CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 367/24

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	First Applicant
BHEKABANTU MJWENI	Second Applicant
PATRICK NDLOVU	Third Applicant
TREVOR NTULI	Fourth Applicant
MBONGELENI D DLAMINI	Fifth Applicant
DEON VAN DER BYL	Sixth Applicant
NORMAN THWALA	Seventh Applicant

and

INDUSTRIAL OLEO CHEMICAL PRODUCTS	Respondent

Neutral citation:	*National Union of Metalworkers of South Africa and Others v Industrial Oleo Chemical Products* [2026] ZACC [22]
Coram:	Maya CJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Theron J and Tshiqi J
Judgments:	Tshiqi J (majority): [1] to [68] Theron J (minority): [69] to [107]

Heard on: 30 September 2025

Decided on: 29 May 2026

Summary: Labour Relations Act 66 of 1995 — section 189A(7)(b)(ii) — section 191(11) — dismissals based on operational requirements — facilitation — conciliation as a jurisdictional precondition to adjudication by the Labour Court

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ORDER

On application for leave to appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Labour Appeal Court is set aside.
4. The order of the Labour Court is reinstated, and the matter is remitted to the Labour Court to decide the merits of the applicants' case.
5. There is no order as to costs.

JUDGMENT

TSHIQI J (Kollapen J, Mathopo J, Mhlantla J and Rogers J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Labour Appeal Court (LAC). What began as a dispute over the fairness of dismissals based on operational requirements, spiralled into a dispute concerning the jurisdiction

of the Labour Court to adjudicate over allegedly unfair mass retrenchment-related dismissal disputes after a failed facilitation process.[1] This Court is required to determine this very issue.

[2] The application challenges the LAC's interpretation of section 189A(7)(b)(ii),[2] read with section 191(11),[3] of the Labour Relations Act (LRA), which found that after a failed facilitation in the context of mass retrenchments, the parties have to refer the dismissal dispute for conciliation before approaching the Labour Court to adjudicate the matter.

Parties

[3] The first applicant is the National Union of Metalworkers of South Africa (NUMSA). The second to seventh applicants are members of NUMSA, namely: Bhekabantu Mjweni, Patrick Ndlovu, Trevor Ntuli, Mbongeleni D Dlamini, Deon van der Byl and Norman Thwala (collectively, together with NUMSA, referred to as the applicants). The respondent is Industrial Oleo Chemical Products, a business of AECI Chemicals.

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[1] A facilitation process embarked on under section 189A of the Labour Relations Act 66 of 1995 (LRA).

[2] Section 189A(7) of the LRA reads as follows:

> "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)."

[3] Section 191(11) of the LRA reads as follows:

> "(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."

Background and litigation history

[4] In early 2020, the respondent undertook a large-scale retrenchment exercise due to operational concerns, that resulted in the dismissal of the applicants in July 2020. The applicants initially approached the Labour Court on an urgent basis, in terms of section 189A(13) of the LRA.[4] They alleged that in the facilitation meetings, the respondent had already predetermined the employees that it intended to dismiss, and that they were not provided with an opportunity to make representations against the respondent's findings on their dismissals. The applicants succeeded in their urgent application and were reinstated, and a new consultation process before another facilitator commenced in terms of section 189A of the LRA. This new facilitation process resulted in the dismissal of the applicants on 12 November 2020.

Labour Court

[5] Following the dismissal, and after a failed facilitation process, the applicants referred a dispute to the Labour Court in terms of section 189A(7)(b)(ii) of the LRA. The respondent raised a preliminary point, submitting that the applicants were required to first refer the unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a Council[5] before they could approach the Labour Court. Simply put, the respondent contended that after a failed facilitation, dismissed employees cannot bypass conciliation and directly approach the Labour Court.

[4] Section 189A(13) of the LRA reads:

> "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."

[5] "Council" as defined in section 213 of the LRA includes bargaining councils and statutory councils.

According to the respondent, this meant that the Labour Court lacked jurisdiction to determine the unfair dismissal dispute, since conciliation had not first taken place.

[6] The Labour Court dismissed the respondent's preliminary point.[6] It held that it is not necessary to refer a dispute to conciliation once a facilitation process in terms of section 189A(7) of the LRA has taken place. If conciliation was required, so the Labour Court reasoned, the LRA would have prescribed that a dispute be referred to the Labour Court in terms of section 191(1),[7] and not in terms of section 191(11). The Labour Court judgment also made mention of the Regulations for the Conduct of Facilitations in terms of Section 189A[8] (Regulations), an *obiter* (in passing) remark in *Edcon*[9] and the finding in *Bell*[10] to further support its analysis.

Labour Appeal Court

[7] On appeal, the LAC found differently.[11] It held that a referral of a dismissal dispute to the CCMA for conciliation is mandatory after the failure of a facilitation

[6] *NUMSA v Industrial Oleo Chemical Products* [2022] ZALCD 14 (Labour Court judgment).

[7] Section 191(1) of the LRA reads as follows:

> "(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."

[8] Regulations for the Conduct of Facilitations in terms of Section 189A, GN R1445 *GG* 25515, 10 October 2003.

[9] *Edcon v Steenkamp* [2015] ZALAC 2; 2015 (4) SA 247 (LAC); [2015] 6 BLLR 549 (LAC); (2015) 36 ILJ 1469 (LAC).

[10] *National Union of Metalworkers of SA on behalf of Members v Bell Equipment Co SA (Pty) Ltd* [2010] ZALC 217; (2011) 32 ILJ 382 (LC).

[11] *Industrial Oleo Chemical Products v National Union of Metalworkers of South Africa* [2024] ZALAC 53; [2025] 1 BLLR 1 (LAC); (2025) 46 ILJ 328 (LAC) (Labour Appeal Court judgment).

process. The LAC found that there is a functional distinction between facilitation and conciliation.[12] It relied on *SAA Technical*[13] to conclude that section 189A is concerned only with what should happen during the consultation process and not with what happens after the consultations have taken place. Relying on *SAA Technical*, the LAC held the view that a "dismissal is . . . a fresh dispute . . . from the 'consultation' *causa* [(cause of action)]".[14] The LAC cited this Court's decision in *Ngululu*,[15] to observe that section 191 requires disputes about unfair dismissals to be referred to conciliation "with the exercise of the Labour Court's jurisdiction deferred until a dispute has been conciliated".[16] In the LAC's view, this accords with the legislative structure of the LRA – which requires parties to a dispute to first exhaust non-litigation dispute resolution mechanisms before approaching the courts for assistance.[17] The LAC accordingly held that, notwithstanding the facilitation process, a referral of the dismissal dispute to conciliation, after mass retrenchments, was mandatory.[18] Aggrieved by the LAC's decision, the applicants approach this Court for relief.

Issues to be determined in this Court

[8] This Court is required to make a pronouncement on the following:

(a) Whether this Court's jurisdiction is engaged and, if so, whether leave to appeal should be granted.

(b) Whether section 189A(7)(b)(ii) of the LRA requires the parties to first refer a dismissal dispute for conciliation after a failed facilitation, before

[12] Id at para 17.

[13] *National Union of Metalworkers of SA on behalf of Members v SAA Technical SOC Ltd* [2024] ZALAC 41; [2024] 12 BLLR 1259 (LAC); (2024) 45 ILJ 2524 (LAC).

[14] Id at para 24.

