



IN THE LABOUR COURT OF SOUTH AFRICA
[HELD AT BLOEMFONTEIN]

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

CASE NR : JS 1068/11

SOUTH AFRICAN EQUITY WORKERS ASSOCIATION
MARTHA STOCKL
ELSIE DIBA
ANDRIES KOTSI
JOSEPH MELK
CORNELIUS MOKWAKWA
THABO NDINISA
EXECUTOR: ESTATE OF THE LATE
MOSIUOA JACOB RATHABA
JANET RATHABA

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT

EIGHTH APPLICANT
NINTH APPLICANT

AND

TITANCOR SIXTEEN (PTY) LTD

RESPONDENT

Date of the hearing: 03-05 June 2013; 19 August 2013; 05 October 2013.

Date Delivered: 13 December 2013

JUDGMENT

PHATSHOANE AJ

[1] The claims by the South African Equity Workers Union (“the Union”), the first applicant, and Ms Martha Stockl, Ms Elsie Diba, Mr Andries Kotsi, Mr Joseph Melk, Mr Cornelius Mokwakwa, Mr Thabo Ndinisa, the executor of estate of the late Jacob Rathaba and Ms Janet Rathaba, the second to the ninth applicants, are in two parts. On Claim “A”, the second to the ninth applicants, contend that they were unfairly retrenched by the respondent, Titancor Sixteen (Pty) Ltd, t/a

as Top Furniture, Bloch Furniture, Ace Furniture, Chief Furniture and Protea Furniture in a number of towns in the Free State Province. On Claim “B”, the applicants argued that they are entitled to minimum wages as set out in the Sectoral Determination No 9, published under GN 1600 on 19 December 2003 in that the respondent underpaid them. Claim “B” is founded on s 74 of the Basic Conditions of Employment Act, 75 of 1997.ⁱ A copy of the calculations of the claim is attached to the pre-trial minutes as Annexure “B”. The respondent conceded liability in respect of the latter claim.

- [2] At the commencement of the proceedings I was informed that the ninth applicant, Mr Mosiuoa Jacob Rathaba, passed away on 25 February 2012. An application was made that he be substituted in these proceedings by the executor in his estate. This application was granted.

- [3] In their statement of claim the applicants sought an order that the dismissal of the second to the ninth applicants be declared substantively unfair; that the respondent be ordered to pay the second to the ninth applicants compensation equivalent to 12 months’ salary and the attendant costs. At the conclusion of the trial, before the closing argument could be heard, the applicants brought an application for the amendment of the relief sought in the statement of claim. In its amended form the relief is substantially couched as follows:
 - [3.1] Declaring the dismissals of the second to the ninth applicants invalid and null and void. Alternatively,
 - [3.2] That the dismissals of the second to the ninth applicants are declared substantively unfair in terms of s 189A(19) of the Labour relations Act, 66 of 1995 (the LRA);
 - [3.3] That the dismissals of the second to the ninth applicants are declared procedurally unfair;
 - [3.4] That the respondent is ordered to pay the second to the ninth applicants compensation equivalent to 12 months’ remuneration in accordance with their rates of remuneration as at 31 July 2011;

- [3.5] That the respondent is ordered to pay the third, fourth, fifth, sixth, seventh and ninth applicants the amounts set out in Annexure “B” to the pre-trial minutes, being the underpayments made under Sectoral Determination No 9, Wholesale and Retail Sector (Claim “B”);
- [3.6] That the respondent, alternatively, the respondent and AVZ Labour Law Services CC, is to pay the applicants’ costs on an attorney and own client scale, jointly and severally, the one paying the other to be absolved.
- [4] The respondent objected to the amendment on the basis that the Court may grant costs against AVZ Labour Law Services CC, a member of AHI Employers’ Organisation, which was not a party to the proceedings. Put differently, the resultant effect of the order would be the joinder of AVZ to the proceedings while the applicants had not followed the procedures set out in the Rules; that the hearing had been finalized; that the applicants had ample time to amend their papers prior to the hearing; that the proposed amendment will necessitate the recalling of witnesses and that AVZ was never granted any opportunity to answer to the claim and/or present evidence.
- [5] Having considered the argument, I granted the amendment and ordered the applicants to pay the related costs. The parties were informed that my reasons for granting the application for the amendment were to form part of this judgment.
- [6] In seeking an amendment Mr Johannes Hendrik Engelbrecht, the deponent to the founding affidavit, states that at the time the statement of claim was drafted he was advised that the existing case law in terms of s 189A, properly read, precluded the aggrieved employee from seeking an order declaring his/her dismissal procedurally unfair in trial proceedings. That the applicants have referred to issues involving procedural fairness in their statement of case and the pre-trial minutes including the fact that the respondent failed to issue a Notice in terms of s 189(3) on 25 May 2011. He further explained that the applicants mentioned that the respondent had failed to give the union an opportunity to engage in a meaningful joint consensus-seeking process.

