

SOUTH AFRICA / JUDGMENT

HeroTel (Pty) Ltd v Moses and Others

(CA05/2024) [2025] ZALAC 42 (10 July 2025)

[2025] ZALAC 42

COURT

Labour Appeal Court

BEFORE

Savage, Waglay, Musi

CASE / FILE NUMBER

CA05/2024

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FLYNOTES:

LABOUR – Dismissal – Operational requirements –
Misleading
rationale provided – Omitted key details about transfer of
business units and revenue streams to business
– Lack of
transparency – Undermined fairness of consultation process
and substantive justification for dismissals
– Failure to
disclose information directly impacted employees’ ability to
challenge rationale for retrenchment
– Reliance on financial
difficulties not supported by evidence – Dismissals
substantively unfair – Appeal
dismissed – Labour
Relations Act 66 of 1995, s 189.
THE
LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN
Not
Reportable
Case
no: CA05/2024
In

the matter between: HEROTEL
 (PTY)
 LTD
 Appellant
 and
 GHIEM
 MOSES AND 10 OTHERS
 First Respondent
 FUSION
 WIRELESS (PTY) LTD t/a SONIC TELECOMS
 Second Respondent
 JL
 KRYNAUW
 N.O
 Third Respondent
 CC
 MIENIE
 N.O
 Fourth Respondent
 HERO
 TELECOMES (PTY) LTD
 Fifth Respondent

Heard: 15 May 2025

Delivered: 10 July 2025

Coram: Savage JA, Waglay et Musi AJJA

JUDGMENT

WAGLAY, AJA

Introduction

- [1] This appeal, with leave of the court a quo, concerns the fairness of the dismissal of the respondents (Affected Employees) on the grounds of operational requirements.

Condonation

- [2] There are two applications for condonation in this appeal: one in respect of the late filing of the record of appeal, and another with respect to the late filing of the Affected Employees' heads of argument. I will deal with both in turn.
- [3] The appellant has sought condonation for the late filing of the record of appeal, which is some nine months late. The application is unopposed. In explaining the delay in the filing of the record, the appellant points to the delay in locating the entirety of the appeal record as the greater part of the cause of the delay in its filing. Although the delay is excessive, the explanation is sufficient and detailed. The appellant continually sought to update the record

until it was finally complete. I am satisfied that there was neither a deliberate delay nor any negligence in the late filing of parts of the record. In the circumstances, I am satisfied that condonation for the late filing of the record should be granted and the appeal reinstated.

- [4] The Affected Employees have also sought condonation for the late filing of their heads of argument. Heads of arguments are not pleadings but serve as an aid to the Court, a chairperson or a commissioner. While rules may require heads to be filed at a particular time or heads or full argument may be requested by the person(s) presiding to be filed by a particular date, failure to do so within the time limit or at all does not prejudice the merits of the case of the party who has failed to comply. The presiding officer has a discretion with regard to the further conduct of the proceedings because of the failure to file heads of argument timeously.
- [5] In the exercise of its discretion, this Court will receive the heads and additional heads late; the respondent was given an opportunity to respond to the additional heads if they so wished within five days after argument was concluded in the matter.

Background

to the dispute

- [6] During 2020, HeroTel Group announced that four of its entities, including its subsidiary, Fusion Wireless, trading as Sonic Telecoms (hereafter “Fusion”), would be undergoing a retrenchment exercise. The Affected Employees were employed by Fusion.
- [7] On 1 September 2020, Fusion issued its employees, including the Affected Employees, with a s 189(3) notice in terms of which retrenchment within the entity was contemplated.
- [8] In terms of the notice, the rationale for retrenchment was described as being financially driven. In particular, the notice detailed the financial position of the Fusion, namely that it was experiencing a worrying trend over a nine-month period within the Western Cape metropolitan area. This trend is illustrated by inter alia a downturn in sales, an increase in churn (increase in the number of clients who ceased doing business with Fusion), and an increase in the number of customers who were choosing fibre over wireless, wireless being the service provided by Fusion. Adding to this, the national lockdown, due to the COVID-19 pandemic, had impacted the business and its customers’ ability to make payments on time. According to the notice, the business was not in as sound a financial position as it had been in the past, and it was unable to continue operating as it had.
- [9] In setting out the selection criteria to be used, the s 189(3) notice indicated that the selection criteria for each department would be dealt with during the consultation process, that Fusion proposed that ‘skills’ be used as the predominate selection criteria and that the employees may also be selected based on LIFO, according to the operational requirements of the said department.