[15] *Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation)* [2020] ZACC 8; 2020 (7) BCLR 779 (CC); [2020] 10 BLLR 959 (CC); (2020) 41 ILJ 1837 (CC). Please note that the Labour Appeal Court judgment above n 11 at para 15 refers to "*Remhoogte Plant Hire and Others v Jacob Durr Trust and Others*", while citing the same citation as *Ngululu*. This is a clerical error.

[16] Labour Appeal Court judgment id. See also *Ngululu* id at para 16.

[17] Labour Appeal Court judgment id.

[18] Id at para 18.

a dismissal dispute arising from mass retrenchments can be referred to the Labour Court.

(c) If the answer to (b) is negative, what the purpose is of the reference to section 191(11) in section 189A(7)(b)(ii) of the LRA.

Jurisdiction and leave to appeal

[9] The applicants submit that this Court's jurisdiction is engaged as the matter raises—

(a) the interpretation of the LRA;

(b) the right to fair labour practices as prescribed in section 23(1) of the Constitution;[19] and

(c) the right of access to the Labour Court, a facet of the right guaranteed under section 34 of the Constitution.[20]

[10] It is further submitted that this Court's jurisdiction is engaged because the case raises arguable points of law of general public importance, envisaged under section 167(3)(b)(ii) of the Constitution,[21] as the relevant provisions of the LRA have been interpreted differently in two previous cases in the Labour Court.

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[19] Section 23(1) of the Constitution states that everyone has the right to fair labour practices.

[20] Section 34 of the Constitution reads as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[21] Section 167(3)(b) of the Constitution reads as follows:

> "(3) The Constitutional Court—
>
> . . .
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[11] The respondent concedes that this matter engages this Court's jurisdiction, but argues that leave to appeal should be refused as the appeal does not enjoy prospects of success. The basis of the respondent's assertion is that the LAC has twice rejected the applicants' argument, and that this Court in *Intervalve*[22] endorsed the principle that conciliation is a precondition to the Labour Court's jurisdiction. The respondent submits that section 189A(7) of the LRA is no exception to this principle.

[12] I agree that this matter engages both legs of this Court's jurisdiction under section 167(3)(b)(i) and (ii) of the Constitution. Considering that the LRA's provisions have been interpreted differently in two previous cases before the Labour Court, it is in the interests of justice for this Court to provide clarity on the issue. Leave to appeal must therefore be granted.

Legislative framework

[13] Prior to the enactment of section 189A of the LRA in 2002, all disputes on dismissals based on operational requirements were adjudicated by the Labour Court as disputes of "right" under section 189 of the LRA.[23] Section 189A was introduced to address substantive and procedural fairness in large-scale retrenchments. It establishes, amongst others, a facilitated consultation process and an option to strike.[24] Upon the failure of the facilitation process, section 189A(7) of the LRA provides employees[25]

[22] *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* [2014] ZACC 35; 2015 (2) BCLR 182 (CC); [2015] 3 BLLR 205 (CC); (2015) 36 ILJ 363 (CC).

[23] Du Toit *Labour Law Through the Cases* issue 26 at 8-78 (15).

[24] Id. See also section 189A(3) of the LRA, which states:

> "The [CCMA] must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if—
>
> (a) the employer has in its notice in terms of section 189(3) requested facilitation; or
>
> (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the [CCMA] within 15 days of the notice."

[25] Or a registered trade union, acting in a representative capacity.

with an election to resort to strike action[26] or refer an unfair dismissal dispute to "the Labour Court in terms of section 191(11)".[27]

[14] According to the applicants, the 2002 amendment means that a dispute concerning mass retrenchments can be referred directly to the Labour Court through section 189A(7)(b)(ii) once facilitation has failed. The respondent disagrees with this interpretation and maintains that section 189A(7)(b), read with section 191(11), only triggers the Labour Court's jurisdiction "after prior referral to conciliation" has occurred.

Principles of statutory interpretation

[15] When interpreting section 189A(7)(b)(ii) of the LRA, this Court must have regard to section 39(2) of the Constitution, which reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights."

[16] Additionally, section 3 of the LRA provides:

> "Any person applying this Act must interpret its provisions—
>
> (a) to give effect to its primary objects;
>
> (b) in compliance with the Constitution; and
>
> (c) in compliance with the public international law obligations of the Republic."

[17] Recently, this Court in *Regenesys*[28] emphasised that the correct approach to the interpretation of legislation, particularly the LRA, is to ensure that the interpretation

[26] In terms of section 189A(7)(b)(i) of the LRA.

[27] Section 189A(7)(b)(ii) of the LRA.

[28] *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga* [2024] ZACC 8; 2024 (5) SA 593 (CC); 2024 (7) BCLR 901 (CC); [2024] 8 BLLR 777 (CC); (2024) 45 ILJ 1723 (CC).

aligns with section 39(2) of the Constitution.[29] This essentially requires us to examine the objects and purpose of the LRA and to interpret its provisions in conformity with the Constitution. Therefore, statutory interpretation necessitates consideration of the text, context and purpose of the provisions of the LRA. This Court in *Regenesys* quoted the purpose of the LRA, as stated in section 1, as to—

> "advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote—
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the workplace; and
>
> (iv) the effective resolution of labour disputes."[30]

[18] Additionally, the principles for the interpretation of documents in general, including statutes, have been authoritatively set out in *Endumeni*:[31]

> "Interpretation is the process of attributing meaning to the words used in a document . . . having regard to the context provided by reading the particular provision

[29] Id at paras 62-3.

[30] Id at para 63.

[31] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 BPLR 133 (SCA); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

> or provisions in the light of the document as a whole and *the circumstances attendant upon its coming into existence*. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . . The process is objective, not subjective. *A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results* or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute is to cross the divide between interpretation and legislation. . . . *The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision*."[32] (Emphasis added.)

[19] It follows that, in interpreting section 189A(7)(b)(ii) of the LRA, we must start by looking at the language of the provision; however, the language must be considered in context and there must be regard to the purpose of the provision. The purpose, as already observed, is, amongst others, to provide for the adjudication of disputes about procedural fairness in mass retrenchments at an earlier stage of the ordinary dispute resolution process, and to provide for their determination, inevitably as a matter of urgency, on application rather than by way of referral. This purpose will be kept in mind when determining the issue at hand: whether employees who have gone through facilitation may approach the Labour Court without pursuing conciliation in respect of the dismissal dispute.

Does the interpretation of section 189A(7)(b)(ii) of the Labour Relations Act require conciliation after a failed facilitation, before a dispute can be referred to the Labour Court?

The distinction between facilitation and conciliation

[20] The applicants concede that there is a difference between the roles of facilitation and conciliation but maintain that this is not a decisive factor in the present enquiry.

[32] Id at para 18.

They conclude by stating that facilitation, and the engagement entailed by it, should be held to be sufficient in the context of a dismissal post-facilitation.

[21] The respondent argues that facilitation and conciliation are fundamentally different. In the case of a facilitator, they are appointed to assist the parties engaged in section 189A consultations by essentially chairing the consultation process and encouraging the parties to reach their own agreement. It contends that the process is *sui generis* (unique), and that the facilitator is neither an arbitrator nor a conciliator.

[22] The respondent submits that during the 60-day period when a facilitator is appointed, the parties are not in dispute but are instead engaged in a meaningful, joint consensus-seeking process which can only result in a dispute once the employer resorts to dismissing the employees. It is further argued that such a referral is designed to protect the interests of the parties and reduce the costs of litigation. The respondent raises the fact that dispute conciliation is an expeditious process of 30 days, compared to that of the adjudication of a dismissal dispute by the Labour Court.