- [7] Engelbrecht says that it was not brought to his attention when the statement of claim was filed that there is case-law permitting the Court at the trial to grant a declarator. After the pre-trial minutes had been filed he was made aware of the decision of the Labour Appeal Court in *Revan Civil Engineering Contractors & Others v National Union of Mineworkers & Others* (2012) 33 ILJ 1846 (LAC) which held that the Labour Court may grant the declarator. The applicants state that when their counsel finally settled their heads of argument he realised that he had not moved for an amendment in line with the Practice Notice and therefore the Notice for an amendment was accordingly served and filed.
- [8] It is trite that a party can amend its pleadings at any stage of the proceedings even after argument but before the judgment, provided that the other party is not to be prejudiced thereby, if to do so would facilitate the proper ventilation of the dispute between the parties so that justice may be done (see *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A); *Morgan and Ramsay v Cornelius and Hollis* 1910 NPD 262 at 264; *Rishton v Rishton* 1912 TPD 718 at 719-720).
- [9] It was initially in dispute whether s 189 or s 189A of the LRA applied to the retrenchment of the second to the ninth applicants. This much is apparent from the statement of claim and the pre-trial minutes. When the trial commenced the respondent conceded that s 189A of the LRA applied. In view of the uncertainty on the process that ought to have been followed in effecting the retrenchments, issues pertaining to procedural fairness were traversed in the evidence of the respondent. Counsel for the respondent, understandably, did not object to this line of cross-examination. Mention should also be made that in the pre-trial conference minutes one of the issues the Court was required to determine was recorded as follows:
- “In the event of the Court deciding that s 189A was applicable and that the provisions of s 189A are peremptory the Court is required to decide whether the dismissal of the second to the ninth applicants on 31 July 2011 was both procedurally and substantively fair”.
- [10] The applicants pleaded in their statement of case that s 189A applied. In their Practice Notice filed on 24 May 2013 they make it plain that they would seek an order declaring that their dismissals were invalid and of no force and effect as

the respondent failed to follow s189A. Alternatively, in the event that the Court finds that s189 was applicable that an order would be sought to declare the dismissal substantively and procedurally unfair. The amendment should therefore not come as a surprise to the respondent.

- [11] Nothing turns in the prayer for costs against AVZ, an employer's organisation that assisted and/or carried out the retrenchment on behalf of the respondent. In my view, the question of joinder of AVZ for the purposes of costs is not necessary because the Court has a discretion, in appropriate cases, to award costs against any person who represented a party in the litigation even if that person is not citedⁱⁱ. The following dictum in *Sikhosana & Others v Sasol Synthetic Fuels* (2000) 21 ILJ 649 (LC) at 663G-I is instructive:

"At common law it is clear that orders for costs can be given against persons who are not parties to the litigation. The subjects of such orders are, typically, legal practitioners who act improperly in conducting the case; but costs are sometimes given against other non-parties who have supported the litigation or have some other connection with it. See, for an example of such a case, *Francarmen Delicatessen (Pty) Ltd v Gulmini & another* 1982 (2) SA 485 (W). In the absence of some contrary stipulation in the Act, there is no reason why the Labour Court should not have the same power. It is a court that, within its province, is of equal status to the High Court and is expressly vested with the power to make orders for costs in the exercise of its discretion (see, in addition to s 162(1), s 158(1)(a) (vii))."

- [12] In *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547(A) at 565G-J Corbett CJ, for the Court, made the following pronouncement:

"Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles. These principles are well summed up in the judgment of Caney J in *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640H - 641C. In the portion of the passage referred to, Caney J states (at 641A):

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.'

With this should be read the remarks of De Villiers JP in *Krogman v Van Reenen* 1926 OPD 191 at 195:

'... (H)e must show, for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the Court and the other party to the manifold inconveniences of a postponement...'

It should further be noted that in the *Trans-Drakensberg Bank* case supra it was held that mere delay in bringing forward an amendment is no ground for refusing it (see at 642H)."

- [13] The amendment sought cannot be said to be without any basis. As it will later become apparent, it invokes an important arguable question. In my view, the resultant prejudice was not too substantial that it could not be cured by an appropriate costs order. To mitigate any prejudice that the amendment could have caused to any of the parties I issued a directive in terms of which the parties could file further pleadings and reopen their respective cases. Further, the parties were informed that they could file supplementary heads. It is for these reasons that the application for an amendment was granted.
- [14] The respondent's statement of defence was filed 49 days late. The application for condonation of the late filing thereof is unopposed. This application was granted in the interest of justice and because the explanation proffered is plausible.
- [15] This Court is enjoined to determine if the dismissal of the second to the ninth applicants was fair. The respondent bore the onus to prove the fairness thereof. The applicants did not testify.
- [16] Mr Julius de Villiers took over the business of the respondent from his father in December 2010. He testified that his father left him with a debt of approximately R7.2 million and therefore he decided to restructure.
- [17] On 25 May 2011 the union received a facsimile message from AVZ, acting on behalf of the respondent, in which it was informed that the respondent contemplates to restructure its business and extending an invitation to the union to attend a consultation meeting in terms of s 189 of the LRA. Mr André van Zyl of AVZ testified that when this letter was issued a decision had not been made that the dismissals would take place.
- [18] On 30 May 2011 the respondent provided the union with a list of names of employees likely to be affected by the retrenchment exercise prior to the consultation process. On 03 June 2011 the union directed a letter to Mr Neels van der Merwe of AVZ in which it gave information on the list provided by Van Der Merwe. The first paragraph of this letter reads:

“1) Hiermee die inligting wat u aangevra het i.v.m die lys wat u aan my besorg het op die 30/05/2011. Die volgende werknemers op die lys is nog nie lede van SAEWA nie. Meriam Hlatwayo, Talita Manotsi, Pertus Motaung...”

