidarity upfront rejects the proposal that such placements should be in line with BWE’s employment equity plan and we believe the LRA specifically prohibits possible terminations on race.”*[13]

15. In response to this letter, Barloworld stated as follows on 3 August 2020 under the heading “*Selection Criteria and Severance Pay”*:

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10 **Vol 1** Annexure “FA9” p.90
11 **Vol 1** FA par 31 p. 24
12 **Vol 4** RA par 15 – 17 pp. 327 - 328
13 **Vol 1** Annexure “FA8” p. 87

"These matters are noted and the company is happy to engage further on same in the CCMA facilitated session planned for 3 August 2020."[14]

16. Since no consultation took place on 3 August 2020, Barloworld authored an email dated 5 August 2020 confirming the CCMA's conclusion of the facilitated consultation process and Barloworld's decision to schedule a further meeting "*in an attempt to conclude any outstanding consultation issues from the consultation process followed to date"*.[15]

17. In answer to this email, the Applicant authored an email dated 6 August 2020 wherein the following was stated with regards to selection criteria:

"6. Engagement on selection criteria – Solidarity has made a full proposal in our letter of the 30th July 2020 and that is our position to engage from – lifo and skills retention".[16]

18. This email further made it clear that the Applicant appreciated the fact that Barloworld has realised that the process has not been properly consulted on and that Solidarity will avail themselves to attend further meetings until the parties have reached consensus on all outstanding issues. The Applicant further stated upfront that they do not accept the standard "Barloworld answer", being "*we have dealt with this already in previous sessions"*.

19. It is reiterated that Barloworld misinterpreted what was stated in the founding affidavit pertaining to the criteria of lifo, skills and qualifications. The Applicant made it clear that it agreed to lifo, skills and qualifications in the event that the skills and qualifications criteria's assessment and implementation methods had to be consulted on and agreed to. This never happened and absent from Barloworld's answering affidavit in the urgent application is any cogent explanation as to when this was done, how it was done, when it was consulted on, agreed on and alternatively how it was to be implemented[17].

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14 **Vol 4** Annexure "RA1" p. 355
15 **Vol 5** Annexure "RA2" p. 358
16 **Vol 6** Annexure "RA2" pp. 356 - 357
17 **Vol 4** par 20 p. 329

20. Instead of consulting on Barloworld's proposed criteria of its employment equity plan, it now adopted the selection criterion of *"transformation targets"* without elaborating as to why this would be adopted and how it would be applied. There was no consultation on what Barloworld now termed a "*weighted score / selection criteria"*[18].

21. The Applicant's willingness to agree to two of the pillars of the selection criteria (being lifo and skills and qualifications) was on the condition that employees would be treated fairly in the contemplated restructuring, but then awaiting the framework for assessing skills and qualifications. Although transformation was mentioned during the CCMA facilitation sessions, there was no meaningful consultation on the criterion, nor an attempt by Barloworld to reach consensus thereon. Barloworld simply (post the facilitation sessions and consultations) unilaterally adopted this third pillar, namely transformation which the Applicant was not meaningfully consulted on. In addition, the Applicant is of the view that even if there was a proper consultation and consensus-seeking process on this criterion (which is denied), then and in that event the criterion is neither fair, nor objective. The criterion is also unfair, unilateral and ultimately discriminatory.

22. The effect of the so-called *"weighted score"* and selection matrix is explained in the founding and replying affidavits. The nett effect of the manner in which the weighting was allotted had the effect that White, Indian and Coloured males and females (who may far out-qualify African males and females and may have been employed for a far greater period of time under lifo) will then nonetheless lose their employment to African males and females on the construct created by Barloworld, directly discriminating against them. White males and females (and Coloured and Indian males and females to an extent) cannot compete fairly as a portion of the weighted score, being "*transformation",* is simply not available to them or scores them much lower than African males and females.[19]

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[18] **Vol 1** FA par 32 – 35 pp. 25 - 27
[19] **Vol 1** FA par 36 – 54 pp. 27 – 34 and **Vol 4** RA par 46 – 47 p. 338

23. The weighting attached to each separate criterion was never consulted on at all, nor agreed between the consulting parties. The weighting was designed in such a fashion that, for example, an employee with more than 30 years' service is treated on the same level than an employee with for example 10 years' service.

24. On 2 September 2020, the Applicant addressed a letter to Barloworld wherein it stated that a number of the Applicant's members started receiving termination notices from approximately 17 August 2020. This was in the face of the fact that the consultation process had not been finalised or exhausted (on Barloworld's own version) and that there was no genuine attempt to reach consensus on all the issues listed[20].

25. In this correspondence it was again reiterated on 2 September 2020 that there was a number of open positions at Barloworld and notwithstanding this fact the Applicant's members were being retrenched at the time. This strikes to the consultation topic of alternatives to retrenchment and the fact that it is unfair to declare a process closed and to start retrenching when open positions are still available.

26. In answer thereto, Barloworld's representatives authored a letter dated 4 September 2020[21]

27. In this letter, Barloworld denied that transformation is an unfair or unlawful selection criterion. In paragraph 3.7 of the letter the issue of vacant positions is discussed. It stated that Barloworld is "*currently engaged in the process of ensuring that those available vacancies are filled by suitable candidates from the pool of employees affected by the restructuring"*. Barloworld (optimistically so, in submission) then stated that in the event that any affected employee who is serving notice secures a suitable alternative position before the expiry of the notice period, that particular notice of termination would automatically fall away but if no suitable alternative position could be found for someone

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20 **Vol 1** FA par 55 p. 34 and Annexure "FA22" pp. 164 - 168
21 **Vol 1** Annexure "FA23" pp. 169 - 171

affected and serving notice, the termination of employment will become effective after the expiry of the notice period. Once again, Barloworld has placed the proverbial cart before the horse and prematurely terminated the consultation process and started implementing terminations of employment before all alternatives were exhausted and before the parties could exhaust a meaningful joint consensus-seeking process as further and fully set out in the founding and replying affidavits in the urgent application.

28. The Applicant then brought an urgent application to the Labour Court on 14 September 2020. At the same time NUMSA (the 5th Respondent) brought a similar application and the matters were heard on the same day by Justice Moshoana (on 28 September 2020). Judgment was delivered on 2 October 2020.[22]

29. The Labour Court dismissed the Applicant and NUMSA's applications and they were ordered to pay the costs of Barloworld, including the costs of two counsel. Dissatisfied with the outcome, the Applicant sought leave to appeal. On 20 November 2020 Justice Moshoana refused the application, with costs.[23]

30. The Applicant then petitioned the Labour Appeal Court under case no. JA102/20 and the Labour Appeal Court ordered on 1 March 2021 that the petition is refused, with no order as to costs[24]

31. The Applicant then sought leave to appeal to this Honourable Court on 23 March 2021.[25]

32. The application was opposed by Barloworld[26].

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22 **Vol 4** Judgment pp.381 - 395
23 **Vol 5** Judgment pp. 465 - 466
24 **Vol 5** LAC Judgment pp. 463 - 464
25 **Vol 4** p. 396 – **Vol 5** p. 459, Notice and FA
26 **Vol 5** AA pp. 477 - 508

THE LABOUR COURT'S JUDGMENT:[27]

33. The Learned Justice Moshoana concluded as follows:

33.1 Section 189A(13) is aimed to ensure compliance with a fair procedure only and the Court's jurisdiction to preside and adjudicate over matters of procedural fairness is ousted[28];

33.2 That the Labour Court's jurisdiction to preside and adjudicate over procedural fairness is replaced with compliance with a fair procedure, facilitation processes and strike action;

33.3 That there is a huge and essential difference between seeking to find procedural fairness and the compliance with a fair procedure and that in a procedural fairness concept, the net is wider as opposed to compliance[29];

33.4 That the issue is no longer procedural fairness, but compliance with a fair procedure by one of the consulting parties – the employer[30];

33.5 That the Labour Court is incapable of hearing and adjudicating matters dealing with procedural unfairness disputes in motion proceedings;

33.6 That where the Labour Court adjudicates procedural unfairness disputes under the banner of Section 189A(13), the Labour Court would be acting *ultra vires* since its powers were taken away by Section 189A(18). The Court concluded that once it

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27 **Vol 4** LC Judgment pp. 381 - 395
28 **Vol 4** LC Judgment par 7 p. 385
29 **Vol 4** LC Judgment par 9 p. 385
30 **Vol 4** LC Judgment par 10 p. 386

appears that an employer may have complied with its statutory obligations as set out in Section 189 of LRA, then the Labour Court is unable to exercise its statutory discretion in terms of Section 189A(13) of the LRA[31];

33.7 That the Applicants did not raise compliance issues, but raised general procedural fairness issues and to a certain extent substantive fairness issues and that those issues are all complaints *intra* the consultation process and did so by relying on his own judgment in ***Tawusa obo Mothibedi & Others v Satawu & Another***[32]*;*

33.8 In relying on ***Tawusa***, the Court stated that once an employer commences with a consultation process, the focal point thereafter is on the consulting parties as a unit (my emphasis);

33.9 That the word *"engage"* as found in Section 189(2) merely has the meaning to "*occupy oneself, become involved"* and that *"consultation"* in Section 189(1) is limited to an "*engagement"* only and that engagement as a process is not the duty of the employer alone[33];

33.10 That Barloworld's "*engagement"* on the selection criterion of transformation was sufficient and that transformation is "*not a selection criterion per se"*[34]*;*

33.11 Found that the issue of which selection criteria to apply is an issue of substance and not procedure (whereas the real issue, in submission, was the adoption of selection criteria as a procedural challenge)[35];

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31 **Vol 4** LC Judgment par 12 – 13 p. 287
32 Unreported judgment of Justice Moshoana, Labour Court, Case No. J885/20 delivered on 17 September 2020. **Vol 4** LC Judgment par 14 p. 388
33 **Vol 4** LC Judgment par 17 p. 389
34 **Vol 4** LC Judgment par 18 pp. 389 - 390
35 **Vol 4** LC Judgment par 18 p. 390

33.12 That the Applicant's complaint pertaining to the failure to consult on the transformation criterion and other selection criteria goes to substantive fairness and is not a procedural issue;

33.13 That the consulting parties at the very least engaged over the method pertaining to selection criteria and that the initial proposal was to take into account Barloworld's employment equity plan and that it was in the Judge's view wide enough to encapsulate transformation since transformation is a species of employment equity. This was not changing tack from its original proposal, but simply a perfection and giving of content to the general concept of EEP (Employment Equity Plan)[36];

33.14 That the Labour Court did not retain jurisdiction on the issue of unlawfulness under Section 189A(13) and in doing so cited the authorities since ***Steenkamp & Others v Edcon Ltd***[37];

33.15 That temporary reinstatement would not be appropriate and that the horse has bolted in that too long a period has passed and that the application should have been brought earlier if the purpose of Section 189A(13) was to be served[38];

33.16 Made no finding on the Applicant's distinct case and argument that there was a general failure to consult (nor was there an attempt to reach consensus in a meaningful joint consensus-seeking process), especially on selection criteria and on the "*weighting"* and *"scoring"* attached to each selection criterion, including transformation;

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[36] **Vol 4** LC Judgment par 16 p. 389
[37] ***2019 (40) ILJ 1731 CC;*** **Vol 4** LC Judgment par 19 p. 390
[38] **Vol 4** LC Judgment par 20 p. 390

33.17 Failed to make a finding on the distinct ground and argument advanced by the Applicant that its members were being retrenched at a time where the process was not concluded, alternatively where there were still vacant positions available that could have been filled by the retrenched and/or affected employees and members of the Applicant;

33.18 Failed to make a finding on Barloworld's failure to conclude the so-called interview process for positions that became vacant as a result of the restructuring at a time where the Applicant's members were being retrenched;

33.19 After finding that the application was brought belatedly (although within the period as stipulated by the LRA), failed to consider the granting of compensation for procedural unfairness;

33.20 Found that (with regards to disclosure of information) that recourse had to be had to the provisions of Section 16 of the LRA and that any such complaint is not to be adjudicated upon by the Court in an application of the current nature[39];

33.21 Found that it is generally sufficient to only "*engage"* in a retrenchment process with employees and trade unions and that the relevant section equates *"engagement"* to a *"joint consensus-seeking process"*;

33.22 Disregarded the relief sought in terms of the notice of motion pursuant to Section 189A(13)(d) (i.e. the granting of compensation);

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[39] **Vol 4** LC Judgment par 22 p. 391

33.23 Dismissed the application with costs (contrary to the trite principles as applicable)[40]; and

33.24 Awarded costs against the Applicant and NUMSA (including the costs of two counsel), where non-profit organisations litigated in pursuit of constitutional rights and rights as entrenched in the LRA and where costs should not have been granted against the trade unions.

34. It is submitted that the Court should have found (as more fully dealt with *infra*):

34.1 That Section 189(13)(a) – (c) was designed by the Legislature to correct errors in an ongoing retrenchment process;

34.2 That the Labour Court is entrusted with wide-ranging powers to ensure that large-scale retrenchments are conducted in accordance with procedures which are fair. The approach adopted by the Labour Court leaves hardly any room for the Labour Court ever having the moment to exercise its power of discretion, which could never have been the intention of the Legislature;

34.3 That Section 189A(18) of the LRA provides that the Labour Court may not adjudicate a dispute about the procedural unfairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of Section 191(5)(b)(ii), meaning that the Court *a quo* should have adjudicated the complaints of procedural unfairness;

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[40] **Vol 4** LC Judgment par 25 – 28 pp. 392 - 393

34.4 That the prohibition in Section 189A(18) is not a general one which deprives the Labour Court of jurisdiction to adjudicate the procedural fairness of mass retrenchments and it is restricted to disputes regarding the procedural fairness of dismissals referred to the Labour Court in terms of Section 191(5)(b)(ii);

34.5 That the intention of the Legislature was to provide for wide-ranging powers to the Labour Court to ensure procedural fairness in mass retrenchments, in addition to outside facilitation;

34.6 That the legislature recognised the fact that despite all of the above and notwithstanding, procedural unfairness may still occur which cannot be remedied by orders under Section 189A(13)(a) – (c);

34.7 That this will typically be the case where the horse has bolted and the wrongs in a procedure cannot be undone, rendering orders in terms of subsections (a) – (c) inappropriate or impractical;

34.8 That in such circumstances, the intention of the legislature was clearly intended for employees to be compensated in terms of subsection (d). This does not mean that the Labour Court may not adjudicate an application for compensation after dismissals have taken effect;

34.9 That the underlying principles of Section 189 and 189A are not distinguishable. An employer is obliged to follow a fair procedure, i.e. to invite consulting parties to a meaningful and joint consensus-seeking process which includes reaching consensus on "*the method for selecting the employees to be dismissed"*, to give written notice of such consultation/s, to provide the other consulting parties an

opportunity to make representations in the matter dealing with subsections (ii), (iii) and (iv) and to respond to such representations;

34.10 That employers are obliged to select employees earmarked for dismissal according to selection criteria which is either agreed upon or which are "*fair and objective"*, which did not happen in the current matter;

34.11 That the selection criteria opted for by Barloworld was neither agreed upon, nor fair and objective. Although the application of an unfair and biased selection criterion falls within the substantive fairness purview, the fact that Barloworld failed to consult in a meaningful and joint consensus-seeking manner regarding the content and adoption of the selection criteria (including the transformation leg) falls within the realm of procedural unfairness;

34.12 That the remedies in terms of Section 189(13)(a) – (d) of the LRA ought to have been granted since the Applicant made out a case for the relief sought in the notice of motion;

34.13 Should not have found that there is a *"huge and essential difference in seeking to find procedural fairness and compliance with a fair procedure"*, whereas there is respectfully no basis to conclude that there is huge or essential difference between procedural fairness and compliance with a fair procedure;