[23] The respondent lists a few main differences between the two processes, namely: a facilitator is appointed at a different time; a facilitator performs different tasks; and facilitation, in practice, does not involve proper consultation (in this regard, the respondent made an example at the hearing that trade unions usually oppose any idea of retrenchment). The respondent disagrees with the applicants' assertion that after failed facilitation, there is nothing left to discuss during the conciliation of a resultant dismissal dispute that has not already been discussed during facilitation.

[24] I accept that facilitation occurs during the retrenchment consultation stage, before dismissal (a forward-looking process), whilst conciliation, if it is necessary, would occur after a dismissal has taken place (a backward-looking process). The fundamental difference is that facilitation is consultative and pre-emptive, while conciliation is remedial and reactive.

[25] It is helpful to contrast section 189A(7) with section 189A(8).[33] The former deals with a case such as the present, where there has been facilitation. The latter deals with a case where there has not been facilitation. What gets referred to conciliation in terms of section 189A(8)(a) is not a dismissal dispute but a pre-dismissal interest dispute about whether there are fair reasons for retrenchment, selection criteria and so forth. The respondent's submission, which in this limited respect makes sense to me, is that where there has been facilitation as contemplated in section 189A(7), the interest dispute will have been debated through a process which, although different from conciliation in certain respects, is aimed at reaching consensus in disputes centred around retrenchments. Both processes – facilitation and conciliation – are meant to assist the parties to explore ways that retrenchments could be avoided or mitigated.

[26] When considering the differences between facilitation and conciliation in the context of section 189A(7)(b)(ii), these differences appear to be academic. There seems to be little to no benefit to post-facilitation conciliation regarding the substantive fairness of ensuing dismissals, and counsel for the respondent was unable to substantiate the fundamental differences between the two processes.

[27] I accept that facilitation and conciliation are distinct in that one mechanism primarily aims to assist with communication and the other with reaching an agreement. However, it seems that the parties will be discussing, at least fundamentally, the same

[33] Section 189A(8) of the LRA reads:

> "If a facilitator is not appointed—
>
> (a) a party may not refer a dispute to a council or the [CCMA] 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)."

issues in a subsequent conciliation over the fairness of the retrenchment dismissals as they would have discussed in the facilitation process. I accept that certain issues might not have been raised during facilitation or might arise for determination thereafter. However, nothing prevents parties to a retrenchment dispute from discussing those issues and utilising other means such as pre-hearing meetings that entail consensus-seeking.

[28] Because facilitation happens before the actual dismissal, the focus will naturally be on ways to avoid retrenchments or mitigate them. If conciliation were to be insisted upon after facilitation has failed and notices of dismissal have been issued, the focus will still be on whether the retrenchments were justified, whether the selection criteria were fair, the fairness of the retrenchment packages and so forth. These are the matters that would have been the subject of the failed facilitated consultation. The point is that the agenda in both instances concerns the retrenchments and the aim is to reach consensus about the fairness of the retrenchment process and retrenchment packages. This renders a referral of the dismissal dispute to the CCMA duplicative.

[29] Where, however, there has been no facilitation, the lawmaker in section 189A(8) wanted the parties to debate their interest dispute over possible retrenchments in a conciliation process that would take the place of facilitation. Those stages of the process would, as with section 189A(7), take 60 days.[34]

[30] In both section 189A(7) and (8), dismissed employees have two options once the employer has given dismissal notices: to strike or to refer a dismissal dispute to the Labour Court. In terms of section 64(1)(a), employees may not ordinarily strike over a dispute unless 30 days have expired from the referral of the dispute to conciliation. It is clear from a reading of section 189A(7) that employees may resort to strike action over retrenchment dismissals despite the fact that the dismissal dispute has not been referred to conciliation. Section 189A(7) and (8) require only that the 60-day period of

[34] The applicable time periods are computed as follows: 60 days in terms of section 189A(7) of the LRA, and two 30-day periods in terms of section 189A(8)(a) and (b) read with section 64(1)(a).

forward-looking, pre-dismissal facilitated consultation (subsection (7)) or consultation and conciliation (subsection (8)) over possible retrenchments should have been exhausted. It does not make sense that those who opt for strike action should have a right to strike after receiving a letter of dismissal from the employer, without first exploring conciliation in respect of the dismissal dispute, but those who do not opt for strike action but want to pursue a court process are obliged to go through a conciliation process.

[31] If the Legislature intended that conciliation over retrenchment dismissals should follow after failed facilitation, it would have been necessary to incorporate such a requirement specifically. And if the correct interpretation is that after a failed facilitation it is necessary to resort to conciliation over a dismissal dispute before such dispute can be referred to the Labour Court, then this requirement would apply even in cases where the employees opt for strike action, yet there is no such requirement in the latter instance.

[32] The LAC was right in *Edcon* to say that "[w]here there has been a facilitation process, it would be [an] unnecessary duplication to require an additional 30-day conciliation process at the end of the 60-day period allowed for facilitation".[35] I accept that the statement was *obiter*, but I think it is correct.

[33] One of the matters that needs to be considered in determining whether conciliation is required before the referral of mass retrenchment disputes to the Labour Court is whether the process of conciliation itself is a precondition to the Labour Court's jurisdiction.

[34] The respondent submits that section 189A(7)(b) of the LRA does not simply permit a referral to the Labour Court but includes the *condition* that the referral to the Labour Court is made "in terms of section 191(11)". It further argues that

[35] *Edcon* above n 9 at para 15.

section 191(11), which in turn references section 191(5)(b),[36] indicates that the Labour Court has jurisdiction only once a Council or the CCMA commissioner has certified that the dispute remains unresolved.[37] It submits that the language in section 191(11) thus clearly indicates that such a referral will follow only after conciliation. According to the respondent, the failure of the forward-looking facilitation process does not mean that there was any effort at resolution of the backward-looking dismissal dispute or that the resolution has failed. It contends that an attempt at resolution of the dismissal dispute must occur during the course of conciliation.

[35] As previously mentioned, the respondent relies on *Intervalve* to advance the argument that the reference to section 191(5)(b) in section 191(11) operates to confirm that conciliation is a precondition to the Labour Court's jurisdiction.[38] However, the context in *Intervalve* is different from the matter before us, in that *Intervalve* concerned an ordinary dismissal dispute. This required an interpretation of section 191 of the LRA. It is uncontroversial that in that context a precondition for referring a dismissal dispute to the Labour Court is that the dispute should have been the subject of a failed conciliation. The present application, by contrast, requires a specific interpretation of section 189A(7)(b)(ii) in the context of a failed facilitation process in mass retrenchments. Section 189A did not feature at all in *Intervalve*.

[36] In *Intervalve*, employees were dismissed after participating in an unprotected strike. NUMSA referred an unfair dismissal dispute to the bargaining council on behalf

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[36] Section 191(5)(b)(ii) of the LRA provides:

> "(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 [CCMA] received *the referral* and the dispute remains unresolved—
>
> . . .
>
> (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." (Emphasis added.)

[37] The respondent makes reference to *National Union of Metalworkers of SA v SA Five Engineering* [2004] ZALC 81; (2004) 25 ILJ 2358 (LC); [2005] 1 BLLR 53 (LC) at para 14.

