



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 109/2023

In the matter between:

**THE NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA obo MEMBERS**

Appellant

and

SAA TECHNICAL SOC LTD

Respondent

Coram: Molahlehi AJP et Sutherland and Musi AJJA

Heard: 13 August 2024

Delivered: 10 September 2024

Summary:

This judgment has been delivered by uploading it to the court online digital database of the Labour Courts of the High Court of South Africa, Johannesburg, as utilised by the Labour appeal Court, , and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10h00 on **10 September 2024**.

ORDER

1. The appeal is dismissed with no order as to costs
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JUDGMENT

SUTHERLAND, AJA

Introduction

[1] The crux of this case is the proper interpretation of section 189A(7)(b)(ii) of the Labour Relations Act¹ (LRA) which regulates a referral to the Labour Court of an unfair dismissal dispute after facilitated consultations in large-scale retrenchments have been concluded.

[2] The court *a quo*² held that a party to a facilitated retrenchment engagement about the alleged substantive unfairness of the retrenchment must refer that dispute to conciliation before a valid referral can take place to the Labour Court to adjudicate a dispute alleging an unfair dismissal. The appellant, NUMSA, contends that the step of referring a dispute to conciliation, once the facilitation exercise is over, is not required as a precursor to a referral to the Labour Court. The respondent employer, SAA Technical SOC Ltd, contends that a referral to conciliation is mandatory.

[3] An examination of the controversy about the proper meaning of section 189A(7)(b)(ii) requires that several sections of the LRA about unfair dismissal for operational reasons be read together.

The statutory framework

[4] Section 191 stipulates the procedure for how unfair dismissal disputes (of several kinds) reach adjudication, either in an arbitration or before the Labour Court. Section 191(1) prescribes a referral to conciliation as the first step. The failure to

¹ Act 66 of 1995, as amended.

² *National Union of Metal Workers of South Africa obo Members v SAA Technical (Pty) Ltd* [2023] ZALCJHB 154; (2023) 44 ILJ 2000 (LC).

resolve the dispute about the unfair dismissal during conciliation triggers the next step, set which is out in section 191(5):

'If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if –

(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct or capacity, unless paragraph (b) (iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the *employee* does not know the reason for *dismissal*; or

(iv) the *dispute* concerns an unfair labour practice; or

(b) the *employee* may refer the *dispute* to the Labour Court for adjudication if the *employee* has alleged that the reason for *dismissal* is –

(i) automatically unfair;

(ii) based on the employer's *operational requirements*;

(iii) the *employee's* participation in a *strike* that does not comply with the provisions of Chapter IV; or

(iv) because the *employee* refused to join, was refused membership of or was expelled from a *trade union* party to a closed shop agreement.' [Own emphasis added]

[5] From the text of this section, it must follow that no distinction is made between dismissals for operational reasons and dismissals for other reasons, except for the destination for adjudication. This text is that as amended in 2014. This aspect of the historical evolution of the LRA is significant.

[6] Section 191(11) further stipulates the procedure for referrals to the Labour Court of the four categories of disputes identified in section 191(5)(b):

‘(11) (a) The referral, in terms of subsection (5) (b), of a *dispute* to the Labour Court for adjudication, must be made within 90 days after the *council* or (as the case may be) the commissioner has certified that the *dispute* remains unresolved.

(b)’

[7] This text of section 191(11) was introduced in 1998.

[8] In 2002, section 189A was added to the LRA. The subject matter of the text had no predecessor. It gave effect to a policy choice that in large-scale retrenchments, different treatment was necessary for procedural unfairness and substantive unfairness of retrenchment dismissals. Also, a procedure was invented for a ‘facilitator’ to be appointed to “...*assist the parties engaged in consultations*”. The consultations envisaged were those triggered by a notice in terms of section 189(3). Section 189(3) does not prescribe the content of the assistance, but the lengthy list of factors in section 189(3) to be considered by an employer in a consultation process with the representatives of the affected workers indicates clearly the scope of the contemplated assistance. Notably, the third-party intervenor is labelled a ‘facilitator’ not a ‘conciliator’. This distinctive labelling is plainly not inadvertent and has deliberately been chosen.