34.14 That nowhere in the ***Edcon*** judgment, *supra* of the Constitutional Court was it suggested that the concept of a fair procedure is only confined to the contents of Section 189 of LRA;

34.15 That the restrictive interpretation of Section 189A(13) as found by the Labour Court is respectfully superficial and simply states that "*if an employer does not comply with a fair procedure"* instead of the interpretation attached thereto by the Court *a quo*, which would only be justified if the legislature included the wording *"if an employer does not comply with the provisions of Section 189(1) – 189(7)"*, which wording is not included in the relevant section;

34.16 That "*compliance issues"* and *"general procedural unfairness issues"* should essentially not be differently treated as the Labour Court did in its judgment;

34.17 That Section 16 rights (disclosure of information) are only available to trade unions that enjoy organisational rights and that a distinction should have been drawn in this regard, making it practically impossible for trade unions who only enjoy organisational rights in terms of Section 12, 13 and 15 of the LRA to have access to information during a retrenchment process (and especially if the process is not facilitated), coupled with the fact that non-unionised employees (who are also affected during a retrenchment process) would not be in a position to obtain the information in terms of Section 16 of the LRA;

34.18 An unfair (and ultimately unlawful) selection criterion can never be described as being adopted as part of a so-called fair procedure;

34.19 That the fairness of a selection criterion goes to the heart of procedural fairness and is not solely reserved for adjudication under the heading of substantive fairness;

34.20 That Barloworld engaged in a tick-box approach and that this is not sufficient to establish procedural fairness, in compliance with a joint consensus-seeking consultation process;

34.21 That Barloworld's decision to retrench the Applicant's members at the time when the interview process was not concluded pertaining to vacant positions and where there were indeed vacant positions at the time of the retrenchment notices was procedurally unfair;

34.22 That costs should not have been awarded against the trade unions, especially seen in the light of the fact that a constitutional issue was raised as well as that trade unions litigated in pursuance of the protection of their members' rights. The Judge *a quo* did not correctly interpret and apply the relevant precedents in this regard;

34.23 That a "*fair procedure"* is not only confined to the contents of Section 189 of the LRA and that Barloworld's failures in the current matter resulted in procedural unfairness; and

34.24 That there is no real distinction between "*compliance issues"* and *"general procedural"* unfairness issues in a matter of current nature and where procedural unfairness in a retrenchment exercise is in dispute.

"ENGAGE" VS CONSULTATION AND REMEDIES IN TERMS OF SECTION 189A(13)(a) – (d):

35. The Court *a quo* concluded that the Labour Court's jurisdiction to preside and adjudicate over procedural fairness is replaced with compliance with a fair procedure, facilitation processes and strike action.

36. As an example, the Court *a quo* held that even in the event that there was no proper consultation on the issue of transformation and selection criteria, it was sufficient for the employer to *"engage"* over the criterion of transformation and other criteria in general. On this score, the Court *a quo* found that the word *"engage"* effectively equals consultation. Section 158(1)(a)(v) gives the Labour Court the power to make any appropriate order including *"an award of compensation in any circumstances contemplated in this Act"*. This confirms the Labour Court's wide range of powers should there be procedural unfairness.

37. The distinction then drawn by the Court *a quo* is respectfully superficial. The Labour Court has to assess the facts serving before it in order to come to a conclusion as to whether there was procedural fairness in the process. If there was not, the remedies are clear.

38. There is no other precedent (apart from the Learned Judge's judgment in ***Tawusa***, *supra*) to suggest that the words *"a fair procedure"* are confined only to the contents of Section 189 of LRA. If the Legislature intended this restrictive interpretation of Section 189A(13), the Section would surely have read: *"if an employer does not comply with the provisions of Section 189(1) – (7)"* instead of the wording currently employed in the relevant section, i.e. *"if an employer does not comply with fair procedure"*.

39. This then created a situation where the Court *a quo* drew a distinction between compliance issues in general procedural unfairness issues, negating consultation and a meaningful joint consensus-seeking process to merely mean for the parties to *"engage"*.

40. The Republic of South Africa ratified 27 conventions of the International Labour Organisation. This includes the convention on *"Discrimination (Employment and Occupation) Convention, 1958 (No. 111)"* as ratified on 5 March 1997.

41. Although the Republic has not formally ratified the ILO Convention No. 158 (Termination of Employment) and the ILO *"Termination of Employment Recommendation 166"*, the Republic follows the principles as set out therein and are also duty-bound to the contents of Convention 158 and Recommendation 166. Section 1 of the LRA sets out its purpose. The LRA's purpose is stated to be the advancement of economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are:

    "(a) to give effect to an regulate the fundamental rights conferred by Section 23 of the Constitution of the Republic of South Africa 1996;

    (b) to give effect to obligations incurred by the Republic as a Member State of the International Labour Organisation …".

42. South Africa is a Member State of the ILO. Recommendation No. 166 provides guidance as to the kind of measures which could be adopted to avert or minimise termination of employment and also for operational requirements. The Committee of Experts that debated issues and came to Recommendation No. 166 has noted the value of holding *"consultations"* before the stage at which termination of employment becomes inevitable. It held that *"consultation provides an opportunity for an exchange of views and the establishment of a dialogue which can only be beneficial for both the workers and employer, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is propitious to the continuation of the employer's activities"*.[41] Neither Convention 158, nor Recommendation 166 issued by the ILO has the effect that consultation equals for parties to "engage"[42].

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41 GS 1995 at 283

42 Termination of Employment Recommendation 166 (1982) and Comparative ILO source material based on the general survey of 1995: ILO Termination of Employment Digest: A Legislative Review (2000) Geneva, International Labour Office

43. A scrutiny of South African and International standards reveals that the eloquently phrased objectives of consultation in Section 189(2) of the LRA are not South Africa's pearls of wisdom, but those of the ILO. All international consultation measures – simplistically referred to *"the employer's burden"* in leading textbooks – codify ILO Convention 158 and ILO Recommendation 166. The obligation to consult (and not to merely engage) is an international duty implemented in different ways across the globe.

44. A pre-retrenchment consultation is an *"exhaustive joint problem-solving or consensus-seeking process between the employer and consultant parties"* involving the provision of all relevant information[43].

45. *"Consultation"* it has been held must therefore be *"exhaustive"* and *"not sporadic, superficial or a sham"* to be meaningful[44]. The Courts act as monitors of the process. Social dialogue is a two-way process. The code of good practice on dismissals based on operational requirements codifies this when it states: *"the employer should in all good faith keep an open mind throughout and seriously consider proposals put forward"*.[45]

46. Prior to the enactment of the Labour Relations Amendment Act in 2002 (providing for the current Section 189A), the amendment to the LRA was naturally debated by the Labour Portfolio Committee in the Parliament's National Assembly. The draft bill also contained an amendment to Section 189(2). It read as *"… the employer and the other consulting parties must in the consultation envisaged by the subsections (1) and (3) engage in a joint-consensus seeking process …."*. The word *"meaningful"* was absent from the draft and the final draft then included the word *"meaningful"*. This evidences the Legislature's

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43 The current Section 189(1) echoes the words of Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union 1999 (20) ILJ 89 LAC

44 Hadebe & Others v Romatex Industrials Ltd 1986 (7) ILJ 1718 LAC

45 Code of Good Practice on Dismissal based on Operational Requirements GN1517 published in Gazette 20254 on 16 July 1999

intention for the consultation to be *"meaningful".* It negates the description that the Court *a quo* (respectfully in submission) attaches to consultation as being to *"engage"*.

47. Consultation is seldom deemed sufficient when it is rushed. To be *"meaningful"* in terms Section 189(2) of the LRA, the consultation process must allow sufficient time for disclosure, consideration and dialogue.

48. What then is an employee or trade union's remedy when there was no meaningful consultation by means of a joint consensus-seeking exercise and an order in terms of Section 189A(13)(a) – (c) is not appropriate? Shouldn't the remedy catered for in Section189A(13)(d) not be available to such a wronged party? There are different schools of thought in the Labour Courts pertaining to whether the Labour Court can adjudicate a claim about procedural unfairness with reference to Section 189A(13)(d) and with reference to Section 189A(18). As an example, in the matter of ***Saccawu & Others v Southern Sun Hotel Interests***[46] Justice Whitcher of the Labour Court had occasion to deal with this question. She summarised the legal position on this point and the differing interpretations. She referred to ***NUMSA & Others v SA Five Engineering & Others***[47] where Murphy AJ (as he then was) noted that Section 189A bestows on employees in these operational requirement dismissals a choice between industrial action and adjudication as the means to resolve the dispute. If adjudication is chosen then:

> *"Referrals to the Labour Court are overtly restricted by subsection 189A(7)(b)(ii) and 189A(8)(b)(ii)(bb) to disputes "concerning whether there is a fair reason for the dismissals", in other words disputes concerning substantive fairness. Moreover, both provisions state expressly that the referral is to be made in terms of Section 191(11) … Disputes about procedure in cases falling within the ambit of Section 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in Section 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of Section 189A(13), read with Section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have the option for adjudication rather than industrial*

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46 2017 (38) ILJ 463 LC
47 2005 (1) BLLR 78 LC at par 32

action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action."

"It must be noted, however, that this novel scheme is not of universal application. This section will only apply if the total number of employees employed by the employer exceeds 50, and the employer proposes dismissing a certain number of employees in accordance with the sliding scale contained in Section 189A(1). It could arguably follow that dismissals for operational requirements not falling within the ambit of Section 189A should continue to be processed as they were before the introduction of the amendments, meaning that both disputes about procedural and substantive fairness may continue to be referred to the Labour Court in terms of Section 191(1)(5)(b)(ii) read with Section 191(11). However, a compelling argument can equally be made that the general language used in Section 189A(18) operates to restrict all procedural disputes to application proceedings and thus excludes the referral of disputes about the procedural fairness to the Labour Court for trial by means of a statement of claim."[48]

49. In ***Banks & Another v Coca-Cola SA (a division of Coca-Cola Africa (Pty) Ltd)***[49] Van Niekerk AJ (as he then was) stated:

"In regard to the nature of the relief sought, it would appear that Section 189A contemplates separate procedures for allegations of substance and procedural unfairness respectively … Disputes about procedural unfairness on the other hand are to be dealt with separately and by way of application to this Court under Section 189A(13) …".

"The bifurcation in procedure established by Section 189A is more easily established in legislation than it is applied in practice. There a number of reasons why disputes about dismissals for reasons based on the employer's operational requirements do not always lend themselves to the convenient compartmentalisation contemplated by the LRA, chief amongst them being the extent to which, in the real world of work, substantive and procedural issues are intertwined. This difficulty has previously been acknowledged by this Court …".[50]

50. This reasoning by Justice Van Niekerk was followed on in the later matter of ***NUMSA v General Motors of SA (Pty) Ltd***[51] . Justice Van Niekerk held that subsection (13) in effect requires the Labour Court to "*determine disputes about the procedural unfairness of larger scale retrenchments within a decided timeframe in motion proceedings, at least where there is no dispute of fact. The Court has previously observed that to the extent that this*

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48 SA5 par 7 - 8
49 2007 (10) BLLR 929 LC
50 Banks & Another par 9 - 11
51 2009 (30) ILJ 1861 LC at par 34 and 35

bifurcation may have been motivated by the notion that procedural defects lent themselves to quick and accessible legal proceedings, in practice, a separation of substance and process is often less easily achieved …".

51. Key to the findings of Justice Van Niekerk is the effect of subsection (13), requiring the Court to *"determine disputes"* about *"procedural fairness"*. In ***Southern Sun Hotel Interests,*** *supra*, Justice Whitcher held as follows:

> *"Read together with Section 189A(13), it would appear that in permitting employees to elect to seek the early, expedited and effective intervention of the Labour Court in procedural obligations that attach to Section 189A dismissals, the Legislature has seen fit to exclude employees from coupling these procedural claims of substantive unfairness. The LRA provides for the adjudication of procedural claims by way of motion proceedings and claims of substantive unfairness by way of a separate trial*".

Again, the Labour Court here confirmed that procedural claims may be *"adjudicated"* by way of motion proceedings.

52. In conclusion then on ***Southern Sun Hotel Interests***, the Labour Court held that:

> *"A party with procedural complaints still has access to a fair public hearing of their complaint. Section 189A(13) read together with Section 189A(18) simply provides that this must be done on motion and not a referral ….".*
>
> *"It is not apparent to me either that the constitutional right to fair labour practices is meaningfully intruded upon by a provision of the LRA directing the claims of procedural unfairness be adjudicated separately from claims of substantive unfairness. The LRA provides remedies for procedural unfairness in a Section 189A dispute, and the particular remedy the Applicants in this case, compensation, may be attained utilising the application mechanism the LRA has set aside in cases of procedural unfairness."*[52]

53. The Labour Court in ***Southern Sun,*** *supra* stated the following in footnote 13 of the judgment:

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[52] Par 25 - 26

"Section 189A(13)(d) ensures that an employee's procedural fairness claim could be adjudicated if paragraphs (a) to (c), which provided a form of supervisory or interdictory relief, were inappropriate."

54. In ***Association of Mine Workers & Construction Union & Others v Tshipi Eentle Manganese Mining (Pty) Ltd***[53], the Court had occasion to deal with a dispute where the relief in terms of Section 189A(13)(a) to (c) was not appropriate.

55. The Labour Court found that the purpose of Section 189A will not be served if the Court was to grant an interdict against dismissal and issue directions to compel the employer to comply with a fair procedure at a late stage. These remedies were found to be inappropriate where the retrenchment process was completed[54]. *"The Constitutional Court recently held in* **Steenkamp & Others v Edcon Ltd & Others** *that where an employer already dismissed employees without complying with a fair procedure, the consulting party may apply for an order reinstating the employees until the employer has complied with a fair procedure. In my view and based on the facts before me it will serve little purpose at this late stage to reinstate the individual applicants until such a time that the Respondent complied with a fair procedure. This I say because the Applicants challenged the procedural fairness of their dismissal only in limited respects, namely failure to consult on measures to avoid retrenchment and selection criteria. Where the fairness of the entire process is not challenged, reinstatement would not be an appropriate remedy after the dismissals took effect. The process is concluded and the only remedy that remains and that is potentially available to the Applicants, is an award of compensation as provided for in Section 189A(13)(d)."*[55]

56. The Court then proceeded to refer the dispute for oral evidence. It was noted that the normal rules pertaining to disputes of fact in motion proceedings would not apply to Section

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53 Unreported Judgment of the Labour Court, Johannesburg – Case No. J332/16 delivered on 18 March 2016 by the Honourable Prinsloo J

54 Par 32 Amco

55 Par 33 – 34 Amco

189A(13) referrals since an employee party is bound to bring a dispute by the speedier means of motion proceedings in view of a statutory prescribed procedure.

57. The Court concluded that in terms of Rule 7(7) of the Labour Court Rules, the Court must deal with an application in any manner it deems fit, including referring the dispute for the hearing of oral evidence:

> *"43. I intend to adopt an approach similar to that applied in* Banks *to require that the substantive and procedural aspects of this dispute be dealt with simultaneously, in a trial action. Should the Applicants not refer a dispute concerning the substantive fairness of their dismissal to this Court, this application may be re-enrolled on the trial roll for the hearing of evidence and adjudication."*[56]

58. The import of this conclusion by the Court in ***Amcu*** is that disputes about procedural unfairness brought in terms of Section 189A(13) may indeed be adjudicated and should be adjudicated and may even be referred to evidence on the trial roll on procedural fairness only, should a party not challenge the substantive leg of the dismissal. This is another example of where the justices of the Labour Court came and are coming to different conclusions on the very same aspect. In the judgment *a quo* that is the subject-matter of the current application, the Judge held a totally different view. There is a dire need for legal clarity on these contentious aspects pertaining to consultation versus "engage", procedural unfairness and seeking to find procedural fairness, adjudication or otherwise of procedurally unfair dismissal disputes in an operational requirementd dismissal context and whether Section 189A(13)(d) read with Section 189A(18) is entitling a party a self-standing right to be heard on the issue of procedural unfairness and to obtain compensation as a result thereof.