[38] *Intervalve* above n 22 at para 40.

of the dismissed employees, citing only one of the employers, namely, Steinmüller Africa (Pty) Limited (Steinmüller), when in reality some of the employees were employed by Intervalve (Pty) Limited (Intervalve) and BHR Piping Systems (Pty) Limited (BHR). Steinmüller, Intervalve and BHR shared the same premises and human resources services, and the attorney who represented Steinmüller in the conciliation proceedings subsequently represented Intervalve and BHR in opposing their joinder.

[37] NUMSA later attempted to join Intervalve and BHR by way of a second referral, but the late referral was not condoned. In the circumstances, NUMSA brought the first referral to the Labour Court and sought to join Intervalve and BHR. The Labour Court permitted the joinder of Intervalve and BHR, given that: (a) the entities had shared resources; (b) transfers of employees took place without termination of their employment; and (c) the dismissal letters issued to their respective employees were identical, and so the failure to cite Intervalve and BHR in the first referral was not fatal.

[38] The LAC overturned the Labour Court's decision, finding that NUMSA did not timeously refer the dispute against Intervalve and BHR to conciliation as prescribed by section 191 of the LRA. The LAC reasoned this way because Intervalve and BHR had not been cited in the referral for conciliation, only Steinmüller was cited. Consequently, the Labour Court did not have jurisdiction to then join Intervalve and BHR. This Court dismissed an appeal against the LAC's judgment.

[39] *Intervalve* was decided in the context of a dismissal resulting from strike action. This entailed a determination of the general process to be followed in disputes about unfair dismissals and unfair labour practices as envisaged in section 191 of the LRA, and not section 189A(7)(b)(ii) in the context of a failed facilitation process in mass retrenchments.

[40] It is clear that the LAC and this Court in *Intervalve* were not pronouncing on the process to be adopted in dismissals resulting from mass retrenchments because the case concerned dismissals regulated by section 191 of the LRA and not dismissals regulated

by section 189A(7)(b)(ii). The Legislature deemed it necessary to have a separate dispensation for disputes resulting from mass retrenchments. This Court in *Steenkamp*[39] has already endorsed the Labour Court's description of the purpose of the amendments to the LRA thus:

> "The purpose of section 189A(13) has been recognised in a long line of cases. In *Insurance & Banking Staff Association*[40] the Labour Court explained:
>
> > 'The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible. All too often the changes in an enterprise with the passage of time deter reinstatement as a remedy. So, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals.'"[41] (Footnote added.)

[41] The common sentiment expressed in both of these matters is that section 189A(13) of the LRA was introduced to speed up the process of intervention in mass retrenchments. It is clear that a speedy resolution of such procedural flaws is needed. What then happens if the facilitation fails? Does it become necessary for the parties to go back and embark on the very process that was discontinued in order to resolve these disputes quickly?

[42] Another source of concern is that, whilst the old process was discontinued because of the length of time it took, if it is held that it is necessary to go through a conciliation process after a failed facilitation process, then the period that will elapse will be even longer than the period sought to be replaced through the amendment.

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[39] *Steenkamp v Edcon Ltd* [2019] ZACC 17; 2019 (7) BCLR 826 (CC); [2019] 11 BLLR 1189 (CC); (2019) 40 ILJ 1731 (CC).

[40] *Insurance & Banking Staff Association v Old Mutual Services & Technology Administration* (2006) 27 ILJ 1026 (LC) at para 9.

[41] *Steenkamp* above n 39 at para 52.

[43] Since this Court in *Intervalve* did not make a pronouncement in the context of section 189A(7)(b)(ii) of the LRA, I shall now conduct this analysis in this context. The text is clear that section 189A(7)(b)(ii) allows for a direct referral to the Labour Court. It is an unequivocal, jurisdiction-conferring provision. The Labour Court's jurisdiction is immediately engaged under this section and it does not require the parties to pass another "jurisdictional hurdle" before approaching the Labour Court. It would be contrary to our legal framework to expect litigants to pass through two "jurisdictional hurdles" before engaging the Labour Court, and would unjustifiably limit the applicants' rights envisaged in section 34 of the Constitution. This clarity leaves no room for doubt that conciliation is not a prerequisite under this provision. While section 191(11) is referenced, it does not trigger the conciliation requirements found in section 191(5)(b).

[44] Counsel for the respondent conceded during the hearing that section 191(5)(b) is a jurisdiction-conferring provision. The language used in section 191, specifically section 191(1), (5)(b) and (11), references a *referral* to conciliation, and not that conciliation must have actually taken place.

[45] In *Driveline*,[42] the Labour Court held that conciliation does not have to be "meaningful", as the LRA only appears to require that conciliation was, at the very least, attempted. On this basis, it seems to me that what is important is a referral to conciliation, rather than conciliation actually materialising. I accept that conciliation can be crucial in resolving dismissal disputes, such as in the case of *Intervalve*, but I have already mentioned that *Intervalve* is distinguishable from the present case. The matter before us makes me question whether conciliation is, in fact, a jurisdictional requirement having substantive value in every dismissal dispute process. As indicated above, what gets referred to conciliation in terms of section 189A(8)(a) is not a dismissal dispute but a pre-dismissal interest dispute.

[42] *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* [1999] ZALC 157; [2000] 1 BLLR 20 (LAC) at paras 8 and 12.

A comparison between section 189A(7) and section 189A(8) of the Labour Relations Act

[46] Section 189A(7) sets out a different process to that envisaged in section 189A(8), where a facilitator has not been appointed. Section 189A(8) specifically provides for the dispute to first be referred to conciliation before the employees may (a) go on strike or (b) refer a dispute to the Labour Court.

[47] In the context of strike action for example, section 189A(8)(b) allows employees to strike only "once the periods mentioned in section 64(1)(a) have elapsed".[43] There are two periods of 30 days envisaged in sections 189A(8) and 64(1)(a). First, in terms of section 189A(8)(a), there is a 30-day period for consultation following the employer's notice in terms of section 189(3) inviting affected employees to consult. Second, and upon the expiry of the first 30-day period, in terms of section 189A(8)(b) read with section 64(1)(a), a further 30 days must be allowed for conciliation following a referral of the retrenchment dispute to the CCMA or a Council. Only then may the employer issue notices of dismissal, and only then may the dismissed employees have recourse to strike action or a referral to the Labour Court over the dismissals. The cumulative 60 days for consultation and conciliation match the 60 days contemplated in section 189A(7).

[43] Section 64(1)(a) of the LRA reads:

> "(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 [CCMA] 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 [CCMA]."

[48] It seems to me that in this context, *facilitation* is the determining factor as to whether conciliation is required before strike action in the context of section 189A(7).[44] That is the fundamental difference between section 189A(7) and section 189A(8) – this is why conciliation is not a pre-requisite under section 189A(7) and thus, conciliation is not required for strike action in the context of section 189A(7)(b)(i). In the former instance, facilitated consultation over proposed retrenchments is required. In the latter instance, non-facilitated consultation followed by conciliation over proposed retrenchments is required. In neither instance is conciliation over subsequent dismissals required.

[49] During the hearing, the applicants submitted that the interpretation of section 189A(7)(b)(ii) should avoid creating an unfair differentiation between employees who choose to strike in terms of section 189A(7)(b)(i) and those who choose adjudication under section 189A(7)(b)(ii). They argue that their interpretation of section 189A(7)(b)(ii) guards against this unfair differentiation, in that it does not require any party to refer a matter to conciliation. I agree with this view, given that section 189A(10)(a) precludes a consulting party who has elected to refer the dispute to the Labour Court from serving a notice of a strike later.[45] The same is said for a consulting party who elects to strike – they too are precluded from referring a dispute to the Labour Court. The dismissed employees are given two mutually exclusive options, and the right to exercise either of them is immediately available once the time periods contemplated in section 189A(7) and (8) have expired.

