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

Reportable

Case no: JS 30 /2022

In the matter between:

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

and

**SAA TECHNICAL (PTY) LTD** **Respondent**

**Heard:** **12 May 2023**

**Delivered:** **31 May 2023**

**This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 31 May 2023.**

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**JUDGMENT**

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**PRINSLOO J**

The facts

[1] The background facts of this matter are common cause and relevant to give context to the issue this Court has to decide.

[2] The Respondent initiated a section 189A process on 28 April 2021 by issuing a notice in terms of the provisions of section 189(3) of the Labour Relations

Act[1] (LRA) to the affected employees. The CCMA facilitated the consultation process under section 189A, which process was finalised around 1 October 2021. On 18 October 2021, the Respondent dismissed 1 193 of its employees for operational reasons.

[3] On 16 January 2022, the Applicant, acting on behalf of its members (employees), referred a statement of claim to this Court, challenging the substantive fairness of the employees' dismissal on 18 October 2021.

[4] The Respondent subsequently challenged the Applicant's statement of claim on two bases. Firstly, the Respondent contends that the statement of claim constitutes an irregular step because the statement of claim was filed without the dispute first having been referred to conciliation. The Respondent's case is that a referral to this Court without a referral of the dispute to conciliation constitutes not only an irregular step but also ousts the jurisdiction of this Court. Secondly, the Respondent filed an exception to the Applicant's statement of claim on the grounds that it lacks averments necessary to sustain a cause of action, alternatively that it lacks factual allegations to enable the Respondent to plead, alternatively that the allegations are vague and embarrassing.

[5] The grounds for exception are only to be considered in the event that this Court finds that it has jurisdiction, notwithstanding the absence of a referral to conciliation.

The applicable legal framework

[6] The employees were dismissed after a facilitated consultation process as envisaged in section 189A of the LRA.

[7] Section 189A(7) provides that after 60 days have elapsed from the date on which notice was given in terms of section 189(3), an employer may give notice to terminate the contracts of employment, in accordance with section 37(1) of the Basic Conditions of Employment Act[2] (BCEA). A registered trade union or the employees who have received the notice of termination, may either give notice of a strike in terms of section 64(1)(b) or (d) or they may

[1] Act 66 of 1995, as amended.
[2] Act 75 of 1997, as amended.

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

[8] Section 191(5) provides that if a council or 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 remained unresolved, the employee may refer the dispute to the Labour Court for adjudication if the reason for dismissal is *inter alia* based on the employer's operational requirements.

[9] Section 191(11) provides that the referral, in terms of section 191(5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after it was certified to remain unresolved. The time frame for referring the dispute to the Labour Court as set out in the LRA must be adhered to, but section 191(11)(b) however provides that late referral may be condoned on good cause shown.

[10] *In casu*, the Applicant has not referred the dispute to a council or the CCMA, prior to the filing of the statement of claim, challenging the substantive fairness of the employees' dismissal.

[11] The Respondent's case is that the Applicant was required under section 191(11), read with section 191(5)(b)(ii), to seek conciliation of the dispute before the CCMA, prior to filings its statement of claim with the Labour Court. Absent a referral of the dispute to conciliation, the referral to this Court is premature, constitutes an irregular step and ousts the Court's jurisdiction.

[12] The Applicant's case on the other hand is that if a facilitator is appointed and 60 days have elapsed since the issuing of the section 189(3) notice, the employer may give notice of termination of the employees' contracts. A registered trade union or the retrenched employees may then refer a dispute regarding the substantive fairness of their dismissal to the Labour Court in terms of section 191(11). There was no need to refer the dispute for conciliation before it could be referred to the Labour Court and *in casu,* the Applicant's referral to this Court was made within 90 days of receiving the notices of termination.

The issue and the authorities

[13] The crisp question is this: Was the Applicant required, under section 189A(7), read with section 191(5)(b)(ii) and 191 (11) of the LRA, to seek the conciliation of the dispute before the CCMA, prior to filing its statement of claim with the Labour Court.

