



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case Number: JS 730/15

In the matter between:

**SATAWU obo T BALOYI & 220 OTHERS**

Applicant

and

**MENZIES AVIATION (SOUTH AFRICA) (PTY) LTD**

Respondent

**Date heard: 24 April 2014**

**Delivered: 25 September 2015**

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**JUDGMENT**

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RABKIN-NAICKER J

- [1] This matter concerns certain points in *limine* raised by the respondent in the pre-trial minute filed by the parties. The action was referred to this court in relation to the alleged unfair dismissal of the individual applicants in terms of section 189A of the LRA.

FIRST POINT IN LIMINE

[2] The respondent alleges that the court lacks the requisite jurisdiction to entertain the matter in that dispute was not referred to the CCMA before referral to this court. In consequence no certificate of outcome of conciliation has been issued by the CCMA, nor has a period of 30 days expired since the referral of the dispute to the CCMA.

[3] The dismissals followed a facilitation in terms of section 189A(7) of the LRA which provides as follows:

“(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)”

[4] The question as to whether section 189A(7) requires a referral to conciliation before the dispute is referred to this court has now been dealt by the LAC in ***Edcon v Steenkamp & others (2015) 36 ILJ 1469 (LAC)*** in which it is stated as follows:

“[13] Section 189A(7) of the LRA deals with the situation where a facilitator has been appointed. It reads:

“(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 I 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).'

[14] It is immediately evident from this provision that where facilitation has been attempted and 60 days have lapsed since the employer issued a s 189(3) notice inviting consultation and disclosing relevant information, the employer may give notice to terminate the contracts of employment of the employees selected by it for retrenchment in accordance with agreed or fair selection criteria as required by s 189(7) of the LRA. Section 37(1) of the Basic Conditions of Employment Act (the BCEA) stipulates notice periods for the termination of employment which are variable depending on the employee's period of service.

[15] 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 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.”

[5] In view of the above, the first point in *limine* raised by the respondent must fail.

#### SECOND POINT IN LIMINE

[6] The second point raised by the respondent is that section 189A(13) of the LRA renders it incumbent on a party seeking to challenge procedural fairness in respect

of a retrenchment process to pursue such dispute by way of an application within the time limit set in section 189A(17)(a). The applicant has sought to mount a procedural challenge in relation to procedural fairness in the action.

[7] In respect of this issue, the following paragraphs of the **Edcon** LAC judgment are apposite:

“[19] Having carved out distinct alternative procedures for the resolution of disputes about the substantive fairness of large-scale retrenchments, s 189A of the LRA additionally creates a distinct procedure for disputes about procedural fairness in dismissals falling within the ambit of the section. Section 189A(18) of the LRA provides that the Labour Court may not adjudicate a dispute about the procedural fairness of an operational requirements dismissal referred to it in terms of s 191(5)(b)(ii) of the LRA. Consulting parties who allege procedural unfairness in the consultation process are now required to approach the Labour Court by way of an application made in terms of s 189A(13) of the LRA within 30 days after the employer has given notice to terminate or, if notice of termination is not given, within 30 days of the date of dismissal. In an application made in terms of s 189A(13) of the LRA, the consulting party may seek an order, if need be on an urgent basis —

- (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; or
- (d) awarding compensation, if an order in terms of paras (a) to (c) is not appropriate.

[20] The object of s 189A(13) of the LRA, as appears from a purposive interpretation of s 189A read as a whole and in context, is to separate out procedural issues and to provide a means whereby the consultation and facilitation processes are not undermined by procedural flaws. It offers a useful expedient to the parties to seek the assistance of the court, acting as the guardian of the process, to ensure that the issues are adequately identified, considered and ventilated in the process of consultation or facilitation before it ends. It thus ensures that only disputes about the

fairness of substantive reasons and outcomes will generally be subjected to resolution by means of collective action or in a trial involving the hearing of oral evidence.”

- [8] The second point in *limine* is thus upheld to the extent that the applicants may only challenge the substantive fairness of their dismissals at trial. The fact that they sought to include such a claim does not preclude them from pursuing the substantive fairness claim as the respondent appears to suggest in its submissions.

### THIRD POINT IN LIMINE

- [9] The third point in *limine* raised is that Menzies Aviation was not the employer of the employees at any point; it being the case that Menzies Aviation (South Africa) (Cleaning) (Pty) Ltd (“Menzies Cleaning”), a separate legal entity, was their employer. This point is closely related to the first point in *limine* herein i.e. that the matter should have been referred to the CCMA, and the ‘correct ‘employer’ cited in such referral.
- [10] I have already determined that the first point in *limine* should not be upheld. In addition it is evident from the application to join “Menzies Cleaning” to the action proceedings, that the issue of the joinder of a second respondent should properly be dealt with at trial.
- [11] In the result, I make the following order:
1. The first and third points in *limine* are dismissed;
  2. The applicants are limited to a claim that their dismissals are substantively unfair in the main action.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv J.S. Mphahlani

Instructed by: M.M. Baloyi Attorneys

For Respondent: Adv Riaz Itzkin

Instructed by: Hogan Lovells (South Africa)

LABOUR COURT