



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA05/2023

In the matter between:

INDUSTRIAL OLEO CHEMICAL PRODUCTS

Appellant

and

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

First Respondent

BHEKABANTU MJWENI & 5 OTHERS

Second and
further Respondents

Date of hearing: 20 August 2024

Date of judgment: 23 October 2024

Coram: Savage ADJP, Nkutha-Nkontwana JA and Mlambo AJA

JUDGMENT

SAVAGE ADJP

Introduction

[1] In issue in this appeal is whether the Labour Court has jurisdiction to adjudicate an unfair dismissal based on operational requirements referred to it in terms of section 189A(7)(b)(ii) of the Labour Relations Act 66 of 1995 (the LRA) when the dispute has not first been referred to the Commission for Conciliation Mediation and Arbitration (the CCMA) or the relevant bargaining council for conciliation in terms of section 191(1). The Labour Court found that it had jurisdiction to determine the dispute referred despite the fact that it had not been referred for conciliation. The Court refused leave to appeal, which was granted by this Court on petition.

[2] Shortly after this appeal was argued, the parties were provided with an opportunity to file further submissions regarding the decision of a differently constituted bench of this Court in *National Union of Metalworkers of South Africa obo Members v SAA Technical SOC Ltd (SAA Technical)*,¹ which was handed down after the hearing of the current appeal. The parties indicated that they had elected not to file any further submissions regarding the issue. In *SAA Technical*, the Court was faced with the same issue, namely the proper interpretation of section 189A(7)(b)(ii) of the LRA which regulates the referral to the Labour Court of an unfair dismissal dispute after facilitated consultations in large-scale retrenchments have been concluded. It was found that the proper interpretation of section 189A(7)(b)(ii) is that notwithstanding the facilitation process, a referral to conciliation is mandatory.

Relevant background

[3] In July 2020 the second and further respondents (the employees), together with other employees, were retrenched by the appellant, Industrial Oleo Chemical Products, in a large-scale section 189A retrenchment exercise. In August 2020, following a successful urgent application to the Labour Court brought in terms of section 189A(13) by the first respondent, the National Union of Metalworkers of South Africa (NUMSA) on behalf of its members, all dismissed employees were

¹ *National Union of Metalworkers of South Africa obo Members v SAA Technical SOC Ltd* [2024] ZALAC 41.

reinstated. Thereafter, a new consultation process commenced in terms of section 189A, with a facilitator appointed. On 12 November 2020 the second to further respondents were dismissed for reason of the appellant's operational requirements.

[4] More than five months after their dismissal, on 19 April 2021, the employees referred a dispute to the Labour Court in terms of section 189A(7)(b)(ii), seeking that the late referral of their dispute be condoned. The appellant raised as a preliminary issue before the Labour Court that the employees had failed to refer an unfair dismissal dispute to the CCMA or any bargaining council for conciliation before approaching the Labour, which therefore lacked jurisdiction to determine the matter.

[5] The Labour Court dismissed the preliminary issue raised on the basis that the LRA does not require that a dispute be referred for conciliation in terms of section 64(1),² in the manner that section 189A(8) does, and that a referral to conciliation in

² Section 64(1) provides:

- '(1) Every employee has the right to strike and every employer has recourse to lock-out if -
- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and - (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that
 - (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
 - (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).'

respect of dismissals arising from a facilitated section 189A retrenchment exercise is unnecessary. It found that the LRA would have required that a dispute be referred to the Labour Court in terms of section 191(1)³ and not section 191(11)⁴ had a referral to conciliation been required. Such an interpretation was found not to offend against the finding of the Constitutional Court in *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd and Others (Intervolve)*,⁵ with the requirements of s189A(7)(b)(ii)⁶ and s189A(8)(b)(ii)(bb),⁷ properly interpreted, not found to contradict the Court's view.

³ Section 191(1) states:

'(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

(i) a council, if the parties to the dispute fall within the registered scope of that council; or (ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within –

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.'