The Respondent's case

[14] The Respondent's case is that a referral to the Labour Court may only be made within 90 days of the CCMA or bargaining council certifying that the dispute between the parties remained unresolved. In support of its argument, the Respondent relied on several authorities, as set out *infra.*

[15] In *National Union of Metal Workers of South Africa and others v Driveline Technologies (Pty) Ltd and another*[3] *(Driveline),* the majority judgment held that:

> '[66] The Act does contemplate that the Labour Court will have jurisdiction to adjudicate a dispute even when there has been no meaningful conciliation in respect of such a dispute. This is supported by the fact that s 191(5) of the Act contemplates, amongst others, that a dispute may be referred to arbitration or adjudication if the dispute remains unresolved after a period of 30 days has lapsed since the council or the CCMA received the referral of such dispute to conciliation…
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> …
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> [73] To me it is as clear as daylight that the wording of s 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication. I cannot see what clearer language the Legislature could have used other than the language it chose to use in s 191(5) ... In s 191(5) the Legislature used the wording:
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> > "If a council or commissioner certified that… or if 30 days have expired since… and the dispute remains unresolved –

[3] (2000) 21 ILJ 142 (LAC) at paras 66 and 73.

(a) the council or the Commission must arbitrate the dispute…

(b) the employee may refer the dispute to the Labour Court for adjudication."'

[16] In *NUMSA and others v SA Five Engineering and others*[4] *(SA Five Engineering),* the Court held that:

'…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] 1 BLLR 20 (LAC) at 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."'

[17] The Respondent also referred to *Catering Pleasure and Food Workers Union v National Brands Limited*[5] *(National Brands)* in which a facilitation process was embarked upon and after the employees were dismissed, their union referred a dispute to the Labour Court. The employer raised a special plea that the applicant had failed to refer a dispute about unfair dismissal to the CCMA for conciliation but instead referred the dispute directly to the Labour Court. It was contended that, in the absence of a conciliation process, the Labour Court lacked jurisdiction. The union contended that the facilitation process constituted a substitute for conciliation. The Court rejected the argument and held that:

'[20] Employees who seek to institute action proceedings following their retrenchments, under subsections (18) and (19), must prove to the Court that a CCMA or bargaining council commissioner has certified that the dispute remains unresolved, or if 30 days have expired since

[4] [2005] 1 BLLR 53 (LC) at para 14.
[5] (2007) 28 ILJ 1064 (LC).

the council or the commissioner received the referral. If the dispute remains unresolved –

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

(ii) based on the employer's operational requirements… (Section 191(5)(b)(ii) of the Act)."

[21] The certificate, obtained only if a dispute has been referred to the bargaining council or CCMA for ordinary conciliation, which process had failed (or the expiry of 30 days) is a jurisdictional fact to be proved before the matter may be referred to the Labour Court under s 189A of the Act. It is a necessary prerequisite for the exercise of jurisdiction by the Labour Court in unfair dismissal proceedings. That was the authoritative view held by the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd & Another 2000 21 ILJ 142 (LAC)* and *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others (2000) 21 ILJ 2382 (LAC).*"

[18] Ultimately the Court found that the applicant did not procure a certificate to enable the Labour Court to exercise jurisdiction over the fairness of the dismissal.

[19] In *South African Equity Union obo Van Wyk and 100 members v Lodestone Confectionary (Pty) Ltd t/a Candy Tops*[6] *(Lodestone),* the employer issued notices in terms of section 189(3) of the LRA and a CCMA facilitator was appointed to facilitate the process, as provided for in section 189A. The facilitation failed and the employer issued notices of termination of service. After the employees' services were terminated, they referred their matter to the Labour Court, without a referral for conciliation. The employer's case was that the employees were required by section 191 of the LRA to refer their unfair dismissal dispute for conciliation first, before approaching the Labour Court. The employees denied that they were required to first refer a dispute relating to the substantive fairness of their dismissal to conciliation since their dismissal followed a CCMA facilitated process.

[6] Unreported judgment handed down on 26 May 2017 under case number PS19/16.

