CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 72/14

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Applicant
and	
INTERVALVE (PTY) LTD	First Respondent
BHR PIPING SYSTEMS (PTY) LTD	Second Respondent
STEINMÜLLER AFRICA (PTY) LTD	Third Respondent
STRATEGIC HUMAN RESOURCES	Fourth Respondent
TQA TRADING ENTERPRISES (PTY) LTD	Fifth Respondent

Neutral citation:	*National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* [2014] ZACC 35
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Judgments:	Cameron J (majority): [1] to [74] Zondo J (concurring): [75] to [141] Nkabinde J (dissenting): [142] to [190] Froneman J (dissenting): [191] to [197]
Heard on:	4 September 2014
Decided on:	12 December 2014

Summary: Labour Court Rules — rule 22 — application for joinder of employer in unfair dismissal dispute — joinder refused

Labour Relations Act 66 of 1995 — section 191 — conciliation a precondition for adjudication by Labour Court — effect of failure to cite all employers in referral to conciliation — no substantial compliance unless each employer is cited

Waiver — estoppel — effect of employers handling the dispute jointly — grounds for neither waiver nor estoppel established

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

CAMERON J (Mogoeng CJ, Moseneke DCJ, Khampepe J, Leeuw AJ and Zondo J concurring):

[1] In this application for leave to appeal, the applicant union, the National Union of Metalworkers of South Africa (NUMSA), seeks to join two employers, the first and second respondents, Intervalve (Pty) Ltd (Intervalve) and BHR Piping Systems (Pty) Ltd (BHR), as parties to unfair dismissal proceedings pending in the Labour Court between NUMSA and the third respondent, Steinmüller Africa (Pty) Ltd

(Steinmüller).[1] Steinmüller, Intervalve and BHR are associated companies. They have interlinked shareholders and directors. The dismissed employees, some 204, were each employed by one or other of them. NUMSA referred the dismissal first to conciliation and then to the Labour Court, but cited only Steinmüller. Its later attempt to join the other two to the pending proceedings succeeded in the Labour Court,[2] but failed in the Labour Appeal Court.[3] That is the judgment NUMSA now seeks to overturn. Its attempt to do so raises questions about how process must be initiated in the Labour Court and what the law can do to penetrate the opacities of form. But, most importantly, the question is who must take responsibility for the plight of the dismissed employees. For their claim that they were unfairly dismissed lies at the heart of the matter.

Background

[2] Steinmüller, Intervalve and BHR are engineering companies that manufacture different components for power-generating plants.[4] They operate, together with a number of other, unconnected companies, from an industrial site in Pretoria West controlled by Arcelormittal SA Ltd, a steel-manufacturing entity. This was where an unprotected strike involving employees of all three companies took place. As a result, 204 employees were dismissed on or about 14 April 2010.

[3] The three companies are closely connected. They each have common shareholders and directors. All three are subsidiaries of Bilfinger Berger Power

[1] Two further entities cited in the Labour Court proceedings, Strategic Human Resources (Strategic HR) and TQA Trading Enterprises (Pty) Ltd (TQA), are the fourth and fifth respondents in this Court, but they did not oppose the initial joinder application or take part in the subsequent appeal proceedings.

[2] *National Union of Metalworkers of South Africa v Steinmüller Africa (Pty) Ltd and Others* [2012] ZALCJHB 13; [2012] 7 BLLR 733 (LC) (Labour Court judgment).

[3] *Intervalve (Pty) Ltd and Another v National Union of Metalworkers of South Africa* [2014] ZALAC 29 (Labour Appeal Court judgment).

[4] Steinmüller produces boiler components and performs maintenance services, Intervalve manufactures specialised gas valves, and BHR manufactures high-pressure piping systems.

Holdings (Pty) Ltd (Bilfinger).[5] They share the same payroll administration, purchasing of materials, quality control – which is externally serviced – and heat treatment. Signally for the arguments in this case, they also share human resources (HR) services. These shared services maintain a single employee record system for all three employers. In the manufacturing process, certain supervisors perform management functions with no distinction as to which employees are employed by which entity.