59. This Court in ***Edcon***, *supra* indeed dealt with the issue of compensation in terms of Section 189A(13)(d) as follows (as per the Honourable Zondo J, as he then was):

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[56] Amco par 43

> *"Subsection (13)(d) provides that a consulting party may apply to the Labour Court for an award of compensation "if an order in terms of paragraphs (a) to (c) is not appropriate". It seems to me that the phrase "if an order in terms of paragraphs (a) to (c) is not appropriate" constitutes a condition precedent that must exist before the Court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)(a) – (c) as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)(d) when it is not appropriate to make any orders in subsection 13(a) – (c)."*[57]

60. On the construct adopted by the Court *a quo*, where a trade union and its members opt for an application in terms of Section 189A(13) (and where it does not embark on industrial action), that consulting party is now for ever non-suited on the issue of adjudication of procedural fairness. The Court *a quo's* reasoning effectively means that the relevant application is to seek procedural fairness only and not also to adjudicate procedural unfairness. Although the primary purpose of Section 189A(13) is to attempt to set the parties on the right procedural track before concluding the retrenchment process (alternatively interdicting the employer from retrenching employees prior to complying with a fair procedure), the relevant section indeed caters for an award of compensation. The Court *a quo* could reasonably, for example, have referred the issue of procedural fairness and the adjudication thereof to the trial roll if it was of the view that there existed substantial factual dispute on the papers at the time. It did not. The Applicant is precluded from raising procedural issues on trial in a referral in terms of Rule 6 of the Labour Court Rules, effectively meaning that it is perpetually non-suited *in casu* pertaining to the issue of procedural fairness and from obtaining a remedy. It is submitted that this could never have been what the Legislature had intended, nor what this Court has intended in the judgment of ***Edcon*** *supra*.

61. The bifurcation of procedural and substantive issues makes it all the more complex. In another judgment on this aspect the Labour Court in ***National Union of Mineworkers &***

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[57] Edcon supra at par 162

Others v WBHO Construction (Pty) Ltd[58] held that to use Section 189A(13) to simply claim compensation for procedural unfairness in trial proceedings brought to the Labour Court to challenge a substantive fairness of the dismissal is not appropriate[59].

62. The Court in ***WBHO*** was then critical of the practice of bringing separate proceedings under Sections 189A(13) and Section 191(5)(b)(ii) and then consolidating these proceedings into one process at trial. The Court held that *"Section 189A(13) was never intended to be utilised in such a fashion, which can only serve to negate the primary objective of proactive intervention to remedy procedural unfairness at the outset".*[60] This judgment is in conflict with other judgments of the Labour Court as set out hereinabove and would again have the effect to non-suit an employee party or trade union acting on behalf of its members to obtain appropriate relief for procedural unfairness as meted out by the employer.

63. The Court *a quo* erred by holding that the application was brought at the outer limit of what was envisaged by Section 189A. In paragraph 20 of the judgment *a quo*, the Labour Court stated that the termination notices were issued from August 2020 and the Applicants approached the Court at the end of September 2020 for relief. *"Much as Section 189A(17)(a) provides an outer period, applications of this nature ought to be brought earlier than that if the purpose of Section 189A(13) is to be served – to bring the consulting parties back on track".* The Court *a quo* erred in this regard. The Applicant clearly stated in its application that Barloworld has failed to give the requisite one calendar month's notice of termination as per the individual employee's contracts of employment and by annexing a relevant copy thereof[61].

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58 Judgment of the Labour Court Case No. J1687/15 and JS620/15 delivered on 13 December 2017 by the Honourable Acting Justice Snyman
59 Par 101 WBHO
60 Par 103 WBHO *supra*.
61 **Vol 1** FA par 66 and Annexure "FA27"; **Vol 3** p. 209

64. Since the notices of termination were issued as from approximately 17 August 2020, the Court *a quo* failed to even pronounce on this issue or to take into account that Barloworld effectively breached the individual employee's contracts of employment by not giving a requisite calendar months' notice. This would mean that valid notice could only have been given as from 1 September 2020 and that the application was not brought on the outer limit in any event as is spelled by the Court *a quo*. In answer to this averment, no version was proffered by Barloworld, having the effect that the Court patently erred in not considering this undisputed issue and not pronouncing thereon[62].

65. Taking the above properly into account, an order in terms of Section 189A(13)(a) – (c) was wholly possible and was respectfully supposed to be granted by the Court *a quo*.

66. The Learned Judge lost sight of the factual position that termination notices were issued during the second part of August 2020 and that the application was filed on 14 September 2020. It can thus not be said that the application was brought belatedly and thus failed to serve the purpose of what Section 189A(13) seeks to achieve. The gist is that the Legislature has made it incumbent upon a party challenging procedural fairness to bring an application of the current nature within thirty (30) calendar days of notice of termination being issued.

SELECTION CRITERIA, WEIGHTING AND TRANSFORMATION:

67. As set out hereinabove, the issue of selection criteria was only addressed once and then on 7 August 2020 at the very end of the consultation process. The Applicant was prepared to accede to the criteria of lifo, skills and qualifications but then on the condition that there

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[62] **Vol 3** AA par 85 pp. 252 - 253

should be a meaningful joint consensus-seeking process on the framework for assessing skills and qualifications[63].

68. It is not disputed that the selection criteria were only discussed once and then on 7 August 2020. Both the Applicant and NUMSA took issue with the fact that there was no joint consensus-seeking consultation process on the selection criteria to be used. NUMSA complained that Barloworld also ignored its proposal to use lifo symbiotically with bumping as opposed to skills and experience.

69. For Barloworld thus to allege that there was *"agreement"* on selection criteria is simply untrue.

70. As set out hereinabove, the selection criteria proposed at the onset of the consultation morphed into something totally different during the last session of 7 August 2020 by the implementation of a construct of *"weighted scores / selection criteria"* and then with the inclusion of the criterion of *"transformation"*, versus the initial proposal as contained in the Section 189(3) notice of Barloworld's *"employment equity plan"*.

71. The Court *a quo* concluded that *"transformation is not a selection criteria per se*"[64].

72. The Court then held that the Applicant's complaint goes to substantive fairness as the issue of which selection criteria to apply is an issue of substance and not procedure[65].

73. The Applicant respectfully differs. The Court was duty-bound to pronounce on the issue of selection criteria not having been properly consulted on since the criteria as adopted is a definitive precursor to the ultimate dismissal of an employee to be selected on the criteria. If selection criteria were not meaningfully consulted on (and where an unfair, biased and even unlawful criterion was adopted), this would not strike at substantive

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63 **Vol 1** FA par 34 p. 26
64 **Vol 4** LC Judgment par 18 p. 389
65 **Vol 4** Judgment par 18 p. 390

fairness. The fairness in applying and the method of applying the adopted criteria may strike at substantive fairness.

74. Selection criteria are supposed to be established in advance (as advocated by the ILO), since the risk of subjective decision-making is then reduced. ILO Recommendation 166 (Article 23(1)) seeks to make the choice of workers affected by dismissal as objectively as possible to avoid the risk of arbitrary decision-making:

> *"Criteria for selection for termination*
> *23.1 The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers".*

75. It is argued in submission that *"due weight"* means a balance, i.e. selection criteria that speaks both to the interests of employers and employees.

76. A cursory perusal of the answering affidavit in the Court *a quo* makes it plain that there was no proper explanation by Barloworld as to why it contended that there was a meaningful consultation process on the issue of selection criteria as well as the weighting/scores that would be applied to the criteria as adopted by Barloworld. This has the effect that the criteria as adopted did not give *"due weight*" to the interests of the employees as well. It only served the interests of Barloworld.

77. This Court in the majority judgment in ***Amcu & Others v Royal Bafokeng Platinum Ltd & Others***[66] dealt with procedural unfairness and selection criteria in general. *"126. There is no procedural unfairness in the consultation process under Section 189. We have seen that dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. The process involves a shared attempt at arriving at an agreed outcome that gives joint consideration*

[66] 2020 (41) ILJ 555 CC at par 126

to the interests of employer and employees. Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the kind of process where union assistance to employee members will be invaluable."

78. This Court thus stated that as part of a consultation process, it requires objective selection criteria. The Court *a quo's* view that the Applicant's complaint pertaining to failure to meaningfully consult on selection criteria and the adoption of transformation as a selection criterion strikes to substantive fairness is respectfully incorrect.

79. By adopting a *"selection criteria matrix"* without consultation with the Applicant strikes at procedural fairness and not substantive fairness. Again, the results of measuring affected employees with the weighting as per the selection criteria matrix may strike at substantive fairness, but the fact that the selection criteria matrix was not consulted on with the affected employees and their representatives renders the process procedurally unfair.

80. The Court *a quo* failed to have regard to the examples used by the Applicant used in its application that illustrate the unfairness that would result if the relief sought was not granted, i.e. the retrenchment process being interdicted and Barloworld be directed to, for example, consult in compliance with a fair procedure. The Court *a quo* had no regard thereto.

81. The so-called *"weighting"* and scores allotted to each separate head of selection criteria was neither consulted on, nor agreed to. How skills, for example, (would be measured) was equally not consulted on, rendering the process blatantly procedurally unfair.

82. The Learned Judge found that there was no basis to interfere when the Applicant raised the issue of transformation being adopted and implemented by the employer as a selection criterion (in a way where such adoption was eminently unfair, apart from being unlawful and discriminatory, relying also on the constitutionality thereof). The Court *a quo* held that

the criterion of transformation was not a selection criterion *per se*. This is, in submission, wrong.

83. An unfair (and ultimately unconstitutional and discriminatory) selection criterion can never be described as being adopted as part of a so-called fair procedure. The implementation of such a criterion would also ultimately lead to unfairness. The Court *a quo* should have interdicted the adoption of this criterion, which would have precluded its ultimate implementation and application (that resulted ultimately in further unfairness), alternatively the Court had the jurisdiction to invoke the provisions of Section 189A(13)(d) in ordering appropriate compensation. It was not disputed that the criterion of *"transformation"* was adopted by Barloworld.

84. The fact that the concept of *"transformation"* as a selection criterion was mentioned at the very last consultation session of 7 August 2020 does not constitute consultation as such, nor being compliance with a meaningful joint consensus-seeking process. This is apart from the criterion being unfair and unconstitutional[67]. Even if the employer was able to negotiate an agreement providing for selection on the basis of race or gender, such an agreement would be void and unenforceable. It is submitted that the mere fact that transformation as a selection criterion was proposed by Barloworld (and then in the very last meeting) was *per se* unconstitutional, unfair and any adoption and ultimate application thereof would be void and unenforceable.

85. In ***Thekiso v IBM South Africa***[68] the Labour Court confirmed that affirmative action (or transformation) does not confer legal rights to preferential treatment on individuals in respect of particular appointment or dismissal decisions. *"Not only does the EEA not provide any mechanism for pursuing such a complaint, but, in my view, on a proper construction thereof, there is no obligation on an employer when taking any particular*

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67 Larbi-Odam & Others v MEC for Education (North-West Province) & Another 1998 (1) SA 745 CC

68 2007 (3) BLLR 253 LC at par 47

appointment or dismissal decision to give preference to suitably qualified employees from a designated group. In my view, Section 15(2)(d)(ii) does not impose an obligation on an employer contemplating retrenchments to retain black employees in preference to white employees it believes better meets its needs. Whilst Chapter 3 of the EEA (including Section 15(2)(d)(ii)) plainly imposes legal obligations, those obligations are, in the language of Tip AJ "problematic and systemic". They require consultation, and the implementation of, an employment equity plan but they do not confer rights to preferential treatment on the individuals in respect of particular appointment or dismissal decisions".[69]

86. It is compelling to note that Barloworld initially communicated that *"where there are more associates to positions or there are vacant positions, these positions would be filled applying lifo subject to skills, qualifications and experience and in compliance with our employment equity plan".*[70]

87. Barloworld thus relied on compliance with its employment equity plan. It gave no further information on this aspect.

88. In ***IBM***, *supra* the Labour Court stated that it does not see how an employee who has no right to rely directly on the EEA can nevertheless have a right to rely thereon indirectly by means of an allegation in an unfair dismissal case brought in terms of the LRA that the employer has failed to consider its obligations under the EEA.

89. In ***Robinson & Others v PriceWaterhouseCoopers***[71] it was confirmed by the Labour Court that affirmative action is not and has never been legitimate grounds for retrenchment. This being the case, the Court *a quo* ought to have found that a criterion which is prohibited can never be held to be adopted fairly and should have (on that basis

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69 Par 46 IBM *supra*
70 **Vol 1** Annexure "FA2" p. 54 Section 189(3) notice dated 27 April 2020
71 2006 (5) BLLR 504 LC par 22

alone), granted the relief sought in the notice of motion. The Court *a quo* further laid no basis (nor gave any sufficient reasoning) for concluding in paragraph 28 of the judgment *a quo* that it is not unlawful or unfair for that matter for an employer to give *"due regard to transformation and/or employment equity considerations when choosing the method to employ for selecting employees to be dismissed"*. This is a pure constitutional issue and this issue was respectfully not properly and fully entertained by the Judge *a quo*.

90. In addition to that, Barloworld in the current matter never relied on the contents of its employment equity plan in adopting the criterion of transformation. The criterion evolved from *"compliance with our employment equity plan"* to transformation (ostensibly generally). This had to be done in order to have lent any credence to the attempt to adopt this criterion[72].

91. The Applicant made the positive averment in the founding affidavit that Barloworld indeed exceeded its employment equity targets and in support thereof annexed the employment equity plan for the period in question[73].

92. The plan was signed on 15 January 2020 by the CEO of Barloworld, ending 30 September 2020. The Applicant challenged Barloworld to disclose in the answering affidavit its employment equity plan for the period 1 October 2020 going forward. This request was met with radio silence[74].