[44] Or before a referral to the Labour Court.

[45] Section 189A(10)(a) of the LRA reads:

> "A consulting party may not—
>
> (i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;
>
> (ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal."

[50] In an attempt to justify why conciliation over a dismissal dispute would not be required if employees choose to strike under section 189A(7)(b)(i), the respondent argues that the right to strike is retaliatory in nature and to require conciliation would emasculate this right and defeat its purpose. This is said to be so because a referral to conciliation would take 30 days. By that time, the notice period in terms of section 37(1) of the Basic Conditions of Employment Act,[46] which the employees were placed under, would have run out and the decision to retrench would have taken effect, consequently disentitling them from striking afterwards. Yes, strike action is used by employees as a means of putting pressure on employers during negotiations pertaining to labour disputes. I accept that requiring conciliation before embarking on a strike would result in the employees exploring conciliation with the retrenchment notice period "looming over their heads" and employees would ultimately be overtaken by the retrenchment event, but I am not persuaded by the respondent's submission that such a strike is retaliatory.

[51] In any event, this submission does not assist the respondent in justifying why conciliation, in the context of section 189A(7)(b)(ii), is mandatory. As I have previously stated, the Legislature specifically mentioned "the Labour Court" and cross-referenced section 191(11), not section 191(5), when drafting section 189A(7)(b)(ii). It therefore did away with the conciliation requirement in the context of section 189A(7)(b)(ii). And even in section 189A(8), there is no requirement of conciliation in respect of a *dismissal dispute*; conciliation in the context of section 189A(8) is conciliation over proposed retrenchments, at a time before notices

[46] 75 of 1997. This section reads:

> "Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than—
>
> (a) one week, if the employee has been employed for six months or less;
>
> (b) two weeks, if the employee has been employed for more than six months but not more than one year;
>
> (c) four weeks, if the employee—
>
> (i) has been employed for one year or more; or
>
> (ii) is a farm worker or domestic worker who has been employed for more than six months."

of dismissals have been, or can be, given. The conciliation required by section 189A(8) is a substitute for the facilitated consultation which section 189A(7) deals with. The result is that under both subsections a period of 60 days must elapse from the employer's section 189(3) notice before the employer may issue dismissal notices and before the employees may resultantly strike or refer a dismissal dispute to the Labour Court.

[52] Additionally, section 189A(7)(b)(i) is instructive. The section does not refer back to section 64(1)(a). The implication is that where facilitation has taken place, employees may immediately give notice in terms of section 64(1)(b) or (d) to strike. Given the context that a right to strike following facilitation is immediate, it follows that a right of referral to the Labour Court would likewise be immediate.

What is the purpose of the reference to section 191(11) in section 189A(7)(b)(ii) of the Labour Relations Act?

[53] The applicants contend that section 191(11) does not contain any substantive requirements but has the sole purpose of providing the time within which a dispute must be referred for adjudication to the Labour Court. The respondent disagrees with this interpretation and refers this Court to the LAC's findings in *SAA Technical*,[47] which held against the use of section 191(11) as a mere time limit provision. Accordingly, the respondent submits that conciliation is a universal norm, as reflected in the jurisprudence, and if the Legislature had intended to deviate from this norm in section 189A(7)(b)(ii), it would have done so unambiguously and expressly.

[54] During the hearing, the respondent accepted that section 189A(7)(b)(ii) is a jurisdiction-assigning provision: in plain terms, it gives dismissed employees a right (as an alternative to striking) to refer a dismissal dispute to the Labour Court. To that end, therefore, it would create a second "jurisdictional hurdle" if this Court were to interpret the reference to section 191(11) as requiring an aggrieved employee to go through a fresh jurisdiction-assigning process. One may then ask why, in section 189A(7)(b)(ii),

[47] *SAA Technical* above n 13 at para 21.

or for that matter in section 189A(8)(b)(ii)(bb), the Legislature said that the dismissed employees could refer a dismissal dispute *to the Labour Court* when the Legislature supposedly meant that they could only refer a dismissal dispute *for conciliation to the CCMA or a Council*. If that is what the Legislature meant, the supposed right of referral to the Labour Court in section 189A(7) and section 189A(8) would add nothing to the rights which the dismissed employees would in any event have. Dismissed employees who consider their dismissals to be substantively unfair would in any event have the right to refer a dismissal dispute for conciliation and then to the Labour Court. The respondent's interpretation thus renders the right of referral to the Labour Court in section 189A(7) and section 189A(8) redundant, and there is of course a presumption against this.

[55] On that basis, the reference to section 191(11) must be interpreted as a time requirement rather than a requirement of substance in order to establish jurisdiction that had already been assigned. In conclusion, I hold that the reference to section 191(11) in sections 189A(7) and section 189A(8) does not have the effect of conferring jurisdiction. In the context of an ordinary dismissal, the jurisdiction-assigning provision is section 191(5)(b), not section 191(11). Likewise, in the context of retrenchment dismissals falling within the ambit of section 189A, the jurisdiction-assigning provision is section 189A(7)(b)(ii) or (8)(b)(ii)(bb), as the case may be. In both instances, section 191(11) serves only as a time clause and cannot impose the conciliation requirements found under section 191(5)(b).

[56] It is clear to me that the Legislature deliberately referred to section 191(11), rather than section 191(1)(a) and (5), with the intention to exclude conciliation over retrenchment dismissals where facilitation or consultation on conciliation has taken place in terms of section 189A(7) or section 189A(8), as the case may be. Had the Legislature intended otherwise, it would have explicitly stated so in section 189A(7) by referencing the provisions governing conciliation as a prerequisite for referrals to the Labour Court, namely section 191(1) and (5).

[57] I therefore agree with the Labour Court's finding in *Bell* that section 191(11), in the context of section 189A(7)(b)(ii), must be understood as simply providing a time period for a dispute to be referred to the Labour Court.

How should the 90-day period be computed?

[58] I agree with the applicants' submission that the proper interpretation of section 189A(7)(b)(ii) is to apply the wording of section 191(11) *mutatis mutandis* (with the necessary adjustments), having regard to the specific context of a referral to the Labour Court pursuant to section 189A(7)(b)(ii), thereby providing a sensible, businesslike result. Approached in this way, the 90-day period runs from the date the registered trade union or employees receive the dismissal notices, following the facilitation process and the expiry of 60 days from the date of the original section 189(3) notice. The 90-day period is similarly computed in the case of section 189A(8). It is upon receipt of the notices of dismissal that the employees obtain their unconditional but mutually exclusive rights to strike or to refer a dismissal dispute to the Labour Court.

[59] Since I have interpreted section 191(11) as a timing provision, the principle in *Endumeni*, that words in a statute must be given their ordinary grammatical meaning unless they lead to absurdity, must apply. The Labour Court in *Latiff*[48] held that the 90-day period is regulated by the provisions of section 4 of the Interpretation Act,[49] which provides that—

> "[w]hen any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday".

[48] *Latiff v Donro (Pty) Ltd* [2004] ZALC 56; [2004] 11 BLLR 1151 (LC); (2004) 25 ILJ 2219 (LC) at para 8, with reference to the Supreme Court of Appeal decision in *Nedcor Bank Ltd v The Master* [2002] ZASCA 54; 2002 (1) SA 390 (SCA); [2002] 2 All SA 281 (A).

[49] 33 of 1957.

