



Employment Law

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SOUTH AFRICA

- Labour Court has confirmed the limited powers of CCMA facilitators in section 189A retrenchment consultations, but some facilitators are still overstepping their powers
- Is there a time period within which to distribute the payment of a death benefit?
- High Court rules against employer's unlawful deductions



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Labour Court has confirmed the limited powers of CCMA facilitators in section 189A retrenchment consultations, but some facilitators are still overstepping their powers

Section 189A processes under the Labour Relations Act 66 of 1995, as amended (LRA) arise out of difficult circumstances being faced by companies, which is often time critical. In *NUM v CCMA and Others* [2011] 7 BLLR 713 (LC), the Labour Court considered the scope of the powers of a facilitator appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) in large-scale retrenchment consultations under section 189A of the LRA. The judgment confirms that a facilitator's role is primarily procedural and facilitative. Unless the parties agree otherwise, a facilitator may not make binding substantive rulings on issues such as the level at which retrenchment consultations must be conducted. This is significant because it allows the facilitation process to be focused on the consultative topics while the parties work against the clock imposed by the LRA to attempt to reach consensus.



Facts

The employer issued a notice in terms of section 189(3) of the LRA, contemplating the retrenchment of approximately 454 employees. In the same notice, the employer requested the CCMA to appoint a facilitator in terms of section 189A(3) of the LRA.

At the first facilitation meeting, certain unions objected to one facilitation process covering all the employer's affected operations. They argued that each operation was autonomous and constituted a separate workplace, and that each should therefore have its own separate consultation process. The employer disagreed and maintained that it was the employer of all affected employees, irrespective of the operation in which they worked.

The facilitator adjourned the meeting and later issued an outcome in which he made a Ruling that each affected operation had to be consulted separately. The Ruling was based on the definition of "workplace" in section 213 of the LRA. The National Union of Mineworkers (NUM) brought an application in terms of section 158(1)(g) of the LRA to review and set aside the facilitator's ruling. It contended that the facilitator had exceeded his powers under section 189A of the LRA and the applicable Regulations for the Conduct of Facilitations (Facilitation Regulations).





Legal question

The central issue before the Labour Court was whether a facilitator appointed under section 189A(3) of the LRA has the power to make a binding ruling on the level at which retrenchment consultations must be conducted.



Applicable law

Section 189A(3) of the LRA allows the CCMA to appoint a facilitator in large-scale retrenchment consultations. Section 189A(6) (b) of the LRA empowers the Minister of Employment and Labour, after consulting National Economic Development and Labour Council and the CCMA, to make regulations relating to the powers and duties of facilitators.

Regulation 4(1) of the Facilitation Regulations provides that, unless the parties agree otherwise, a facilitator may chair meetings, decide issues of procedure for the efficient conduct of such facilitation meetings, and even direct the parties to consult without the facilitator being present. Regulation 4(2) provides that a facilitator's decision on any matter concerning the procedure for the actual facilitation, including the date and time of meetings, is final and binding.



Application of law to the facts

The Labour Court held that the facilitation process under section 189A is intended to assist the parties to reach consensus. It is not designed to empower a facilitator to make binding rulings on substantive disputes that could arise during retrenchment consultations. The court drew a clear distinction between procedural directives and substantive determinations. A facilitator may regulate the conduct of facilitation meetings, and procedure to be adopted at such meetings. However, the power to decide procedural issues under Regulation 4(1)(b) does not extend to deciding the level at which section 189 consultations must take place.

The court found that the facilitator's ruling was not merely procedural. By directing that each affected operation had to be consulted separately, the facilitator determined the structure of the consultation process itself. That was a substantive issue and, in the absence of agreement between the parties, fell outside the facilitator's powers.

The court also held that the facilitator's reliance on the definition of "workplace" in section 213 of the LRA was misplaced. That definition is relevant

in the context of organisational rights and any workplace forums, but it does not determine the level at which retrenchment consultations must be conducted. The Labour Court accordingly reviewed and set aside the facilitator's Ruling.

In the recent CCMA ruling in *NUM and UASA v Richards Bay Minerals*, a facilitator in a section 189A process declared the employer's section 189(3) notice defective. It held that the CCMA lacked jurisdiction to facilitate the matter and directed the employer to reissue the notice. Properly understood through the lens of *NUM v CCMA*, the facilitator appears to have exceeded his powers. Whether a section 189(3) notice complies with the LRA is a substantive question, not a procedural issue. While a facilitator may regulate the process and, where empowered, deal with disputes about the disclosure of information, they may not make binding determinations on substantive aspects absent agreement between the parties. The Ruling therefore illustrates the precise risk identified in *NUM v CCMA*: a facilitator assuming an adjudicative role under the guise of facilitation.





