REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

CASE NO. **D753/09**

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) obo MEMBERS	**FIRST APPLICANT**
LIST OF APPLICANTS ANNEXED TO APPLICATION MARKED "A"	**SECOND AND FURTHER APPLICANTS**

and

BELL EQUIPMENT COMPANY S A (PTY) LTD	**RESPONDENT**

JUDGMENT

VAN NIEKERK AJ:

[1] The second and further applicants, who I will for the sake of convenience refer to as "the employees", were formerly employed by the respondent. The employees had their services terminated by the respondent on 28 August 2009, ostensibly due to the operational requirements of the respondent. As at the date of their dismissal, the employees were all members of the first applicant.

[2] The first applicant and the employees instituted proceedings in terms of Section 189A(7)(b)(ii) of the Labour Relations Act ("LRA") by delivering a Statement of Claim in terms of which it is alleged that the dismissal of the employees was substantively unfair and in which they seek an order that the dismissal by the respondent be declared unfair and that

the employees be reinstated to the employ of the respondent on the same terms and conditions as applied prior to their dismissal, with full retrospective effect.

[3] The first applicant and the employees simultaneously launched an application under the same case number in terms of section 189A(1) of the LRA in which it is alleged that the dismissals were procedurally defective. The relief sought in this application is that the respondent be directed to reinstate the dismissed the employees on the same terms and conditions as pertained to their dismissals with effect from 28 August 2009 until it has complied with a fair procedure and further, that the respondent pay just an equitable compensation, if appropriate.

[4] The respondent opposes these proceedings. Firstly, it delivered a notice in terms of rule 7 of the Uniform Rules of the High Court in which it disputes that the attorneys representing the first applicant and the employees, Brett Purdon Attorneys, are properly authorised to act on behalf of the applicants in the proceedings instituted in terms of section 189A(7)(b)(ii). Secondly, it delivered a notice of exception to the Statement of Claim. Thirdly, it delivered an answering affidavit to the application in terms of section 189A(13).

[5] I will firstly deal with the question of the attorneys' authority and the exception to the Statement of Claim and thereafter I will consider the application in terms of section 189A(13).

[6] The authority of applicants' attorneys to act

The respondent's attorneys delivered a notice in terms of rule 7 of the Uniform Rules of Court, read with rule 11(3) of the Labour Court Rules in which they gave notice that the respondent disputes that the applicants' attorneys are properly authorised to act on their behalf and called upon them to satisfy the court that they are authorised to so act. No response was delivered to the notice and the applicant's attorneys did not file powers of attorney as contemplated by rule 7. It was contended in argument before me that the failure to do so meant that the delivery of a notice of opposition to the notice of exception and the filing of a replying affidavit in the application in terms of section 189A(13) constituted steps improperly taken and that until such time as the applicant's attorneys have filed the requisite powers of attorney, they fall to be disregarded.

[7] Rule 7(1) of the Uniform Rules of Court provides as follows:

> *"Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application".*

[8] The question I must, therefore, consider is whether the attorneys representing the applicants are authorised to act on their behalf. In argument before me Mr Seery, representing the applicants, pointed out that both the Statement of Claim and the Notice of Motion are signed by the same attorney, Mr Brett Purdon, and that in the affidavit filed in support of the application, Mr Thulani Ngubane, who deposed to the founding affidavit, stated that he is the regional organiser of the first applicant and that he is duly authorised to depose thereto and to make application on behalf of the applicants. Mr Seery submitted that I should take these facts into account when considering the *dictum* of Watermeyer J in ***Mall Cape (Pty) v Marino Ko-Operasie Beperk*** 1957 (2) SA 347 (C) at 351 A-C which states as follows:

> *"Where a notice of motion which is issued in the name of an individual is complete and regular on the face of it and purports to be signed by an attorney acting for the applicant, then, in the absence of anything to show that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, the Court will presume that the attorney was duly authorised to do so. An attorney is an officer of the Court and it must be presumed in the absence of any evidence to the contrary that he has satisfied himself that he has authority from the applicant to commence proceedings before doing so. By appending his signature to the notice of motion he in effect certifies that he has authority to act on behalf of the applicant. I say that the Court will presume the attorney's authority in the absence of evidence to the contrary, for it is of course always open to the respondent, if he has reason to believe that the proceedings have not been properly authorised by the applicant, to file an opposing affidavit setting out the grounds of his belief, in which case a triable issue of fact arises. I do*