[60] I have not found anything in section 191(11)(a) which provides a departure from the calculation of the 90-day period in this fashion.

Second judgment

[61] I have read the carefully reasoned judgment of my sister, Theron J (second judgment), which concludes that, on a proper interpretation of section 189A(7)(b)(ii), a dispute must first be referred to conciliation before being referred to the Labour Court. It finds that "section 189A(7)(b)(ii) incorporates section 191(11), which incorporates section 191(5), which, by necessity, incorporates a referral in terms of section 191(1)".[50] I disagree. The second judgment's interpretation of section 189A(7)(b)(ii) leads to unbusinesslike results – something which the Supreme Court of Appeal in *Endumeni* cautions against.[51] It also undermines the architecture of our labour law legislative framework and the purpose of the amendments in the context of mass retrenchments.

[62] I have already accepted that conciliation can be crucial in resolving dismissal disputes. However, the importance of pre-adjudication conciliation, advanced by the second judgment, does not consider that it is the "referral" to conciliation and not that conciliation itself must have taken place that is a prescribed pre-requisite under the LRA. It, therefore, does not disabuse me of the views expressed in paragraphs [44] and [45] of my judgment, which are supported by the LAC's decision in *Driveline*.

[63] I have acknowledged that, in the context of an ordinary dismissal dispute, the jurisdiction-assigning provision would be section 191(5)(b). This was also conceded by the respondent during the hearing. It seems, to me at least, that the second judgment does not consider the context within which retrenchment dismissals under section 189A operate. It appears to ignore (and fails to advance reasons against), the jurisdiction-assigning provisions in section 189A(7)(b)(ii) and section 189A(8)(b)(ii)(bb); and does

[50] See the second judgment at [76].

[51] *Endumeni* above n 31 at para 18.

not posit a reason why, in both instances, section 191(11) cannot function as a time clause.

[64] The second judgment treats employees who choose to strike under section 189A(7)(b)(i) differently from those who choose adjudication under section 189A(7)(b)(ii) by finding that the latter employees' circumstances require conciliation. I remain unpersuaded by that finding, as there is no such explicit requirement in the case of section 189A(7)(b)(i). To include such a requirement in section 189A(7)(b)(ii) would, with respect, deviate from *Endumeni*'s finding that "[j]udges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used".[52]

Relief

[65] For the reasons set out above, I find that the decision of the LAC must be set aside and the order of the Labour Court reinstated. The matter is remitted to the Labour Court to decide the merits of the applicants' case.

Costs

[66] The general rule is that costs do not follow the result in labour matters. This Court has previously held that—

> "where . . . democracy entrenches labour rights, thereby appreciating the unique and significant nature of matters involving a person's livelihood, and creates fora in which labour disputes are to be ventilated and peacefully resolved, it is of utmost importance that the right of access to those fora is safeguarded. It is precisely this recognition that is embedded in the rule that costs in labour disputes do not follow the result."[53]

[52] Id.

[53] *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd* [2021] ZACC 26; [2021] 12 BLLR 1173 (CC); (2021) 42 ILJ 2371 (CC) at para 1. See also *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (6) BCLR 686 (CC); 2018 (39) ILJ 523 (CC) at para 24.

[67] The applicants and respondent do not seek costs against each other. Considering that the parties have approached this Court with the *bona fide* (good faith) intention to vindicate labour rights, there is no order as to costs.

Order

[68] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Labour Appeal Court is set aside.
4. The order of the Labour Court is reinstated, and the matter is remitted to the Labour Court to decide the merits of the applicants' case.
5. There is no order as to costs.

THERON J (Maya CJ, Majiedt J and Musi AJ concurring):

Introduction

[69] I have read the judgment of my Colleague, Tshiqi J (first judgment). I align myself with the factual background as set out by the first judgment. I further agree that this Court's jurisdiction is engaged and that leave to appeal should be granted, for the reasons set out by the first judgment.

Merits

[70] This matter is concerned with a crisp issue: whether the correct interpretation of section 189A(7)(b)(ii) requires a dispute to first be referred to conciliation, before being referred to the Labour Court. It is trite that in statutory interpretation, "[t]he 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and

production of the document".[54] Statutory interpretation is a unitary exercise, with "neither [the context nor the language] predominating over the other".[55]

[71] At the hearing of this matter, both parties acknowledged the possible textual ambiguity of section 189A(7)(b)(ii). This case is not one where the text itself is "clear and admits of little if any ambiguity",[56] nor is it a case "where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity".[57] This case is one that the Supreme Court of Appeal described in *Endumeni* as follows:

> "[I]n most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."[58] (Footnote omitted.)

[72] In this judgment, I consider the text, context and purpose of section 189A(7)(b)(ii). I conclude that the interpretation of the Labour Appeal Court, namely that section 189A(7)(b)(ii) requires a referral for conciliation prior to a referral of an unfair dismissal dispute to the Labour Court, is preferable to the one posited by the applicants, namely that such prior referral for conciliation is not required.

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[54] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) (*Auckland Park Theological Seminary*) at para 64, quoting *Endumeni* above n 31 at para 18 (footnote omitted).

[55] *Auckland Park Theological Seminary* id at para 65, quoting *Endumeni* id at para 19.

[56] *Endumeni* id at para 25.

[57] Id.

[58] Id at para 26.

Text

[73] Section 189A(7) 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 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)*." (Emphasis added.)

[74] On my reading, the plain meaning of section 189A(7)(b)(ii) contemplates not only a referral to the Labour Court, but also that such referral must occur pursuant to another provision, namely "in terms of section 191(11)".

[75] Section 191(11) provides:

> "(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." (Emphasis added.)

[76] Section 191(11) similarly references section 191(5)(b),[59] which contemplates instances where, following a referral in terms of section 191(1)(a), an employee can

[59] Section 191(5) of the LRA reads:

"bypass" arbitration proceedings and take a dispute directly to the Labour Court. In summary: section 189A(7)(b)(ii) incorporates section 191(11), which incorporates section 191(5), which, by necessity, incorporates a referral in terms of section 191(1).

[77] When these sections are read together, there is no strained language. The section 189A(7) process is simply brought in line with the existing referral process. This accords with the purpose of incorporating a section by reference, as section 189A(7)(b)(ii) does with section 191(11). Where a procedure prescribed by one set of provisions is intricate and lengthy, and another provision is intended to incorporate that procedure without repeating the entirety of it, it is convenient to do so by using words such as "in terms of section X", where "section X" by necessity implicates other provisions as well. This is not an uncommon legislative mechanism[60] and is exactly what section 189A(7)(b)(ii) does. Instead of having to repeat the entirety of the process set out in section 191, culminating in section 191(11), it simply makes reference to the final section, in order to conveniently incorporate the process as a whole.

[78] In my view, this is the most sensible interpretation of the words "in terms of section 191(11)". It reads as a reference, not to any specified portion of section 191(11),

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> "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 [CCMA] received the referral and the dispute remains unresolved—
>
> . . .
>
> (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."

[60] Although one should be careful not to equate different sections with each other directly, there are a few other examples of this mechanism in the LRA itself. For example, section 64(2) of the LRA requires that "an advisory award must have been made in terms of section 135(3)(c)" before a strike notice is issued. Section 135(3)(c) necessarily implicates the preceding section 135(1) and (2). A further example is section 88(1) of the LRA, which refers to "a matter [that] has been referred to arbitration in terms of section 86(4)(a) or (b)". Section 86(4)(a) and (b) come at the end of the consultation process prescribed by section 86(1).

but to section 191(11) as a whole, including the further cross-reference to section 191(5).