Key Takeaways

The judgment confirms that CCMA facilitators appointed under section 189A of the LRA perform an important but limited role. Their function is to facilitate meaningful consultation, not to determine substantive disputes between the consulting parties which once made need to be set aside by the Labour Court.

A facilitator may make final and binding decisions on matters concerning the procedure for conducting facilitation under Regulations 4(1) and 4(2). However, absent agreement between the parties, a facilitator may not make binding rulings on substantive issues such as the level or structure of retrenchment consultations.

For employers, the judgment is a useful reminder that the duty to conduct a fair consultation process remains with the employer. For unions and employees, it confirms that concerns about the fairness or structure of consultation must be pursued through the appropriate remedies under the LRA, rather than through an overextension of the facilitator's statutory powers.

Fiona Leppan, Imraan Mahomed, Kgodisho Phashe, Biron Madisa and Goitsemodimo Litheko



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Is there a time period within which to distribute the payment of a death benefit?

On 28 May 2026, the Supreme Court of Appeal (SCA) delivered a landmark judgment in *South African Retirement Annuity Fund v Pension Funds Adjudicator and Another (1163/2024) [2026] ZASCA 79 (28 May 2026) clarifying section 37C(1) of the Pension Funds Act 24 of 1956 (Act) in terms of the time period within which a fund is required to trace and pay dependants.*

Section 37C(1) of the Act provides for two scenarios:

1. If the fund, within 12 months of the death of the member, becomes aware of or traces a dependant(s), the benefit must be paid to such dependant or, as determined by the fund, to one or more dependants.

2. If the fund does not become aware of or cannot trace any dependant within 12 months of the death of the member, and the member has designated a nominee who is not a dependant, the benefit (or a portion thereof) must be paid to such nominee.

The central question before the SCA was whether a pension fund is relieved of its obligation to trace and pay dependants after the 12-month period stipulated in section 37C(1) has lapsed from the date of the member's death.

The SCA rejected such a restrictive interpretation, holding that the 12-month period serves as a guideline for the administration of death benefits, rather than an absolute cut-off that extinguishes the rights of dependants.



Facts

Mr Marius Viljoen passed away on 26 December 2019. He was a member of the South African Retirement Annuity Fund (Fund), underwritten by Old Mutual Life Assurance Company (South Africa) Limited, and had a retirement annuity benefit of R52,120.53. He had not nominated a beneficiary and died intestate. As the value of his estate fell below the statutory threshold of R250,000, no executor was appointed.

Mr Viljoen was survived by his wife, Mrs Sophia Viljoen, who relied solely on a state-funded old-age social relief grant. She was unaware of the existence of the retirement annuity benefit until it was brought to her attention by a broker. On 28 March 2022 – approximately two years and three months after Mr Viljoen's death – she submitted a claim to the Fund with the broker's assistance.

The Fund repudiated Mrs Viljoen's claim on the basis that no dependant had been identified within 12 months of Mr Viljoen's death. On 18 July 2022, it resolved to pay the death benefit into Mr Viljoen's estate, despite the estate not having been reported to the relevant Master of the High Court.

Mrs Viljoen lodged a complaint with the Pension Funds Adjudicator, which on 23 June 2023 set aside the Fund's decision and directed it to investigate and determine the deceased's beneficiaries. The Fund challenged this determination in the High Court, which dismissed its application and confirmed the adjudicator's order.



The SCA's decision and key principles

The SCA dismissed the appeal. The key principles emerging from the judgment are as follows:

The 12-month period is not an absolute cut-off

The process of tracing and determining dependants can only commence once the Fund becomes aware of the member's death. It is the Fund's knowledge of the death – not the date of death itself – that triggers the identification and verification process. The 12-month period was intended as a guideline to promote administrative efficiency, rather than being a rigid deadline.

The Fund bears a statutory duty to trace dependants

Section 37C of the Act imposes a legal duty on the Fund to identify the dependants and nominees of a deceased member. Once identified, the Fund must effect an equitable distribution of the death benefit. This process necessarily involves tracing dependants, which is a precondition to identification – not a discretionary exercise. Accordingly, even where the Fund becomes aware of the death more than 12 months later, nothing precludes it from investigating and tracing dependants.

Payment to the estate is a last resort, not the default

Section 37C(1) makes clear that death benefits do not form part of the deceased estate. Payment to the estate under section 37C(1)(c) is permissible only once all statutory avenues for tracing and identifying dependants and nominees have been exhausted. The Fund's interpretation – which treated payment to the estate as the default position – was inconsistent with the purpose of the Act.