93. If Barloworld was then desirous to rely on transformation as a criterion (and by reference to attaining the goals as set out in an employment equity plan), it should have consulted the Applicant thereon (without the Applicant conceding that the adoption of this criterion

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72 M Gordon v Department of Wealth, Kwa-Zulu Natal 2008 (6) SA 522 SCA at par 27

73 **Vol 2** Annexure "FA24" pp. 172 - 206

74 **Vol 1** FA par 60 p. 36 – par 65 p. 37; **Vol 3** AA par 85.1 – 85.2 pp. 252 – 253 where Barloworld did not entertain the allegation that it in any event exceeded its employment equity targets as set out in the then current employment equity plan and as annexed as Annexure "FA25", nor did it respond to the issue raised by the Applicant that nothing prevented Barloworld from addressing the issue of the employment equity plan's goals that they are not to be achieved due to retrenchment as a result of the Covid-19 pandemic. This could have been addressed in the newest employment equity plan. Barloworld equally failed to disclose its latest employment equity plan in the answering affidavit.

was proper in any circumstances). The adoption of transformation as a criterion should have been outrightly rejected by the Court *a quo* and then also for the following reasons:

93.1 Selecting a person/s for retrenchment on the basis of race (or gender) would be to discriminate on a ground prohibited by the Constitution of the Republic and the Employment Equity Act[75];

93.2 While, within limits, favouring *"designated"* employees may be accepted by both the Constitution and the EEA as *"fair discrimination"*, there is no mention of such a defence in the provisions of the LRA. The LRA is the only Act that regulates operational requirement terminations;

93.3 While the LRA does not spell out the criteria which render selection fair and objective, such criteria have been established by jurisprudence. This is normally the criterion of lifo, except where departures can be justified by the need to retain key or scarce skills;

93.4 Historically employers are taken to task for using employees' disciplinary records or performance as a means of selection for retrenchment. Such dismissals have been largely impugned because a dismissal based on operational requirements is being used for an ulterior purpose. In submission, this also applies by using race and gender as a selection criterion;

93.5 The First Respondent would surely have no defence if it used some other prohibited ground of discrimination (for example age, religion, disability, sexual

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[75] Section 6(1) of the EEA

orientation and the like) as a criterion for selection. By using race and gender as a criterion for selection is self-evidently unfair and unlawful;

93.6 Selection criteria are nothing less than a definitive prelude to an ultimate dismissal[76].

93.7 It is argued that the prohibition on dismissals based on prohibited grounds as per Section 187(1)(f) of the LRA allows for only two defences. The first would be that a dismissal may be fair if *"the reason is based on the inherent requirement of the particular job"* and the second is that *"a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity"*.[77]

93.8 It thus follows that any dismissal flowing from the selection of an employee on the basis of race and gender must in itself be unfair. The selection of such an employee on the criterion of transformation flows from the adoption of the specific criterion. Without the criterion being adopted by the employer it can naturally not be applied. *In casu*, the criterion <u>was</u> adopted, leading to unfair results, which begged for the Court's intervention to halt the ensuing unfairness. The adoption itself is unfair. It should therefore follow that using race and gender as a selection criterion is absolutely prohibited by the provisions of the LRA.

94. As stated above, the LRA contains no provision that may justify an employer relying on the basis of race and gender to select an employee for retrenchment. Is such *"positive*

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[76] Section 187(1) of the LRA holds that a dismissal would be automatically unfair if the employer in dismissing an employee acts contrary to Section 5 or if the reason for dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

[77] Section 187(2) of the LRA

discrimination" permitted by any other law? The answer is in the negative. Whilst the Constitution is the highest law of the country, it supersedes legislation specifically designed to give effect to entrenched rights only if that legislation is itself declared unconstitutional. In order to rely directly on the Constitution, an employer sued under Section 187(1)(f) would therefore have to challenge the constitutional validity of that provision or perhaps the provisions of Section 187(2).

95. The provisions of the EEA are definitely not designed to deal with dismissals. The EEA cannot and should not apply or be applied when an employer seeks justification to rely on discrimination based on race and gender in selecting employees for retrenchment. The LRA deals exhaustively and exclusively with the issue of dismissal and then dismissals based on operational requirements.

96. The EEA expressly excludes from its scope disputes about unfair dismissals. Such disputes must be referred for arbitration or adjudication under the LRA in terms of Section 10(1) of the EEA.

97. This clearly indicates that the merits of dismissal disputes must be resolved by reference to the provisions of the LRA and not the EEA.

98. Even if the EEA was relevant (which it is not) it would not serve to justify selecting employees for retrenchment on the ground of race and gender. Whilst *"dismissal"* may be included in the definition of *"employment policy or practice"*, it is argued that it can hardly be among the steps employers are required to adopt to *"promote equal opportunity in the workplace by eliminating unfair discrimination in any policy or practice"*.[78]

[78] Section 5 of the EEA

99. In the event that Barloworld equates the criterion of *"transformation"* to mean *"affirmative action measures"*, affirmative action measures are defined as those designed to achieve equity in the workplace by *"implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure the equitable representation in all occupational levels in the workplace"*.[79] There is simply no mention of affirmative action measures that are allowed to be introduced in termination of employment.

100. The question then arises as to whether it is permissible to adopt a selection criterion in the form a *"permissible affirmative action measure"* or then transformation. It is argued that it is certainly not. As part of the regulations issued under the EEA, the code of good practice on the integration of employment equity into human resources policies and practices provides in item 18.1.2 thereof that *"employers may consider negotiating retrenchment criteria that will deviate from the last in first out principle, where the implementation of this principle will detrimentally affect representivity of designated groups in that workplace*". As set out hereinbelow, this code in any event does not trump the Constitution's peremptory provisions, nor those found in the LRA. Barloworld has failed to consult on this aspect. The issue strikes wider. The code (insofar as it may be applicable, which it is not) places an obligation on employers to negotiate retrenchment criteria that will deviate from lifo. It does not require an employer to merely *"consult"*. *"Negotiation"* in any event did not take place in the current matter pertaining to the criterion of transformation.

101. It is imperative to note that the regulations published in terms of the EEA do not elevate it to having the status of legislation. In argument, it presupposes that to implement a criterion that discriminates against non-designated employees could only have been done by agreement. *In casu* there is no such agreement.

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79 Section 2(b) of the EEA

102. Here again the issue of implementation versus adoption of selection criteria enters the fray. The code (if at all applicable, which it is not) in any event places a positive obligation on an employer to negotiate implementation of such a criterion. Implementation is after criteria were adopted. It thus further presupposes that implementation must be preceded by adoption and that both would then have to be at least negotiated on and agreement being reached thereon.

103. Any such *"agreement"* would then have been *contra bonos mores* and unlawful, for obvious reasons. Paragraph 18.1.2 of the said code of good practice was cast in permissive terms and is obviously invalid to the extent that it conflicts with the provisions of the LRA.

104. As stated, even if Barloworld was able to negotiate an agreement providing for selection on dismissal on the base of race and gender, such agreement would be void and unenforceable. It violates the constitutional and statutory rights of affected employees.

105. Even if the EEA is relevant in the current matter (which it is not), the regulation issued in terms of the EEA pertaining to the preparation, implementation and monitoring of the EEA states as follows in paragraph 8.3.3 thereof:

> *"The employer is under no obligation to introduce an absolute barrier relating to people who are not from designated groups, for example having a policy of not considering white males at all for promotion or excluding them from applying for vacant positions".*[80]

106. In the restructuring exercise embarked on by Barloworld, non-designated employees were effectively deprived from applying and/or filling vacant positions that existed on the structure, alternatively were created on the structure by the application of the so-

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[80] GNR1394 dated 23 November 1999

called selection matrix (including transformation) and the weighting attached thereto. Barloworld further reneged on their undertaking that the filling of the positions would be fairly structured, by employing a fair interview process headed by a panel. It jettisoned this process and extremely belatedly adopted the *"selection matrix"*, including the criterion of transformation.

107. Equally, item 9 of the code of good practice on dismissals based on operational requirements (as published under the LRA)[81] holds in paragraph 9 as follows:

> *"Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally, the test for fair and objective criteria will be satisfied by the use of "last in, first out" (lifo) principle. There may be instances where the lifo principle or other criteria need to be adapted. The lifo principle, for example, should not operate so as to undermine an agreed affirmative action program. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution."*

108. Whilst the wording *"affirmative action program*" is present in the code of good practice in paragraph 9, it equally does not elevate it to the status of legislation. The Respondent's case for adopting the transformation criterion in the current matter appears not to be based on *"an agreed affirmative action program"*. Although initially referring to Barloworld's employment equity plan, the adoption of the criterion was that of *"transformation targets"* in general and without being specific. The weighted scoring that was unilaterally implemented scored, for example, White males as *"0"* and to the top of the scale scored African females *"6"*. Nowhere is it mentioned (neither was it consulted on) that this was done so as to not "*undermine an agreed affirmative action program",* nor that Barloworld's employment equity plan's goals and targets would not be attained should lifo (and alternatively lifo, skills and experience) be implemented as the selection criteria. In submitting so, it is not admitted that *"transformation*" could have been implemented as a selection criterion in the first place.

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[81] As updated on 16 July 1999

109. As held in ***Thekiso*** *supra*, (referring with approval to ***Dudley v City of Cape Town***[82]), the Labour Court held that the provisions of Chapter III of the EEA do not *"bring about an individual right to affirmative action"*.

110. Further, in ***Thekiso***, the Applicant argued that inasmuch as her dismissal was unfair in terms of the LRA, there was an obligation to consider the EEA when making the relevant decision. The Applicant attempted to bring the provisions of Section 189(3)(b) and (d) (alternatives to dismissal and proposed method for selecting employees to retrench) under the guidance and application of the EEA. This was rejected by the Labour Court[83].

111. The Court in ***Gordon***, *supra*, held that the earmarking of posts based on affirmative action had to be applied in terms of a plan or policy. The earmarking was criticised by the SCA as haphazard, random and overhasty. For this reason, the Court was of the view that the earmarking of the posts amounted to an *"untrammelled discretion to earmark posts to designate the groups without any overall plan or policy*".[84]

112. In ***Gordon*** there was reference to the matter of ***Minister of Finance v Van Heerden***[85] where Moseneke J (as he then was) confirmed that remedial measures that are arbitrary, capricious or display naked preference could hardly be said to be designed to achieve the constitutionally authorised end.

113. *In casu*, Barloworld only referred to its employment equity plan in the notification inviting consultation. The factual position clearly cements the situation where Barloworld did not specifically rely on the contents of any employment equity plan, but rather on the broader concept of transformation. This is unfair, unlawful,

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82 2004 (25) IRJ 305 LC
83 Thekiso par 47
84 Gordon par 21
85 2004 (6) SA 121 CC at 139

unconstitutional and contra the judgments of the Labour Courts, the Supreme Court of Appeal and the Constitutional Court. The Labour Court has accepted that selection criteria can be multi-ranged, provided that it is fair and objective[86].

114. Another consideration that needs mention is the recent notice issued by the Employment Equity Commission in May 2020[87].

115. As stated, it appears that Barloworld is not relying on its employment equity plan in adopting the *"transformation"* criterion. If it was, however, guidance could have been sought from the notice issued by the Chairperson of the Commission for Employment Equity.[88]

116. The Employment Equity Commission has clearly foreseen that there may be a number of retrenchments as a result of the Covid-19 pandemic (also the reason that Barloworld is holding out as the basis for the retrenchment exercise) and thus assured employers that they would not be *"breaching"* their submitted employment equity plans in such an instance. Barloworld, however, patently did not rely on meeting targets and goals as set out in its employment equity plan annexed to the founding affidavit in implementing this criterion.

117. It is apposite to refer to the provisions of another ILO Convention, i.e. the Convention on Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Article 1 of the Convention confirms that for purposes of the Convention the term "*discrimination"* includes *"(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, natural extraction or social origin,*

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86 National Union of Metal Workers of South Africa & Others v Columbus Stainless (Pty) Ltd unreported judgment of the Labour Court, Case No. JS529/14 delivered on 30 March 2016

87 **Vol 3** Annexure "FA26" pp. 207 - 208

88 Par 2 Employment Equity Commission Notice of May 2020; **Vol 4** pp. 207 - 208

which has the effect of nullifying or impairing equality or opportunity or treatment in employment or occupation".

118. South Africa has not denounced the Convention. It remains bound by it. By adopting the criterion of transformation, Barloworld is in direct breach of the import of the specific ILO Convention.

119. Furthermore, the Republic is bound by the International Convention on the Elimination of all forms of Racial Discrimination (the ICERD). The Convention is overseen by the Committee on the Elimination of Racial Discrimination.

120. By adopting the criterion of transformation, Barloworld effectively contravened a number of articles of the ICERD. South Africa, as a State Party, is bound thereto.[89]

121. The Republic has the obligation to ensure that special measures (such as affirmative action and then transformation) may not as a consequence lead to the maintenance of separate rights for different racial groups. In compliance with the fundamental obligations laid down in Article 2 of the Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, national or ethnic origin, to equality before the law, notably in the enjoyment of rights, including the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment and to equal pay for equal work and to just and favourable remuneration.

122. By adopting the criterion of transformation, White, Indian and Coloured individuals had their fate sealed and faced no protection against the ensuing unemployment following the adoption and application of the particular criterion. It is argued in submission that

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[89] Article 1, par 1 and 4 read with General Recommendation 32 of 2009 of the ICERD; Article 2 par 2, read with the General Recommendation 32 of 2009; Article 5(d)(e)(i) read with the General Recommendation 20 of 1996 of the ICERD

the Constitutional Court (as the apex Court of this country) can and should interfere in the current instance.

123. In conclusion on the aspect of the selection criteria, the weighting applied to the criteria and specifically the criterion of transformation, the Court *a quo* erred by not granting the relief sought in terms of Section 189A(13)(a) – (c) and should have (at the very least) ordered appropriate compensation for the procedural unfairness meted out to the Applicant's members as an alternative.

PREMATURE TERMINATION OF THE CONSULTATION PROCESS:

124. Section 189(2)(a)(i) – (iv) obliges Barloworld to consult on appropriate measures to avoid dismissal, to minimise the number of dismissals, to change the timing of dismissals and to mitigate the adverse effects of the dismissals.

125. It is common cause that at the time when Barloworld started issuing termination notices (during the second part of August 2020) there were still vacant positions on the structure which stood to be filled (also by Barloworld's application of its adopted selection criteria).

126. Barloworld shied away from this procedural difficulty in the answering affidavit.[90] In answer thereto, this allegation was not specifically dealt with by Barloworld. It thus stands as uncontested[91].

127. It is trite that the line between procedural and substantive fairness is often blurred. In the case of open positions existing at a time where employees are retrenched, it is

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90 **Vol 1** FA par 45.

91 **Vol 3** par 81 AA pp. 250 – 251. The issue of the premature termination of the consultation process was also raised by the Applicant's legal representative on 2 September 2020 (and during the Applicant's members' notice period) and specifically par 3.8 thereof, **Vol 2** pp. 166 – 167. Bowmans (acting on behalf of Barloworld) responded thereto in a letter dated 4 September 2020 as set out hereinabove, which explanation on the issue is (in submission) wholly insufficient: **Vol 2** FA 23 pp. 170 – 171.

argued that the termination of the consultation process by Barloworld at such a time would constitute procedural unfairness. The Labour Courts have held in the past that a vacant position is an alternative to dismissal.[92]

128. The Court *a quo* did not deal with this aspect in its judgment.

129. In the Labour Appeal Court's decision of ***General Food Industries Ltd v Fawu***[93], Nicholson JA had the following to say:

> *"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 steps have been considered and taken to prevent to the retrenchments or to limit those to a minimum."*

130. The Labour Appeal Court again confirmed in ***CWIU and Others vs Algorax (Pty) Ltd***[94] that to resort to dismissal, especially a no-fault dismissal which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort. *In casu* Barloworld failed in its obligations to meaningfully consult on measures to avoid dismissal, to minimise the number of dismissals and to change the timing of the dismissals by having open positions available at the time but nonetheless proceeded to retrench, which behoved the Court *a quo's* intervention. Equally, no finding was made by the Labour Court on this aspect. Even at the belated stage of the retrenchment process (where employees in some instances effectively already served their notice period), Barloworld did not even furnish the consulting parties with lists of applicable employees and members affected by the restructuring and which positions were now filled and which are not. It was, however, clear at the time that there were a

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92 **South African Airways v Bogopa & Others 2007 (11) BLLR 1065 LAC at par 60** wherein the following was stated: "The question, which arises, is what the obligation of an employer is in relation to the dismissal of employees for operational requirements when it does away with an old structure and adopt a new structure (for operational requirements). An employer has an obligation to try and avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position, the duties of which the employee concerned can perform with or without at least minimal training….".

93 2004 (7) BLLR 667 LAC at 682 J, par 55

94 2003 (11) BLLR 1081 LAC

large number of vacant positions still available at the time when the members were retrenched.