- [10] The consultation process was facilitated by a CCMA commissioner.
- [11] The first consultation was held on 22 September 2020, whereat the business reiterated that the rationale for the contemplated retrenchments was due to financial reasons as contained in the notice.
- [12] During the consultation, the Affected Employees contested the rationale presented for possible retrenchments, submitting that the reason for retrenchments was due to a series of intercompany transactions between Fusion and the other entities within the HeroTel Group which resulted in the selling off of key revenue streams to the appellant, negatively impacting the finances of the Fusion.
- [13] Between the first and second consultation meetings, the Affected Employees sought the disclosure of certain financial information, including Fusion's audited income statements, its management accounts and various other

financial information in order to support its contention that Fusion had entered into intracompany transactions in a bid to move its key revenue streams. This request was refused during the second consultation meeting held on 28 September 2020.

- [14] Between 2 and 6 October 2020, there was correspondence between the Affected Employees and Fusions in a bid to secure the disclosure of the financial information requested. While these discussions were taking place, on 8 October 2020, the Fusion wrote to some of its individual employees, notifying them that consensus had been reached on the selection criteria to be applied,

that being one based on performance. The Affected Employees disputed that any such consensus had been reached on the selection criteria.

- [15] The refusal to provide the requested documentation prompted the Affected Employees to approach the CCMA in terms of s 16 of the Labour Relations Act[1] (LRA) for the disclosure of and access to the requested information. The application was successful, and on 19 October 2020, the CCMA ruled that Fusion's financial information be disclosed including the preceding four years of audited financial statements; management accounts for the period ending in September 2020; and inter-group financial transactions and management account transaction between Fusion and HeroTel subsidiary companies if reflected in the requested management accounts.
- [16] Despite the terms of the ruling requiring the disclosure of the audited financial statements for the year 2020, those were not forthcoming. Instead, a draft, unaudited statement was provided. In that respect, the reason proffered to the Affected Employees was that the 2020 audited financials were not yet ready and had not yet been audited. It was the position of the Affected Employees that without these audited financials, they were unable to engage meaningfully in the consultation process

particularly as, had they been provided with the requested information, the Affected Employees would have been able to demonstrate that the rationale for retrenchment was unjustified, pre-determined or substantively unfair or to propose alternatives to retrenchment.

[17] The Affected Employees were ultimately dismissed in and during October and November 2020.

[18] The Affected Employees referred an unfair dismissal dispute to the CCMA for conciliation and then for adjudication to the Labour Court.

[19] On 20 May 2022, what was left of Fusion was placed in voluntary liquidation. However, prior to the hearing of the dispute in the Labour Court, the (I suspect provisionally) liquidated business, Fusion's business, and the contracts of employment of its employees were transferred in terms of s 197 of the LRA to the appellant.

In the Labour Court

[20] The Labour Court took the view that, with regard being had to the Constitutional Court judgment of *Solidarity on behalf of members v Barloworld Equipment Southern Africa and Others*[2], which held that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal for operational requirements

referred to it in terms of s 191(5)(b)(ii) of the Act, it did not have jurisdiction to consider the procedural fairness of a retrenchment conducted in terms of s 189A of the LRA.

[21] Turning to the substantive fairness of the dismissal, the court found that the redirection of company money to the holding company in the manner as done between Fusion and appellant, leading to the gradual transfer of the business and its eventual voluntary liquidation and thereafter the s 197 transfer, supported the contention that the retrenchments were a *fait accompli*. Further, the court found that no evidence had been led to support the statement that a fair and objective selection criteria had been used, or that any consideration of the alternatives to retrenchment had been made. On that basis, the court found that the dismissals were substantively unfair. The court *a quo* ordered the retrospective reinstatement of the Affected Employees.