[4] Some documents in the record reflect these interconnections by referring to the companies collectively as the "Steinmüller group of companies".[6] NUMSA alleges that several employees were transferred between the three companies at various times, without one contract being terminated and a new one being signed.

[5] The strike occurred at the shared Pretoria premises. From the employers' side, it was handled by the shared HR services, which communicated with the employees through correspondence signed by Mr Abert simply as "General Manager".[7] The letterhead bore the names of Steinmüller, Intervalve and BHR, as well as of KOG Fabricators (Pty) Ltd t/a Bellows Africa (KOG). KOG is not party to these proceedings. The dismissal letters issued to the employees were identical. They were signed by Mr von Neuberg as "Managing Director". He is in fact the Chief Executive Officer of the holding company, Bilfinger. The dismissal letters again bear the logos of Steinmüller, Intervalve and KOG. A tag line at the foot declares: "One Team – One Target".

[5] Bilfinger holds the majority shareholding in Steinmüller (74.9%) and BHR (74.9%) as well as 50% of Intervalve, which is a black women-owned company whose main place of business is not in Pretoria, but in Bethal, Mpumalanga.

[6] An addendum to the standard employment contract bears the names of Steinmüller, Intervalve and KOG Fabricators (Pty) Ltd t/a Bellows Africa, and refers to the "Steinmüller group of companies". By signing the addendum, the employee accepts that the "Steinmüller group of companies" bargains at the national level at the Metal and Engineering Industries Bargaining Council. The description "Steinmüller group of companies" also appears in a Code of Conduct issued by Mr von Neuberg, Chief Executive Officer of Bilfinger.

[7] Documents in the record indicate that Mr Abert was a director of Steinmüller, and a "Management Brief" dated 11 March 2010 sent to "all employees at the Pretoria workshop" designates him "General Manager".

[6] The Labour Relations Act[8] (LRA) provides that an aggrieved employee may refer a disputed dismissal to the bargaining council having jurisdiction within 30 days.[9] On 20 April 2010, within the 30-day period, NUMSA referred the unfair dismissal dispute on behalf of the employees to the Metal and Engineering Industries Bargaining Council (Bargaining Council). The referral cited only one employer party. That was Steinmüller.

[7] The conciliation meeting was held on 19 May 2010. Steinmüller was represented by its HR manager, Mr Janse van Rensburg, and an attorney, Mr Bakker. The same attorney currently represents Intervalve and BHR in opposing their joinder. At the meeting, Steinmüller's representatives pointed out to NUMSA that many of the dismissed employees listed in the referral were not its employees.

[8] NUMSA notes that Steinmüller did not, at that time, provide a list indicating which employees were employed by which entity. It complains that to determine this it had to undertake a long process of verification, contacting each employee and comparing the information elicited with the documentary records Steinmüller's attorneys later furnished. NUMSA has not yet completed this process, but suggests the Labour Court should hear evidence to determine each employee's employer.

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[8] 66 of 1995.

[9] Section 191(1) provides:

> "(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—
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> (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."

[9] Two months passed. NUMSA decided to refer the dispute to the Bargaining Council a second time. It did so on 22 July 2010. It was now more than three months after the disputed dismissal – and well outside the LRA's 30-day cut-off for referrals. The second referral was more encompassing. It cited the employer party to the dispute as Steinmüller, alternatively Intervalve, alternatively BHR, alternatively KOG. NUMSA applied for condonation for the lateness.[10]

[10] On 15 August 2010, the Bargaining Council refused condonation. We do not know why. NUMSA did not place its reasons before us. Whatever they were, NUMSA made no move to challenge them by way of review. Again, we do not know why. Instead, on 17 August 2010, it filed a statement of claim in the Labour Court in respect of the first referral – that involving Steinmüller alone. The relief sought was solely against Steinmüller.

