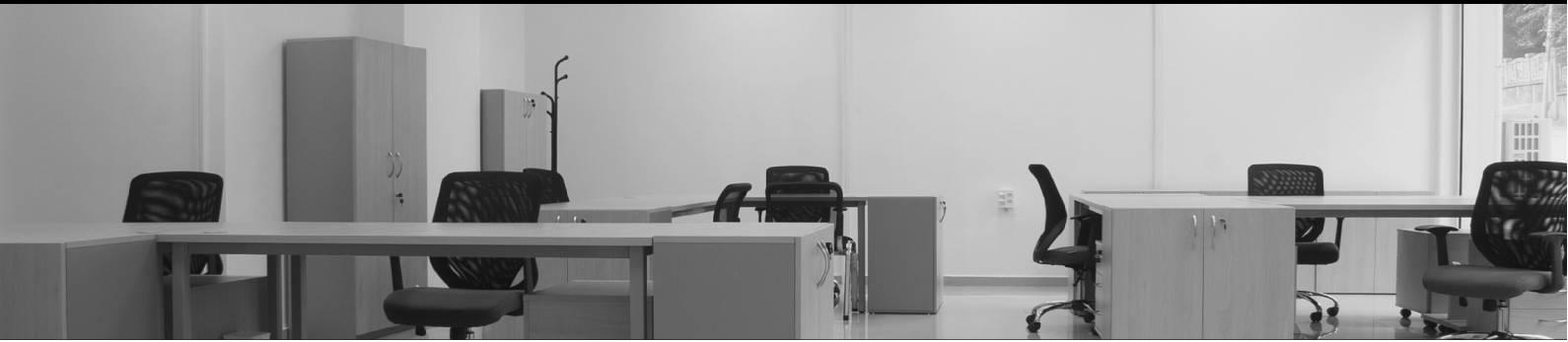




## EMPLOYMENT

# Redundancy and the Duty to Consult: Lessons from Tsogo Sun Casinos v SACCAWU

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Retrenchment is often described as a ‘no-fault’ dismissal, yet it remains one of the most litigious areas of South African labour law. A recurring point of contention is whether an employer has truly entered consultations with an open mind or is merely performing a ‘tick-box’ exercise to reach a predetermined result. In *Tsogo Sun Casinos (Proprietary) Limited t/a Emnotweni Casino v SACCAWU obo Mavuso and Others*,<sup>[1]</sup> the Labour Appeal Court (“LAC”) clarifies the employer’s obligations under Section 189 of the Labour Relations Act 66 of 1995, as amended, (“LRA”), particularly regarding the hierarchy of consulting parties and the rejection of alternative proposals.

## The Issue

The primary issue before the LAC was whether the dismissal of three crèche attendants following a restructuring process was substantively and procedurally fair. Specifically, the court had to determine:

1. Whether the employer was required to consult with a trade union (SACCAWU) despite the absence of a recognition agreement;
2. Whether the consultation process was a *fait accompli* because the employer rejected all employee-proposed alternatives; and
3. The appropriateness of reinstatement as a remedy when a crèche facility has been permanently closed and the functions outsourced.

## The Facts

The individual employees were employed as crèche attendants at the Emnotweni Casino. Following the declaration of the national lockdown in March 2020, the crèche was closed and the employees were placed on layoff. While the casino reopened in July 2020, the crèche remained closed for 18 months.

In September 2021, the appellant issued a Section 189(3) notice, proposing the redundancy of the crèche positions as it was unlikely the facility would reopen in the foreseeable future. Consultations were held over three months, during which the employees proposed various alternatives, including:

- Redeployment to cleaning or reception duties.
- Implementation of a rotational shift system.

- Outsourcing the crèche to the employees themselves.

The employer rejected these proposals as unfeasible given the pandemic's impact and the uncertainty of the crèche's future. One employee accepted a voluntary severance package (VSP), while the remaining three were dismissed in November 2021. The Labour Court initially found the dismissals unfair, citing a 'tick-box approach' and a failure to consult the employees' trade union, ordering reinstatement with full backpay.

## The Law

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The LAC considered several key provisions of the LRA:

Regarding Section 189(1), the LAC held that it establishes a hierarchy of consulting parties. If no collective agreement or workplace forum exists, the employer must consult a registered trade union whose members are likely to be affected. Only in the absence of such a union may the employer consult directly with the employees.

Regarding Section 189(2), the LAC explained that it requires parties to engage in a 'meaningful joint consensus-seeking process' regarding alternatives to dismissal, selection criteria, and severance pay.

Regarding Section 193, the LAC noted that reinstatement may be inappropriate if it is not reasonably practicable.

The court also applied the principle from *Solidarity obo Members v Barloworld Equipment*,<sup>[2]</sup> which holds that an employer must keep an open mind and provide reasons for rejecting representations in order for the consultations to be considered meaningful.

## The Application

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The LAC disagreed with the Labour Court's finding that the process was a sham. The court noted that a consultation is not a *fait accompli* simply because an employer provides immediate answers to proposals based on an established business rationale. The rejection of alternatives, such as continued layoff or a shift system for a non-operational facility, was deemed commercially rational.

Regarding the union, the court clarified the 'hierarchy' of consultation as follows –

The court found no evidence that the employer was aware of the first two employees' trade union membership at the start of the process. Their vague requests to consult 'someone' did not trigger a legal obligation for the employer to divine SACCAWU's involvement.

However, for the third employee, the court found that the employer was aware of her history with the trade union. During the process, she explicitly mentioned consulting a SACCAWU official regarding the issue of a voluntary severance package. The LAC found that as of November 2021, the employer should have engaged SACCAWU specifically, for her.

However, the court also criticised the trade union's inaction. Despite being aware of the process, the trade union took no steps to intervene or assert its right to consult on their member's behalf.

## Conclusion

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The LAC upheld the appeal in part. It found the dismissals of the first two employees to be both substantively and procedurally fair. In the case of the third employee, the dismissal was substantively fair but procedurally unfair due to the minor failure to involve the trade union once her membership of same became clear.

The court set aside the reinstatement order noting it was impracticable since the crèche no longer existed in the company structure and instead awarded the third employee three months' compensation.

## Key takeaway for employers

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While you are not compelled to accept every employee proposal, you must demonstrate a genuine consideration of alternatives. Furthermore, while the burden of consultation is shared, ignoring even late-stage references to trade union representation can result in a finding of procedural unfairness.

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[1] JA106/24) [2025] ZALAC 64 (27 November 2025)



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