- [19] In the aforesaid letter of 03 June 2011 the union informed the respondent that Ms Marietjie Stockl was elected as a shop steward and requested that Stockl, employees on the list and De Villiers, the respondent's manager, attend the meeting. Much was made on how the union came to be in possession of the list. It is not certain from the evidence who gave the union the list because Van der Merwe was not called to testify but from its statement of defence, the respondent provided the list. What is material is that the union was in possession of the list of 'the affected employees' as at 03 June 2011. AVZ responded to the letter of 03 June 2011 on the same day intimating that Stockl could attend the meeting and that it was not possible to release all the workers to attend. AVZ also confirmed that the meeting would take place on 09 June 2011.
- [20] The first consultation between the union and AVZ was held on 09 June 2011. Present at this meeting were Mr Hennie Stander, the regional organiser of SAEWA and Stockl, representing unionised employees on the one hand and on the other hand, Van der Merwe and Van Zyl, representing the respondent. According to Van Zyl, this was a short meeting the aim of which was merely to get the retrenchment process underway. He says that this meeting was bitterly difficult as Stander insisted that De Villiers be present despite the fact that he was duly represented. Van Zyl also intimates that Stander also wanted Stockl's name to be removed from the list of the "affected employees". This is the only time, Van Zyl says, he got to know of the existence of the list. Under cross-examination he was constrained to accept that the list was compiled before the retrenchment exercise.
- [21] Van Zyl testified that at the time of the meeting of 09 June 2011 he had not given the union information on the number of employees that were to be retrenched or on the timing thereof. He states that he explained to the consulting parties that the reason for the contemplated retrenchment was that the respondent had several stores in the Free State which it wished to be operated on a similar basis. That the key staff were to be a manager and two

staff members who had to be in possession of the drivers' license of which one would have to be strong enough to load and offload the furniture. On the terse minutes of the meeting of 09 June 2011, which Van Zyl dismissed as merely notes, there is no indication that the reason for the retrenchment was disclosed. It also does not appear on the respondent's statement of defence that the union was given the reason for the retrenchment. Be that as it may, Van Zyl says that as he gave the reason for the retrenchment Stander stopped him and enquired why the respondent was not exploring offering voluntary retrenchment packages to the employees.

[22] Those present at the meeting of 09 June 2011 agreed to discontinue the meeting so that the question of voluntary retrenchments could be considered to ascertain if there would be employees interested to opt for this form of retrenchment. Accordingly, on 10 June 2011 a letter offering voluntary retrenchment packages to the employees was distributed to about 30 of the respondents' branches. The offer was valid until the close of business on 13 June 2011. It is common cause that the union advised its members not to accept the voluntary retrenchment packages which were set at the statutory one week's pay for every completed year of service. Only one employee, Ms L Vrey, accepted the package offered.

[23] In the pre-trial minutes it is recorded as a common cause fact that at the meeting referred to in the preceding paragraph the union made the following suggestions: that the employees be offered voluntary retrenchments and that the services of the employees above 65 years of age be terminated. It is also recorded as an issue not in dispute that the union requested disclosure of information on: any retrenchments that took place in the 12 months preceding the contemplated retrenchments; the criteria to be used to retrench employees; and the possibility of retrenching casual employees first.

[24] Van Zyl testified that in effecting the retrenchments he applied s 189 not s 189A of the LRA. He became aware that s 189A applied after the letter of voluntary severance package was dispatched to the employees. As the cross-examination progressed he intimated that he became aware that s 189A applied only after the retrenchment process was completed. He added that he

was not obliged to tell the union that s 189A applied to the retrenchment. He says that the retrenchments were supposed to be finalised as soon as possible, by the end of July 2011. He discussed short-time and lay-offs of employees as alternatives to retrenchments with De Villiers. Other alternatives were open to be discussed in consultation with the union. Future reemployment was not offered.

[25] On 28 June 2011 AVZ directed a letter to the union inviting it to represent the affected employees in the retrenchment process; confirming that it had been tentatively agreed that the meeting was to be held in Bloemfontein on 30 June 2011 and that the list of the affected employees remained unchanged. Attached to this letter is a contentious Notice in terms of s 189(3) of the LRA dated 28 June 2011. The following is recorded in this notice:

“Herewith find notice in terms of s 189(3) of the Labour Relations Act, 66 of 1995, in terms of operational requirements.

- a. The reason for the retrenchment is due to restructuring of the business.
- b. The Employer considered alternative employment, reduction in salaries and short time. The Union and Management agreed to forward an offer of voluntary retrenchment. One Employee was interested in the voluntary retrenchment offer.
- c. The Employer Party contemplates that 15 (fifteen) Employees might be retrenched.
- d. The Employer Party contemplates that the retrenchment will take effect on the 31st of July 2011.
- e. Criteria used are due to special needs of the business and the LIFO principle.
- f. The Employer Party proposes one (1) week severance pay for every completed year of service.
- g. The Employer Party proposes to assist Employees by issuing a UI 19 document and looking for alternative employment.
- h. The Employer Party cannot consider re-employment due to the restructuring of the business.
- i. The Employer employs 168 (hundred and sixty eight) employees.
- j. The Employer dismissed no Employees in terms of operational requirement in the preceding twelve months.