[9] Section 189A (7) prescribes what happens after a facilitator has been appointed to ‘assist’:

(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189

(3) –

(a) 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

(b) a registered *trade union* or the *employees* who have received notice of termination may either –

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

(ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).' [Own emphasis added]

[10] The text of subsection (ii) is the seat of the controversy in this appeal. On a plain reading, upon the ending of the facilitated process, a party is required to proceed further as prescribed by section 191(11) which, in turn, implicates section 191(5)(b). The result of these interlocking provisions is that a referral to the Labour Court may be made if the referring party is armed with a certificate of non-resolution of conciliation or the 30 days since referral to conciliation has elapsed.

[11] Or is that truly what the provisions provide? The obvious first thought to strike the reader is why bother with a conciliation process if the parties have already engaged in a facilitated engagement. Bluntly, what possibly could there be left over to talk about? This notion has attracted little judicial attention.

Case law

[12] The court *a quo* addressed the question afresh. The facts relevant to the issue are simply that the appellant did not refer the matter to conciliation before referring it to the Labour Court. It cannot be condemned for not doing so: there is ample precedent stating unequivocally that it was not necessary to do so.³ Notwithstanding that precedent, the court *a quo* considered the case law declaring the conciliation step to be necessary and concluded, in effect, that those cases were wrongly decided.

[13] The rationale of the court *a quo* is captured in this passage of the judgment at paras [42] – [51]:

'[42] Section 191(5)(b) permits employees to refer disputes where the reason for dismissal was based on an employer's operational requirements to the Labour Court for adjudication. The LRA does not differentiate between

³ It may be noted in passing that the regulations are framed upon an assumption that a party may emerge from a facilitation process and straightway refer a dispute to the labour Court. The regulations are of no assistance to a court interpreting the statute. The issue of the validity of the regulations is not before this Court.

section 189 and section 189A retrenchments as reason for dismissal for purposes of a referral for adjudication, nor does it provide separate dispensations for that.

[43] To accept the Applicant's interpretation and understanding of sections 189A(7) and (8) and the applicability of section 191(11) of the LRA, will not only be at odds with the provisions of the LRA, but will also lead to unbusinesslike consequences and will undermine the broader operation of the LRA.

[44] The common law presumes that statutes do not contain invalid or purposeless provisions. Section 189A(7)(b)(ii) makes specific reference to a referral in terms of section 191(11). The legislature intended to provide that the referral to the Labour Court for adjudication had to be made in compliance with section 191(11), which not only prescribes a time period of 90 days, but also provides for the referral to be made after the CCMA or the bargaining council has certified that the dispute remained unresolved.

[45] If the intention was to permit a direct referral to the Labour Court for adjudication, following a facilitation process, the legislature would not have referenced a referral in terms of section 191(11). This is not the result of inelegant drafting but rather in keeping with the spirit of the LRA and the requirement for unfair dismissal disputes to be conciliated.

[46] Fourthly, the Applicant's notion is that, where a section 189A process was facilitated by the CCMA, the dismissed employees are exempted from referring their unfair dismissal dispute to the CCMA and they are entitled to refer their dispute to the Labour Court within 90 days after their services were terminated. This is so because, where a facilitator is not appointed, section 189A(8) provides specifically that the dispute must first be referred to conciliation before the employees may go out on strike or refer a dispute to the Labour Court. Section 189A(7), where a facilitator is appointed, does not require that. I already dealt with this issue *supra* and in my view, this is an incorrect interpretation of section 189A(7).

[47] The Applicant's case is further that there are no benefits to post-facilitation conciliation regarding substantive fairness as the parties will be discussing the exact same issues they discussed during the facilitation process.

[48] In my view there is no merit in this argument. The facilitation process during a section 189A retrenchment process is a pre-dismissal process and it is focussed on compliance with and serving the requirements of section 189(3). The facilitation process does not concern itself with an unfair dismissal dispute, as the process happens prior to dismissal. Conciliation on the other hand happens post-dismissal, when the fairness of a dismissal is challenged with a view to resolving the dismissal dispute.