> *not think that, in the case of notice of motion proceedings brought by an individual, the mere failure to file the power of attorney or a statement under oath showing that the applicant has conferred authority upon the attorney, renders the proceedings open to objection".*

[9] It is significant that in the answering affidavit filed in opposition to the application in terms of Section 189A(13), nothing was said regarding the respondent's grounds of belief that Brett Purdon Attorneys are not authorised to act. Ms Nel, who appeared for the respondent, referred me to ***Creative Car Sound and Another v Automobile Radio Dealers Association 1989 (Pty) Ltd*** 2007 (4) SA 546 (D) in support of the attack on Brett Purdon Attorneys' authority to represent the applicants. I agree with the submission contained in the applicants' heads of argument that the case is distinguishable as it concerned an application in which a founding affidavit had been deposed to by a candidate attorney and no affidavit had been deposed to by the applicants themselves.

[10] In view of the fact that both matters were brought under the same case number, that they have been considered together and that no grounds have been placed before me which set out the respondent's belief that Brett Purdon Attorneys are not authorised to act on behalf of the applicants, I must accept their authority to represent the applicants.

[11] The exception

The respondent delivered an exception to the Statement of Claim in terms of rule 23(1) of the Uniform Rules of the High Court read with rule 11(3) of the Labour Court Rules. There are a number of grounds of exception each of which will be dealt separately.

[12] The first ground of exception is as follows:

> 1. *As at the date of institution of the proceedings and delivery of the Applicants' Statement of Claim the Applicants had not:*
>
> *1.1 made an application to this Honourable Court in terms of s189A (13); and/or*
>
> *1.2 referred an unfair dismissal dispute to the Metal Industries Bargaining Council, as required by s191 (1)(b)(i) of the Labour Relations Act 66 of 1995,*
>
> *entitling the Applicants to approach this Honourable Court for relief arising from an alleged substantively unfair dismissal for operational requirements as contemplated by the provisions of s189A (7)(b)(ii) of the Labour Relations Act 66 of 1995.*
>
> 2. *As at delivery of this exception, the Applicants had only referred the dispute forming the subject of the Applicants' present claim, to the Metal Industries Bargaining Council, on 23 September 2009, and accordingly:*
>
> *2.1 the Metal Industries Bargaining Council has not certified that the dispute remains unresolved; and*

2.2 30 days have not expired since the Metal Industries Bargaining Council received the referral;

accordingly, the Applicants are not entitled to have referred a dispute in terms of s189A (7)(b)(ii) read together with s191 (11) of the Labour Relations Act 66 of 1995, having not conciliated the dispute prior to its referral to the Labour Court."

[13] Proceedings were instituted in terms of section 189A(7)(b)(ii) by serving the Statement of Claim on the respondent on 18 September 2009. The Statement of Claim itself with its service affidavits was filed with the court on 22 September 2009. It was only thereafter on 23 September 2009 that the dispute concerning the dismissal of the employees was referred to the Metal and Engineering Industries Bargaining Council ("the Council").

[14] The respondent's first contention under this heading of the exception is that as at the date of the institution of proceedings, the applicants had not yet made application to the court in terms of section 189A(13). It is necessary, therefore, to set out the provisions of section 189A(7) to determine whether it is indeed a prerequisite for proceedings such as these that as at the date of the institution of proceedings an application to court in terms of subsection 13 must have been made. Subsection 7 reads as follows:

"(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) –

(a) The employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(b) A registered trade union or the employees who have received notice of termination may either-

(i) give notice of a strike in terms of section 64(1)(b) or (d); or

(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court <u>in terms of section 191(11)</u>". (my underlining)

[15] I do not consider it necessary to quote the provisions of subsection 13 but I record that it provides that if an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for relief *inter alia* to direct the employer to reinstate an employee until it has complied with a fair procedure.