- k. ***Herewith find express notification of termination of employment contract as required by the Basic Conditions of Employment Act.***

If you need any information, do not hesitate to contact the writer.”

[26] Van Zyl did not attend the meeting of 30 June 2011 but Van der Merwe did. According to a report Van Zyl says he received, Stander and Stockl attended the meeting only to inform Van der Merwe that they would respond to the Notice in terms of s 189(3) in writing. The hand-written minutes of the meeting of 30 June 2011 contained in the respondent's bundle, on the contrary, merely states that the Notice in terms of s 189(3) was handed over to the union and that Stander and Stockl acknowledged receipt thereof.

[27] In paragraph 'K' of the Notice in terms of s 189(3) referred to earlier the second to the ninth applicants were given express notification of termination of their contracts of employment. The minutes of 30 June 2011 referred to in the preceding paragraph are quite revealing of the approach adopted by the respondent in dismissing the applicants than that professed by it in the following way.

27.1 Van der Merwe recorded on these minutes a telephone call at 10h00 on the same day as follows: *“betrokke lede moet nie aanmeld vir diens Julie 2011”*.

27.2 In the next page of these minutes the following telephonic conversation in a hand-written form is also recorded by Van der Merwe: *01 July 2011 “Julius bel my. Hy sê Marietjie sê Hennie [Stander] sê hy kan nie sy mense inlig nie want dit is telefonies aan hom oorgedra”*.

27.3 On same date Van der Merwe recorded sending a Short Message Service (SMS) to Stander which reads *“Geliewe asb, al u betrokke lede in te lig dat hulle pligte othef is vir Julie 2011 soos telefonies met u bespreek. Dankie Neels.”*

27.4 On the same day at 7h45 Van der Merwe records again: *“Hennie bel my. Hy sê dat dit is nie sy plig om sy lede in te lig nie. Dit is die werkgewer se verantwoordelikheid om dit te doen. Hy sal terugvoering*

van hulle kry. Ek sê vir hom dit is sy verantwoordelikheid om sy unie se lede in te lig van die retrenchment”.

[28] Despite these notes, De Villiers testified that the employees were given the option to report or not to report for duty after they were served with the Notices in terms of s 189(3) which incorporated the notice of termination of their services. Ultimately, the listed employees were retrenched. Their last day of work was 31 July 2011 but before then, on 07 July 2011, letters were distributed to the already dismissed employees. They read:

“It is with regret that Titancor Sixteen (Pty) Ltd has to inform you of the termination of your service due to the retrenchment procedures.

Titancor Sixteen (Pty) Ltd and you and/or your Union representative have been in extensive consultations regarding the retrenchment. During these consultation meetings, the Company followed the Provisions of Section 189 of the Labour Relations Act, Act 66 of 1996, to the letter.

The Following have been agreed upon:

1. That a fair procedure was followed in terms of Section 189 of the Labour Relations Act.
2. That fair objective criteria were implemented to nominate affected Employees.
3. No alternative to the retrenchment could be implemented.
4. The retrenchment will take effect on 31 July 2011.

It was further agreed that the following payments are due to you.

Notice pay for month of July 2011	
Retrenchment Package ... weeks	
Prorata Leave Pay ... days	
Total	

Notice Pay will be paid out on 31 July 2011. Please check if you agree with the pro rata leave pay and the retrenchment totals. You have until Friday 12 August 2011 to log any queries. If no queries were logged it will be assumed as correct and be paid out as is.”

[29] The aforesaid letters sparked controversy because Van Zyl testified that, insofar as they demonstrate that the respondent and the union/employees agreed on certain issues mentioned therein, it is not true. He added that this was a standard *pro forma* communiqué AVZ used in retrenchment processes generated by his office. He says that there was no agreement: that a fair procedure had been followed; that a fair and objective criteria was implemented; on the alternatives to retrenchment; on the timing of the dismissals; or on the retrenchment packages payable to the employees.

- [30] On 11 July 2011, despite the purported notice of termination of employment, AVZ addressed a further letter to the union. Of relevance in this letter is that mention is made that the respondent was willing to consult on the contemplated retrenchment and to provide the union with any relevant information and to consider the union's representation. On 25 August 2011 AVZ directed a further letter to the union still expressing the respondent's willingness to consult.
- [31] Mr Landman, for the applicants, contended that the respondent's evidence was of a poor quality and did not merit any response from the applicants. He argued that a proper case had been made out for a declaratory relief in that the notice of termination of the applicants' contracts of employment was premature. In the alternative, counsel argued that the Court should declare that the dismissals of the second to the ninth applicants were substantively and procedurally unfair.
- [32] Mr venter, for the respondent, argued that the Court should draw an adverse inference on the applicants' failure to testify. He contended that an answer was required of them to explain, *inter alia*, why they advised their members against acceptance of voluntary severance packages; why they felt that there was no reason to restructure or felt that the restructuring process was unnecessary; why they displayed indifference to correspondence forwarded to them and had not provided a response.
- [33] The respondent approached the retrenchment on the basis that s 189 as opposed to s 189A of the LRA applied. Van Zyl was unable to give good reason why the respondent followed s 189 instead of s 189A. Mr Venter contended that the respondent made a *bona fide* mistake in invoking the provisions of s 189 of the LRA when it embarked on the retrenchment exercise. That it followed the provision of s 189 with no resultant prejudice to the applicants and urged the Court to approach this matter on that basis and conclude that the procedure leading to the termination of the applicants' services was effected fairly as envisaged in s 189 of the LRA. Mr Landman countered that the respondent was ably represented by well-qualified and experienced labour law specialists during the retrenchment process. In any event, he contended, the respondent's alleged *bona fide* error was not pleaded. He pressed that failure to follow

s 189A in circumstances where it applied, is itself an act of procedural unfairness.

