



# Employment Law

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## SOUTH AFRICA

- Global restructuring is subject to local operational requirements: CCMA confirms that the tail does not wag the dog
- Data privacy and retirement fund investigations



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## Global restructuring is subject to local operational requirements: CCMA confirms that the tail does not wag the dog

Can a South African subsidiary fairly retrench employees simply because a foreign parent company has decided to reduce global headcount due to global constraints, not local operational needs?

A recent Commission for Conciliation, Mediation and Arbitration (CCMA) arbitration award provides a clear answer, namely: The decision of a foreign holding company to reduce its global headcount does not, without more, qualify as operational requirements of the South African subsidiary's (employer's) business.



### Background

In a recent arbitration, the CCMA commissioner considered whether the retrenchment of an employee was substantively and procedurally fair. The employer relied on a group-level restructuring decision taken by its foreign parent company and implemented locally.

The evidence showed that the South African entity was not experiencing financial difficulty, the employee's salary was paid locally, while her services benefited the global organisation for free, and the decision to reduce headcount was effectively taken at parent-company level and implemented in South Africa. Crucially, there was no proof of other retrenchments at the global level. There was no consultation on the rationale, the selection criteria or alternatives to retrenchment before the decision to dismiss was taken, meaning the consensus-seeking process required under section 189 of the Labour Relations Act 66 of 1995 (LRA) was found wanting. These facts became central to the commissioner's analysis.

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## Key findings

### Operational requirements of the local undertaking

The commissioner reiterated that dismissals for operational requirements must be based on the local undertaking's economic, technological, structural or similar needs.

A general instruction from a foreign parent company to reduce headcount was held to be insufficient where the local entity could not demonstrate how the dismissal served its own operational needs.

In particular, the commissioner found that the employer's business case was flawed where the South African business was financially stable, no evidence was presented to show that retrenchment would produce savings for the group, and that no evidence was adduced to demonstrate that the employees position was genuinely redundant at local level.

### Consultation must be genuine and not a *fait accompli*

The award also emphasised that consultation under section 189 of the LRA requires a genuine consensus-seeking process.

Where a decision to retrench has already been taken at global level and is merely implemented locally, consultation risks becoming a formality rather than a meaningful engagement.

The commissioner observed that in the case before her, the decision to dismiss had effectively already been made before the consultation process had commenced, making much of the consultation process a "*sham*".

### The focus remains on the local undertaking

A recurring theme is that the legal enquiry focuses on the employer in South Africa, not the multinational group as a whole.

Even where group-level restructuring occurs, the South African entity must demonstrate a real operational need within its own business, meaningful consultation on the business rationale and operational requirements of the local business, and evidence supporting the redundancy of the position.

The commissioner further noted that: "*international companies doing business in South Africa must follow South African law, and that includes the obligation to consult before deciding to dismiss for operational requirements*".

Absent these elements, dismissals may be found both substantively and procedurally unfair, as occurred in this case.





## Business rationale versus operational requirements

The award serves as a useful reminder of an important distinction between business rationale and operational requirements.

A business rationale refers to the strategic objective an organisation seeks to achieve, such as reducing costs or restructuring operations globally. Operational requirements, by contrast, refer to the concrete operational measures required within a particular employer's business to achieve that objective.

The reduction of headcount would qualify as an operational requirement where the decision is to reduce operating expenditure and the method chosen is reduction of employee costs.

While a general instruction from a foreign parent company to reduce headcount is, without more, neither a business rationale nor an operational requirement by itself, the existence of a business rationale at group level does not automatically establish operational requirements at subsidiary level. The latter must be independently demonstrated.



## Practical takeaways for employers

This award underscores several important principles for multinational employers operating in South Africa:

- **Global decisions are not determinative:** A group directive to reduce headcount does not, without more, establish operational requirements for a South African subsidiary to justify a local retrenchment in South Africa.
- **Local justification is essential:** Employers must be able to demonstrate a genuine operational need of the South Africa business.
- **Consultation must be meaningful:** Consultation must occur before any final decision is taken and must involve genuine engagement on rationale, alternatives, and selection criteria.
- **Evidence matters:** Employers should be prepared to substantiate the financial or operational basis for retrenchment at the level of the local entity.



