
Cutting out the middle step in facilitated mass retrenchments disputes

Section 189A(7)(b)(ii) – mass retrenchments – facilitation – conciliation – jurisdiction – Labour Court

On 29 May 2026, the Constitutional Court in *NUMSA and Others v Industrial Oleo Chemical Products* [2026] ZACC [22] clarified that, in a facilitated largescale retrenchment, it is not necessary to first refer a dispute to conciliation before approaching the Labour Court to challenge the substantive fairness of the dismissal. The judgment brings certainty in relation to section 189A(7) of the Labour Relations Act (“LRA”), following a line of conflicting judgments in the Labour and Labour Appeal Courts.

In this matter, following a failed facilitation process, the union referred an unfair dismissal dispute directly to the Labour Court. The respondent raised a preliminary point that the dispute was not conciliated. The Labour Court dismissed the respondent’s preliminary point. On appeal, the Labour Appeal Court upheld the respondent’s argument, finding that conciliation is a mandatory procedural step, even after a failed facilitation process.

The union appealed to the Constitutional Court. In determining the matter, the majority judgment held that, where facilitation has occurred under section 189A(7) of the LRA, employees are entitled to refer the dispute directly to the Labour Court. Conciliation is not required as an additional jurisdictional step because section 189A(7)(b)(ii) is itself a jurisdiction-conferring provision; a further conciliation requirement would impose an unwarranted additional hurdle inconsistent with the text and purpose of the provision.

While facilitation and conciliation are conceptually distinct, the Court observed that there is considerable overlap of the issues addressed in these stages. Questions relating to the fairness of the retrenchment, the application of selection criteria, and the determination of severance benefits are often canvassed during facilitation. Thus, requiring parties to engage in a subsequent conciliation process would duplicate the process followed in facilitation.

The judgment provides clarity that following a failed facilitation process, employees may refer an unfair dismissal dispute directly to the Labour Court without first referring a dispute to conciliation. This approach will assist in promoting expeditious dispute resolution.

Irshaad Savant, Director
irshaad@cth.co.za

Xolile Maphanga, Associate
xolile@cth.co.za

Kutlwano Legwale, Candidate Attorney
kutlwano@cth.co.za

www.cth.co.za

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