The definition of "unclaimed benefits" reinforces a flexible timeframe

The definition of "unclaimed benefits" in section 1 of the Act refers to a death benefit not paid within 24 months from the date on which the Fund becomes aware of the death of a member, or within such longer period as may be reasonably justified by the board. The SCA relied on this to confirm that funds are afforded a reasonable period to identify and determine dependants before transferring benefits to an unclaimed benefit fund.



Key takeaways for pension funds and practitioners

This judgment sends a clear signal to pension funds and retirement annuity providers:

- The 12-month period in section 37C(1) is a guideline aimed at promoting administrative efficiency, not a statutory deadline that extinguishes the rights of dependants.
- Funds must not default to paying death benefits into the estate merely because 12 months have elapsed from the date of death.
- Funds are required to exhaust all avenues for tracing and identifying dependants before resorting to payment to the estate.
- Ultimately, the judgment reinforces the foundational principle that section 37C constitutes social security legislation designed to protect the dependants of deceased members, and must be interpreted and applied in a manner that advances that purpose.

Imraan Mahomed and Thato Makoaba



High Court rules against employer's unlawful deductions

In *Malumane v MEC for Health – Mpumalanga and Others* [2026] ZAMPMBHC 47 (11 June 2026), the High Court, Mpumalanga Division, reiterated that employers may not make deductions from an employee's remuneration without the employee's written consent or other lawful authority as required by section 34 of the Basic Conditions of Employment Act 75 of 1997 (BCEA).



Factual background

The applicant, a clinical manager, medical doctor and office bearer of the South African Medical Association Trade Union (SAMATU), attended several SAMATU and Health Professions Council of South Africa (HPCSA) meetings and activities during days which he ought to have been at work. SAMATU had formally requested his release from duty to attend the activities and the applicant had formally submitted his request for leave for the days he was attending HPCSA meetings. However, when the applicant approached the human resources (HR) department to access his payslip, he discovered that his employer had made two substantial deductions amounting to R105,000 which were categorised as "leave without pay" and "overtime". Soon thereafter, the applicant approached the High Court, Mpumalanga Division, on an urgent basis, seeking an order declaring the deductions unlawful and interdicting his employer from making further deductions. The respondents, officials within the Mpumalanga Department of Health, opposed the application on the basis that the matter lacked urgency and that the High Court lacked the jurisdiction to adjudicate the matter. The employer alleged that the applicant had not obtained the correct approvals, hence the deductions from his remuneration.





The legal position

The BCEA strictly limits when deductions may be made by an employer from an employee's salary. In terms of section 34, an employer may only deduct from an employee's remuneration where such employee has agreed in writing, or where the deduction is authorised by law, by a collective agreement, court order or arbitration award. Any deduction made outside of this scope is unlawful.



Court's findings

The High Court heard the matter on an urgent basis. The court rejected the jurisdictional point raised by the respondents on the grounds that it enjoyed concurrent jurisdiction in terms of section 77(3) of the BCEA on the basis that the claim was contractual in nature.

On the merits, the High Court, per Vukeya J, rejected the employer's argument that the employee's absence was unauthorised and that it could therefore deduct from his remuneration. It was common cause that the SAMATU had requested that the employee be absent from work to partake in trade union activities, by submitting leave requests for days which he would be absent. It was further common cause that the employer had not responded to the requests from the trade union.

In assessing the lawfulness of a deduction in terms of section 34 of the BCEA, the court held that the question was not whether or not the leave (being the reason for the deduction) was approved or authorised, but whether or not the deduction met the criteria set out in section 34. The court conveniently summarised the section 34 criteria as such deduction being authorised by either (i) a written agreement to the deduction of a debt specified in that agreement; or (ii) the deduction is required or permitted in terms of a law, a collective agreement, a court order or an arbitration award. The High Court pointed out that there was no agreement to deduct from the employee's remuneration and held that the employer "*resorted to self-help*" when it deducted from the applicant's remuneration. The court found such conduct impermissible and contrary to section 34 of the BCEA. In the result, the High Court interdicted the employer from making deduction to the employee's remuneration and ordered that the employee be repaid all monies which were unlawfully deducted.



Key takeaways

- The High Court has concurrent jurisdiction with the Labour Court in respect of contractual claims arising from an employment relationship, including claims based on section 34 of the BCEA.
- Employers may not deduct amounts from an employee's remuneration without complying with section 34 of the BCEA, even where they believe, or as a matter of fact, the employee is not entitled to payment.
- Even where an employee's absence from work is questioned, an employer is required to follow lawful processes and may not resort to self-help by withholding the employee's contractual remuneration. It amounts to breach of contract where an employer withholds or deducts such contractual remuneration in the absence of consent from the employee.

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