IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

REPORTABLE

CASE N0: C1061/02

In the matter between

NUMSA **&** **OTHERS**
Applicants

and

SA FIVE ENGINEERING & OTHERS
Respondents

JUDGMENT

MURPHY AJ

1. On the 11 October 2002 the applicants filed a notice of motion in terms of section 189A(13) of the Labour Relations Act ("the LRA") seeking an order declaring that the dismissal of the individual applicants was procedurally unfair and directing the respondents to reinstate the applicants retrospective to the date of dismissal pending a fair consultation procedure being complied with.

2. The individual applicants were employed by the respondents to upgrade a vessel, the Glas Dowl, in June 2002. The contracts of employment did not contain a specific termination date, but in relation to some applicants, it is alleged, they were intended to terminate at the end of the refurbishment and upgrading project. During September-October 2002 correspondence was entered into between the first respondent and first applicant, which culminated in the dismissal of the 110 individual applicants on operational requirement grounds. Within a matter of a few days, the applicants filed this application

seeking relief in terms of section 189A(13), which in general terms permits employees to seek interdictory relief or compensation where an employer does not comply with a fair procedure when effecting operational requirement dismissals.

3. The matter was initially enrolled for hearing before my colleague Waglay J on 27 January 2002 and then postponed *sine die*. On 24 January 2003 Ntsebeza AJ granted an order joining the second to sixth respondents. Thereafter the matter again came before Waglay J on 6 March 2003, at which stage he made the following order:

> 1. The matter is removed to the trial roll for the determination of the fairness of the dismissal both on procedural and substantive grounds.
>
> 2. The parties are required to file a pre-trial minutes within 21 days of today.
>
> 3. The parties are not required to refer this dismissal dispute for conciliation - non-compliance with this requirement is condoned.
>
> 4. Costs to stand over for later determination.

On the basis of this order, the matter was set down before me on the trial roll of 1 November 2004. At the commencement of the proceedings, I raised with the parties' legal representatives the question of whether it was competent for this court to condone non-compliance with the requirements of conciliation in disputes concerning the substantive fairness of an operational requirements dismissal. Mr Jacobs, who appeared on behalf of respondents, relying on the provisions of section 189A(18) and (19), then also argued that the court was not entitled to adjudicate a dispute about procedural fairness when seised with a referral of a dispute about substantive fairness in terms of section 191(5)(b)(ii) of the LRA. His point begs the question of whether the court was indeed so seised, an issue to which I revert presently. Nonetheless, at the hearing I ruled that the court indeed lacked jurisdiction to determine the dispute regarding substantive fairness, but was competent to proceed with the adjudication of the dispute about procedural fairness in terms of section 189A(13), and reserved my reasons for the ruling. Mr. Whyte, on behalf of the applicants, then sought a postponement in respect of the section 189A(13) application and indicated his intention to refer the dispute about substantive fairness to the CCMA, where he presumably intends to seek condonation for any delay in that regard, on grounds that he had proceeded in good faith on the basis of Waglay J's order, which I have found for the reasons

stated below to have been mistaken. I accordingly granted the request for a postponement. These are the reasons for my rulings.

4. A proper understanding of my ruling requires a careful analysis of the provisions of section 189A of the LRA, inserted by section 45 of the Labour Relations Amendment Act 12 of 2002 ("the amendments"), which became effective on 1 August 2002. The dismissals of the individual applicants occurred on 4 October 2002 and are therefore subject to the amendments.

5. Before turning to a discussion of the amendments, it is necessary to comment briefly on the pleadings in this matter. Litigation between the parties was commenced by way of application proceedings in terms of rule 7, which requires a notice of motion in compliance with Form 4 and a supporting affidavit setting out the information detailed in rule 7(3). Bearing in mind that the applicants initially sought relief under section 189A(13), it was entirely in keeping with the prescriptions of that section for the applicants to have proceeded on notice of motion. Such procedure stands in contrast to that applicable to disputes about substantive fairness. Disputes about substance must be *referred* to adjudication in terms of section 191(5)(b)(ii) read with section 191(11). Referrals to the Labour Court are initiated by a statement of claim in terms of rule 6. The order of Waglay J of 6 March 2003, therefore, aimed at two procedural consequences. Firstly, the removal of the procedural dispute between the parties to the trial roll was in effect an exercise of the learned judge's discretion under section 7(8)(b) to refer the factual disputes appearing on the papers for the hearing of oral evidence. Secondly, by referring the dispute about substantive fairness to the trial roll, he purported to exercise his discretion under rule 11(4) to do what he considered expedient in the circumstances to achieve the objects of the Act, in particular expediting the proceedings by allowing the motion pleadings to stand as the statement of claim and response under rule 6 and directing the parties to bring the pleadings to a close by means of a pre-trial minute in terms of rule 6(4). There can be no objection to a judge following such a

route in general. The difficulty, as will appear, is whether the referral of a dispute about substantive fairness on such a basis will be competent without a prior referral to conciliation, and whether the learned judge was correct in his assumption that he was entitled to condone non-compliance with the requirement of conciliation.