On appeal

[22] The appellant now seeks an appeal against the whole of the judgment of the court *a quo*. The appellant advanced six points in support of its case, namely:

22.1. The court *a quo* made findings on issues that were not properly before it, more particularly in respect to the selection criteria and the alternatives to retrenchment. Alternatively, the court erred in finding that no evidence had been led to establish substantive fairness in respect of the selection criteria and the alternatives to retrenchment;

22.2. The evidence led at trial did not support the finding that the retrenchment of the Affected Employees constituted a fair accompli, particularly as the court was not empowered to consider issues of procedural fairness;

22.3. The court erred in finding that the test for the fairness of the underlying rationale was something other than whether the rationale was operationally justifiable on rational grounds; particularly, that the Court was not entitled to second-guess the employer's rationale on how it had decided to conduct its business;

22.4. The court failed to make a finding on the fairness of the underlying rationale, i.e. the financial rationale for retrenchments.

Alternatively, if the court made such a finding by implication, it erred in finding that the rationale was unfair;

22.5. The court erred in finding that the retrenchment of the Affected Employees was substantively unfair; and

22.6. The court erred in finding that reinstatement was appropriate.

[23] The appellant argued that it was not the Affected Employees' pleaded case that their retrenchment was in some way substantively unfair due to the selection criteria used or that alternatives to retrenchment existed, nor were these issues included by the first respondent in the main portion of the second pre-trial minute concluded between the parties as issues in dispute.

[24] As the contention went, the first respondent had only raised the issue of selection criteria in the additional section of the pre-trial minute dealing with the Judge President's directives relating to retrenchment disputes, which was objected to as selection criteria had not been pleaded.

[25] The appellant further stated that the Affected Employees had not raised that any alternatives to retrenchment had existed; instead, the Affected Employees had pleaded that, as they had not been provided with the relevant information and financial documents, they were unable to participate meaningfully in the retrenchment process.

[26] On the finding that the retrenchment of the Affected Employees was a fait accompli, the appellant submits that it is unclear whether the court a quo had found that the retrenchments were indeed a fait accompli, as the court had merely remarked that the Affected Employees' proposition in this regard had been strengthened. Nevertheless, the appellant submits that the findings that the retrenchments were a foregone conclusion are wrong on the basis that (i) the Affected Employees sought to challenge the procedural fairness of their dismissals based on the allegation that their retrenchments were presented as a fait accompli, with no allegation of substantive unfairness linked to this allegation; and (ii) the allegation of a dismissal being a fait accompli speaks to procedural fairness and that, as the court had found that it did not have the necessary jurisdiction to determine

allegations of procedural fairness, the allegation that the retrenchment was a *fait accompli* should not have been decided by the court.

- [27] On the test used to determine the fairness of the rationale advanced, the appellant impugned the court a quo's finding that the test was something other than whether the rationale was operationally justifiable on rational grounds and took issue with the court's intimation that a rational decision cannot be a fair decision because a fair decision is one that balances the interests of both the employer and employee.
- [28] In the Affected Employees' statement of case, the issues for determination included whether Fusion had taken steps to inter alia slow down steps and whether Fusion's decision to conduct retrenchment processes was premised on a fair rationale, and that was a challenge to the substantive fairness of the retrenchments. However, the court a quo, in discussing these issues, held that this strengthened the proposition that the retrenchments were a *fait accompli*, a procedural fairness issue. Thus, so the argument goes, the court a quo did not make a finding as to the fairness of the rationale, which argument is bolstered by the court a quo's rejection of the appellant's evidence relating to the rationale. Thus, the appellant submitted that the court erred in not making a definitive finding as to the fairness of the rationale.
- [29] Finally, the appellant submitted that the record of evidence was sufficient to establish that it met the test that the rationale for retrenchment was operationally justifiable on rational grounds and that, in coming to a contrary decision, the court a quo erred in finding that the Affected Employees should be reinstated.
- [30] The Affected Employees, on the other hand, contended that, despite what was contained in the s 189(3) notice regarding the reasons for the proposed retrenchments, the true reason for the retrenchments related to the move/transfer of various business units of Fusion to the appellant. In its evidence, the Affected Employees submitted that Fusion's finances, contrary to what was contained in the s 189(3) notice, actually showed an increase in revenue and profits (after tax) in the year ending 31 March 2020.
- [31] Contrary to the s 189(3) notice and the appellant's submissions, the Affected Employees' submissions paint a picture of a fairly complex accounting exercise intended to transfer/move the business of Fusion to the appellant without the knowledge of the Affected Employees, including actions taken before, during and after the retrenchment process. These actions included: (i) the unilateral decision to discontinue providing services in terms of Fusion's reseller agreements which had generated revenue for the business in excess of R19 million during the period April to September 2020; (ii) the transfer of the clients of Fusion to the appellant some months before the issuing of the s 189(3) notice; (iii) the unilateral levying of a 'administration and management' fee of R12 million as demonstrated in the 2020/2021 annual financial statements where no such fee had been imposed in the preceding year and where no evidence existed that any actual expenses had been incurred between the group entities; and (iv) a sharp increase (in excess of R10 million) in 2021 of the