⁴ Section 191(11) states:

'(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) However, the Labour Court may condone non-observance of that timeframe on good cause shown.'

⁵ [2014] ZACC 35 para 40.

⁶ Section 189A(7) states:

'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

[6] Reliance was placed by the Court on the Regulations for the Conduct of Facilitations in terms of section 189A,⁸ which state that “(a) *dispute in terms of section 189A(7)(b)(ii) must be referred to the Labour Court within 90 days of the notice of termination, or, if no notice is given, within 90 days of the dismissal*”, with no reference made to a referral to conciliation. Following *Edcon v Steenkamp and Others (Edcon)*⁹ and *NUMSA obo Members and others v Bell Equipment Co SA (Pty) Ltd (Bell Equipment)*,¹⁰ it was found that a referral in terms of section 189A(7)(b)(ii) need not be preceded by a referral to conciliation in order for the Labour Court to have jurisdiction to adjudicate the matter. The Court distanced itself from the Labour Court’s judgment in *South African Equity Union obo Van Wyk and 100 members v Lodestone Confectionary (Pty) Ltd t/a Candy Tops (Lodestone)*¹¹ and concluded that despite the matter not being referred to conciliation, it held the requisite jurisdiction to determine the matter.

Submissions on appeal

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

⁷ 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).’

⁸ GN R1445, G25525 (10 October 2003).

⁹ 2015(4) SA 247 (LAC) at par 14 and 15.

¹⁰ (2011) 32 ILJ 382 (LC).

¹¹ [2010] ZACT 63.

[7] The appellant contends on appeal that it is clear from *Intervalve* that before an unfair dismissal dispute can be adjudicated it must be conciliated and that *Lodestone* confirmed as much. Support for such conclusion is to be found in the fact that facilitation and conciliation are distinct processes with the former taking place before any termination and the latter after it, and the purpose of conciliation being to avoid prolonged unfair dismissal disputes and provide parties with an opportunity to settle a matter. The finding in *Bell Equipment*, which pre-dated *Intervalve*, that facilitation is not dissimilar from conciliation and that there was therefore no need to refer the dispute to conciliation, the appellant submits, overlooked the fact that different purposes were served by the two processes. Further, the Court's remarks in *Edcon*¹² were *obiter* on the issue. Consequently, the Labour Court erred and its decision falls to be set aside.

[8] The respondents oppose the appeal contending that prior to the introduction of section 189A, an unfair dismissal dispute could only be referred to the Labour Court via section 191(5)(b) which required a referral to conciliation. However, after the amendment, a dispute may be referred to the Labour Court under section 189A(7)(b)(ii) with no requirement that it first be referred to conciliation. Section 189A(7)(b) implicates section 34 of the Constitution and must not be interpreted restrictively but should be interpreted to promote and not hinder access to the court.

[9] The respondents accept that the reference in subsection 189A(7)(b)(ii) to section 191(11) has led to the sub-sections being differently interpreted in two lines of irreconcilable cases. However, since section 191(11) does not contain any substantive requirements, the respondents contend its sole purpose is to set out a limitation of the time within which a dispute must be referred to the Labour Court. It is argued that it would therefore be illogical to give this provision a more extensive meaning when the right to refer a dispute to the Labour Court in terms of subsection 189A(7)(b) read with section 191(11) of the LRA is a parallel right to that contained in section 191(5)(b) and the LRA did not provide for the dispute to be referred to the CCMA or bargaining council. If such a referral was intended it would have to be read into the statute through an oblique reference in section 191(11) to section 191(5)(b).

¹² 2015 (4) SA 247 (LAC).

Further support for such a conclusion is to be found in the fact that while section 189A(8) provides for the referral of the dispute to CCMA or bargaining council, section 189A (7) includes no such reference. The respondents therefore submit that the Labour Court came to the correct conclusion and that the appeal should be dismissed.