[20] The Court (per Lallie J) was referred to *Bell Equipment and National Union of Mineworkers of South Africa v Intervalve (Pty) Limited and others*[7] *(Intervalve),* and the point on the lack of jurisdiction was upheld. The Court concluded that:

> 'The Constitutional Court confirmed that the referral of a dispute to the CCMA or bargaining council and the issuing of the certificate of the non-resolution of the dispute constitute the necessary jurisdictional fact for the Labour Court to have jurisdiction over unfair dismissal disputes which include unfair mass retrenchment disputes.'[8]

[21] In *Steenkamp and others v Edcon Ltd*[9] (*Steenkamp),* the minority held that[10] section 189A expressly limits the disputes that can be referred to the Labour Court in terms of the provisions of sections 189A(7)(b)(ii) and 189A(8)(b)(ii(bb) to only those concerning disputes about substantive fairness. The referral, in either case, must be made in terms of section 191(11), which provides that the referral to the Labour Court for adjudication in terms of section 191(5)(b) must be made within 90 days after the bargaining council or the CCMA certified that the dispute remained unresolved. The majority of the Constitutional Court held that[11]

> 'The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed, which is provided for in s 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. The requirement for the referral of dismissal disputes to conciliation is one of the processes created by the LRA. The CCMA, bargaining councils and the Labour Court are some of the fora. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA.'

[22] Mr Boda for the Respondent submitted that, notwithstanding a prior facilitation process, conciliation was still necessary post dismissal as the issue that is facilitated pre-dismissal, relates to the question as to how best the requirements of section 189(3) of the LRA are served and it is a pre-dismissal dispute. The dispute on retrenchment is a dispute of right concerning a

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[7] (2015) 36 ILJ 363 (CC).
[8] *Lodestone* at para 11.
[9] 2016 (3) SA 251 (CC).
[10] At para 31.
[11] At para 105.

dismissal and that gives rise to a fresh cause of action that must be conciliated.

The Applicant's case

[23] The Applicant submitted that sections 189A(7) and (8) provide for different scenarios and as such, their interpretation and application should be differentiated. Section 189A(7) applies specifically to a section 189A retrenchment process where a facilitator was appointed to assist the parties engaged in consultations and section 189A(8) applies when a facilitator was not appointed. Where there was no facilitation, the dispute must be referred for conciliation prior to a referral to the Labour Court, but where the process was already facilitated, the dispute could be referred to court without first referring it for conciliation. According to the Applicant, this is indicative of the fact that the legislature made a deliberate choice to exclude the requirement of conciliation from section 189A(7). The reference to section 191(11), in both sections 189A(7) and 189A(8), is the result of a lack of drafting elegance.

[24] Mr Meyerowitz for the Applicant conceded that *National Brands* and *Lodestar* were against the Applicant. He submitted that in *SA Engineering* and *Steenkamp,* there was no facilitation process and as such, the authorities do not assist the Respondent. Where there was no facilitation, section 189A(8) specifically provides that the dispute must be referred for conciliation first.

[25] The Applicant relies on *National Union of Metalworkers of SA on behalf of Members and Others v Bell Equipment Co SA (Pty) Ltd*[12] *(Bell Equipment)* to support its argument. In *Bell Equipment,* the Court was faced with the question of whether the reference to section 191(11) in section 189A(7)(b)(ii) meant that it was a requirement that before a referral to the Labour Court may be made, a dispute should first have been referred to the CCMA and that it must have certified that the dispute remains unresolved. The Court (per Van Niekerk J) held that post-facilitation conciliation is not a requirement for a referral to the Labour Court in terms of section 189A(7)(b)(ii) and found an interpretation that it was required, absurd. It was held that:

> '[24] … In arriving at this conclusion I take into account two important factors. The first is that in the event of the appointment of a facilitator,

[12] (2011) 32 ILJ 382 (LC).

the parties benefit from the facilitation process which is not identical to but not dissimilar from the conciliation process. What is more, a period of 60 days must elapse from the date on which the s 189(3) notice is given before an employer may give notice to terminate. Secondly, subsection (7)(b) (i) does not require a trade union or the employees who have received notice of termination to refer a dispute to the CCMA or the bargaining council for conciliation and for a certificate of non-resolution to be issued should the employees wish to give notice of a proposed strike in terms of s 64(1)(b) of the LRA. I can see no reason why the legislature in drafting subsection (7)(b) (ii) would require employees to refer disputes to the CCMA or a bargaining council if they wish to refer such disputes to the Labour Court.