[49] When employees who were dismissed, after a section 189A process was followed, seek to challenge the fairness of their dismissal, a fresh cause of action arises. The dispute arose post-dismissal and was certainly not considered or conciliated during the pre-dismissal facilitation process. It is a fresh dispute that must be conciliated.

[50] In short: facilitation and conciliation are two different processes. Facilitation happens pre-dismissal, as part of the consultation process with a view to avoid retrenchment and to ensure compliance with the provisions of section 189(3) of the LRA. When the facilitation process happens, there exists no dispute, but rather a contemplation of dismissal based on the employer's operational requirements.

[51] Section 191(1)(a) of the LRA explicitly provides that a dispute about the fairness of a dismissal must be referred to the CCMA or the relevant bargaining council within 30 days of the date of dismissal. The existence of a dispute about the fairness of a dismissal is a prerequisite for a referral and logic dictates that such a dispute arises only after dismissal. As the LRA requires that a 'dispute' must be conciliated and no 'dispute' existed when the facilitation process happens, the facilitation process cannot be equated to conciliation and it does not exempt dismissed employees from referring their unfair dismissal disputes to the CCMA or bargaining council for conciliation.' [

Own emphasis added]

[14] I am in full agreement with this interpretation.

[15] I turn now to deal with the contrary case law which the court *a quo* considered but did not follow. The most lucid exposition of the contrary interpretation is that of the Labour Court in *National Union of Metalworkers of SA on behalf of Members and*

*others v Bell Equipment Co SA (Pty) Ltd*⁴ (*Bell Equipment*). That court was alive to the question of the practicality or impracticality of imposing a conciliation-step on top of a facilitation-step for the purpose of section 189A(7) and contrasted that notion with what its sister provision, section 189A(8), contemplated, where no facilitator was appointed. The Labour Court held thus:

'[22] In support of her submissions to me in support of the exception, Ms Nel referred me to *National Union of Metalworkers of SA & others v SA Five Engineering & others* (2004) 25 ILJ 2358 (LC), a decision concerning the provisions of s 189A(8)(b)(ii) in which the court found that the Labour Court has no jurisdiction to adjudicate a dispute about the substantive fairness of an operational requirements dismissal in terms of the said section unless the dispute has first been referred to conciliation and the bargaining council or the CCMA has certified that the dispute remains unresolved. The court went on to hold that there is no power on the part of the court to condone non-compliance with this jurisdictional precondition. It found that absent conciliation, the Labour Court does not have jurisdiction.

[23] Section 189A(8) provides as follows:

'(8) 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)*.' (Emphasis added.)

[24] In my view it is clear from subpara (b) that the referral of a dismissal dispute to the Labour Court does not because of the reference to s 191(11)

⁴ (2011) 32 ILJ 382 (LC).

require yet a further referral to the CCMA or a bargaining council because that would already have occurred in terms of subsection (8)(a). Likewise, I would consider it to be absurd if the reference to s 191(11) were to be read in that manner in the context of subsection (7)(b) (ii) In arriving at this conclusion I take into account two important factors. The first is that in the event of the appointment of a facilitator, the parties benefit from the facilitation process which is not identical to but not dissimilar from the conciliation process. What is more, a period of 60 days must elapse from the date on which the s 189(3) notice is given before an employer may give notice to terminate. Secondly, subsection (7)(b) (i) does not require a trade union or the employees who have received notice of termination to refer a dispute to the CCMA or the bargaining council for conciliation and for a certificate of non-resolution to be issued should the employees wish to give notice of a proposed strike in terms of s 64(1)(b) of the LRA. I can see no reason why the legislature in drafting subsection (7)(b) (ii) would require employees to refer disputes to the CCMA or a bargaining council if they wish to refer such disputes to the Labour Court.