[16] It will be apparent from the aforegoing that proceedings in terms of section 189A(7)(b)(ii) do not require as a prerequisite for their validity an application in terms of subsection 13. The exception on this ground must, therefore, fail.

[17] The second ground for exception raises the question whether the reference to section 191(11) in section 189A(7)(b)(ii) means that it is a requirement that before a referral to the Labour Court may be made, a dispute should first have been referred to the Council and that it must have certified that the dispute remains unresolved.

[18] Section 191(11)(a) provides as follows:

> *"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."*

[19] This section, therefore, seems to indicate that before an unfair dismissal dispute may be referred to the Labour Court for adjudication, the dispute must first be referred to the Council for conciliation in terms of section 191(4) whereafter it must certify that the dispute remains unresolved or a period of 30 days must have expired since the referral of the dispute to the Council.

[20] The process of consultation with the employees and the first applicant commenced on 31 March 2009 when the respondent issued a notice to its employees and the trades unions and shop stewards that it was contemplating staff reductions and accordingly, would be commencing a consultation process in terms of section 189 of the LRA. On 6 May 2009 the respondent despatched to the trades unions a formal notice in terms of section 189(3).

[21] During May 2009 the respondent invoked the provisions of section 189A(3) of the LRA by approaching the Commission for Conciliation, Mediation and Arbitration ("CCMA") to appoint a facilitator to assist the parties engaged in consultations. The first consultation meeting consequent upon the section 189(3) notice was held on 29 May 2009 at which the duly appointed facilitator was present. That facilitator was also present at subsequent meetings. As I have already stated, the consultation process culminated in the dismissal of the employees on 28 August 2009, ostensibly due to the respondents' operational requirements. There is, therefore, no dispute that in accordance with section 189A(7), a period in excess of 60 days elapsed from the date on which notice was given in terms of section 189(3). The question is, therefore, whether the applicants were obliged to thereafter refer the dispute to the Council for conciliation and await a certificate of non-resolution or the expiry of a further 30 days after the Council received the referral before the applicants were entitled to refer the dispute to the Labour Court for adjudication.

[22] In support of her submissions to me in support of the exception, Ms Nel referred me to ***National Union of Metal Workers of SA and others v SA Five Engineering and others*** (2004) 25 ILJ 2358 (LC), a decision concerning the provisions of section 189A(8)(b)(ii) in which the court found that the Labour Court has no jurisdiction to adjudicate a dispute about the substantive fairness of an operational requirements dismissal

in terms of the said section unless the dispute had first been referred to conciliation and the Bargaining Council or the CCMA has certified that the dispute remains unresolved. The court went on to hold that there is no power on the part of the court to condone non-compliance with this jurisdictional precondition. It found that absent conciliation, the Labour Court does not have jurisdiction.

[23] Section 189A(8) provides as follows:

> *"(8) If a facilitator is not appointed –*
>
> *(a) a party may not refer a dispute to a Council or the Commissioner 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 employers 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 <u>in terms of section 191(11)</u>."* (my underlining)

[24] In my view it is clear from subsection (bb) that the referral of a dismissal dispute to the Labour Court does not because of the reference to section 191(11) require yet a further referral to the CCMA or a Bargaining Council because that would already have occurred in terms of subsection 8(a). Likewise, I would consider it to be absurd if the reference to section 191(11) were to be read in that manner in the context of subsection 7(b)(ii) (quoted in paragraph 14 above). 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, the parties benefit from the facilitation process which is not identical to but not dissimilar from the facilitation process. What is more, a period of 60 days must elapse from the date on which the section 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 section 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 section 191(11) in subsection 7(b)(ii) serves a purpose. The common law, after all, presumes that statutes do not contain invalid or purposeless provisions (***Case v Minister of Safety and Security*** 1996 (5) BCLR 609 (CC) at paragraph 57). 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 section 191(11)(a). I do, however, realise 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 section 189A(7)(b)(ii)? The only logical answer is that it must be calculated from the date of the notice of termination.