[34] The application of s 189 or 189A to a particular retrenchment exercise is determined with reference to the number of employees the employer contemplates to dismiss in relation to its total workforce. In this case, the union was advised, for the very first time, that the employer employed 168 employees and that it contemplates dismissing 15 employees on 28 June 2011 when it was served with the Notice in terms of s 189(3).

[35] Section 189A applies to the large-scale retrenchments exercises. The primary difference between s 189 and s 189A retrenchments is that in the latter instance the employees may resort to strike in order to dissuade their employer from terminating their services on account of its operational requirements. In addition, either the employer or the employees may compel the other to submit to facilitation by the Commission for Conciliation Mediation and Arbitration (CCMA) or an accredited agency during the consultation process. What s 189A entails was lucidly explained in *National Union of Metalworkers of SA & others v SA Five Engineering & others* (2004) 25 ILJ 2358 (LC) at 2361-2362 para 7 as follows:

“[7] Section 189A sets out to accomplish several objectives. First and foremost it bestows on employees in significant operational requirement dismissals a choice between industrial action and adjudication as the means of attempting to resolve the dispute. To minimize avoidable strikes and litigation, the section allows for the possibility of compulsory facilitation by the CCMA, if either the employer or a consulting party representing the majority of employees targeted for dismissal requests it. Otherwise the parties are free to agree to voluntary facilitation (s 189A(3) and (4)). The appointment of a facilitator suspends the employer's right to dismiss for 60 days. After the period has expired the employer may give notice of termination of employment. Once the notice of termination is given, the employees have the choice of either embarking on lawful industrial action or referring a dispute regarding substantive fairness to the Labour Court - s 189A(7). Once there is a referral to the Labour Court the right to strike is no longer available. Equally, if no facilitator is appointed, neither party may refer a dispute to the relevant bargaining council or the CCMA for 30 days from the date of a s 189A(3) notice. Thereafter the employer is free to give notice of termination and the employees are compelled to opt for industrial action or a referral of the dispute about substantive fairness to the Labour Court.

What is most notable about this scheme for present purposes, is that referrals to the Labour Court are overtly restricted by s 189A(7)(b)(ii) and 189A(8)(b)(ii)(b) to disputes "concerning whether there is a fair reason for the dismissal", in other words disputes about substantive fairness. Moreover, both provisions state expressly that the referral is to be made in terms of s 191(11), the provisions of which appear below. Disputes

about procedure in cases falling within the ambit of s 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in s 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of s 189A(13), read with s 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.”

[36] It is hard to imagine how the proposition advanced by Mr Venter can be practicable. The difficulty in this is that s 189 cannot apply in an instance where s 189A had to apply. To hold otherwise may lead to absurdity and create a situation where the employer has an election to follow either of the sections of the LRA despite the number of employees it contemplates retrenching in relation to its total workforce. The respondent made a concession that s 189A applied. So be it.

The analysis on the substantive fairness of the dismissal:

[37] In *SA Chemical Workers Union & Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at 1727 para 38 Froneman DJP held:

“ [38] It follows that it can no longer be said that the court's function in scrutinizing the consultation process in dismissals for operational requirements is merely to determine the good faith of the employer (compare *SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)* [198] 12 BLLR 228 (LAC); (1998) 19 ILJ 1451 (LAC) para [8]). The matter is now one of proof by the employer, on a balance of probabilities of -

- the cause or reason for the dismissal..
- the defined 'operational requirements' that the dismissal was based on..
- a fair procedure in accordance with s 189...
- the facts upon which a finding of a substantively fair reason for the dismissal can be made (para [36]) above).”

[38] Section 189A(19) provides:

“In any dispute referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if-

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.”

[39] Once it is established that the decision to retrench is based upon sound economic considerations the Court will not interfere with that decision if it was

taken in business way with a view, *inter alia*, to cutting losses or even improving profits. See *Môrester Bande (Pty) Ltd v National Union of Metalworkers of SA & another* (1990) 11 ILJ 687 (LAC) at 689. Our case law is replete that it is not the function of the Court to second-guess the employer's decision to retrenchⁱⁱⁱ. The Court should nevertheless determine if a rational basis exists for the retrenchment.

[40] The respondent's alleged financial difficulty, which it contends triggered the retrenchment exercise, is problematic. No documentary evidence was put before Court in support of the respondent's case that its business experienced financial hardship at the time of the retrenchments. De Villier's cross-examination elicited that around January to April 2011 or when the respondent embarked on the retrenchment exercise its business was profitable and not in any financial crisis. Ultimately, it is for the respondent to satisfy the Court that there was a *bona fide* economic or commercial reason to retrench. Therefore, it can hardly be said that there was a commercial rational to dismiss the second to the ninth applicants.