'lease rentals on operating lease' costs.

- [32] The Affected Employees argued that Fusion had manufactured the very financial crisis and increase in client turnover that it sought to rely on in terms of its s 189(3) notice to justify its decision to engage in a retrenchment process and that such decisions, particularly with respect to the movements of business units and transfer of clients from Fusion to the holding company, were taken without any explanation, discussion or consultation with the Affected Employees, though it should have been obvious that these decisions would impact the employees. It further submitted that the financial downturn experienced by Fusion amounted to accounting entries which, on proper consultation with the Affected Employees, could have been easily reversed. Thus, they argue that their dismissal was substantively unfair.
- [33] In their submissions, the Affected Employees have also revisited the issue of procedural fairness following the handing down of the Constitutional Court judgment of *Regenesys Management (Pty) Ltd v Ilunga and Others*[3] (*Regenesys*), delivered on 21 May 2024, particularly with respect to the non-disclosure of the 2020 audited financial statement. As the submission went, the audited financial statements had been requested on the basis that the documentation would show that the s 189(3) notice was misleading with regards to the reasons for retrenchment and that the failure to disclose the requested information rendered the dismissal procedurally unfair.

Procedural fairness

- [34] I deal first with the issue of procedural fairness for the purposes of disposing of the first respondent's submission that the Labour Court had jurisdiction to decide the issue of procedural fairness in light of the findings of *Regenesys*.
- [35] The Constitutional Court in *Regenesys* clarified the position relating to the adjudication of procedural unfairness complaints by the Labour Court in accordance with s 189A(18). Section 189A(18) provides 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).'

- [36] The Constitutional Court held that, although s 189A(18) ousted the Labour Court's jurisdiction to procedural fairness complaints in large-scale retrenchments under s 191, the same could not be said for cases where a referral was made in terms of s 189A(13). As such, the court a quo was correct in finding that, without a s 189A(13) application before it, it did not have jurisdiction to decide the procedural fairness complaint.

Selection criteria

- [37] The appellant submits that the issue of selection criteria and alternatives to retrenchment had not been properly before the court a quo, and as such, the court could not have made a finding in respect of these two issues.
- [38] In their statement of case, the Affected Employees alleged that, despite Fusion's correspondence indicating that the parties had reached consensus on the selection criteria, the Affected Employees had not agreed to the selection criteria as they were still engaged in discussing the rationale of the retrenchment. Similarly, in the second practice note references are made with respect to the Affected Employees impugn of the selection criteria applied, namely under the section headed 'facts which are common cause', where the Affected Employees raised that they had not agreed to the selection criteria imposed; under the section headed 'facts in dispute', where the court a quo was called to decide, among other things, 'whether the Affected Employees had agreed/consented to the applied selection criteria of "performance"'; and under the section headed 'was the selection criteria fair?', the Affected Employees answered that '[Affected Employees] contend that no fair selection criteria were applied' and 'the [first respondent's] did not aver in their statement of case that the selection criteria was unfair and cannot now effectively plead this issue in the pre-trial minute'. Finally, and more generally, the second practice note indicates that the court a quo was called to determine whether their dismissal was substantively and procedurally unfair.
- [39] The court a quo found that, as the Affected Employees had generally pleaded that their dismissals were substantively unfair, it was incumbent upon the court to consider the fairness of the selection criteria applied, despite same not being expressly pleaded.
- [40] The Affected Employees' pleaded case is that the selection criteria were not agreed upon between the parties, despite Fusion's correspondence to the contrary. They did not, in their statement of case, plead that, in addition to the selection criteria not being agreed to, such criteria were neither fair nor objective.
- [41] Similarly, the issue of alternatives to retrenchments was not pleaded by the Affected Employees; this was clearly due to the non-disclosure of the financial documents the Affected Employees needed to support their claim that the true rationale for the retrenchments was not as what was reflected in the s 189(3) notice. The appellant is correct in stating that no alternatives had been proffered (given the lack of disclosure), and as such, the court a quo was incorrect in finding that the appellant had failed to lead evidence of its consideration of alternatives to retrenchment by the employees as no such alternatives had been presented during the consultation.