131. *In casu* Barloworld restructured its workforce. It initially required affected employees to compete for open positions. This later changed to *"dislocated"* employees being retrenched by applying the unfair *"selection criteria matrix"*. This in itself was unfair since being required to compete for a post after restructuring is not a method of selecting dismissal; rather it is a legitimate method of seeking to avoid the need to dismiss a dislocated employee.[95] It was furthermore confirmed in ***Louw*** that a dislocated employee who applies for a new post and fails (and by reason thereof remains at risk of dismissal if other opportunities do not exist), does not convert the assessment criteria for competition for that post into selection criteria for dismissal (as Barloworld did), notwithstanding that broadly speaking it is impossible to perceive the assessment process for the new post as being part of a long, logical, causal chain ultimately ending in dismissal[96].

132. In the current matter Barloworld proceeded to dismiss so-called affected employees prior to the interview process even having been jolted into action, alternatively completed, and with other positions being open and available. It gallantly applied the unfair *"selection criteria matrix"* in selecting employees to dismiss with open positions being available. It failed to exhaust the consultation process with regards to minimising the number of employees to be dismissed, coupled with avoiding dismissals. The timing of the dismissals could also have been altered to a time where all the vacant positions have been filled, yet Barloworld elected to act prematurely.

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95 South African Breweries (Pty) Ltd v RS Louw 2019 (39) ILJ 189 LAC at par 22

96 Louw par 19

PROCEDURE vs SUBSTANCE:

133. It is so that the primary purpose of Section 189A(13) of the LRA concerning an unfair procedure is to prevent unfair retrenchment as soon as the procedural flaws surface and the most appropriate order is that of reinstatement. It is trite that a distinction between procedural and substantive fairness lies close together and that it is well-known that procedural unfairness may result in substantive unfairness. For this reason, it is generally appropriate to reinstate employees pending further consultation on the procedure which order will then endure until an employer has complied with a fair procedure.

134. Barloworld insists in its opposing affidavit in both the main application as well as in the application for leave to appeal that the complaint relating to selection criteria is substance-related and not a procedural issue[97].

135. As set out in the replying affidavit, Barloworld's contention that the Applicant agreed to two of the three selection criteria is patently incorrect, also with reference to the relevant documentation[98].

136. Barloworld maintains its stance that the current issues as raised by the Applicant are all substantive issues and not those pertaining to a procedure[99].

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97 **Vol 3** par 80 – 80.3 p. 250AA

98 **Vol 4** RA par 14 – 27 pp. 327 331

99 **Vol 5** AA Leave to Appeal par 58 – 61 pp. 497 – 498; Barloworld also annexed a statement of claim filed by Solidarity on behalf of four individual members against Barloworld (**Vol 5** AA1 pp. 509 – 525). The matter that served before the Court *a quo* was on behalf of all of Solidarity's members that were affected by the restructuring, including those dismissed ultimately. The statement of claim referred to (quite opportunistically so in submission) by Barloworld does refer to procedural shortcomings in the retrenchment process, as part of the body of the statement of claim and in summary of the relevant facts. It, however, makes it plain that the substance of the dismissal is attacked. The Applicants in that matter contend that there was in reality no need to retrench them and there was no substantive rationale at the time. They should also not have been selected for retrenchment and the selection criteria that was applied was also applied in an unfair and discriminatory manner. Again, issues of substance and procedure are oft bifurcated, as set out *supra*.

137. Properly read and interpreted, the Applicant's application before the Court *a quo* and the application for leave to appeal before this Honourable Court properly and definitively raise issues of procedural unfairness and is not a substantive fairness challenge.

THE RIGHT TO INFORMATION:

138. The Court *a quo* held that recourse had to be had to the provisions of Section 16 and any such complaint (the failure to disclose and furnish information as sought) is not to be decided on by the Court in an application of the current nature.[100]

139. According to the Court *a quo*, Section 16 sets out a detailed procedure which first of all requires the CCMA to attempt resolution through conciliation and if it fails to resolve the dispute through arbitration. The Court relied on Section 157(5) that provides that except as provided in Section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA requires the dispute to be resolved through arbitration.

140. The Labour Court, however, has the inherent power to adjudicate a dispute pertaining to the non-disclosure of information as per Section 158(1)(a)(iii) and (v), read with Section 158(1)(b) (and order for it to be disclosed). Although it is so that Section 16(2) holds that an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in Section 14(4), this is not where the matter ends with regards to operational requirements processes. Section 14(4) makes no mention of operational requirements consultation and information to be disclosed in such a process. It mentions a trade union's right to perform functions in the workplace and to represent

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100 **Vol 4** Judgment par 22 p. 391

an employee in grievance and disciplinary proceedings, to monitor an employer's compliance with work-related provisions of the LRA and any law regulating terms and conditions of employment and any collective agreement binding on the employer, as well as to report any alleged contravention of workplace-related provisions of the LRA. Lastly, it provides for a trade union to perform any other function agreed to between the representative trade union and an employer.

141. The right for a trade union to be consulted (and an employee for that matter) is not a matter of *"agreement"* between a representative trade union and an employer. It is a matter of right as per Section 189.

142. The obligation on the employer is to disclose in writing all relevant information. Failure to do so would render the process wholesale unfair.

143. The dichotomy that now exists by the Court *a quo* finding that a failure to disclose relevant information by an employer invokes the provisions of Section 16, is that Section 16 rights are only available to trade unions that enjoy organisational rights at the workplace (and these rights are not available at all to individual employees). A distinction should have been drawn by the Court *a quo*, making it legally impossible for trade unions who are not *"representative"* to invoke Section 16.[101]

144. This is coupled with the fact that non-unionised employees (who are also affected during a retrenchment process) would then never be in a position to obtain the information sought during a retrenchment process (as the Court omitted to consider) in terms of Section 16 of the LRA.

145. Furthermore, a period of 60 days is applicable in Section 189A-disputes. When the information sought is not furnished, such a dispute needs to be referred to the CCMA

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[101] This is especially so relating to trade unions that only enjoy rights in terms of Sections 12, 13 and 15 of the LRA.

and conciliation should then be scheduled. Only after it remains unresolved may the dispute be resolved through arbitration (alternatively when 30 days have elapsed since the date of referral to conciliation)[102].

146. This would then invoke a process where approximately two-and-a-half months would pass prior to an award being issued if regard is had to the peremptory time periods as set out in the LRA, as well as notice periods for conciliation and arbitration (14 and 21 days respectively). This makes a mockery of a consulting party's right to information in terms of the LRA. The Court *a quo* should have ordered that Barloworld discloses all the information sought.

147. Employees may no doubt already be retrenched prior to the dispute pertaining to disclosure of information being arbitrated upon finally (alternatively being retrenched even before conciliation can take place). This could equally never have been what the Legislature envisaged in enacting Section 189 and Section 16 and granting the right to a consulting party to the disclosure of information.

148. The Court *a quo* erred in not finding that a consulting party is entitled to an order of procedural unfairness where an employer failed to disclose relevant information, alternatively directing the employer to disclose the information and interdicting the dismissals as a result thereof.

COSTS:

149. The Court *a quo* ordered costs against the two trade unions and then costs consequent upon the employment of two counsel. In justifying the order as to costs, the Learned Judge *a quo* referred to his own judgment in ***Tawusa*** (*supra*) wherein he expressed a particular view pertaining a Section 189A(13) process which (according to the Court *a*

[102] Section 16(8) and (9) of the LRA

quo) should effectively have precluded the Applicants from bringing the application that they did. The Applicants *a quo* were clearly not in agreement with the manner in which the Learned Judge *a quo* interpreted the provisions of Section 189A(13) in ***Tawusa***.

150. The Court *a quo* then described the applications that served before him as seeking not to challenge compliance issues, but general procedural defects (and according to the Learned Judge in some instances substantive attacks)[103].

151. What the Court *a quo* effectively said is that the Labour Court has absolutely no jurisdiction to entertain general procedural defects (even if those defects would then be the cause of procedural unfairness) in an application of the current nature. This is certainly not what the Legislature intended.

152. The Court *a quo* was of the view that the applications were an abuse of the Section 189A(13) process and that trade unions cannot hide behind the *"ongoing relationship ticket"*.

153. The Court *a quo* mentioned that Judges need to contend with *"reams upon reams of documentation"* and for employers to put up an answer in a very short and truncated time period. In the current instance, the application that served before the Court *a quo* did not fall into that category. All the documentation of the Applicant was referenced and was patently relevant to the dispute. The founding affidavit with all the annexures thereto span approximately 371 pages. The opposing affidavit, however, was the one that cluttered the application.

154. Not forming part of the record currently before this Court are **Annexures "AA3" – "AA27"** of Barloworld's opposing affidavit. Those annexures span approximately 1400

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[103] **Vol 4** Judgment par 25 – 29 pp. 392 - 394

pages of respectfully irrelevant matter, being representation upon representation that holds out to be Barloworld's confirmation of its business rationale in restructuring and ultimate retrenching employees. There was hardly any specific reference to the bulky annexures in the answering affidavit deposed to by Barloworld.

155. For the Court *a quo* thus to state that *"employers are brought to this Court often times late, as is the case in this matter, and have to contend with reams upon reams of documentation in order to put an answer at a very short and truncated time period suggested by the trade unions in urgent Court. Ideally, the urgent Court is not a place for dispute of facts – the relevance or irrelevance of documents and information to be disclosed"*[104].

156. It is not disputed that the Applicants have brought the application within the time periods allowed for by the LRA. It can further not be disputed that all the annexures to the founding affidavits were patently relevant and were properly referenced and relied on. This can certainly not be said of Barloworld's opposition.

157. Furthermore, Barloworld was <u>not</u> brought to Court and required to put an answer at a very short and truncated time. Applications of the current nature are inherently urgent. It is designed to attempt to secure employees from losing their livelihoods. The application was filed on Monday, 14 September 2020. It provided ample time until Wednesday, 23 September 2020, for the delivery of an opposing affidavit, i.e. 9 calendar days. The Court *a quo* thus erred in holding that the current application falls within the description as per paragraph 26 of the judgment *a quo*.

158. The fact remains that the Applicant indeed raised constitutional matters as well as other matters deserving for this Court's attention pertaining to the patent unfairness meted out to the Applicants' members (read with conflicting judgments on the aspects as

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104 **Vol 4** Judgment par 26 p. 292

alluded to in the founding affidavits, whereas the Judge *a quo* relied on his own judgment of ***Tawusa*** to justify an adverse costs order against the trade unions).

159. The fact that the Applicants were litigating against a private company and not the State does not justify an order as to costs. The matter of ***Limpopo Legal Solutions and Others v Vhembe District Municipality & Others***[105] dealt with the judgment that the Court *a quo* referred to the judgment, being ***Biowatch Trust v Registrar Genetic Resources & Others***[106]. In ***Biowatch*** the Constitutional Court dealt with constitutional litigation between private parties. The principle is not (in submission) that it is prudent for costs to follow the result where civil litigation is conducted between private parties where a constitutional issue arises. The Court in ***Biowatch*** held that should costs be routinely awarded in matters between private parties when constitutional issues arise, it may result in a discouraging of the pursuit of constitutional claims[107].

160. Equally, the Court *a quo* failed to have regard to the decision of ***Ferguson & Others v Rhodes University***[108] where the Constitutional Court dealt with the enforcement of rights as enshrined in the Bill of Rights.

161. The Court *a quo* erred in not having regard to the fact that the trade unions are organisations not for gain, now mulcted in costs where a constitutional issue was raised and furthermore where general unfairness in the process existed and where there was (in submission) patently no malice or vexatious conduct in bringing the applications they did.

162. The Court *a quo* should not have ordered costs even in the event of being unsuccessful in the application.

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105 Unanimous Judgment of the Constitutional Court delivered on 18 May 2017 under case no. CCT159/16
106 ***2009 (6) SA 232 CC***
107 ***Biowatch*** *supra,* ***par 26 - 28***
108 ***2018 (1) BCLR 1 CC***

163. In the recent matter of ***Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd & Others***[109], this Court criticised the Labour Courts for routinely ordering costs where the Constitutional Court confirmed time and time again when costs orders would be appropriate. This Court further stated that it is being called upon to overturn orders of the Labour Court and Labour Appeal Court having applied the general rule that costs follow the result, rather than departing (as they should) from the premise that labour-related disputes constitute an exception to the general rule.

164. This Court referred again to Section 23 of the Constitution which entrenches various labour rights and noted that the primary purpose of the LRA (intended to give effect to Section 23 of the Constitution) is to promote the effective resolution of labour disputes.

165. In this judgment, the Applicant wrongly attempted to engage the Labour Court's jurisdiction leading to the Labour Court dismissing the application with costs. The Labour Appeal Court refused the petition, but did not make any finding on costs.

166. The Constitution Court (in a unanimous judgment) dismissed the application for leave to appeal on the merits, however, granted leave to appeal against the costs order of the Labour Court. It is submitted that in the unfortunate event that this Honourable Court may find that there may be no substantive merits in the current appeal, then and in that event leave to appeal should still be granted against the costs orders as issued by the Court *a quo*.

167. It is within this Honourable Court's constitutional jurisdiction and further in the interest of justice to consider the question of costs given that there were at the very least prospects of success in the Labour Court and in the appeal. The current matter is certainly not a case where there had been *"absolutely no prospects of success"*.

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109 Unreported Judgment of the Constitutional Court, Case No. CCT192/20 delivered on 7 September 2021

168. This Court furthermore held that the laudable goal of Section 23 and the LRA is eroded where right bearers are faced with the threat of adverse costs orders in circumstances where their claims may fail. By ordering costs, the Court *a quo* has shut its doors by keenly mulcting parties in costs by discouraging the proper resolution of disputes referred to it. *In casu*, the Court *a quo* did not exercise its discretion judicially.

169. In this judgment, the Court referred with approval to its judgment in ***Member of the Executive Council for Health, Western Cape v Coetzee***[110], and ***National Education Health and Allied Workers Union v University of Cape Town***[111].

170. *"Lest I be misunderstood, I must make this clear: the right to pursue industrial action, which is protected by both the LRA and Section 23 of the Constitution, is indispensable to our democracy. It is "of both historical and contemporaneous significance"; it enables workers "to assert bargaining power in industrial relations"; and is a key "component of a successful bargaining system" of the nature contemplated in the Constitution and the LRA.[112] Nothing said in this judgment must be taken as suggesting otherwise. The crisp point I am making, rather, is this: when costs orders are too readily made against those who seek to vindicate their constitutionally entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action. That would cultivate unlawfulness and be inimical to the foundational value of the rule of law underpinning our democratic order."*

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110 ***2020 (41) ILJ 1303 CC***

111 ***2003 (2) SA 1 CC***

112 ***Union for Police Security and Corrections Organisation****, supra,* ***par 31 and National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd 2003 (3) SA 513 CC at par 13***

171. As stated in ***Union for Police Security and Corrections Organisation*** *supra*,[113] the Applicant is mandated to safeguard its members' labour rights and was *bona fide* in litigating in pursuit of what they perceive to be an important constitutional imperative. Even if Barloworld (and the Judge *a quo*) are of the view that the application before the Labour Court bore poor prospects and had to fail (which is disputed by the Applicant), it is not on its own a sufficient reason to ignore the clear message of ***Zungu***: Courts adjudicating labour matters must prefer an approach to costs that will not have a chilling effect on *bona fide* litigation intended to vindicate labour rights.

LEAVE TO APPEAL AND JURISDICTION:

172. Barloworld was at pains to attempt to illustrate that the Applicant has poor prospects on appeal in this Court and that no constitutional issues were raised[114].

173. It further alleges that the issues before this Court are moot[115].

174. The Applicant differs. The application *a quo* was not brought late and not *"just before 30 days after the notices of dismissal"*. I refer the Court to the discussion on this issue hereinabove as well as the fact that notice was in any event not given by Barloworld in terms of the contractual imperatives.