[41] Mr Landman argued that, with the present retrenchments, the respondent aimed to rid itself of trade union members by reducing the number of employees who were union members in anticipation of the time when it had to sign the recognition agreement. Counsel contended that this agreement provides that the respondent must recognise the union if its membership is and remains at 50% plus one. When the membership falls below this number the respondent need not interact with the union. That the respondent aimed to get rid of the unionised employees cannot be discerned from the papers or from the evidence. To the contrary, the evidence shows that almost half of retrenched were not unionised.

[42] Quite apart from the purported economic rational, which the respondent claimed necessitated the retrenchment, the respondent's case is that it needed to restructure its business in order to achieve a uniform structure and to improve efficiency at its head office. The restructuring of the business somewhat conflates with the selection criteria. Therefore they are dealt with together.

[43] In terms of s 189A(19)(d) the selection criteria in respect of employees likely to be dismissed must be fair and objective. De Villiers testified that when he selected employees to be retrenched he gathered information from the personnel records. His selection was based on the last in first out (LIFO) method. He also looked at the special needs of the business. At a branch level he required a manager and two employees. One of these two employees had to hold a driver's licence and the other to be strong enough to load and offload the furniture. He conceded that the affected employees on the list he compiled were not necessarily of the shortest duration of service. He could not say how long the applicants had been in the service of the respondent nor could he recall how he came to select the individual employees on the list, save that it was based on criteria already mentioned. The respondent may have had the need to restructure its business but the manner in which it went about it was wrong as it shall later become apparent.

[44] With regard to alternatives considered by the respondent in an attempt to avert the dismissals, De Villiers stated that he did not consider same because of the structural changes of the business. Insofar as the Notice in terms of s 189(3), referred to in para 25 hereinbefore, suggests that the respondent considered alternative employment, reduction in salaries and short-time, De Villiers testified that it would have been futile to consider alternative employment as this would not fit in with the new structure. Similarly, it will be pointless to reduce the salaries if the purpose of the retrenchment was to reduce the number of employees. Likewise, the short-time was not considered. This evidence should put an end to an enquiry into the question whether the respondent considered alternatives to retrenchment because it did not.

The analysis on the procedural fairness of the dismissal:

[45] It is trite 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 s 191(5)(b)(ii) (see

s 189A(18)). The respondent contended that the applicants chose not to avail themselves of the remedies set out in s 189A(13) of the LRA from 25 May 2011 when they were invited to consult, until 31 July 2011 when their contracts of employment came to an end. Mr Venter argued that the respondent was not exclusively to blame for the procedural defects. The applicants were just as much to blame.

[46] Section 189A(13) of the LRA provides:

- “(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-
- (a) compelling the employer to comply with a fair procedure;
 - (b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;
 - (c) directing the employer to reinstate an *employee* until it has complied with a fair procedure;
 - (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.”

[47] In *National Union of Mineworkers & others v Revan Civil Engineering Contractors & others* (2011) 32 ILJ 2167 (LC) at 2177 para 43 the Court held that where the employees were not afforded an election contained in s 189A(3), that is, a request for the appointment of a facilitator to assist the parties engaged in consultations because the respondent chose to conduct the retrenchment as though s 189A did not apply the employees cannot lose their right to claim procedural fairness of their dismissal.

[48] Section 189, provides in part:

- “(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-
- (a) appropriate measures-
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;
 - (b) the method for selecting the employees to be dismissed; and
 - (c) the severance pay for dismissed employees.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-
- (a) the reasons for the proposed dismissals;

- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
 - (c) the number of employees likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which employees to dismiss;
 - (e) the time when, or the period during which, the dismissals are likely to take effect;
 - (f) the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
 - (h) the possibility of the future re-employment of the employees who are dismissed;
 - (i) the number of employees employed by the employer; and
 - (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.
- (4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).
- (b) In any dispute in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.
- (5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed dismissals.”

[49] The applicants could not have known if s 189 or 189A applied if the respondent had not furnished them with the relevant information as required in terms of s 189(3) and had dealt with the retrenchment as if s 189 applied. As already alluded, they became aware of this fact on 28 June 2011. Ordinarily the Notice in terms of s 189(3) should precede the consultation process so as to enable the union to make representations and meaningful contributions on issues enumerated in s 189(2), (3) and (4). This would also serve to give an indication to the union if s 189 or 189A applied. In *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* (2011) 32 ILJ 1293 (LAC) 1302-1303 para 31-32 the Court enunciated on the duty to consult as follows:

“[31]...Section 189(1) creates a duty upon the employer to consult in the event of a contemplation of dismissal for operational requirements. Section 189(2) provides that the employer and the other consulting parties must, in the consultation as envisaged by subsections (1) and (3), engage in a meaningful and joint consensus-seeking process in an attempt to reach consensus on what are considered to be appropriate measures to deal with the contemplation of dismissal. Thus, subsection (2) gives content to the general duty in terms of s 189(1), namely that an employer, when it contemplates dismissing one or more employees on the basis of operational requirements must consult either the parties as set out in terms of a collective agreement, the workplace forum and the registered trade union whose members who

are likely to be affected by the proposed dismissals or, in the absence of a union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

[32] The section contemplates a dispute, namely that the employees, quite obviously, do not accede to losing their employment and there is then a need for a fair process. Hence a consultation process is designed to ensure that some form of consensus can be reached as to how to deal with a problem of a reduction of a workforce based on the employer's operational requirements..."