[25] It must be accepted, however, that the reference to s 191(11) in subsection (7)(b)(ii) serves a purpose... It appears to me that what the legislature intended was to provide that the referral of the dispute to the Labour Court for adjudication must take place within 90 days, that being the time referred to in s 191(11)(a). I do, however, realize that the section provides for the referral to be made within 90 days after the CCMA or bargaining council has certified that the dispute remains unresolved. When then should the 90-day period be calculated from in terms of s 189A(7)(b)(ii)? The only logical answer is that it must be calculated from the date of the notice of termination.

…

[27] It is for these reasons that I have concluded that the legislature could not have intended what is contended for on behalf of the respondent but that what was intended by subsection (7)(b) (ii) is that a trade union or an employee who has received a notice of termination may refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court within 90 days of receipt of the notice of termination. It follows, therefore, that the second ground of exception cannot succeed.'[13]

[26] The argument is that, in light of the above, there was no need for NUMSA to first refer the dispute to conciliation before referring the dispute to the Labour Court, therefore the filing of its statement of claim on 16 January 2022 was not an irregular step.

[13] *Bell Equipment* at paras 24 – 25 and 27.

[27] In *NUMSA and others v Industrial Oleo Chemical Products*[14] *(Oleo),* the employer issued notices in terms of section 189(3) of the LRA and a CCMA facilitator was appointed to facilitate the process, as provided for in section 189A. After the employees' services were terminated, they referred their matter to the Labour Court, without a referral for conciliation. They argued that it was not necessary to refer a dispute relating to the substantive fairness of their dismissal to conciliation since their dismissal followed a facilitation process. The respondent's case was that the employees were required to refer their unfair dismissal dispute for conciliation first.

[28] In *Oleo,* the Court (per Hiralall AJ) was referred to *Bell Equipment, Intervalve, Lodestone and Steenkamp* and concluded that:

> '[21] In the case of s189A(7), there is no reference to any requirement of a referral in terms of s64(1)(a) as there is in s189A(8). The employer is entitled, after a period of 60 days has elapsed, to give notice of termination in accordance with s37(1) of the BCEA, and the employees are entitled to either give notice of a strike in terms of *s64(1)(b) or (d)*, or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of s191(11).
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> [22] In my view, if the legislature intended that the dispute be referred to conciliation after the expiry of the 60-day period, it would have stated that the employees were entitled to refer a dispute to the Labour Court in terms of section 191(1).'[15]

Analysis

[29] On the question of whether the Applicant was required, under section 189A(7)(b)(ii) of the LRA, to seek the conciliation of the dispute before the CCMA, prior to filing its statement of claim with the Labour Court, there are conflicting judgments, as alluded to *supra*.

[30] In my view, the Applicant was required to seek the conciliation of the dispute prior to filing its statement of claim with the Labour Court. I am inclined to follow *National Brands* and *Lodestone.* I say so for the following reasons:

[14] [2022] JOL 56702 (LC).
[15] *Oleo* at paras 21 – 22.

[31] Firstly, a proper interpretation of the LRA dictates that a dispute challenging the fairness of a dismissal for operational reasons must be conciliated before it is adjudicated by the Labour Court.

[32] Section 191(1)(a) of the LRA provides that a dispute about the fairness of a dismissal must be referred to the CCMA or the relevant bargaining council within 30 days of the date of dismissal. If the reason for dismissal is based on the employer's operational requirements, section 191(5(b) provides that the dispute may be referred to the Labour Court for adjudication. Such a referral is to be made within 90 days after the CCMA or the bargaining council has certified that the dispute remained unresolved, as per section 191(11)(a).