Dismissal as a fait accompli and rationale

- [42] The appellant contends that the finding that the retrenchment of the Affected Employees was a *fait accompli* is erroneous on the basis that the allegation that a dismissal is a foregone conclusion is an allegation that speaks to procedural fairness and not the substantive fairness of the dismissal, particularly as the unfairness arises due to a pre-determination which hampers the consultation process.
- [43] It has been accepted by the Labour Court[4] that the line between procedural unfairness and substantive unfairness can be difficult to detect in dismissals for operational requirements. This is demonstrated in the second judgment of *Unitrans Zululand (Pty) Ltd v Cebekhulu*. [5], wherein it was held that ‘there may be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure’.[6]
- [44] Zondo JP (as he then was), writing for the majority and in carving out a distinction between procedural and substantive fairness, stated as follows:
- ‘... In relation to a dismissal, procedural fairness relates to the procedure followed in dismissing an employee. Substantive fairness relates to the existence of a fair reason to dismiss. In relation to substantive fairness the question is whether or not, on the evidence before the court, and not on the evidence produced during the consultation process, a fair reason to dismiss existed. With regard to procedural fairness, the question is not whether a fair procedure was followed in court. The question is whether, prior to the dismissal, the employer followed a fair procedure. The result hereof is, therefore, that, if the evidence placed before the court establishes a fair reason to dismiss which was present at the time of the dismissal, the dismissal is substantively fair. It does not matter, for purposes of determining the substantive fairness of the dismissal, that such reason was not the subject of discussion during the consultation process.’
- [45] However, this distinction is not always clear cut, as held in *Banks & another v Coca-Cola SA (A Division of Coca-Cola Africa (Pty) Ltd)*[7], where it was stated that:
- ‘The bifurcation in procedure established by section 189A is more easily established in legislation than it is applied in practice. There are a number of reasons why disputes about dismissals for reasons based on employer’s operational requirements do not always lend themselves to the convenient compartmentalisation contemplated by the LRA, chief amongst them being the extent to which, in the real world of work, substantive and procedural issues are intertwined.’
- [46] In this case, the reason for the dismissal, as expounded by the s 189(3) notice (and as proffered in evidence before the court *a quo*), was, in the view of the Affected Employees, at odds with the true reason for the contemplated retrenchments. As such, and in a bid to strengthen their argument that the notice had attempted to mislead them as to the true reason for the dismissals, the Affected Employees sought the disclosure of Fusion’s financial records. It is clear that the substantive fairness element (the reason for dismissal) is so closely linked with the procedural fairness element (disclosure of information during

consultation) that a clear severing of the elements of substantive fairness from those of procedural fairness, as proposed by the appellant, is not possible on the facts of this case, particularly with respect to the question that the dismissals of the employees were a foregone conclusion – a fait accompli.

[47] On the basis of the above, it is necessary to consider whether the court erred in its application of the test for determining the substantive fairness of the dismissals.

[48] This Court in *National Union of Food Beverage Wine Spirits & Allied Workers v Coca Cola Beverages SA (Pty) Ltd*[8] summarised the development of the test for determining substantive fairness as follows:

‘[39] In the case of a dismissal based on an employer’s operational requirements, there must necessarily be some objective link between the dismissals and some economic, technological or similar need on the part of the employer. This court has held that while employers have the prerogative to restructure their operations to maximise profits and operational efficiency, the courts do not have to accept the employer’s proffered rationale at face value, nor do the courts defer to employers. Earlier decisions by this court limited intervention to those instances where the employer was unable to demonstrate that the ultimate decision arrived at by the employer was not genuine, or was merely a sham, or put in a positive sense, that the dismissal was operationally and commercially justifiable on rational grounds. On this approach, the court’s function is not to decide whether the employer’s decision was the best decision in the circumstances; rather, the court’s enquiry is limited to whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process. A different approach was later adopted in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* where Davis AJA rejected the test for fairness predicated on the approach to judicial review of administrative action and said the following:

“The word “fair” introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness, is the mandated test.”