Discussion

[10] In *National Union of Metalworkers of South African obo Members v SAA Technical SOC Ltd*¹³ this Court was faced with the same issue.

[11] Section 189A(7) applies to large-scale retrenchment processes in which a facilitator has been appointed, providing that 60 days after notice has been given to employees in terms of section 189(3), the employer may give notice to terminate employee contracts of employment. Thereafter, the employees or their registered trade union may either give notice of a strike in terms of section 64(1)(b) or (d); “*or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)*”.

[12] Section 191(11), which existed before the introduction of section 189A into the LRA in August 2002, provides that “*(t)he 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*”. If a dispute has been certified as unresolved, or 30 days or any further period as agreed between the parties has expired, in terms of section 191(5)(b) “*the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is - ...(ii) based on the employer’s operational requirements*”.

¹³ *National Union of Metalworkers of South African obo Members v SAA Technical SOC Ltd* [2024] ZALAC 41.

[13] In *Intervale*¹⁴ the Constitutional Court held that a referral to conciliation is indispensable and a pre-condition to the Labour Court's jurisdiction over unfair dismissals. The Court noted that:

'The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships.'¹⁵

[14] The two preconditions before a dispute can be referred to the Labour Court for adjudication set out in section 191(5) are that there must be a certificate of non-resolution, or 30 days must have passed since the referral of the dispute. If neither condition is fulfilled, the LRA was found in *Intervale* to provide "*no avenue through which the employee may bring the dispute to the Labour Court for adjudication*".¹⁶ The Court rejected the concern that making conciliation a jurisdictional precondition would foster formalism, encourage technicalities and be overly restrictive on the basis that jurisdiction is not a formality, nor would requiring the referral to conciliation impede the effective resolution of labour disputes but "is likely to lead to less, not more, litigation".¹⁷

[15] In *Remhoogte Plant Hire and Others v Jacob Durr Trust and Others*¹⁸ the Constitutional Court again noted that section 191 requires disputes about the fairness of a dismissal to be referred to conciliation, with the exercise of the Labour Court's jurisdiction deferred until a dispute has been conciliated. This was found to

¹⁴ [2014] ZACC 35 para 40.

¹⁵ At para 46.

¹⁶ *Intervale* (*supra*) at para 32.

¹⁷ *Intervale* (*supra*) at paras 36 -37 and 71.

¹⁸ [2020] ZACC 8; 2020 (7) BCLR 779 (CC); (2020) 41 ILJ 1837 (CC); [2020] 10 BLLR 959 (CC).

accord with the structure of the LRA which obliges parties to disputes to first make use of non-litigation dispute resolution mechanisms, before approaching courts.¹⁹

[16] We agree with the Court in *SAA Technical* 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. This is so in that section 189 is concerned only with what should happen in the consultation process and not with what may happen after consultations have been concluded.

[17] The interpretation adopted in cases such as *Bell Equipment* to the effect that section 189A(7) seeks to prevent a superfluous referral to conciliation, disregards the functional distinction between facilitation and conciliation. This is so in that, as stated in *SAA Technical*, the 'dismissal' *causa* is a fresh dispute, even if it emanates from the 'consultation' *causa*. Similarly, the right to strike as an alternative to litigation, reflects the statutory distinction between rights and interest disputes as identified in sections 189A(7)(b) (i) and (ii).

[18] For all of these reasons, we agree with the decision of this Court in *SAA Technical* and find that the proper interpretation of section 189A(7)(b)(ii) is that notwithstanding the facilitation process, a referral to conciliation is mandatory.

[19] Given the nature of the matter and considerations of law and fairness, each party should bear its own costs.

Order

[20] For these reasons the following order is made:

1. The appeal is upheld with each party to bear its own costs.
2. The order of the Labour Court is set aside and replaced as follows:
'1. The applicants' referral is struck from the roll.'

¹⁹ *Remhoogte* (supra) at para 16.

Nkutha-Nkontwana JA and Mlambo AJA agree.

APPEARANCES:

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