175. The Applicant acknowledges that it may be hard-pressed for this Honourable Court to order relief reversing the dismissals of its members (which would at the time of hearing the appeal have been approximately 14 months earlier). This is, however, not the only matter serving before this Court. There are a myriad of issues raised by the Applicant in the current appeal, for instance the issue of conflicting judgments on the aspects as

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113 ***Par 40***
114 **Vol 5** AA pp. 477 - 508
115 **Vol 5** AA par 36 – 48 pp. 488 - 494

mentioned hereinabove, what *"consultation"* entails (and whether it is a mere *"engagement*"), whether the adoption of a discriminatory criterion is procedurally fair (and whether, on Barloworld's submission, this is a substantive issue), whether the fact that the weighting attached to the unilaterally adopted selection criteria that was not consulted on renders the dismissal procedurally unfair, whether the Labour Court should *"adjudicate"* procedural unfairness as referred in terms of Section 189A(13), whether the Court is then at liberty to award compensation as per Section 189A(13)(d), etc.

176. A judgment on the issues raised in this appeal would no doubt provide legal clarity going forward on the important aspect of operational requirement dismissal processes in general and the interpretation, purpose and application of Sections 189 and 189A(13) and the remedies catered for therein.

177. Even if the Court is not with the Applicant on any of the issues raised in the appeal, the issue of costs being wrongly awarded against the trade unions is at the very least a matter deserving of this Honourable Court's scrutiny. The issue of mootness is misplaced.

178. The Constitutional Court has previously held that matters which concern the interpretation and application of legislation (like the LRA) enacted to give effect to the Bills of Rights do raise constitutional issues[116].

179. The current matter clearly engages this Honourable Court's jurisdiction as it concerns, *inter alia*, a proper interpretation of Section 189 and 189A(13). These sections give content to operational requirement dismissals (and the fairness or unfairness thereof), underpinned by the right to fair labour practices which are entrenched in Section 23(1) of the Constitution.

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116 ***Nehawu v University of Cape Town 2003 (3) SA 1 CC at par 14***

180. Notwithstanding the engagement of its jurisdiction, this Honourable Court in any event enjoys the discretion to determine whether it is in the interest of justice to grant leave to appeal. In addition to the requirement of reasonable prospects of success (which although not determinative carries substantial weight), there is a string of other key factors to be considered as espoused in ***General Council of the Bar of South Africa v Jiba***[117].

181. These factors "*include the importance of, and the public interest in, the determination of the constitutional issues raised. Retrenchments usually involve the loss of jobs and income by a number of employees through no fault of their own. They have a more significant social and economic ill-effect than any other forms of dismissals because they affect a large number of employees. Such issues are of critical importance to the parties involved, the labour force and other future employment relationships. Therefore, reaching certainty and finality on whether dismissals constitute retrenchments that are not automatically unfair in terms of Section 187(1)(c) of the LRA, it is in the public interest and warrants a determination by this Court.*"[118]

182. As in ***Aveng***, the Applicant calls on this Court to decide on how provisions of the LRA are to be interpreted in the context of the LRA as a whole, taking into account its structural integrity as well as the jurisprudential force of prior case law. As in ***Aveng***, the current matter is not narrowly circumscribed to the parties in the present matter (i.e. Solidarity and Barloworld (and NUMSA on the issue of costs)); it has a broad and practical reach. Employers, employees and representatives alike will surely benefit from clarity from this Honourable Court on the matters raised in the appeal. It is submitted that the interest of justice warrants that leave to appeal be granted.

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117 ***2019 (8) BCLR 919 CC at par 36***

118 ***NUMSA & Others v Aveng Trident & Steel (a division of Aveng Africa (Pty) Ltd) & Another 2021 (42) ILJ 67 CC at par 35***

183. The Court *a quo* equally dismissed the application for leave to appeal with costs. The Judge *a quo* gave no explanation or justification to dismiss the application for leave to appeal with costs. The Court *a quo's* reasoning on this aspect is a terse one.

"2. Having considered the grounds for leave to appeal, I come to the conclusion that the application lacks reasonable prospects of success.

ORDER
1. The application for leave to appeal is refused with costs."[119]

184. The Applicant has thus been mulcted in costs twice, yet Barloworld persists that costs was awarded fairly and justly[120].

185. Barloworld persisted with its opposition to the Applicant's application for leave to appeal, also on the issue of costs. It states that Solidarity seeks to guise its alleged automatically unfair dismissal claim as a constitutional issue in order to escape being mulcted with costs. Solidarity is accused of attempting to evade costs of the Court orders of the Court *a quo* by bringing the current application. That approach should indeed be criticised and, if any, there exists sufficient cause for this Honourable Court to award costs against Barloworld in also opposing this particular subject of appeal.

CONCLUSION:

186. For reasons as set out hereinabove and in the application for leave to appeal (read with the contents of the application that served before the Court *a quo*) an order is sought as follows:

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119 **Vol 5** Judgment Annexure "A4" pp. 465 - 466
120 **Vol 5** AA par 80 -83 pp. 506 - 507

186.1 That leave to appeal be granted against the whole of the judgment and order of the Court *a quo* dated 2 October 2020;

186.2 That the judgment and order be substituted with an order that the dismissal of the Applicant's members was procedurally unfair and granting the Applicant and its members the appropriate relief in terms of Section 189A(13)(a) – (c), alternatively granting the Applicant's members appropriate compensation in terms of Section 189A(13)(d) should an order in terms of paragraphs (a) – (c) not be appropriate, further alternatively remitting the matter to the Labour Court and ordering the Labour Court to award appropriate compensation to the Applicant's dismissed members in terms of the provisions of Section 189A(13)(d);

186.3 Should no leave to appeal be granted on the substantive merits of the dispute, that this Honourable Court grants the Applicant leave to appeal against the costs orders issued by the Court *a quo*;

186.4 That the Court *a quo* erred in awarding costs against the Applicant (and by necessary implication against NUMSA, the other party to the dispute) and that no order as to costs should have been granted against it;

186.5 That the costs of the current appeal and the opposition thereto be left to this Honourable Court's discretion.

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WILHELM P BEKKER
APPLICANT'S COUNSEL
CLUB CHAMBERS
HAZELWOOD
PRETORIA
16 September 2021

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No.: CCT 42/21
LAC Case No. JA 102/20
LC Case No.: J 913/20

In the matter between: –

SOLIDARITY obo MEMBERS Applicant/Petitioner

and

BARLOWORLD EQUIPMENT SOUTHERN AFRICA First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

NATIONAL ASSOCIATION OF SOUTH AFRICAN WORKERS Third Respondent

ASSOCIATION OF CONSTRUCTION AND MINE WORKERS UNION Fourth Respondent

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Fifth Respondent

UASA-THE UNION Sixth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

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Introduction

1. During the course of 2020, the First Respondent (Barloworld) embarked on a large-scale retrenchment process which resulted in a number of employees being dismissed based on its operational requirements. Prior to dismissing the employees, Barloworld followed the mandatory consultation procedure contained in section 189A of the Labour Relations Act of 1995 (the LRA). Notices of termination of employment were issued during mid-August 2019.

2. Almost a month later, the Applicant, Solidarity, acting on behalf of affected members, brought urgent proceedings in the Labour Court, in which it sought final relief, being an order declaring that the dismissal of its members was procedurally unfair.[1]

3. The primary consequential relief sought by Solidarity was an order reinstating the affected employees and directing Barloworld "*to embark on and continue with a meaningful joint consensus-seeking process (including consultations) as envisaged by section 189 and 189A of the [LRA]*". In addition, Solidarity sought an order interdicting Barloworld from dismissing its members until it had complied with "*a fair operational requirements procedure*".

4. In the alternative, Solidarity sought compensation "*in an amount to be*

[1] Notice of motion, Vo1 p2

determined by this Honourable Court for a procedurally unfair dismissal." It persists with claiming all of the relief initially sought, in this appeal.[2]

5. The Third Respondent, NUMSA, launched similar proceedings at around the same time, but complained of other defects in the consultation process. Barloworld opposed both applications, which were heard together. Moshoana J dismissed both applications. Solidarity's applications for leave to appeal were dismissed by the Labour Court and the Labour Appeal Court. Solidarity now approaches this Honourable Court for leave to appeal the judgment of Moshoana J.

6. Solidarity subsequently referred a dispute on the substantive fairness of the dismissals to the Labour Court on behalf of four members[3]. In its statement of claim, Solidarity states that "*This matter deals with the automatic unfair dismissal of the Second to Fifth Claimants due to the mala fide actions of the Respondent, in terms of using transformation/race and gender as selection criteria for dismissing the Second to Fifth Claimants*."[4] Solidarity claims that its members' dismissals were automatically unfair, alternatively substantively unfair, and seeks reinstatement and compensation as relief. The matter is opposed and will proceed to trial in due course.

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[2] Application for leave to appeal, Vol 4 p397-8.
[3] Vol 5 p509.
[4] Statement of claim, para 12, Vol 5 p512.

General submissions on the merits of Solidarity's application for leave to appeal

7. Solidarity's claim is based on section 189A(13) of the LRA, which reads:

> *"(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—*
>
> *(a) compelling the employer to comply with a fair procedure;*
>
> *(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;*
>
> *(c) directing the employer to reinstate an employee until it has complied with a fair procedure;*
>
> *(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate*."

8. Solidarity's main complaint is that use of race as one of the selection criteria in retrenchment proceedings amounts to unlawful discrimination, and accordingly *"the criterium of "transformation" as applied and accepted by the First Respondent behoves this Court's sanction and intervention"*[5].

9. At a procedural level, Solidarity complains that Barloworld implemented the criterion of transformation without engaging in proper prior consultation. At the same time, Solidarity asserts that it would never have agreed to this

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[5] Vol 1 p 28 para 39

criterion, regardless of the extent of consultation, as it regards the use thereof as constituting unlawful discrimination.

10. Solidarity's complaints will be properly ventilated in the trial on substantive fairness and alleged automatically unfair dismissals. This trial will take place in due course, where the primary subject matter for determination will be whether the selection criteria used were fair and objective and were these fairly applied. This is the correct forum in which these complaints should be aired.

11. It is submitted that the Honourable Moshoana J was correct in describing the urgent application as an abuse of process, and in dismissing the application:

11.1. The legislation is clear – there is no self-standing actionable right to claim relief for a procedurally unfair dismissal following a dismissal for operational requirements in terms of section 189A of the LRA (as opposed to s189). Section 189A(18) expressly states that "*The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii)*."

11.2. This Court and the Labour Appeal Court have made it clear that the partial clawback of jurisdiction envisaged by section 189A(13) does not negate the exclusion of procedural fairness as a ground on which to claim relief for

alleged unfair dismissal. This Court dealt decisively and comprehensively with the issue in *Steenkamp II*[6], in paragraphs 45 to 73 of the unanimous judgment of the Court, written by Basson AJ, and in particular in the following quoted portions:

"Nature, purpose and functioning of section 189A(13)

[45] The LRA provides for a consultative framework within which employees facing possible retrenchment may participate in the consultation process in an attempt to either avoid a possible retrenchment or, where retrenchments are unavoidable, to participate in attempts to ameliorate the adverse effects of such a retrenchment.

[46] Where a retrenchment exercise involves a large number of employees, section 189A of the LRA applies. This section not only strives to enhance the effectiveness of the consultation process by providing for the appointment of a facilitator, but also provides for mechanisms to pre-empt and resolve disputes about substantive and procedural unfairness issues as and when they arise during the consultation process.

[47] A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the substantive fairness of

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6 *Steenkamp and others v Edcon Ltd* [2019] 11 BLLR 1189 (CC); (2019) 40 ILJ 1731 (CC)

the dismissals to the Labour Court in terms of section 191(11) of the LRA.

[48] Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair.

[49] Although a clear policy decision has been made to remove claims of procedural unfairness from the ex post facto jurisdictional competence of the Labour Court, employees are not left without a remedy. In what the Labour Appeal Court referred to as a "partial claw-back of jurisdiction", they may approach the Labour Court in terms of section 189A(13) of the LRA for an order compelling the employer to comply with a fair procedure. Where employees have already been dismissed, the Labour Court has the additional power in terms of section 189A(13)(c) of the LRA to reinstate such an employee to allow for the consultation process to run its course.

[50] Only where these orders are not appropriate, may the Labour Court, where it is appropriate to do so, order compensation in terms of subsection (d).

[51] The rationale for the removal of the Labour Court's jurisdiction in respect of procedural issues from the ambit of section 191(5)(b)(ii) of the LRA, must be viewed against the broader context and purpose of section 189A as a whole. Recognising that large-scale retrenchments may benefit

from the intervention of third parties, section 189A provides for an assisted consultative framework in the context of large- scale retrenchments albeit only for a limited time.

[52] Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track. The purpose of section 189A(13) has been recognised in a long line of cases. "[52] … The purpose of section 189A(13) has been recognised in a long line of cases. In Insurance & Banking Staff Association the Labour Court explained:

> *"The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible. All too often the changes in an enterprise with the passage of time deter reinstatement as a remedy. So, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals.*

[53] Similarly in SA Five Engineering the Labour Court held that –

> *"Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action."*

…

[55] Where the strict temporal limits set out in section 189A(17) are not adhered to, the Labour Court may, on good cause shown, condone the failure to adhere to the strict time limits. Although the Labour Court retains its discretion to grant condonation, it has consistently held that, given the strict temporal limits attached to a section 189A(13) application, even a delay of five months is too long and therefore condonation was refused.

[56] It is not difficult to see why even a relative short delay of five months is considered too long in the context of section 189A(13) of the LRA: the purpose of this procedure is remedial in nature and the "intent no doubt is to allow for early corrective action so that a process failure will not escalate into a substantive injustice". Once the delay becomes too protracted, the purpose of this process – which is to allow the Labour Court to interfere with

the consultation process and to make an appropriate order which will remedy the procedural flaw – will be undermined.

…

[69] The Labour Appeal Court interfered with the Labour Court's discretion because of the Labour Court's misconception about the purpose and functioning of section189A(13) of the LRA. Here the Labour Appeal Court criticises the Labour Court's acceptance that it has the jurisdiction to adjudicate disputes about unfair procedure in the context of large scale retrenchments. It concludes by emphasising the point that the jurisdictional competence assigned to the Labour Court in section 189A(13) cannot be read disjunctively from sections 191(5)(b)(ii) and 189A(18) because "plainly, this power is an exception to the primary prescription that no adjudication can occur about unfair procedure".

[70] The Labour Appeal Court's criticism is warranted."

(Emphasis added)

11.3. Read in light hereof, it is submitted that Moshoana J was undoubtedly correct in finding that the proper interpretation of the words in section 189A(13) - "*If an employer does not comply with a fair procedure…*" is not "*if a dismissal is procedurally unfair…*", but rather refers to serious shortcomings that have or threaten to derail the entire consultation procedure. The aim of relief under section 189A(13) is to get the broader consultation process matter back on track, not to determine fairness of

selection criteria, as Solidarity sought to do. Moshoana J rightly held that section 189A(13) does not refer to procedural fairness, but rather to compliance with a fair procedure, and that these concepts have different meanings.