[26] I conclude, therefore, that reading section 189A(7)(b)(ii) in the manner contended for by the respondent leads to an absurdity which must be avoided. In ***Fishoek Primary School v G W*** 2010 (2) SA 141 (SCA) at paragraph 6, the Supreme Court of Appeal referred with approval to the *dictum* of Stratford JA in ***Bhyat v Commissioner for Immigration*** 1932 AD 125 at 129 where it was held that:

> *"The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the law giver from the language employed in the enactment..... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended."*

In paragraph 7 of the judgment the Supreme Court of Appeal referred to ***Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape*** 2001 (3) SA 582 (SCA) at paragraph 11 where Schutz JA stated that the effect of the formulation in *Bhyat* -

> *"is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of defining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend".*

[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.

[28] The third ground for exception to the Statement of Claim is that in paragraph 16 thereof, the employees set out their reasons why they allege their dismissals were procedurally unfair. The Statement of Claim, however, makes it clear that the claim is in respect of a substantively unfair dismissal. Ms Nel submitted that in terms of section 189A(7)(ii) the applicants are precluded from referring a dispute concerning an allegedly procedurally unfair dismissal under the guise of a dispute as to whether there was a fair reason for the dismissal.

[29] Mr Seery submitted that the applicants are not precluded from referring to procedural issues as background facts in a claim concerning substantive unfairness. He referred me to the decision in ***Unitrans Zululand (Pty) Ltd v Cebekhulu*** [2003] 7 BLLR 688 at 702, paragraph 48 where Du Plessis AJA pointed out that the LRA makes a distinction between "unfair dismissals" and dismissals that are "unfair only because the employer did not follow a fair procedure". He went on to say:

> *"In my view this distinction does not justify an inference that substantive fairness and procedural fairness will always fall into separate, impermeable compartments. There may be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure."*

[30] I cannot exclude the possibility that this is a case such as described by Du Plessis AJA. For this reason I do not consider that the Statement of Claim is excipiable by reason of the inclusion therein of allegations concerning the procedurally unfair dismissal of the employees. This exception too, therefore, fails.

[31] The fourth ground of exception concerns the allegations contained in paragraph 13 of the Statement of Claim which I quote:

> *"In particular, the First Applicant believed that certain interventions undertaken by the First Applicant and members of the Trade Union alliance COSATU could and would have had the result of funding being obtained, which would have alleviated the need to proceed with forced retrenchments."*

[32] This must be read with paragraph 23 which contains a catch–all allegation that the dismissals of the employees "were accordingly substantively unfair".

[33] The exception taken is that the applicants, with specific reference to paragraph 13, failed to allege any material facts in support of the conclusion contained in paragraph 23 that the dismissals were substantively unfair. The exception goes on to state that the applicants' Statement of Claim lacks the averments necessary to sustain a cause of action on the basis that their dismissals were not effected for a fair reason as contemplated by the provisions of section 189A(7)(b)(ii).

[34] Mr Seery submitted that at best for the respondent the Statement of Claim is vague and embarrassing. He pointed out that rule 23 of the Uniform Rules of Court requires that a party taking an exception on this ground must afford the other party an opportunity of removing the cause of the complaint. The respondent did not do so.

[35] I agree that paragraph 13 of the Statement of Claim is vague and embarrassing. There are no details pleaded of what interventions were referred to which would have lead to an avoidance of the necessity to retrench employees. I consider, however, that the applicants should be provided with an opportunity of amending and amplifying the Statement of Claim. I consider that it will be appropriate if the applicants are given leave to amend the Statement of Claim and remove the cause of complaint within 15 days as is provided for in terms of rule 23(1) of the Uniform Rules of Court (see ***Constantaras v BCE Food Service Equipment (Pty) Ltd*** 2007 (6) SA 338 at 348 C – F). Should the applicants not within that time avail themselves of the opportunity of removing the cause of complaint, paragraph 13 should be considered to have been struck out of the Statement of Claim.

[36] In summary, the exception to the Statement of Claim does not succeed save to the extent that I have found that paragraph 13 of the Statement of Claim is vague and embarrassing.

[37] The application in terms of section 189A(13)

In this application the applicants seek an order directing the respondent to comply with fair procedures prior to the termination of the service of the employees and that they be reinstated into their employ with the respondent with effect from 28 August 2009 until the respondent has complied with a fair procedure.