[79] The applicants contend that the reference to section 191(11) in section 189A(7)(b)(ii) incorporates only the 90-day period referred to in section 191(11). This 90-day period, they argue, must run from the date of the notice of termination contemplated in section 189A(7)(a). On their argument, this interpretation gives meaning to the words "to the Labour Court", for otherwise the referral would not be a referral "to the Labour Court" but instead a referral "to the [CCMA] or a bargaining council".

[80] On a pure textual basis, there are two reasons why the applicants' interpretation is unsound. First, the applicants contend that the respondent's interpretation fails to give effect to the words "Labour Court" in section 189A(7)(b)(ii). But the respondent's interpretation does not do away with the Labour Court as the eventual arbiter of the unfair dismissal dispute; it simply stipulates that the route to get to the Labour Court is the one set out in section 191(11) (and thus in section 191(1) and (5)).

[81] This is also why the argument that section 189A(7)(b)(ii) is a jurisdiction-assigning provision does not advance the applicant's interpretation. I agree with the first judgment that section 189A(7)(b)(ii) assigns jurisdiction to the Labour Court over disputes referred in terms of that section. But, crucially, it only assigns jurisdiction to the Labour Court over a dispute referred to it "in terms of section 191(11)". That argument thus takes one back to the disputed meaning of "in terms of section 191(11)" and does not advance either the applicants' or the respondent's interpretations.

[82] The second reason why the applicants' interpretation is not supported by the text, is that it in effect requires the reader to both ignore large portions of section 191(11), as well as read in new words. The reader would have to ignore the reference to section 191(5)(b), as well as the reference to the 90-day period running from the date

that "the council or (as the case may be) the commissioner has certified that the dispute remains unresolved". This is because, on the applicants' interpretation, there is no referral to conciliation, and the dispute will thus never be certified as unresolved by a commissioner or bargaining council. Then, a new event from which the 90-day period has to run needs to be read into the section. The applicants suggest the most logical date is the date of the notice of termination.

[83] The respondent provides a useful illustration of how section 191(11)(a) would have to be read to truly give effect to the applicants' interpretation:

> "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~~ the employee or trade union has been served with the notice of termination."[61]

[84] This would be a radical departure from the actual text and contrary to the rule of interpretation that each word used in a legal instrument should be given meaning.[62] This is not a logical interpretation.

[85] There is indeed a degree of awkwardness in referring to what is essentially the "concluding" provision in the conciliation process, and it might have read better if section 189A(7)(b)(ii) had referred to section 191(1) or (5). However, the applicants' interpretation suffers from a similar, and in my view more fatal, defect. Had the Legislature intended the meaning ascribed to the provision by the applicants, it could have avoided ambiguity by replacing "in terms of section 191(11)" with "within 90 days

[61] The deleted portions are represented by ~~strikethrough~~. The words to be read in are underlined.

[62] The rule is often expressed through the maxim *ut res magis valeat quam pereat* (rather let it survive than perish). See in this regard *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 77 and *Minister of Water and Sanitation v Lötter N.O.; Minister of Water and Sanitation v Wild; Minister of Water and Sanitation v South African Association for Water User Associations* [2023] ZACC 9; 2023 (4) SA 434 (CC); 2023 (6) BCLR 763 (CC) at para 34.

after the notice of termination". This would not only have removed the ambiguity, but it would not have required the piecemeal reading of section 191(11) explained above.

[86] For these reasons, the text of section 189A(7)(b)(ii) clearly favours the interpretation posited by the respondent and endorsed by the Labour Appeal Court.

Context

[87] Next, it is necessary to consider the context of the section in which section 189A(7)(b)(ii) is located which, as held in *Endumeni*, is an "important [guide] to the correct interpretation".[63]

[88] The most immediate context is section 189A(7)(b)(i), which provides employees who have received a notice of termination with the right to give notice of a strike in terms of section 64(1)(b) or (d). These paragraphs provide employees with the right to strike following a notice period given to an employer, without requiring them to first refer a matter for conciliation. Thus, in terms of section 189A(7)(b)(i) employees can strike without first having to refer the dispute to conciliation. On this interpretation, I am in agreement with the first judgment.

[89] The applicants argue that, if section 189A(7)(b)(i) does not require a referral before strike action is embarked upon, there is no rational reason to read section 189A(7)(b)(ii) to require such a referral prior to a further referral to the Labour Court. The respondent submits that the strike envisioned in section 189A(7)(b)(ii) is a retaliatory strike, and it is rational not to encumber a retaliatory strike with a prerequisite conciliation process.

[90] The distinction between section 189A(7)(b)(i) and (ii) drawn by the respondent is rational. Employees retrenched in terms of section 189A(7) are essentially serving out their notice period. Therefore, if they were required to first refer the matter to

[63] *Endumeni* above n 31 at para 26.

conciliation, their right to strike would be kneecapped. As far as I have been able to determine, section 189A(7)(b)(i) provides the only circumstance where employees are granted the right to strike on the basis of proposed or affected dismissals. This unique right to strike has been identified as the primary innovation of the introduction of section 189A:

> "Before section 189A was introduced into the [LRA] in 2002, employees could not strike over proposed retrenchments. Hence, the precise purpose of section 189A was to provide employees with the right to strike over dismissals based upon operational requirements provided that the provisions of section 189(1) were satisfied."[64]

[91] The applicants, at the hearing of this matter, posited that the section 189A(7)(b)(i) strike is not one undertaken by employees who have been given notice of termination, but rather by the remainder of the workforce. This interpretation is not borne out by the text of section 189A(7)(b), which specifically refers to "a registered trade union *or the employees who have received notice of termination*".[65] However, even if the strike were a strike by the general workforce, such a strike would presumably be aimed at an aspect of the retrenchment dispute, which would lose its force if the employees have served their notice and left the company by the time that they were given the right to give notice of a strike.

[92] I am satisfied that there is a rational reason to not subject the right to strike in section 189A(7)(b)(i) to the requirement of a prior referral to conciliation. Do the same considerations apply for the referral of a dispute to the Labour Court? In my view, they do not. There is not the same immediate urgency for a dispute to be referred to the Labour Court. A requirement of a prior referral to conciliation does not render the remedy of a referral to the Labour Court nugatory, as contended by the applicants. It merely adds an antecedent step, and one with a particular purpose. Although one of the purposes of the LRA is the expeditious resolution of labour disputes, this is not a

[64] *Continental Tyre SA (Pty) Ltd v National Union of Metalworkers of SA* [2008] ZALAC 4; [2008] 9 BLLR 828 (LAC); (2008) 29 ILJ 2561 (LAC) at para 24.

[65] Emphasis added.

warrant to reject conciliation proceedings prior to a referral to the Labour Court. I discuss the particular importance of conciliation to the scheme of the LRA below.

Purpose

[93] The arguments regarding the purpose of section 189A(7)(b)(ii) revolve around the utility of a referral to conciliation where a facilitation process has already taken place. The applicants essentially argue that such a referral to conciliation would be unnecessarily repetitive, given the similarities between conciliation and facilitation processes.