> *"[9] In my view there is a huge and essential difference between seeking to find procedural unfairness and compliance with a fair procedure. In a procedural fairness concept the net is wider as opposed to compliance. …"*[7]

11.4. Van Niekerk J, sitting in the Labour Court, recently made the same point, in *NEHAWU*[8]:

> *"[21] Section 189A(13) is aimed at securing the process of consultation in the interests of a fair outcome. It is aimed at unjustifiable intransigence, not as a tool to thwart a retrenchment process (see Retail & Associated Workers Union of SA v Schuurman Metal Pressing (Pty) Ltd (2004) 25 ILJ 2376 (LC); [2005] 1 BLLR 78 (LC)), and is properly confined to those instances where a substantial failure or refusal to comply with the relevant statutory requirements has occurred (see Association of Mineworkers & Construction Union & others v Sibanye Gold Ltd t/a Sibanye Stillwater & others (2019) 40 ILJ 1597 (LC); [2019] 8 BLLR 802 (LC))"*

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[7] Judgment, Vol 4 p385.

[8] *National Education Health & Allied Workers Union v Minister of Trade, Industry & Competition & another* (2021) 42 ILJ 1992 (LC)

11.5. Van Niekerk J also emphasised the critical role played by the facilitator in mass retrenchment consultations:

> *"[18] The question then is whether the second respondent has failed to comply with the process-related requirements of ss 189 and 189A. At the outset, it should be observed that where a facilitator is appointed to chair the facilitation process, the broad powers and duties of a facilitator conferred by both s 189A and regulation 4 of the Facilitation Regulations, would ordinarily leave little scope for criticism of employer conduct in relation to procedure. The structure of s 189A and the powers and duties conferred on facilitators ought to have the result that facilitators manage the process and ensure that the statutory requirements of procedural fairness are observed. Put another way, one of the primary obligations of a facilitator is to exercise the powers afforded him or her to ensure that the employer complies with a fair procedure*."

12. In summary:

12.1. Barloworld engaged in a lengthy series of detailed consultations with several trade unions and several hundred affected employees in terms of section 189A of the LRA. During the period 3 May 2020 until 11 August 2020, some 15 consultation sessions were held, four of which were formal facilitation sessions under the auspices of the CCMA-appointed facilitator.

12.2. This is hardly the type of case envisaged by section 189A(13), which

applies where a consultation process has become derailed, and can be rescued by speedy intervention of the Labour Court, in the interests of the large number of affected employees. Compare the facts in *Ikapa Coaches*[9], where the Labour Court intervened and ordered the parties to engage in consultations, in circumstances where, aside from an invitation by the employer to the trade union to consult, and a referral by the trade union to CCMA facilitation, no consultations of any kind had taken place by the time the notices of dismissal were issued.

12.3. Solidarity's urgent application was misdirected and was rightly dismissed by the Labour Court. The main complaint as to whether race-based selection criteria are unlawful or unfair, either in principle or in the application thereof, will be dealt with in the trial on the substantive fairness of the dismissals, which is exactly what section 189D(18) envisages.

13. In conclusion, it is submitted that the nature, purpose, function and interpretation of section 189A(13) of the LRA is trite and uncontroversial for purposes of section 167(3)(b)(ii) of the Constitution. Leave to appeal in this matter ought to be refused.

<u>The appellate jurisdiction of this Court is not triggered on the facts of this case</u>

14. Solidarity contends that this application for leave to appeal engages the jurisdiction of this Court because of, amongst others,[10]:

[9] *SA Transport & Allied Workers Union & Others v IKAPA Coaches (A Division of Cullinan Holdings Ltd) & Others* (2021) 42 ILJ 894 (LC)

[10] Solidarity's Heads of Argument p 57 – 58 paras 175, 176 & 178

14.1 It concerns a proper interpretation of sections 189 and 189A(13) as they give content to operational requirements dismissals underpinned by the right to fair Labour practices which are entrenched in section 23(1) of the Constitution;[11]

14.2 The issues raised in this application for leave to appeal *"would no doubt provide legal clarity going forward on the important aspect of operational requirement dismissal processes in general and the interpretation, purpose and application of Sections 189 and 189A(13) and the remedies catered for therein."*;[12] and

14.3 *"There are a myriad of issues arise by the Applicant in the current appeal, for instance the issue of conflicting judgements on the aspects as mentioned hereinabove, what "consultation" entails (and whether it is a mere "engagement"), whether the adoption of a discriminatory criterion is procedurally fair (and whether, on Barloworld's submission, this is a substantive issue), whether the fact that the weighting attached to the unilaterally adopted selection criteria that was not consulted on renders the dismissal procedurally unfair, whether the Labour Court should "adjudicate" procedural unfairness as referred in terms of Section 189A(13), whether the Court is then at liberty to award*

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11 para 179
12 para 176

compensation as per Section 189A(13) (d), etc."[13]

15. In these heads of argument on behalf of Barloworld we submit that leave to appeal ought to be refused because this Court lacks jurisdiction to entertain it, and more so this application for leave to appeal lacks prospects of success.

Jurisdiction

16. Section 167(7) of the Constitution provides that:

> *"a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution".*

17. What the interests of justice warrant matters not if the court lacks the authority necessary for entertaining the appeal.[14]

18. The proper approach to determining whether this Court has necessary authority to entertain this appeal *"is to have recourse to the pleadings and interpret them with a view to determining the nature of the claim advanced. It must be clear from the pleadings that a constitutional issue or an arguable point of law of general public importance is raised. For a constitutional issue to arise the claim advanced must require the consideration and application*

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13 para 175

14 *General Council of the Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC) para [37]

of some constitutional rule or principle in the process of deciding the matter." [15]

19. That this Court has previously held that the fact that the matters which concern the interpretation and application of the LRA enacted to give effect to the Bill of Rights do raise a constitutional issue *"does not mean that this court will, as a matter of course hear appeals against the decision of the Labour Appeal Court dealing with the interpretation and application of the LRA."*[16].

20. Every case is to be adjudicated on its own jurisdictional merits and the interests of justice will in any event, dictate whether this Court should grant leave to appeal.[17]

21. In *Gcaba*[18], this Court outlined the correct approach in determining jurisdiction, and stated as follows:

> *"[35] Jurisdiction is determined on the basis of pleadings … and not the substantive merits … in the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are a determining factor. They contain the legal basis of the claim under which the applicant has chosen to*

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15 *Ibid* para [38]

16 *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27 para [18]; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC)

17 *Member of the Executive Council for Health, Western Cape v Coetzee & Others* [2020] ZACC 3 footnote 25

18 *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC)

invoke the court's competence."[19]

22. The primary question therefore is the following, whether this Court should grant Solidarity leave to appeal the decision of the Labour Court? In order to answer this question, a determination has to be made whether the Labour Court which dismissed Solidarity's claim, was wrong.

23. The answer to the primary question is "no". We submit that this Court lacks jurisdiction to grant Solidarity leave to appeal the decision of the Labour Court.

24. In demonstrating that this Court should not grant Solidarity leave to appeal, we first, as stated in *Gcaba*, demonstrate to the Court by showing the case pleaded by Solidarity before the Labour Court.

25. Before the Labour Court, Solidarity pleaded its case as follows:

> *"15.The process that has been adopted by Barloworld in pursuit of its alleged aim to meet operational requirements has been tainted with procedural difficulty and in the circumstances the process adopted in dismissing a plethora of employees was unfair."*[20]

26. In substantiating this claim, Solidarity alleged that:

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19 *Ibid* para [75]
20 Vol 1 p 18 para 15

"*32.Consultation aside, the first leg of this urgent application finds its nexus in the procedure fashioned by the First Respondent in executing/facilitating the premeditated restructuring which is patently discriminatory. Not only is it patently discriminatory, but in certain instances the process as delineated by the manner in which the First Respondent has achieved and will achieve his desired outcome in ridding its organisation of especially whites can be clearly ascertained by studying the First Respondent "weighted score/selection criteria" which has been crafted in such a manner to ensure that especially white employees cannot score higher than other sexes or ethnicities. Even Indian and Coloured Males will be severely compromised in contrast to African Females who will obtain an automatic 100% of the allocated 30% (with a score of 5 (five), based on colour)."*[21] (Emphasis added)

27. We submit that these complaints are properly justiciable in a complaint of automatically unfair dismissal, referred in terms of section 187(1)(f) LRA:

> *"A dismissal is automatically unfair if … the reason for the dismissal is—*
>
> *…*

[21] Vol 1 p 25 para 32

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

28. This type of complaint is brought in terms of section 191 of the LRA and will result in a trial on the issue of substantive fairness of the dismissals.

29. Solidarity went further in substantiating its claim by pleading that:

"40.The second leg of this urgent application finds its nexus in the manner in which the First Respondent has applied the unilaterally introduced concept of "transformation", as contained in the selection criteria, on a second front. Not only has the First Respondent utilised the selection criteria to determine who stays and who goes, but the First Respondent has implemented[22] the selection criteria internally where redundant employees are competing for new positions (pre– retrenchment) made available by the employer."[23] (Emphasis added)

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22 Once the selection criteria is implemented the question for consideration becomes whether it is fair or objective – it is a matter for substantive fairness.

23 Vol 1 p 28 para 40

30. We submit that these matters neither raise a constitutional issue nor do they raise an arguable point of law of general public importance that ought to be heard by this Court.

Prospects of success

31. The next enquiry that the Court ought to concern itself with is whether the interests of justice warrant that leave be granted. This enquiry involves the exercise of discretion on the part of this Court and entails the weighing up of various factors which include the reasonable prospects of success which, although not determinative, carries more weight than other factors. Prospects of success of an application are an important factor in this Court's determination of whether it is in the interest of justice to grant leave to appeal.

32. This Court has held in *S v Boesak*[24] that:

> *"[12] A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court, and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are*

[24] [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR (CC) at para 12

obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal."

33. And in *S v Pennington*[25] this Court also held:

"[26] Leave to appeal is also a requirement needed to 'protect' the process of this Court against abuse by appeals which have no merit, and it is in the 'interests of justice' that this requirement be imposed, for if appeals without merit were allowed against decision of the Supreme Court of Appeal, justice would be delayed."

34. As a point of departure, confirmation of what was truly Solidarity's case before the Labour Court could be found in its statement of claim[26] before the Labour Court.

35. The statement of facts pertaining to claimants generally[27] in the statement of claim before the Labour Court pertains to facts emanating from the same retrenchment exercise which is a subject this application for leave to appeal. The facts are identical. However, what is conspicuously absent in the statement of claim are claims of unconstitutional conduct against

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[25] [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR (CC) para [26]
[26] Vol 5 p 509
[27] Vol 5 p 513 – 521 paras 14 - 30

Barloworld developed by reference to facts. Solidarity's claim and primary relief sought is based on section 187(1)(f) of the LRA.[28]

36. This claim is based on section 187(1)(f) of the LRA by Solidarity against Barloworld and corroborates Barloworld's submissions above that this Court lacks jurisdiction to entertain Solidarity's application for leave to appeal as it does not raise a constitutional matter. Properly interpreted, it is a claim based on section 187(1)(f) of the LRA and is properly referred by Solidarity in terms of its statement of claim.

The appeal is moot

37. Another factor that militates against the granting of the application for leave to appeal on the basis that it has no reasonable prospects of success, is that the appeal is moot.

38. The limited nature of potential relief under section 189A is further apparent from the extraordinary time-sensitivity attached to the powers of the Court to intervene in a large-scale retrenchment consultation process.

39. Section 189A(13) relief can only be granted if the application is brought at the latest within 30 days of either the notice of termination or termination itself, where no notice has been given, subject to the discretion of the Court to condone compliance with time periods on good cause shown (section

[28] Vol 5 p 512 para 12; p 520 para 31; p 523 para 51 and p 524 para 55.1

189A(17)). But this does not mean that all of the potential relief available under section 189A(13) is available if the application is brought 30 days after notice of dismissal, as was the case here.

40. The Labour Appeal Court has, on three occasions, interpreted the time limits more strictly that may appear on a first reading of section 189A(17).

41. In *Banks and another v CocaCola SA*[29]:

> *“"[17] The requirement in subsection (17) that an application be brought 'not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed', read with subsection (13), places what might be termed an 'outside limit' of 30 days post dismissal or notice of dismissal within which the application must be brought. However, the wording of the subsection and the structure of s 189A generally envisage that the court may be asked to intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, for example, when an employer purports to dismiss employees without commencing any consultation with them or their representatives.*

[29] *Banks and another v CocaCola SA a division of CocaCola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC)

[18] In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus seeking engagement being resumed, the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged, and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)(a), (b) and (c), then compensation as provided by para (d) is the more apposite remedy." (Emphasis added)

42. In *Steenkamp II*[30], the LAC held as follows:

"[24] In context, these time periods speak plainly to the intrinsic urgency of judicial intervention pursuant to s 189A(13), if a party wishes a procedural fairness dispute to be addressed. The relief that a court might grant in terms of s 189A(1)(a)-(d) must be understood in that context. The remedies are designed to be available when an aggrieved applicant brings the application by

30 *Edcon Ltd v Steenkamp & others* (2018) 39 ILJ 531 (LAC)

> *not later than 30 days after the notification of the possible retrenchment, and thus, 30 days before a dismissal notice may be given. The primary purpose is to get the retrenchment process back onto a track that is fair. Remedies (a) and (b) plainly are appropriate before a dismissal is effected. Remedy (c) is aimed at not only reversing a dismissal, but obligating the employer in future to comply with fairness during an implicitly resumed process, which implies timeous proximity to the dismissals. Remedy (d) is plainly contingent on remedies (a), (b) or (c) being inappropriate in given circumstances; it is thus subordinated to the first three options, and cannot be read disjunctively from the rest."* (Emphasis added)

43. In *South African Airways v Numsa*[31], where the employer took the point that the application was premature, as no notices of dismissal had been issued yet. The LAC quoted the above sections in *Banks* and *Steenkamp II* with approval, and held that:

> *"[23] An application in terms of section 189A(13) of the LRA is triggered where an employer does not comply with a fair procedure. A consulting party may approach the Labour Court for an order, inter alia, compelling the employer to comply with a fair procedure. The court would correct any procedural*

[31] *South African Airways (SOC) Ltd (in Business Rescue) and others v National Union of Metalworkers of South Africa obo Members and others (3)* [2020] 8 BLLR 756 (LAC)

> *irregularity as and when it arises so that the integrity of the consultation process can be restored and the consultation process forced back on track. The unions approached the court on an urgent basis to vindicate their members' rights and had satisfied the jurisdictional requirement set out in section 189A(17) of the LRA. In the result, this legal point cannot be sustained and must also fail.* (Emphasis added)

44. In *SAA*, the Labour Appeal Court emphasised the dictum in *Steenkamp II*, by highlighting the following words: "*The remedies are designed to be available when an aggrieved applicant brings the application by not later than 30 days after the notification of the possible retrenchment, and thus, 30 days before a dismissal notice may be given. The primary purpose is to get the retrenchment process back onto a track that is fair*."[32]

45. Similarly, this Court in *Steenkamp II* endorsed the LAC's findings, and stated:

> *"[71] Moreover, the procedure within s 189A(13) of the LRA provides for an urgent remedy on application whilst the parties are still locked in consultations or shortly thereafter in circumstances where the reinstatement of the dismissed employees can still salvage the consultation process by restoring the status quo ante. This process does not contemplate*

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[32] *Ibid* para [22]

a trial at some future time after the horse has bolted." (Emphasis added)

46. With these limitations in mind, the Labour Court (per Moshoana J, sitting in the urgent Court), in *TAWUSA*[33], recently held that, on a proper interpretation of the sections, where a facilitated consultation process is underway, the Labour Court can only be approached for relief during the 60-day consultation period (Para 18-23). It is respectfully submitted that this finding is correct and is in accordance with the LAC and Constitutional Court authorities referred to above, and in the judgment in *TAWUSA*.