[40] In *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd*, the Labour Court said the following:

“[A]s stated in BMD Knitting Mills, the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality

or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employer in the exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in Discreto and BMD Knitting Mills".

- [41] ... Although certain of the English authorities to which the Labour Court referred in its judgment may reflect an overly deferential approach, the Labour Court acknowledged that fairness, rather than correctness, was the applicable benchmark and that the court was obliged to determine the rationality between the retrenchment and CCBSA's commercial objectives and in particular, whether the decision to retrench was a reasonable option in all the circumstances. This approach cannot be faulted.'
- [49] Thus, a decision to retrench will be substantively fair if it is a rational and reasonable response to the operational requirements predicament faced by an employer.[9]
- [50] In this dispute, the evidence presented to the court a quo showed that in the time before the s 189(3) notice was issued, Fusion had either slowly moved over its business to the appellant, as demonstrated through the transfer of its clients and profit making units or had otherwise cancelled revenue generating contracts for reason unexplained and paid higher-than-usual rentals and management fees to the holding company during the 2020 financial year. These actions were at odds with the reasons proffered to its employees, including the Affected Employees, who were told that the reasons for the contemplated retrenchments were due to inter alia financial downturns and client churn when the reality showed that it was the decisions of the Fusion that had led, at least in part, to the financial difficulties that it had found itself in. I do not dispute that the reasons set out in the s 189(3) notice were not true; they simply did not outline the entirety of Fusion's financial position, particularly where it related to the decisions taken by Fusion, which directly impacted its finances.
- [51] On this basis, the rationale set out in the s 189(3) notice was not a true reflection of the reason for the contemplated dismissals; rather, it was the movement of various business units of Fusion to the holding company and the appellant which prompted the retrenchment of the affected employees.
- [52] The movement and transfer of the business of Fusion is not a transgression and the appellant did not proffer a business rationale for moving Fusion's business but rather tried to justify its reason for embarking on the retrenchment process as Fusion's financial downturn, which was clearly not the case; this was a self-created financial crisis. Had the appellant explained that the reason for the retrenchment exercise was that it wished to restructure its business, which they only really raised at the appeal, that might perhaps have justified its actions. As it stands, the business of Fusion is disconnected from the economic

or financial reasons put forward by Fusion, and on that basis, the retrenchments of the Affected Employees were substantively unfair.

[53] On this basis, the appeal stands to be dismissed.

Costs

[54] It is trite that the principle, costs follow the result, does not apply within the context of labour disputes, and rather, it is a matter of law and fairness in terms of which the issue of costs is decided. Having considered the facts, I believe that this is a matter where no order as to costs should be made.

Order

1. Condonation for the late filing of the record is granted, and the appeal is reinstated.
2. The appeal is dismissed.
3. There is no order as to costs.

B Waglay

Savage JA and Musi AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv. Redding SC

Instructed by Solomon Holmes Attorneys

FOR THE FIRST RESPONDENT: Adv. Oosthuizen SC

Instructed by Mcaciso Stansfield Inc

[1] Act 66 of 1995, as amended.

[2]

(2022) 43 ILJ 1757 (CC).

[3]

(2024) 45 ILJ 1723 (CC).

[4] See: Watts v Fidelity Corporate Services (Pty) Ltd [2007] 6 BLLR 579 (LC).

[5]

[2003] 7 BLLR 688 (LAC) at para 25.

[6] Ibid at para 48.

[7]

[2007] 10 BLLR 929 (LC) at para 11.

[8]

(2024) 45 ILJ 1813 (LAC).

[9] See: Shushu & others v Distell Ltd (2025) 46 ILJ 1000 (LC).

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Prepared on 10 October 2026 · Esheria