[38] The basis of the application is that respondent failed to follow a fair procedure in dismissing the employees in that:

(a) the process of consultation was incomplete;

(b) there had not been meaningful and complete consultation on appropriate measures to avoid the dismissals;

(c) there had been incomplete consultation and joint consensus-seeking on methods to minimise the number of dismissals, to mitigate the adverse effects of the dismissals and the method for selecting the employees to be dismissed;

(d) respondent failed to disclose the identity of the first applicant's members who were affected by the retrenchment exercise until shortly before the dismissals were effected;

(e) the respondent failed to utilise fair and objective selection criteria in selecting the employees for retrenchment.

[39] The respondent opposed the application and filed a comprehensive answering affidavit in which it disputes the allegations concerning the unfairness of the dismissals. It alleges that an exhaustive consultation process was entered into with the first applicant and that a facilitator was appointed to assist the consultation process in terms of section 189A(3) of the LRA. The facilitator attended the consultative meetings. The respondent accordingly denies that the consultation process was incomplete or that there had not been meaningful and complete consultation on appropriate measures to avoid the dismissals. It further disputes that there had been incomplete consultation and joint consensus-seeking on methods to minimise the dismissals or to change the timing of dismissals so as to mitigate the adverse effects of the dismissals and the method for selecting employees to be dismissed. It admits, however, that the identity of the employees were not disclosed until immediately before notice was given to them of their termination but it alleges that this was in accordance with an agreement reached with the trades unions who participated in the consultative process, including the first applicant.

[40] In a brief replying affidavit the applicants took issue with the respondent and in paragraph 30 thereof submitted that it is appropriate that the hearing of the procedural and substantive challenges to the dismissals should be dealt with simultaneously at the trial of this matter. I understand this to be a request that the application be

adjourned and that it be referred for the hearing of oral evidence at the same time that the proceedings in terms of section 189A(7)(b)(ii) are set down for trial. In this regard Mr Seery referred me to the ***SA FIVE*** decision (see paragraph 22 above) in which a similar order was made. As in that matter, there has been the effluxion of a considerable period of time since the dismissals occurred. It furthermore appears to me that like in that case, the more important dispute between the parties is the question of the substantive unfairness of the dismissals.

[41] For these reasons and because there are material disputes of fact regarding the fairness of the dismissals, I intend adjourning this application and referring it for the hearing of oral evidence which must be heard simultaneously with the proceedings instituted in terms of section 189A(7)(b)(ii).

[42] Costs

As far as the exception is concerned, I consider that the applicants have been substantively successful and I can see no reason why the usual order should not be made that the unsuccessful party should bear the costs of the exception. These costs are to include the costs incurred in respect of the attack on the authority of applicants' attorneys to represent them. The application in terms of section 189A(13) is to be referred to oral evidence and I propose to make an order reserving the costs of that application.

[43] Order

I make the following order:

(a) the exception is dismissed save that paragraph 13 of the Statement of Claim is found to be vague and embarrassing;

(b) the applicants are given leave to amend their Statement of Claim to cure the defect within 15 days of this order. In the event that such an amendment is not timeously made, paragraph 13 of the Statement of Claim is struck out as being excipiable;

(c) the application in terms of section 189A(13) is referred to the trial roll in terms of section 7(8) for the hearing of oral evidence in relation to the disputes of fact appearing on the papers, such hearing to be simultaneous with the proceedings instituted in terms of section 189A(7)(b)(ii);

(d) the respondent is ordered to pay the applicants' costs of the exception and the attack on the authority of the applicants' attorneys to represent them;

(e) the costs of the application in terms of section 189(13) are reserved for decision by the trial court.

DATE OF HEARING: 15 April 2010

DATE OF JUDGMENT: May 2010

APPEARANCES

FOR THE APPLICANT: MR T E SEERY

INSTRUCTED BY: BRETT PURDON ATTORNEYS

FOR THE RESPONDENT: MS C A NEL

INSTRUCTED BY: MACGREGOR ERASMUS