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- LAC confirms that valid mutual separation agreements preclude unfair dismissal claims
- Conciliation after failed facilitation: The Constitutional Court clarifies the route to the Labour Court in large scale retrenchments

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LAC confirms that valid mutual separation agreements preclude unfair dismissal claims

Can an employee who has signed a mutual separation agreement later claim unfair dismissal on the basis that the agreement was, in substance, a retrenchment? In *WBHO Construction (Pty) Ltd v Masenye NO and Others* (JA124/24) [2026] ZALAC 10 (26 February 2026), the Labour Appeal Court (LAC) answered this question in the negative. The court held that where a mutual separation agreement is freely and voluntarily concluded, no dismissal arises. Consequently, the statutory unfair dismissal regime under the Labour Relations Act 66 of 1995 (LRA) is not engaged. This judgment reaffirms the importance of contractual autonomy in employment law.

The Facts

The employee commenced employment with the employer on 18 April 2018 as a final level grader operator. In November 2020, the employer's operator training manager approached the employee to discuss the company's operational needs and the possibility of transferring the employee to the Northern Cape, where his skills were required. The employee declined the transfer because he did not want to be away from his family. According to the employer's testimony, the employee asked to be retrenched, citing financial difficulties at home and a home construction project. The employee's version differed. He claimed the employer told him he would be retrenched if he refused.

On 3 December 2020, the parties signed a document titled *"Mutual Separation Agreement"*, and the employee received severance pay of R181,541.75. He subsequently referred an unfair dismissal dispute to the Bargaining Council for the Civil Engineering Industry. The arbitrator found that the document was not a genuine mutual separation agreement but rather a retrenchment letter, and that the employer had failed to comply with section 189 of the LRA. The arbitrator ordered reinstatement. The Labour Court dismissed the employer's review application, holding that the employer could not use a mutual separation agreement to circumvent section 189 procedures.

The law

The LAC identified two key legal principles. First, the question of whether a dismissal occurred is a jurisdictional issue that must be determined using the correctness test, not the reasonableness standard. As held in *Johnson Uniform Solutions (Pty) Ltd v Brown and Others* (DA10/2012) [2014] ZALCJHB 32 (13 February 2014), where legal or jurisdictional findings are challenged, the correctness standard applies. Second, the sanctity of contract principle requires that agreements freely and voluntarily concluded must be honoured. As the Supreme Court of Appeal held in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotels Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) parties are free to enter into contracts and their agreements shall be enforced when entered into freely and voluntarily.

For a valid contract to exist, each party must have an intention to be legally bound and the parties consent to the terms. Where these requirements are met, the agreement is valid and enforceable. Importantly, there is nothing in the LRA that precludes parties from concluding a mutual separation agreement even where operational requirements are being discussed.

The court's application of the law

The LAC held that the Labour Court erred in applying the reasonableness test when it should have applied the correctness test. The threshold question was whether a dismissal occurred at all; a jurisdictional enquiry.

The LAC found that both parties had entered into and signed the mutual separation agreement voluntarily. The employee received his severance package as agreed and acknowledged acceptance of the terms in full and final settlement of all claims against the appellant. There was no finding that the employee was coerced into signing the agreement. The conclusion by the Labour Court that the employer had avoided section 189 processes was unfounded, as nothing prevents parties from entering into a mutual separation agreement at any time when operational requirements are discussed.

The LAC emphasised that section 189 governs dismissals for operational requirements, not consensual terminations. Where termination occurs by valid agreement, section 189 is not triggered because the employer has not dismissed the employee. The fact that operational requirements were discussed does not, in itself, transform a mutual separation into a retrenchment requiring compliance with section 189.

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Findings and order

The LAC upheld the appeal and found that the mutual separation agreement was valid and enforceable. Since the agreement was valid, there was no dismissal, and the arbitrator had no jurisdiction to entertain the dispute. The LAC set aside the Labour Court's judgment and substituted it with an order reviewing and setting aside the arbitration award. The court declared that the employer did not dismiss the employee.