[33] Secondly, the Constitutional Court considered the issue of conciliation in *Intervalve.* Although the focus of the judgment was different, the issue of conciliation was considered in broad and general terms and the Constitutional Court addressed general principles which would apply to all unfair dismissal disputes. The interpretation of the LRA, which gives statutory embodiment to the right to fair labour practices, was considered and more specifically, the preconditions to the Labour Court's jurisdiction.

[34] The Constitutional Court accepted the reasoning of the *Driveline* majority[16]:

> 'On the point crucial to this case, the majority firmly rejected the proposition that the Labour Court has jurisdiction to adjudicate a dispute not referred to conciliation at all. It said that it was—
>
> > "as clear as daylight that the wording of s 191(5) imposes the referral of a dismissal dispute to conciliation before such dispute can either be arbitrated or referred to the Labour Court for adjudication".'

[35] It was held that[17]:

> 'Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in

[16] *Intervalve* at para 31.
[17] *Ibid* at para 32.

> South African labour-law history for nearly a century. We should not tamper with it now.'

[36] In *Intervalve,* it was confirmed that referral for conciliation is indispensable and that it is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes.

[37] Thirdly, section 189A(7)(b)(ii) provides that a registered trade union or the employees who have received the notice of termination, may refer a dispute, concerning whether there is a fair reason for their dismissal to the Labour Court, in terms of section 191(11).

[38] The Applicant submitted that the reference to section 191(11) in sections 189A(7) and (8) is the result of 'a lack of drafting elegance'. The argument is that section 191(11) concerns referrals made to the Labour Court in terms of section 191(5)(b) and does not concern referrals made to the Labour Court in terms of sections 189A(7) and (8) and therefore section 191(11) is not applicable. According to the Applicant, this is the interpretation to be accepted.

[39] The Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[18] affirmed the principles applicable to the interpretation of legislation and contracts. In paragraph 26 it was held that:

> 'In between these two extremes, in 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.'

[40] In *University of Johannesburg v Auckland Park Theological Seminary and Another,*[19] the Constitutional Court held that:

[18] 2012 (4) SA 593 (SCA) at para 26.
[19] 2021 (6) SA 1 (CC) at paras 66.

> 'The approach in *Endumeni* "updated" the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.'

[41] These are the principles to be applied in considering the interpretation put forward by the Applicant. The Applicant's argument on the interpretation of sections 189A(7) and (8) and the applicability of section 191(11) is not sustainable and cannot be accepted.

[42] Section 191(5)(b) permits employees to refer disputes where the reason for dismissal was based on an employer's operational requirements to the Labour Court for adjudication. The LRA does not differentiate between section 189 and section 189A retrenchments as reason for dismissal for purposes of a referral for adjudication, nor does it provide separate dispensations for that.

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

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

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

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

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

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

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

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

[51] Section 191(1)(a) of the LRA explicitly provides that a dispute about the fairness of a dismissal must be referred to the CCMA or the relevant

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

Conclusion

[52] The employees were dismissed after a facilitated consultation process as envisaged in section 189A of the LRA. They did not refer an unfair dismissal dispute to the CCMA for conciliation before filing a statement of case with the Labour Court, seeking adjudication of their dispute.

[53] The Respondent's submission, that the Applicant's statement of claim is irregular and improper because there was no referral to conciliation, has merit. This Court lacks jurisdiction to adjudicate an unfair dismissal dispute that was not conciliated.

[54] In view of the conflicting judgments on this issue, the parties submitted that it would be inappropriate for this Court to make any cost order. I agree that this is a case where the interests of justice will be best served by making no order as to costs.

[55] In the premises, I make the following order:

Order

1. Applicant's statement of claim constitutes an irregular step;
2. The Labour Court lacks jurisdiction to adjudicate the Applicant's unfair dismissal case;
3. The Applicant's statement of case is struck off the roll for lack of jurisdiction;
4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

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|---|---|
| For the Applicant: | Advocate M Meyerowitz |
| Instructed by: | Serfontein Viljoen & Swart Attorneys |
| For the Respondent: | Advocate F Boda SC |
| Instructed by: | Cliffe Dekker Hofmeyr Inc Attorneys |