6. Section 189A was inserted into LRA by the amendments with the aim of meeting the demands of various stakeholders for a more efficient method for handling disputes about operational requirement dismissals. Its structure and objective are commendable. Therefore it comes as something of a surprise that two years after its enactment there exists little in the way of judicial commentary on its purpose, scope and application. As this case demonstrates, litigants will accordingly be well advised to proceed with caution when embarking upon a journey through its unchartered waters.

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

What is most notable about this scheme for present purposes, is that referrals to the Labour Court are overtly restricted by sub-sections 189A(7)(b)(ii) and 189A(8)(b)(ii)(bb) to disputes "concerning whether there is a fair reason for the dismissal", in other words disputes about substantive fairness. Moreover, both provisions state expressly that the referral is to be made in terms of section 191(11), the provisions of which appear below. Disputes about procedure in cases falling within the ambit of section 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in section 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.

8. It must be kept in mind, however, that this novel scheme is not of universal application. The section will only apply if the total number of employees employed by the employer exceeds 50, and the employer proposes dismissing a certain number of employees in accordance with the sliding scale contained in section 189A(1). It could arguably follow that dismissals for operational requirements not falling within the ambit of section 189A should continue to be processed as they were before the introduction of the amendments, meaning that both disputes about procedural and substantive fairness may continue to be referred to the Labour Court in terms of section 191(5)(b)(ii) read with section 191(11). However, a compelling argument can equally be made that the general language used in section 189A(18) operates to restrict all procedural disputes to application proceedings and thus excludes the referral of disputes about procedural fairness to the Labour Court for trial by means of a statement of claim. The section provides:

The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).

I do not for present purposes need to make a decisive pronouncement on this issue. I make the observations I do merely as an admonition to litigants to proceed with caution.

9. Section 189A(13) reads as follows:

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.

10. As explained earlier, the applicants initially moved the court in terms of this section for an order of reinstatement and to compel compliance with a fair procedure. As also explained, the order of Waglay J of 6 March 2003 can be interpreted as having referred that dispute to oral evidence under rule 7(8)(b). However, with the effluxion of a considerable period of time since the dismissals, the applicants are less interested in the adjudication of the procedural dispute and would prefer resolution of the dispute about substantive unfairness. Certainly, in practical terms, the time for a pre-emptive interdict has long passed. But section 189A(13) does not limit the applicants to interdictory relief, despite such a remedy being central in the pre-emptive approach envisaged in the overall scheme of the provision. Section 189A(13)(d) also bestows on the applicants the right to seek compensation for procedural irregularities where interdictory relief or specific performance is not appropriate. Moreover, section 189A(14) preserves the court's general power to award compensation under section 158(1)(a) in such cases. Hence, even though the horse has long since bolted the stable, there is no reason why the applicants should be barred from proceeding with their claim for relief in respect of any procedural irregularities that may have tainted their dismissals. For that reason, I was prepared to grant a postponement for the adjudication of the procedural dispute under section 189A(13).

11. The dispute about substantive fairness is however another matter altogether. Section 189A(8)(b)(ii)(bb) provides that where the parties have not opted for facilitation or industrial action, and once the applicable time periods have expired, the union and the employees may "refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)". The applicants contend that this is precisely what they have done and in that regard rely on paragraphs 3 and 4 of the pre-trial minute, which read:

> 3. The parties then agreed that the matter will go to full trail where the substantive and procedural fairness of the dismissals of the second to further applicants will be adjudicated upon. This agreement is reflected in the Court Order of 6 March 2003.

4. This pre-trial minute is therefore drafted pursuant to the abovementioned Court Order.

12. On such a basis, the issue crystallizes into a consideration of whether the order of Waglay J and the pre-trial minute constitute a valid referral of a dispute concerning whether there is a fair reason for the dismissal in terms of section 189A(8)(b)(ii)(bb) read with section 191(11). For the reasons that follow I regret that I am unable to conclude that they do.