See also *Johnson & Johnson v Chemical Workers Industrial Union & others* (1999) 20 ILJ 89 (LAC) at 95 para 27; *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare Cleaning* (2005) 26 ILJ 889 (LC) at 901 para 34.

[50] The respondent did little it was statutorily enjoined to do. One aspect which is particularly lamentable and holds true is that the respondent held no proper consultation with the union. Apart from the brief meeting of 09 June 2011, which was stopped to explore voluntary retrenchment, there is nothing in the evidence suggesting that any further consultation took place.

[51] There are two issues which stood out in the flawed consultation process which I now turn to. The first issue is the list of employees likely to be affected by the retrenchment which the respondent forwarded to the union before the retrenchment process could be set in motion. The disclosure of the names of employees likely to be retrenched prior to the consultation process was irregular. In *Mabaso & others v Universal Product Network (Pty) Ltd* (2003) 24 ILJ 1532 (LC) the employer identified and selected employees for retrenchment before the commencement of the consultation process. At 1546-1549 paras 67-69 the Court held that this led to the dismissal being procedurally unfair and that the ensuing consultation was a sham. In *Goldfields Trust (Pty) Ltd & Another v Stander & Others* [2002] 9 BLLR 797 (LAC) at 806 C-D the Court made the following pronouncement:

"[23]...In those circumstances I am satisfied, like the court a quo, that a final decision of the respondents was taken before the consultation process was initiated and that, for that reason, the consultation process that took place in this matter did not comply with the requirements of section 189. This rendered the dismissal procedurally unfair."

[52] The second issue is the notice of termination of service. It is inconceivable that on 28 June 2011 a Notice in terms of 189(3), inviting the union to consult, encapsulated an effective notice of termination of the second to the ninth

applicants' contracts of employment. In my view, after the employees had received notice of termination of the employment ties, there could not have been a genuine endeavour to consult. In truth, there was nothing to consult on as the final decision to retrench had been announced. The applicants were simply not afforded the opportunity to question their dismissals and to defend their employment. The inescapable conclusion is that the respondent conducted the consultation process with undue haste contrary to a meaningful joint-consensus seeking process envisaged by the Act.

[53] Central to the applicants' contention is the question of the premature notice of termination of employment. The date of delivery of the Notice in terms of s 189(3) is pivotal to the calculation of the number of days that must lapse before the employer may give notice of termination of service. In this case parties had not sought facilitation (s 189A(7)) therefore s 189A(8) applied^{iv}. Where a facilitator has not been appointed and a dispute exists between the parties, a period of 60 days should lapse before the employer can give notice to terminate the contracts of employment. See *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA & others* (2007) 28 ILJ 642 (LC) at 652 para 21.

[54] The notice of termination of service issued simultaneously with the Notice in terms of s 189(3) was woefully premature and improper because such a notice of termination could only have been issued after the lapse of 60 days from the date the Notice in terms of s 189 (3) was issued.

[55] In *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* supra at 1299-1300 paras 19-21 the Court held:

"[19] In *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* (2006) 27 ILJ 1909 (LC) Freund AJ considered the implications of s 189A(8) read together with s 189A(2) which provides *inter alia* that an employer must give notice of termination of employment in accordance with the provision of the section. Reading the two sections together, Freund AJ held at para 35:

'I think it is clear that the lawgiver intended that the employer may only give notice to terminate the contracts of employment if the periods mentioned in s 64(1)(a) have elapsed.'

[20] Accordingly, where a facilitator is not appointed, s 189A(8) is the operative provision. Thus (at para 36):

'A well advised employer intent upon giving notice to terminate the contracts of employment as soon as is lawfully permissible is not prevented by s 189A(8) from giving such notices for any longer than the same 60-day period. To procure this result the employer must ensure that the relevant dispute is referred to a bargaining council or the CCMA as soon it is permissible in terms of s 189A(8)(a), ie as soon as 30 days have elapsed from the date on which the notice was given in terms of s 189(3). Of course, the employer is not obliged to refer the dispute at the earliest permissible moment, but if it fails to do so, the consequence may be that, if agreement is not reached in respect of the retrenchments and the dispute is referred for conciliation, it will have to hold off from issuing notices of termination for the periods mentioned in s 64(1)(a).'

[21] In my view, this approach, as adopted by Freund AJ, is the only one which is clearly justified in terms of the express wording of s 189A(8). The section envisages that a period of 30 days must have lapsed from the date on which notice was given in terms of s 189(3) before the party may refer the dispute to the council or the commission. In addition to the 30-day period, there is the further period set out in s 64(1)(a) which must lapse before the employer can give notice to terminate the contracts of employment. Hence if a dispute existed, the question arises whether it should have been referred, that is after the initial 30-day period."