[94] This Court has recognised that the LRA generally places a high premium on attempted conciliation before other methods of resolution are pursued.[66] In *Intervalve*, this Court said that a "[r]eferral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes."[67] I accept that the judgment in *Intervalve* does not provide a conclusive answer on the interpretation of section 189A(7)(b)(ii). Part of the reasoning of both the majority judgment and the concurring judgment by Zondo J in *Intervalve* rests on the conciliation requirements prescribed by section 191(5). In this case we are attempting to determine whether section 191(5) comes into play at all, and thus *Intervalve* cannot provide the complete answer. However, the importance of attempted pre-adjudication conciliation in the scheme of the LRA and the history of that principle in South African labour law and international labour law instruments[68] is underscored by the judgment, especially in Zondo J's concurrence:[69]

> "Section 191(5) captures a principle of the dispute-resolution dispensation for labour disputes that has been part of various statutes in South Africa for at least the past

[66] *Intervalve* above n 22 at para 34.

[67] Id at para 40.

[68] Id at paras 115-30.

[69] It should be noted that a majority of the Court concurred in both Cameron J's majority judgment and Zondo J's concurrence.

> 90 years. It is not a new principle. The principle is that, before a labour dispute may be the subject of an arbitration or adjudication or industrial action, it should first have been referred to a process of conciliation."[70]

[95] That is not to say that the principle of pre-adjudication conciliation allows for no exception. As recognised in *Intervalve*, certain exceptions are set out in the LRA.[71] For example, section 64(3) allows for circumstances where strikes are allowed without the matter having been referred to conciliation. And, while no equivalent provision appears in the LRA, the now-repealed 1956 Labour Relations Act allowed for an exception that a dispute could be referred for adjudication by the Industrial Court without a referral to conciliation, where all parties involved were satisfied that the dispute could not be settled via conciliation.[72] Exceptions, however, cannot govern the general rule. In my view, where the LRA intends to deviate from the established requirement of a referral to conciliation, the deviation must be set out in clear terms. Section 189A(7)(b)(ii) does not provide the required clarity. As I have concluded above, the text points in the opposite direction.

[96] There is also a qualitative difference between pre-dismissal facilitation (or for that matter, pre-dismissal conciliation in terms of section 189A(8)) and post-dismissal conciliation. The former is aimed at "assist[ing] the parties engaged in consultations".[73] Section 189(2) sets out the purpose of such consultation:

> "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—

[70] *Intervalve* above n 22 at para 116.

[71] Id at para 128.

[72] Section 46(6) of the Labour Relations Act 28 of 1956. See also *Intervalve* id at para 129.

[73] Section 189A(3) of the LRA. See *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2024) 45 ILJ 1831 (LC) at para 36, where the Labour Court held that "[d]uring the facilitation process, there is no dismissal dispute between the parties. The focus [during the facilitation process] is on the provisions of section 189(3) of the LRA."

(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."

[97] At this stage, dismissals have been contemplated, but have not yet been effected. It is possible (and indeed explicitly contemplated in section 189(2)(a)(i) and (ii)) that some or even all of the dismissals may be avoided by measures devised by the joint consensus-seeking engagement.

[98] Post-dismissal conciliation, on the other hand, by definition *follows* certain dismissals having been effected. A dismissal dispute in terms of section 189A(7)(b)(ii) is limited to a dispute concerning whether there is a fair reason for the dismissal. That is a qualitatively different dispute than any which arose prior to dismissal.

[99] Facts that will form the basis of pre-dismissal facilitation and post-dismissal conciliation will often overlap and may at times be similar. However, this is not necessarily the case. For example, it is possible that following a facilitation process, parties may reach consensus on measures that avoid some of the contemplated dismissals. The employer might dismiss only a portion of the employees that it originally contemplated dismissing. The dismissed employees might then contend that *their* dismissals occurred in the absence of a fair reason. Under such circumstances, the post-dismissal dispute might differ in material respects from the pre-dismissal facilitation.

[100] Furthermore, the positions of the parties differ between pre-dismissal consultation and post-dismissal disputes. As has been stated by the Labour Court, "a consulting party [for example, a registered trade union] in a section 189A consultation

process . . . acts in a capacity not dissimilar to a collective bargaining agent".[74] During the pre-dismissal consultation process, the employees, especially where they are represented by a trade union,[75] wield some coercive bargaining power.

[101] This Court in *AMCU* recognised that even where a pre-retrenchment consultation process complies with the requirements of the LRA, it is not determinative of whether the dismissals that follow will be held to be substantively fair.[76] It highlighted the example, discussed in the Labour Court's judgment of *Sikhosana,*[77] where the collective representative that is entitled to consult in terms of section 189(1) does not represent the interests of all employees affected by the retrenchment.[78] The post-dismissal dispute (and thus any post-dismissal conciliation) is aimed at the substantive fairness of the dismissals.

[102] Again, this is not to say that there is no overlap between the matters that will form the subject of the pre-dismissal facilitation and post-dismissal conciliation, respectively. But the processes are aimed at different targets: the first at assisting parties during the consensus-seeking consultation, and the second at resolving a dispute arising from allegedly unfair dismissals.

[103] This is also why it does not assist the applicants to compare section 189A(7) and section 189A(8). While the Labour Appeal Court's interpretation might, by parity of reasoning, mean that employees engaged in a section 189A(8) process would have to undertake two referrals to conciliation, these two referrals are not aimed at the same dispute. As the first judgment also accepts, the section 189A(8)(a) referral is based on

[74] *Association of Mineworkers & Construction Union v Sibanye Gold Ltd t/a Sibanye Stillwater* (2019) 40 ILJ 1597 (LC) at para 24.

[75] *AMCU v Royal Bafokeng Platinum Ltd* [2020] ZACC 1; 2020 (3) SA 1 (CC); 2020 (4) BCLR 373 (CC); (2020) 41 ILJ 555 (CC) (*AMCU*) at para 122.

[76] Id at para 127.

[77] *Sikhosana v Sasol Synthetic Fuels* (2000) 21 ILJ 649 (LC) at 656I-657A.

[78] *AMCU* above n 75 at para 127.

a pre-dismissal interest dispute which, for the same reasons as a pre-dismissal facilitation dispute set out above, qualitatively differs in aim from a post-dismissal conciliation.[79]

[104] I am accordingly satisfied that reading section 189A(7)(b)(ii) to require a referral to conciliation prior to Labour Court adjudication does not amount to redundancy, and that it in fact accords with the general aims of conciliation prior to adjudication – avoiding further conflict and litigation costs, and serving the broader public "by the productive outputs of peaceable employment relationships".[80]

[105] I am also not convinced by the applicants' argument that requiring conciliation unduly delays the finalisation of the dispute. The conciliation process contemplates a referral to the Labour Court becoming available at most 60 days following the dismissal (30 days for the matter to be referred to conciliation[81] plus 30 days for the matter to be certified as unresolved[82]). This argument also presupposes that the conciliation will be unsuccessful, whereas, if the dispute is successfully conciliated, then finalisation is of course not delayed, but is achieved much sooner. This also puts paid to the argument by the first judgment that my interpretation "leads to unbusinesslike results".[83]

[106] Thus, I am satisfied that the purpose of section 189A(7)(b)(ii) aligns with a requirement that a referral to conciliation is made prior to a referral of a dispute to the Labour Court.

Conclusion

[107] In conclusion, and on a proper consideration of the text of section 189A(7)(b)(ii) "read in context and having regard to [its] purpose", the Labour Appeal Court's

[79] See the first judgment at [25].

[80] *Intervalve* above n 22 at para 46.

[81] In terms of section 191(1)(b)(i) of the LRA.

[82] In terms of section 191(5) of the LRA.

[83] See the first judgment at [61].

interpretation should be endorsed. Had I commanded the majority, I would have dismissed the appeal.

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