13. At a formalistic level, I have no difficulty with a ruling under rule 11(4) that it is expedient to consider papers filed in motion proceedings, supplemented by a pre-trial minute, as substituting

for the rule 6 statement of claim and response, if that indeed was what my colleague intended. The difficulty for me is rather one of jurisdiction. Section 189A(8)(b)(ii)(bb) makes it clear that the referral of a dispute about substantive fairness must be in terms of section 191(11) which 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 day 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.

14. The section incorporates by reference the provisions of section 191(5)(b), which sub-section confers substantive jurisdiction on the Labour Court for various causes of action including operational requirement dismissals. Although its primary purpose is to set a 90 day time limit with reference to the certification that conciliation has failed, and to provide for condonation of non-compliance with the time frame, provided good cause is shown, the reference to section 191(5) is important in that such provision operates to confer jurisdiction on the Labour Court only if the bargaining council or the CCMA commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the referral of the dispute to conciliation in terms of section 191(1) and it remains unresolved. *In Numsa v Driveline Technologies (Pty) Ltd & another* [2000] 1BLLR 20 (LAC) @ 38F, Zondo AJP (as he then was) stated in relation to the requirement of conciliation:

"To me it is as clear as daylight that the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a pre-condition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication".

15. I find myself in respectful agreement with the Judge President, and hence the issue resolves into the question of whether this court has the authority to condone non-compliance with the precondition of conciliation. It is clear that the power of condonation granted by section 191(11)(b) is restricted to condoning the lateness of a referral to the court and there appears to be no other provision conferring a general power to condone non-compliance with the other

jurisdictional pre-conditions. In the *Driveline* case, Conradie JA, in a minority judgment was of the opinion that section 157(4)(a) grants the court discretion to dispense with the requirement of conciliation. And given the tenor of his order, I imagine Waglay J concurs with that view. Section 157(4)(a) provides:

The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

Although one sees the prudential merits of the interpretation preferred by Conradie JA, and presumably Waglay J, that section 157(4)(a) confers a discretion to determine a dispute which has not been submitted to conciliation, I cannot agree that such is the correct construction of the section. Even if I were of the view that it was, I would in any event be bound by the majority decision in *Driveline*, which has unequivocally put the matter to rest. The majority held that section 157(4)(a) will only apply in a dispute when no certificate of outcome was issued but where the employee acquired the right to refer the dispute to the Labour Court by virtue of the expiry of the 30 day period stipulated for conciliation. I can put it no better than the Judge President when he said:

"The long and the short of the above is therefore that, in my view, section 157(4)(a) provides no basis for the proposition that the Labour Court has jurisdiction to adjudicate a dismissal dispute which has not been referred to conciliation. It is only a basis for the proposition that, in a case where no certificate of outcome stating that a dispute remains unresolved has been issued and the dispute was referred to conciliation but no attempt was made to conciliate the dispute, the Labour Court may in its discretion refuse to determine the dispute".

16. From this line of reasoning it follows that this court has no jurisdiction to adjudicate a dispute about the substantive fairness of a dismissal referred to it in terms of section 189A(8)(ii)(bb), read with sections 191(11) and 191(5)(b), unless it has first been referred to conciliation and the council or the CCMA has certified that the dispute remains unresolved. There is moreover no power on the part of this court to condone non-compliance with this jurisdictional pre-condition. Absent conciliation there is no jurisdiction.

17. In the premises, the order of Waglay J contains an obvious error or was granted as a result of a mistake common to both parties. Therefore, in terms of section 165 of the LRA, acting of my own accord, I may vary that order. It is also necessary to make additional orders for the further conduct of the proceedings. The order of Waglay J should therefore be regarded as varied to the extent of the differences between the two orders. Accordingly, on 2 November 2004 I ordered as follows:

17.1. The applicant's application in terms of section 189A(13) is referred to the trial roll in terms of rule 7(8) for the hearing of oral evidence in relation to the disputes of fact appearing on the papers.

17.2. It is declared that this court lacks jurisdiction to adjudicate the dispute concerning whether there is a fair reason for dismissal until such time as the applicants comply with the provisions of the Act relating to the conciliation of the dispute.

17.3. The application in terms of section 189A(13) and the referral to oral evidence in terms of rule 7(8) is postponed *sine die.*

17.4. There is no order as to costs.

Date of judgment: 2 November 2004
Date of reasons: 5 November 2004
Applicant's Representative: Mr. J Whyte, Cheadle, Thompson & Haysom
Respondent's Representative: Mr. W Jacobs, W Jacobs & Associates.