47. It follows that the application by Solidarity, brought just before 30 days after the notices of dismissal, was brought too late to obtain substantive relief, aimed at getting the consultation process back on track. Several months later, Solidarity now seeks leave to appeal, in order to obtain relief aimed at reversing the dismissals, which if granted, would happen at least a year after the dismissals were effected. This in circumstances where only the alleged procedural fairness of dismissals is before the Court.

48. On the basis of what is submitted above with regards to the lack of jurisdiction of this Court to entertain Solidarity's application for leave to appeal including a lack of reasonable prospects of success as opined by

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[33] *TAWUSA & SATAWU obo members v Barloworld Transport (Pty) Ltd*, Case J885/20, delivered on 17 September 2020

the Labour Appeal Court and submitted on behalf of Barloworld, the application ought to be dismissed with costs.

Solidarity was consulted on selection criterion

49. In fact, it bears further emphasis to mention that Solidarity conceded in its founding affidavit before the Court *a quo* that there was consultation on the selection criteria. Solidarity said:

> *"37.Again, it is not the Applicant's position that there was no consultation in general on the selection criteria (which there was), but it is the Applicant's assertion that there was no genuine consensus-seeking process in general and specifically on selection criteria."* [34]

50. Solidarity acknowledges that the transformation selection criterion in a retrenchment exercise is not completely outlawed. This is evident from the following in its founding affidavit before the Court *a quo:*

> *"82. Although it is admitted that there may be exceptions to the general rule that transformation may not be the sole criterion in a retrenchment exercise and that employment equity may in exceptional circumstances be negotiated on as a selection criterium, the manner in which the First Respondent is*

[34] Vol 1 p 27 para 37

implemented and applied transformation (or employment equity) as a selection criterium, patently unfairly discriminated against a specific group or groups of employees."[35]

51. Barloworld, in its answering papers, pleaded that:

"*71 The selection criteria that ultimately found consensus among the consulting parties was a combination of LIFO, skills and qualifications, transformation (which was proposed by BWE), bumping/swopping. …"* [36]

52. Whether these criteria are fair, or were fairly applied, is a matter for determination at a trial on the substantive fairness of the dismissals.

53. It bears emphasis, however, that none of the other four trade unions that were party to the process, support Solidarity's complaints of a lack of consultation on selection criteria. Numsa's s189A(13) application, which was dismissed, was based on entirely different complaints, and it has not sought to appeal the findings of Moshoana J.

Compliance with a fair procedure

54. Solidarity's case is primarily based on claims of substantively unfair dismissals. It denies this and claims that it seeks relief for procedurally

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35 Vol 1 p 42 para 82
36 Vol 3 p 247 para 71

unfair dismissals, based on two key complaints: Firstly, that Barloworld failed to engage in a joint consensus-seeking process with consulting parties regarding selection criteria and the application thereof; and secondly, that the use of transformation as one of the selection criteria, is in itself unlawful.

55. The cause of action for relief arising from the failure to follow a fair consultation process prior to a dismissal for operational requirements, exists only in respect of small-scale retrenchments conducted in terms of section 189 of the Labour Relations Act. As stated by Basson AJ, writing for the Full Court in this Court in *Steenkamp II*[37]:

> *"[70] The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by s 189A(18) of the LRA."*

56. As no other Court would have jurisdiction to determine this type of claim, the principle can be also expressed as the lack of a cause of action. The reason for the removal of this right to procedural fairness, and the concomitant cause of action (and jurisdiction) to grant relief for a breach of this right, is that in large-scale retrenchments, the Act is designed in such a way as to prevent errors in the consultation process that could result in a failure of the process, or to correct major errors during the consultation

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37 *Steenkamp II at para* [70]

process itself (or at worst, very shortly thereafter). The rationale is that given the large numbers of employees affected, errors in the consultation process should be prevented or corrected at the time, rather than allowing for a later claim for compensation for unfair procedure.

57. The prevention or correction of material errors in the consultation process is achieved by allowing firstly for facilitation by a CCMA commissioner. Facilitation is a guided consultation process, where the facilitator ensures procedural fairness, and has powers to do so, for example by ordering the disclosure of information.

58. Secondly, the LRA provides for a minimum period of 60 days for consultations, so as to create the necessary space for consultations on all material aspects.

59. Thirdly, the LRA also allows for power play by way of strike action, during the consultation process.

60. Lastly, section 189A(13) allows for the Labour Court to grant relief, in limited and (it is submitted) exceptional circumstances only. This has been described as a ‘partial claw-back of jurisdiction’. It is submitted that the proper application of section 189A(13) is limited to instances where there has been a material error or irregularity in the consultation process, that cannot be rectified by using the primary safety net of facilitation.

61. We submit that the Court *a quo* was correct in drawing a distinction between the questions of whether, all things considered and on the application of a value judgment, the dismissal was procedurally fair; and, on the other hand, whether the employer had complied with its statutory obligation to engage in a fair consultation procedure. The Court *a quo* correctly held that, in proceedings under section 189A(13), the only relevant question was the second one.

62. Solidarity asserts that the inquiry into procedural fairness is far broader, but its argument ignores the express limitation of jurisdiction (and power) to adjudicate procedural fairness issues in mass retrenchments, as explicitly set out in section 189A(18) of the Act.

63. Effectively, the partial claw-back of jurisdiction granted to the Labour Court by section 189A(13) is simply a limited judicial supervisory and oversight role, which enables the Court to intervene in exceptional circumstances, where there has been a gross failure in the consultation process.

Transformation as selection criterion

64. As already submitted above, the complaint pertaining to transformation as a selection criterion is properly justiciable in a complaint of automatically unfair dismissal, referred in terms of section 187(1)(f) LRA. This type of a complaint is brought in terms of section 191 LRA and will result in a trial on the issue of substantive fairness of the dismissals.

65. A trial on substantive fairness will allow a proper ventilation of these issues, and a holistic assessment, on the basis of documentary, expert and *viva voce* evidence, and cross-examination, of the merits of Solidarity's legal argument and case on the facts. For example, a holistic assessment of all of the circumstances surrounding the applications for and appointment to alternative positions, will be required in order to assess whether the manner in which race was factored into the assessment criteria, resulted in unfair discrimination on the basis of race. If no white applicants were successful in applying for alternative positions, this would probably support such a conclusion. If the racial and gender profile of the group of successful applicants is balanced, it may militate against a finding of unfair discrimination.

66. What is clear is that this type of dispute is wholly unsuited to the vehicle created by section 189A(13), which takes place by way of motion proceedings (which do not allow for the resolution of material disputes of fact), and which is aimed only at intervening during consultation proceedings where, despite the safety nets of facilitation and strike action, the proceedings have become completely derailed, but can be restored with quick intervention by the court.

67. The broad policy considerations underlying section 189A(13), which serve to establish its purpose, were stated as follows by Pillay J in *Insurance &*

Banking Staff Association & another v Old Mutual Services & Technology Administration & another (2006) 27 *ILJ* 1026 (LC):

> *"According to the explanatory memorandum accompanying the 2002 amendments to the LRA, s 189A was aimed at enhancing the effectiveness of consultations in large-scale retrenchments. It allows for a facilitator to be appointed to put back on track at the earliest possible moment a retrenchment process that falls off the rails procedurally. The overriding consideration under s 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible.... So, the key elements of s 189A are: early expedited, effective intervention and job retention in mass dismissals."*[38] (Emphasis added)

68. Murphy AJ (as he then was) held as follows in *NUMSA & others v SA Five Engineering & others* [2005] 1 BLLR 53 (LC):

> *"Disputes about procedure in cases falling within the ambit of section 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in section 189A(13), the exact*

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38 At para 9.

scope of which I will return to presently. Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action."[39] (Emphasis added)

69. Van Niekerk J held as follows in *National Union of Mineworkers v Anglo American Platinum Ltd & others* (2014) 35 *ILJ* 1024 (LC) ("*Amplats*"):

"The section affords the court a broad range of powers, most of which appear to suggest that where a complaint about procedure is made by a consulting party, the court has a broad discretion to make orders and issue directives, thereby extending to the court an element of what might be termed a degree of judicial management into a contested consultation process."[40] (Emphasis added)

70. Allied to the above, it is, of course, not every procedural deficiency that would have given rise to the Labour Court granting relief in terms of section 189A(13). It would have only intervened if there is a substantial failure in the process. This was put in the following terms by Murphy AJ (as he then

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39 At para 10

40 At para 19

was) in *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* [2005] 1 BLLR 78 (LC):

> *"I am therefore in agreement with Mr Kirk-Cohen, who appeared on behalf of the respondent, that the aim of section 189A(13) (Act 66 of 1995) is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process. The section is aimed at securing the process in the interests of a fair outcome. It follows that not every minor transgression of a procedural nature will invite the benefit of the court's discretionary power to grant a remedy. To hold otherwise would be to open the door to excessive litigation, abuse and unnecessary delay in the process of consultation. Section 189A(13) is aimed at unjustifiable intransigence, it is not available as a tool to thwart a retrenchment process where the process, as in the present case, is otherwise capable of being rescued by genuine efforts to cure such flaws as may exist. Moreover, it would be cumbersome, if not futile, to make an order compelling the respondent to issue a notice disclosing information which it already has disclosed. There would be no point."*[41] (Emphasis added)

[41] At para 32

71. Recently, Snyman AJ stated this principle as follows in *Communication Workers Union v Telkom SA SOC Ltd & others* (2017) 38 *ILJ* 360 (LC) ("*Telkom*"):

> *"A final consideration is the nature of the alleged procedural defect or flaw. It is not every minimal procedural failure that will attract the application of the remedies in s 189A(13)(a) to (c). The failure must be material, to the extent that it can be said that a fair consultation on one of the consultation topics in s 189(2) is absent. A simple example would be where there is no consultation on the basis of selection of employees to be retrenched, and the employer simply unilaterally applies its own criteria."*[42] (Own emphasis.)

Disclosure of information and Issues not decided on and no findings made

72. Solidarity's complaint is that the Court *a quo* failed to pronounce on certain issues which renders the judgment and order of the Court *a quo* appealable. Furthermore, Solidarity contends that the Court *a quo* erred in finding that recourse had to be had to the provisions of section 16 of the LRA with regard to the failure to disclose information by Barloworld.

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42 At para 43

73. This issue talks to the determination of facts and consequently the jurisdiction of this Court is not engaged.[43]

Costs

74. The *Union for Police, Security and Corrections Organisation*[44] (the *Union for Police*) matter is distinguishable from this matter. In the *Union for Police* matter the Labour Court upheld an exception by the respondent that it did not have jurisdiction to adjudicate the matter because the relevant documents on which the applicants based their claims constituted a collective agreement. It dismissed the application with no order as to costs. However, on application for leave to appeal the Labour Court in dismissing it, ordered costs against the applicants. It provided no reasons for doing so, other than a terse statement that it could find no reason for costs to follow the result.[45]

75. In this matter the Labour Court provided reasons for ordering costs against Solidarity and Numsa. The Labour Court reasoned that trade unions cannot hide behind the ongoing relationship ticket when often they bring employers to the Labour Court, often at times late, as it was the case in this matter and had to contend with the reams upon reams of documentation in order to put up an answer at a very short and truncated time period suggested by the trade unions in urgent court. It also held that the urgent Court was not a

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43 *Mbatha v University of Zululand* 2014 (2) BCLR 123 (CC) at para [197]

44 *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd & Others* [2021] ZACC 26 delivered on 7 September 2021

45 *Union for Police* para [9]

place for disputes of facts, the relevance or irrelevance of documents and information to be disclosed.[46]

76. The Labour Court correctly held that section 189A(13) was not an appropriate route to raise substantive unfairness issues. Solidarity sought to guise its alleged automatically unfair dismissal claim as a constitutional issue, in order to escape been mulcted with costs.

77. In paragraphs 153 and154 of its heads of argument,[47] Solidarity contends that its founding affidavit before the Labour Court, including annexures, does not fall within the category of reams upon reams of documentation as described by the Labour Court. It further contends that the opposing affidavit by Barloworld was the one that cluttered the application. It goes on to state that the record before this Court excludes certain annexures that were contained in the answering affidavit, spanning *"approximately 1400 pages of irrelevant matter, which constituted a presentation upon presentation that holds out to be Barloworld's confirmation of its business rationale in restructuring and ultimate retrenching employees".*

78. This contention by Solidarity is disingenuous. Solidarity disputed the rationale for the restructuring[48]. As a result of Solidarity disputing, amongst others, the rationale for the proposed restructuring, Barloworld had no option but to put up in its answering affidavit, the financial information and

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46 Vol 4 p 392
47 p 52
48 Vol 1 p 19 para 19

shared the presentation with the consulting parties during the consultation process. Furthermore, the consulting parties, Solidarity included, requested Barloworld's financial information during the consultation process.

79. Besides, the directions from this Court dated 28 July 2021 directed the applicant (Solidarity) to file a paginated record in accordance with rule 20(1) and (2) of this Court's rules containing only those portions of the record that are strictly necessary for the determination of the issues. Solidarity in collaboration with Barloworld's attorneys agreed on those portions of the record that are strictly necessary for determination of the issues in compliance with paragraph 2 of the directions.

80. What is patently clear is that section 189A(13) was not an appropriate route to raise substantive unfairness issues. When faced with a costs order, Solidarity sought to guise its alleged automatically unfair dismissal claim as a constitutional issue in order to escape been mulcted with costs. Solidarity is simply, with this application, attempting to evade a costs order of the Labour Court.

81. In paragraph [34] of the *Union for Police* judgement this Court made it clear that principles in section 23 of the Constitution which entrench various labour rights and the LRA itself that promote the effective resolution of labour disputes, could not dictate that costs can never be ordered against a party in labour matters.

82. This Court went further on to state that as it has previously affirmed the principle that costs are discretionary to the Court adjudicating the matter; that applies no differently to labour matters. What mattered was that a Court exercising its discretion to award the cost must do so judicially.[49]

83. In paragraph [35] this Court said:

> *"[35] In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of fairness standard in section 162, and the constitutional and statutory imperatives that underpin it. If the Court fails to do so, it commits an error of law and thus misdirects itself. This Court explained this in Long:*
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> > *"[W]hen making adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties. This, the Labour Court failed to do. There is no reasoning on the question of the*

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[49] *National Union of Mineworkers v Samancor Limited (Eastern Chrome Mines)* [2021] ZACC 16 para [32]; *Long v South African Breweries (Pty) Ltd* [2019] ZACC 7 para [29]; 2019 (40) ILJ 965 (CC); 2019 (5) BCLR 609 (CC); *Zungu v Premier of KwaZulu – Natal* [2018] ZACC 1 para [26]; 2018 (39) ILJ 523 (CC); 2018 (6) BCLR 686 (CC)

costs beyond an indication that costs are to follow the result. This is a misdirection of law and it follows that the Labour Court's discretion in respect of costs was not judicially exercised and must be set aside."

84. As submitted above, the facts of this application for leave to appeal are distinguishable from the *Union for Police* matter. In this case the Labour Court furnished its reasons for exercising its discretion and enforcing the rule that the costs follow the result.

85. Moreover, having regard to the statement of claim by Solidarity on behalf of its members that is before the Labour Court, that confirms that section 189A(13), although denied by Solidarity, was not the appropriate route to raise the alleged substantive unfairness issues. It confirms the Labour Court's justification from departing from the *Zungu* general rule that a losing party in labour matters should not be mulcted in costs.

Conclusion

86. The issues raised by Solidarity in this matter have already been settled by this Court and their determination will be of no fundamental importance to the labour market and employment relations, particularly in the context of large-scale retrenchments. This application for leave to appeal is narrowly circumscribed to the parties in the present matter and thus it is not in the interests of justice that leave be granted.

87. Leave to appeal ought to be dismissed with costs including those consequent upon the employment of two counsel.

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Chambers, Sandton

30 September 2021