EMPLOYMENT LAW
ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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Retrenchments: Transformation, a selection criterion?

When an employer contemplates dismissals based on operational requirements, section 189(1) of the Labour Relations Act 66 of 1995 (LRA) requires the employer to consult any person impacted by the decision, including trade unions whose members may be affected by the proposed retrenchments. The employer and other consulting parties must engage in a meaningful joint consensus-seeking process and attempt to reach consensus on, amongst other things, the method for selecting employees to be dismissed. Where an employer does not comply with a fair procedure, section 189A(13) provides a consulting party with recourse to approach the Labour Court.

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Where the consulting parties have agreed on the selection criteria to be used, the employer is obliged to implement the criteria. However, where no agreement can be reached between the consulting parties, the employer is obliged to use criteria that is fair and objective. This legal position has been crystallised by the Constitutional Court (CC) in its recent judgment of *Solidarity obo Members v Barloworld Equipment Southern Africa and Others* [2022] ZACC 15I.

EVALUATING SUBSTANCE VS PROCEDURE

On 27 April 2020, Barloworld notified its employees, including Solidarity's members, of its intention to restructure its operations resulting from the impact of COVID-19. Shortly thereafter, Barloworld lodged a request with the Commission for Conciliation, Mediation and Arbitration (CCMA) for it to facilitate a joint consensus-seeking process between the affected parties and Barloworld. During the consultative process that ensued, solidarity took issue with the proposed selection criteria – specifically, the inclusion of transformation as part of the selection criteria.

Solidarity and the National Union of Metalworkers of South Africa (NUMSA) approached the Labour Court in separate applications contending procedural irregularities in the consultation process. One of the issues challenged by Solidarity was Barloworld's failure to consult on various issues, including transformation as a selection criterion. This was unlawful and amounted to unfair discrimination. NUMSA contended that the process was flawed in that Barloworld had failed to disclose information that was essential to enable its effective participation; there had been no meaningful consultation on alternatives to retrenchment; there had been no joint consensus-seeking consultation on the selection criterion; and Barloworld had called workers to interviews without furnishing them with important information that they needed prior to attending the interviews.

The Labour Court distinguished between procedural fairness and compliance with fair procedure which is what is envisaged in section 189A(13) of the LRA. Disputes of procedural fairness go beyond the employer's statutory obligations alone and are excluded from the ambit of section 189A(13). The primary remedy envisaged by section 189A(13) is compliance, which is no longer possible once the consultation process is concluded. Solidarity and NUMSA's complaints did not raise compliance issues, but rather general issues related to procedural and substantive fairness.

Retrenchments: Transformation, a selection criterion?

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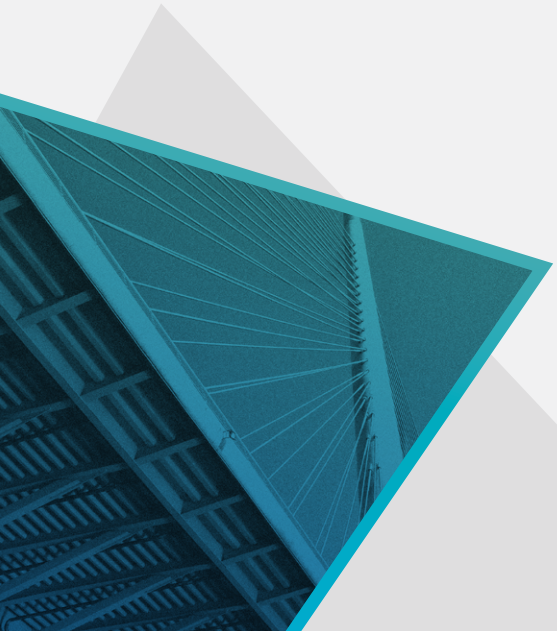
The court also held that in its view transformation is not a selection criterion, per se, and that Solidarity's complaint, properly construed, related to substantive fairness. The court reasoned that the issue of which selection criteria to apply is one of substance and not procedure. It then stated that Solidarity had a right, in terms of section 189A(7)(b)(ii), to refer the dispute as to whether there was a fair reason for the dismissal to the court in terms of section 191(11) of the LRA. The court also held that the issues raised by NUMSA were issues of substance.

BEFORE THE CONSTITUTIONAL COURT

Solidarity's petition was refused by the Labour Appeal Court. It then approached the CC on the basis that it had jurisdiction as it concerned the proper interpretation of sections 189 and 189A(13) of the LRA which were underpinned by the right to fair labour practices. Barloworld disagreed.

The CC held that there was meaningful joint consensus-seeking consultation in that, on the evidence before it, Barloworld genuinely and meaningfully considered the representations made by Solidarity. Parties only need to seek consensus and do not necessarily need to agree. Solidarity rejected the inclusion of transformation in the selection criteria, with the effect that the parties deadlocked on the issue. The failure to reach consensus or agreement did not necessarily mean that the consultation process was not meaningful.

The CC also considered whether failure to present the selection criteria matrix led to a conclusion that the consultation process was procedurally unfair. Once the parties had deadlocked, the next step was for Solidarity to approach the Labour Court in order for it to adjudicate on the substantive fairness of relying on transformation as part of the selection criteria.



Retrenchments: Transformation, a selection criterion?

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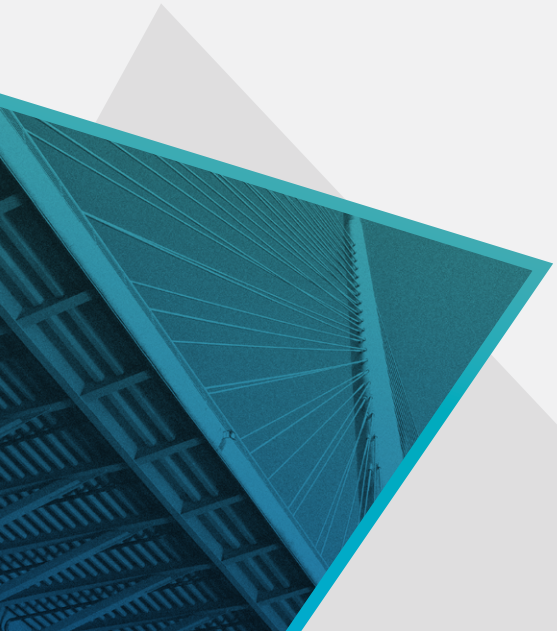
In relation to the distinction between procedural fairness and compliance with fair procedure, the CC reiterated that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii). Disputes about procedural fairness, as a distinctive claim or cause of action, that a dismissal on the basis of operational requirements was procedurally unfair, are removed from the adjudicative reach of the Labour Court. In order for the Labour Court to adjudicate a claim of the unfairness of a procedure in dismissals for operational requirements, the court must be approached in terms of section 189A(13) on the basis of non-compliance with the procedures prescribed by sections 189 or 189A of the LRA.

Finally, the CC differed with the Labour Court on the timing of the referral – that is, after the consultation process had been concluded. Section 189A(17)(a) of the LRA provides that *"an application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employees' services or, if notice is not given, the date on which the employees are dismissed"*. The referral was made timeously.

PHETHENI NKUNA AND MBULELO MANGO



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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