[25] It must be accepted, however, that the reference to s 191(11) in subsection (7)(b) (ii) serves a purpose. The common law, after all, presumes that statutes do not contain invalid or purposeless provisions (*Case v Minister of Safety & Security* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 57). It appears to me that what the legislature intended was to provide that the referral of the dispute to the Labour Court for adjudication must take place within 90 days, that being the time referred to in s 191(11)(a). I do, however, realize that the section provides for the referral to be made within 90 days after the CCMA or bargaining council has certified that the dispute remains unresolved. When then should the 90-day period be calculated from in terms of s 189A(7)(b) (ii)? The only logical answer is that it must be calculated from the date of the notice of termination.

[26] I conclude, therefore, that reading s 189A(7)(b) (ii) in the manner contended for by the respondent leads to an absurdity which must be avoided. In *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) at para 6, the Supreme Court of Appeal referred with approval to the dictum of Stratford

JA in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129 where it was held that:

'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the law giver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.'

In para 7 of the judgment, the Supreme Court of Appeal referred to *Poswa v Member of the Executive Council for Economic Affairs, Environment & Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) at para 11 where Schutz JA stated that the effect of the formulation in *Bhyat* –

“is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of defining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.”

[27] It is for these reasons that I have concluded that the legislature could not have intended what is contended for on behalf of the respondent but that what was intended by subsection (7)(b) (ii) is that a trade union or an employee who has received a notice of termination may refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court within 90 days of receipt of the notice of termination. It follows, therefore, that the second ground of exception cannot succeed.’ [Own emphasis added]

[16] The Labour Appeal Court in *Edcon v Steenkamp and others*⁵ articulated the same view, without citing *Bell Equipment*. It is plainly an obiter statement and on the probabilities the point had not been argued:

‘The notice given by the employer in terms of s 189A(7)(a) of the LRA, after the 60-day period allowed for facilitation has elapsed, triggers the right of the employees or their representatives to resort to either strike action in terms of s 189A(7)(b)(i) of the LRA or litigation in terms of s 189A(7)(b)(ii) of the LRA. There are two notable features of the right to strike conferred by s

⁵ 2015 (4) SA 247 (LAC) (*Edcon*) at para 15.

189A(7)(b)(i) of the LRA. The first is that the dispute does not have to be referred to a bargaining council or the CCMA for conciliation over a 30-day cooling-off period, as is normally required in terms of s 64 of the LRA. Where there has been a facilitation process, it would be unnecessary duplication to require an additional 30-day conciliation process at the end of the 60-day period allowed for facilitation — bearing in mind that the parties may agree to extend the facilitation period in terms of s 189A(2)(c) of the LRA. Likewise, the envisioned referral to the Labour Court in terms of s 191(11) of the LRA does not require a prior referral to conciliation. Secondly, the requirement of 48 hours' notice of the commencement of the industrial action remains applicable.'

[17] This rationale has stood for some thirteen years and ought not to be lightly reversed. I regret that I am unable to agree with the thesis.⁶

[18] Section 189 is concerned only with what should happen in the consultation process. It prescribes the default position in which the employer and the union, typically, engage one another. It is not the locus on what may happen after consultations have been concluded.

[19] The contestation between the two lines of argument about what section 189A(7) (b) (ii) means is rooted in what might be thought to be a preferable aftermath of the consultation process contemplated by section 189. Ultimately, it is the proper interpretation of the text which must dictate which policy was chosen.

[20] The legislative history may explain the textual awkwardness in the interrelationship among the sections cited; i.e. the grafting onto an existing statute of a new procedural idea without a real appreciation of all the knock-on implications. This occurs especially when the style of drafting finds favour with multiple cross-references to existing provisions, rather than stipulating in plain terms what is required in the primary section regulating the process. This awkwardness is not,

⁶ The statement of the Labour Appeal Court in *Edcon* being obiter, is accordingly not binding upon this court. In differing from the Labour Court decision in *Bell Equipment*, it is not necessary to take a view that the interpretation was clearly wrong as contemplated in the dictum in *Turnbull-Jackson v Hibiscus Coast Municipality and others* [2014] ZACC 24; 2014 (6) SA 592 (CC) at paras 56 - 57.

however, a solid platform to impute a better option than the option which is evidenced by the text.

