

Employment Law



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SOUTH AFRICA

- Compete for your own job?
Why restructuring employers must justify new qualification requirements and ensure procedural fairness

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Compete for your own job? Why restructuring employers must justify new qualification requirements and ensure procedural fairness

In *Bothma v Petra Diamonds Southern Africa (Pty) Ltd* (JS 466/2023) [2026] ZALCJHB, delivered on 15 May 2026, the court held that an employer's dismissal of an employee for operational requirements was both procedurally and substantively unfair. The employer had required an incumbent employee to compete for a restructured position that substantially overlapped with functions he had already been performing, applying newly introduced tertiary qualification requirements that it had not objectively justified. The court awarded the employee compensation equivalent to 12 months' remuneration.



Factual background

The employee commenced employment with the employer in 2016 as a group procurement practitioner, appointed on the strength of his many years of procurement and supply chain experience despite not holding formal tertiary qualifications. In December 2020, he was promoted to the more senior, group-wide role of group supply chain manager.

Approximately four months later, following concerns about his lack of tertiary qualifications and that the position ought to be filled by a Black Economic Empowerment (BEE) candidate, he accepted placement in the lower position of procurement co-ordinator and agreed to continue acting as group supply chain manager until a permanent BEE appointment was made.

In December 2021, a new group supply chain manager was appointed, who became the employee's direct line manager. In June 2022, she

presented a proposed new organisational structure that described the employee's procurement co-ordinator position as "obsolete".

The employee applied for the position of procurement manager, which he contended was substantially identical to his existing procurement co-ordinator role. Although shortlisted and interviewed, he was not appointed. The successful candidate was also white male who possessed the stipulated academic qualifications.

He later applied for another position but was again unsuccessful because tertiary qualifications were required. After failed mutual separation discussions, the employer issued a section 189(3) notice on 24 March 2023, identifying the employee as the sole potentially affected employee. No further formal consultation took place, and his employment was terminated with effect from 1 May 2023.





Legal issues

The employee advanced three claims:

1. Automatically unfair dismissal on the ground that the dismissal was for a prohibited reason, namely his race and/or the arbitrary ground of his lack of formal qualifications.
2. Ordinary unfair dismissal for operational requirements, both procedurally and substantively.
3. Unfair discrimination under section 6 of the Employment Equity Act 55 of 1998 (EEA), based on race and/or the arbitrary ground of lack of tertiary qualifications.



The court's findings

Automatically unfair dismissal and unfair discrimination

The court held that race was not the dominant cause of the dismissal. Although earlier race-related considerations formed part of the factual background, the subsequent restructuring was a materially independent operational process. The procurement manager position was ultimately filled by a white male, undermining any inference of racial motivation.

On unfair discrimination, the court held that lack of tertiary qualifications was not an arbitrary ground analogous to listed grounds, as tertiary qualifications are not immutable and lacking them does not impair human dignity comparably to grounds listed in section 6 of the EEA.

Procedural unfairness

The court found that the employer's section 189 process was procedurally unfair for several reasons:

- The employee's position had been identified as obsolete in June 2022, yet the section 189(3) notice was issued only in March 2023, after failed applications and mutual separation discussions.

- No meaningful consultation took place after the section 189(3) notice was issued.
- The section 189 notice was treated as a formality rather than the commencement of meaningful engagement.

Substantive unfairness

The court held that the employer did not establish a fair basis to treat the employee as "dislocated" or to require him to compete for continued employment in the following respects:

- The procurement manager role substantially overlapped with the functions the employee had been performing. Requiring him to compete for what was essentially his existing job was unfair.
- The employer did not establish objective justification for why tertiary qualifications had suddenly become necessary, given that the employee had been performing the work competently without them.
- The fact that the employer shortlisted and interviewed the employee despite his lack of qualifications undermined the contention that tertiary qualifications were a genuine prerequisite for the role.



Key takeaways for employers

- Newly introduced qualification requirements must be objectively justified. When a restructured role substantially overlaps with existing functions, the employer must demonstrate why new criteria have become genuinely necessary.
- Shortlisting undermines a “*genuine prerequisite*” argument. If an employer shortlists an employee who does not meet a purported qualification requirement, it becomes difficult to contend that the qualification was a genuine prerequisite.
- Section 189 consultations must commence as soon as retrenchments are contemplated (i.e. when dismissal becomes a potential outcome) not after mutual separation discussions have failed or after the decision has already been made.
- Meaningful consultation must follow the section 189(3) notice. Issuing the notice and then taking no further consultation steps will be fatal to procedural fairness.
- An employee cannot be required to compete for his or her own job. Where the substance of a restructured role is materially the same as the employee’s existing role, the employee should not be treated as dislocated.
- Lack of qualifications are not, without more, an “*arbitrary ground*” for discrimination. It is not analogous to listed grounds under section 6 of the EEA. However, employers should not use qualification requirements as a pretext for unlawful differentiation.



Conclusion

An employer remains entitled to restructure and set legitimate role requirements. However, this judgment reminds us that an employer’s prerogative is not unfettered. Where a restructuring results in roles that substantially overlap with existing functions, the employer must justify why an incumbent should compete for continued employment on the basis of newly introduced criteria. Section 189 consultation must be genuine, meaningful and timely.

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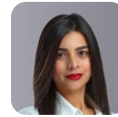
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