Key takeaways

This judgment provides important clarity for employers and employees.

First, the existence of a valid mutual separation agreement means there is no dismissal, and the unfair dismissal regime is not engaged.

Second, parties are not precluded from concluding mutual separation agreements where operational requirements are under discussion. Such agreements remain a legitimate mechanism for ending employment relationships.

Third, where allegations of coercion or misrepresentation are made, the validity of the agreement will be scrutinised.

Fourth, employers should ensure that mutual separation agreements are clearly drafted, consensual, and signed voluntarily to withstand scrutiny.

Aadil Patel and Christiaan Hollander

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Conciliation after failed facilitation: The Constitutional Court clarifies the route to the Labour Court in large scale retrenchments

In *National Union of Metalworkers of South Africa and Others v Industrial Oleo Chemical Products* [2026] ZACC 22, the Constitutional Court was asked to decide a question that has been of interest in relation to mass or large scale retrenchment: where a section 189A facilitation process has failed, must dismissed employees refer their dismissal dispute to conciliation before they can approach the Labour Court for adjudication? In the majority judgment, the Court held that conciliation is not a jurisdictional precondition in this context, and that section 189A(7)(b)(ii) of the Labour Relations Act 66 of 1995 (LRA) permits a direct referral to the Labour Court once facilitation has failed.

Background Facts

In early 2020, Industrial Oleo Chemical Products embarked on a large scale retrenchment exercise on operational grounds, which resulted in the dismissal of the individual applicants ("employees") in July 2020. The employees, represented by NUMSA, first approached the Labour Court on an urgent basis under section 189A(13), alleging that the employer had pre-determined who would be retrenched and had denied them an opportunity to make representations. They were reinstated, and a fresh facilitation process commenced. The second facilitation also failed, and the employees were dismissed on 12 November 2020.

The employees then referred the dispute directly to the Labour Court in terms of section 189A(7)(b)(ii). The employer raised a preliminary point that conciliation before the CCMA or a bargaining council was a jurisdictional prerequisite, and that the Labour Court therefore lacked jurisdiction. The Labour Court dismissed the preliminary point, reasoning that if conciliation were required, the Legislature would have referred to section 191(1) rather than section 191(11). The Labour Appeal Court ("LAC") reversed that finding, holding that facilitation and conciliation are functionally distinct, that a dismissal dispute is a fresh dispute from the consultation process, and that conciliation remained mandatory before referral to the Labour Court. NUMSA and the dismissed employees sought leave to appeal to the Constitutional Court.

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The legal framework

Section 189A was inserted into the LRA in 2002 to address procedural and substantive fairness in large scale retrenchments by introducing a facilitated consultation process and a right to strike over retrenchment.
Section 189A(7) provides that once a facilitator has been appointed and 60 days have elapsed from the section 189(3) notice, the employer may issue notices of termination and the employees may either give notice of a strike under section 64(1)(b) or (d), or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11). Section 191(11) in turn requires referrals in terms of section 191(5)(b) to be made within 90 days after the council or commissioner has certified the dispute as unresolved.

The interpretation disputer was whether the reference to section 191(11) imports the entire conciliation mechanism in sections 191(1) and (5) (so that the section 189A(7)(b)(ii) referral is merely the conclusion of an ordinary dispute process), or whether it operates only as a time period attached to an independent jurisdiction-related provision. The Court applied the unitary interpretive method requiring attention to text, context, and purpose, and informed by section 39(2) of the Constitution and section 3 of the LRA.

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The majority judgment's application of the law

The majority judgment accepted that facilitation and conciliation are not identical. Facilitation is consultative and pre-emptive, occurring before dismissal, while conciliation is remedial and reactive, occurring after dismissal. However, the majority found that these differences are largely academic. Whether before or after dismissal, the parties debate the same core issues, namely whether the retrenchments were justified, whether the selection criteria were fair, and whether the severance packages were adequate, and to the extent issues might not have been raised during facilitation, nothing prevents the parties from addressing them through other means such as pre-hearing meetings. A second, post dismissal conciliation in those circumstances would be repetitive.