Conclusion:

[56] In *National Union of Mineworkers & others v Revan Civil Engineering Contractors & others* (supra) at 2175-2176 paras 34-36 the Court had to consider what the effect of the employer's failure to conduct the retrenchment in terms of s 189(A) was in the case where it conducted same in terms of s 189 and secondly, whether the Court could make an order on procedural fairness of the dismissal where the respondent acknowledged that 189A was applicable. In that case the Court concluded that, on proper reading of s 189A, the remedy of a declaration of invalidity of notices of termination, may only be granted on an interim basis, pending compliance with its provisions not in trial proceedings where such an order will be final in effect. On appeal: *Revan Civil Engineering Contractors & others v National Union of Mineworkers & others* (2012) 33 ILJ 1846 (LAC) at 1849 paras 12-14 the Court held:

"[12] Does s 189A(18), where it applies, preclude the Labour Court from deciding whether the foundation for a claim based on an alleged unfair dismissal exists? This subsection reads:

'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).'

[13] Unless there has been a valid dismissal a court may not consider nor grant any relief on the basis that the dismissal was unfair. Section 189A(18) is not intended to

disturb this fundamental principle. This subsection cannot be read so as to preclude a party from alleging that the very foundation for a claim based on the substantive unfairness of a dismissal does not exist in law. If this were to be the case, it would lead to the absurd result that employees could be reinstated or compensated although the law did not recognize that they had lost their jobs.

[14] The court a quo should have declared that the dismissals of the employees were invalid for being in breach of the provisions of s 189A of the LRA.”

[57] If the employer fails to comply with the mandatory requirement of consultation in terms of s 189(2) and moves to terminate the employment in breach of these provisions, then the dismissal must be considered to be invalid and accordingly of no force and effect^v. I am bound to follow the approach enunciated by the Labour Appeal Court in *Revan Civil Engineering Contractors & others* supra.

[58] On the analysis set out above, even if the retrenchment process was to be approached on the basis that s 189 applied, the respondent would still have failed to discharge the onus that the dismissal was substantively and procedurally fair. The corollary of this is that the dismissal of the second to the ninth applicants should be declared invalid for being in breach of the provisions of s 189A of the LRA.

[59] I should mention at this juncture that the respondent accused the union of having been uncooperative and that it had stymied the consultation process. Even assuming that the union had advised its members not to accept the voluntary retrenchment packages it is still incumbent on the respondent to follow due process. Where the union frustrates the process the employer must attempt to follow a fair procedure to the extent that it is possible and to arrive at a fair decision due to the onus placed on it.^{vi}

On the question of costs:

[60] Mr Landman argued that costs on a punitive scale be awarded against the respondent and AVZ jointly and severally. As against AVZ, he contended that this should be for the role it played during the impugned retrenchment process. A critique of Van Zyl’s conduct in the manner he drove the retrenchment process became the hall-mark of the prayer for costs against AVZ. Mr Landman regurgitates the argument on the unfairness of the retrenchment process to

justify the award of costs on an attorney and own client scale. *Inter alia*, in respect of Claim “A”, the fact that the concession in respect of the applicability of s 189A was belated; in respect of Claim “B”, that the applicants had already expended considerable effort to prepare for the trial on the basis that liability was disputed only to be met with a concession at trial.

[61] In *Waar v Louw* 1977 (3) SA 297 (O) the Court held the administration of justice is sometimes an irritating discipline and that even the most skilful practitioners can make mistakes which cause unnecessary costs. AC Cilliers on Law of Costs 4-14 para 4.09 states:

“In *Van Wyk v Millington* [1948 (1) SA 1205(C)] it was pointed out that the court’s reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrongs before the court to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the court. If, however, the court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs.”

[62] I am not persuaded that this is a case where the Court should, to borrow the words used in *Waar v Louw* supra, ‘crack the whip’ by means of an order that respondent pay costs on a punitive scale let alone that AVZ pay the applicants’ costs. In my view, it would be in accordance with the requirements of law and fairness that the respondent should pay the applicants’ costs on party and party scale.

[63] In the result I make the following order:

ORDER:

1. In respect of Claim “A”, it is declared that the dismissals of the second to the ninth applicants are invalid and null and void.
2. In respect of Claim “B”, the respondent is to pay the third, fourth, fifth, sixth, seventh and ninth applicants the amounts set out in annexure “B” to the pre-trial minutes being the underpayments made under Sectoral Determination No 9, Wholesale and Retail Sector together with interest

thereon at the rate of 15.5% per annum from date of this order to date of payment.

3. The respondent is ordered to pay the applicants' costs.

MV PHATSHOANE

ACTING JUDGE

LABOUR COURT

On behalf of the applicants: Adv A.P. Landman instructed by Graham Attorneys

On behalf of the respondents: Adv P.M. Venter instructed by HV Jordaan Inc.

ⁱ Section 74(2)(a) of the Basic Conditions of employment Act, 75 of 1997, provides: "If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if-

(a) the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;"

ⁱⁱ In terms of s 162(3) of the LRA the Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.

ⁱⁱⁱ See for example, *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at 133E-G; *SA Clothing & Textile Workers Union & others v Discreto - A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC) at 1454J-1455A.

^{iv} Section 189A(8) provides: If a facilitator is not appointed-

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189 (3); and

(b) once the periods mentioned in section 64 (1) (a) have elapsed-

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the Basic Conditions of Employment Act; and

(ii) a registered trade union or the employees who have received notice of termination may-

(aa) give notice of a strike in terms of section 64 (1) (b) or (d); or

(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191 (11).

^v See *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* (2011) 32 ILJ 1293 (LAC) at 1304 para 36

^{vi} See *National Union of Metalworkers of SA v Ascoreg* (1999) 20 ILJ 2649 (LC) at 2651 para 9