[21] The approach taken by *Bell Equipment* to the allusion in section 189A(7)(b)(ii) to section 191(11) being merely to utilise a time period is, in my view, unduly strained because the very text resists the gloss placed upon it. Moreover, the trigger event for the 60-day period to run has, in the thesis, to be identified by an interpolation that it runs from the date of the dismissal notice. True enough, were the invocation of section 191(11) to mean, indeed, a mere stipulation of a time period, the entire process would be much simplified – an objective which is much to be commended. However, one is driven to ask why the drafter did not simply say so straightforwardly, which would have made unnecessary a convoluted cross-reference to a section that said much more than that and gratuitously implicated superfluous provisions.

[22] But more importantly, the neatness of *Bell Equipment*'s conclusion to rescue the section 189A(7) process from a 'superfluous' referral to conciliation, must compete with the equally neat notion of simplicity in determining the jurisdiction of the Labour Court by reference to a single universal norm: i.e., *all that comes before the Labour Court about unfair dismissal must pass first through the portal of conciliation*. It is appropriate that due weight be accorded to this consideration. Where that norm is not to apply, the statute ought to unambiguously and unequivocally say so.

[23] There is another leg to the contested thesis; i.e., the observation that if the union after the end of the facilitated consultation prefers to strike rather than take its chances in adjudication by the Labour Court, it is not required to refer the strike demands to conciliation first. Thus, runs the argument, this contrast, by inference, must on a sensible reading, mean that it is anomalous to require a referral to conciliation before the union refers a dispute to the Labour Court.

[24] However, as held in the judgment *a quo*, there is a functional distinction between facilitation and conciliation. In my view, this normative perspective is critical. As argued on behalf of the respondent, there is a shift from an arena in which there has been a contestation about *interests* to an arena where there is a contestation

about *rights*. It does not automatically follow that the issues canvassed in the retrenchment consultations remain static and do not morph into distinctive other issues that are then sought to be brought before the Labour Court. The ‘dismissal’ *causa* is indeed a fresh dispute, albeit one with some baggage from the ‘consultation’ *causa*. The alternative option to litigation, i.e. the strike option, fits a dispute about an interest dispute as distinct from an unfair dismissal dispute, which exacerbates the difference in the kind of issues identified in each of subsections 189A(7)(b) (i) and (ii).

[25] The proposition of a universal norm in the form of conciliation of a dismissal dispute as a precursor to establishing jurisdiction for adjudication in the Labour Court has been endorsed in several cases, but it is, in my view, questionable whether they can be cogently understood to be authority for the critical issue in this case, because the context in those cases differ materially and moreover, the point at issue had not been argued.⁷

[26] Ultimately what is revealed by the exercise of stripping down the text and examining it in the light of the experience of retrenchment disputes is that the two rival positions are informed by policy choices. It is not the role of the Court to prefer one policy over another, but rather to divine which policy the statute, read as a whole and in the context of the dynamics of collective bargaining and labour litigation, has been stipulated.⁸

Conclusions

[27] In the result, the proper interpretation of section 189A(7)(b)(ii) is that notwithstanding the facilitation process, a referral to conciliation is mandatory.

Costs

⁷ See: *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd and another* [1999] ZALC 157; (2000) 21 ILJ 142 (LAC) at paras 66 – 73; *Steenkamp and Others v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC) at para 31; *National Union of Metalworkers of SA v Intervolve (Pty) Ltd and others* [2014] ZACC 35; (2015) 36 ILJ 363 (CC) at paras 31 - 32, among others.

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 26.

[28] The appropriate order about costs given the nature of the matter is that each party bears its own costs.

Order

1. The appeal is dismissed with no order as to costs.

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R Sutherland

Molahlehi AJP and Musi AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv M. Meyerowitz and Adv D. Bojosi

Instructed by Serfontein, Viljoen en Swart Attorneys

FOR THE RESPONDENT: Adv. F. Boda SC

Instructed by Cliffe Dekker Hofmeyr Inc.