The majority drew a contextual comparison between section 189A(7) and section 189A(8). Where no facilitator is appointed, section 189A(8) substitutes a 30-day consultation period followed by a 30-day conciliation period, also totaling 60 days, before the employer may issue dismissal notices. In both subsections, dismissed employees then have two mutually exclusive options: to strike or to refer a dismissal dispute to the Labour Court. Crucially, neither subsection requires conciliation of the dismissal dispute itself before the right to strike is exercised. Section 189A(7) dispenses with the ordinary requirement under section 64(1)(a) that 30 days must expire from referral to conciliation before employees may strike. It would be incoherent to permit immediate strike action over the dismissal dispute while compelling employees who choose adjudication to take a detour through conciliation. Moreover, if the Legislature intended conciliation to follow after facilitation, it would have incorporated that requirement specifically and, logically, if conciliation was required before a referral for adjudication, the same requirement would apply to strike action.

The majority also noted that section 189A was introduced to expedite intervention in mass retrenchments. If conciliation were required after a failed facilitation, the total elapsed time would be even longer than under the old dispensation that the amendment was designed to replace. Furthermore, relying on the decision in Driveline, the majority observed that the LRA requires only a referral to conciliation, not that conciliation must actually take place or be meaningful, which called into question whether conciliation has substantive jurisdictional value in every dismissal dispute.

Turning to the textual difficulty posed by the reference to section 191(11), the majority held that section 189A(7)(b)(ii) is itself an unequivocal, jurisdiction-conferring provision that immediately engages the Labour Court's jurisdiction without any further jurisdictional hurdle. The Court distinguished its earlier decision in *Intervalve*, which had described conciliation as indispensable to the Labour Court's jurisdiction. *Intervalve* concerned an ordinary dismissal dispute under section 191 and did not engage section 189A at all; the Legislature created a separate dispensation for mass retrenchments, and for dismissal disputes falling outside that dispensation, conciliation remains a jurisdictional prerequisite for all other disputes arising under section 191(5)(b). Because section 189A(7)(b)(ii) already assigns jurisdiction, treating section 191(11) as importing the conciliation mechanism would create a second, redundant jurisdictional precondition and would render the right of direct referral to the Labour Court nugatory. The presumption against redundancy, therefore, favoured the employees' construction.

The majority concluded that the reference to section 191(11) operates only as a time period clause, fixing the 90-day window within which a section 189A(7)(b)(ii) referral must be made, and not as the mechanism that confers jurisdiction. Had the Legislature intended to require conciliation, it would have referenced section 191(1) and (5) directly. The 90-day period is to be applied and runs from the date on which the dismissal notices are received following the expiry of the 60-day facilitation period.

The Court's findings and order

The majority held that, on a proper construction of section 189A(7)(b)(ii), a dismissed employee or trade union may refer an unfair dismissal dispute arising from a failed facilitation directly to the Labour Court, without first referring the dispute to conciliation. Leave to appeal was granted, the appeal was upheld, the LAC's order was set aside, the Labour Court's order was reinstated, and the matter was remitted to the Labour Court to decide the merits.

Key takeaways

Three practical points emerge. First, where a facilitator has been appointed under section 189A and the facilitation process has failed, a dismissed employee or trade union may proceed directly to the Labour Court in terms of section 189A(7)(b)(ii). Second, the 90-day time period in section 191(11) applies and runs from receipt of the notices of dismissal following the expiry of the 60-day facilitation period. Third, employers can no longer rely on the absence of conciliation as a jurisdictional point in section 189A(7) disputes.

Nadeem Mahomed and Sashin Naidoo

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