## Conclusion

For multinational enterprises; South African labour law applies to the South African employer, and where strategic decisions are taken by the foreign holding company 'on a global scale' (or affecting several jurisdictions), such decision must, in fact, translate into a local business rationale, and result in a genuine operational requirement, of the local undertaking (entity's business).

Careful planning, proper local analysis and genuine consultation remain essential to ensuring that retrenchments for operational requirements withstand scrutiny.

**JJ van der Walt and Sashin Naidoo**

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## Data privacy and retirement fund investigations

In the determination of a benefit allocation, a retirement fund inevitably conducts an investigation. Can the fund withhold the investigation report because of the personal information contained in the report? This question arose in the March 2025 determination of *LA Magoso v Eskom Pension and Provident Fund* (issued under section 30M of the Pension Funds Act 24 of 1956) (PFA/KN/00112802/2024/YVT), where the Pension Fund Adjudicator (Adjudicator) set aside the fund's distribution allocation following its interpretation of the Protection of Personal Information Act 4 of 2013 (POPIA) relative to the investigation processes.



### Background

Following the death of a fund member, a R560,160 death benefit became payable. Beneficiaries included the **customary spouse, life partner, major children**, and one **minor child**. The fund allocated 28% to the customary spouse (the complainant), 30% to the minor child, and 28% to the life partner, with the remaining 14% split among the major children. The complainant challenged the inclusion of the life partner and the validity of the beneficiary nomination form. The complainant thereafter sought access to the investigation report.

The fund stated that it was unable to inform the dependants about its investigations based on, *inter alia*:

- **Confidentiality:** Rule 8.3 of the Fund's Promotion of Access to Information Act (PAIA) manual, which is in line with section 11 of POPIA, prohibits sharing of personal information to third parties unless the interested party requests it through the PAIA request form, which is available on the fund's website.
- **Efficiency:** Informing other possible dependents of the investigations could lead to intimidation, bribery or coercion.

The matter came before the Adjudicator. Initially, the fund also refused access to the Adjudicator, raising concerns about providing supporting documents related to a resolution passed by the board, citing the need to protect beneficiaries' information.





## Adjudicator findings

The Adjudicator found that a public body defined in POPIA is permitted to process personal information while exercising its powers, duties and functions in accordance with the Act . The Adjudicator concluded that:

- It falls within the meaning of “*tribunal*” as provided in sections 12(2)(d)(iii) and 18(4)(c)(iii) of POPIA. These subsections allow the Adjudicator to collect personal information from sources other than the data subject when necessary for the conduct of proceedings that have been commenced or are reasonably contemplated. In these circumstances, notifying the data subject about the information required is unnecessary. Therefore, the fund was obliged to provide the requested information without obtaining consent from the beneficiaries.
- The Adjudicator also found that in fulfilling its duties in terms of section 37C of the Pension Funds Act 24 of 1956 (PFA), the board must conduct thorough investigations and gather all relevant evidence from beneficiaries.
- In adjudicating disputes relating to death benefits, the Adjudicator’s role is to assess whether the board acted rationally, reasonably and in accordance with the law.
- The board bears the onus of demonstrating to the Adjudicator that it has conducted a proper investigation in accordance with section 37C by providing the Adjudicator with the investigation report and supporting documentation, so that the Adjudicator can ascertain whether the fund has acted in accordance with the PFA. Therefore, the Adjudicator is entitled to the information that was before the fund when it made its decision.

The Adjudicator also noted that the Financial Services Tribunal had previously remarked that the Adjudicator should insist on investigation reports to ensure sufficient information is available to confirm the fund’s reasoning behind an allocation (see *Semenya and Others v Old Mutual Superfund Pension Fund and Others*, FST, PFA 31/2024).



## Takeaways for retirement funds

Retirement funds cannot invoke privacy legislation to restrict oversight by the Adjudicator.

This determination underscores the growing scrutiny on governance and decision making processes within retirement funds. Boards must ensure:

- Documented, evidence based investigations.
- Proactive dependency assessments are conducted with corroborated evidence.
- Transparent decision making is consistent with section 37C of the PFA.
- Clear audit trails of all investigative steps are maintained.
- Appropriate evaluation of dependency, age, financial need, nomination forms and deceased's wishes.
- Nomination forms are always considered, even where dependency diverges.

Little to no reliance on POPIA or PAIA to limit oversight by the Adjudicator.

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