[11] More than seven months passed. Then, on 23 March 2011, NUMSA brought an application in the Labour Court to join Intervalve and BHR[11] as respondents to the unfair dismissal claim against Steinmüller. That is the dispute before us.

Labour Court

[12] The Labour Court (Steenkamp J) granted joinder on 16 February 2012. It held that Intervalve and BHR could properly be joined under rule 22.[12] It found that these

[10] Section 191(2) provides that if the employee shows good cause at any time, the bargaining council may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

[11] The application also sought to join Strategic HR and TQA (see above n 1), as well as Eduardo Construction (Pty) Ltd (Eduardo).

[12] Rule 22 of the Rules of the Labour Court ("Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties") provides in relevant part:

> "(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.
>
> (2) (a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

parties had a substantial interest in the subject matter of the proceedings. That Intervalve and BHR were the employers of an employee in proceedings in which the dismissal is challenged "quite obviously constitutes a sufficient legal interest in the proceedings" to join them.[13] The fact that conciliation had already occurred with only Steinmüller was not a bar, since the Labour Court had previously held that it has the power to join additional employer parties to an unfair dismissal claim even after conciliation.[14] Indeed, the rule permitting joinder would serve no purpose if NUMSA had to refer separate conciliation disputes against each individual employer only to apply for consolidation afterwards. So it would be overly formalistic to deny joinder. The legal representatives for Intervalve and BHR were the very representatives who had appeared for Steinmüller at the conciliation proceedings. They had thus already taken part in the conciliation process.

Labour Appeal Court

[13] Intervalve and BHR appealed to the Labour Appeal Court.[15] On 26 March 2014 it overturned the grant of joinder.[16] The Court found that the Labour Court had no jurisdiction to entertain an unfair dismissal claim against Intervalve or BHR

(b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs.

. . .

(6) An application to join any person as a party to the proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person's representative is already in possession of those documents.

(7) No joinder or substitution in terms of this rule will affect any prior steps taken in the proceedings."

[13] Labour Court judgment above n 2 at para 21.

[14] Id at paras 28-30 and 33-5, citing *Mokoena and Others v Motor Component Industry (Pty) Ltd and Others* (2005) 26 ILJ 277 (LC) and *Selala and Another v Rand Water* (2000) 21 ILJ 2102 (LC) and distinguishing *SA Commercial Catering and Allied Workers Union v Entertainment Logistics Service* [2011] ZALCJHB 35; (2011) 32 ILJ 410 (LC) (*SACCAWU*).

[15] The other two respondents in the Labour Court, Strategic HR and TQA, did not oppose the initial joinder application or take part in the appeal.

[16] Labour Appeal Court judgment above n 3 (per Waglay JP, with Francis AJA and Dlodlo AJA concurring).

because the LRA requires that the matter first be conciliated against them.[17] The Court pointed out that NUMSA's uncertainty about which employees worked for which employers was no bar to its referring a claim simultaneously against all possible employers: "There was no requirement to set out exactly which member worked for which employer at that stage, or it could be explained that the members worked for one alternatively for the other."[18]

[14] The Court thus held that the discretion to join parties to proceedings cannot trump the clear jurisdictional requirements of the LRA. The application for joinder was anyhow without merit since Intervalve and BHR did not have a direct and substantial interest in the dispute between NUMSA and Steinmüller. While the two employers were connected with the underlying dispute, the judgment NUMSA sought against Steinmüller could not affect them. They therefore had no interest in it.

In this Court

[15] NUMSA urges that this judgment of the Labour Appeal Court be overturned, and that the Labour Court's grant of joinder be reinstated. It contends that the plain meaning of section 191 of the LRA is that only the dispute itself need be referred for conciliation. The referral need not mention every employer involved in it. Additional employers can be joined later in the proceedings, as here. NUMSA prays in aid the interpretive injunction in section 39(2) of the Bill of Rights,[19] as well as the constitutional rights to fair labour practices[20] and access to courts.[21] It says this will

[17] The Court relied on *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another* [1999] ZALC 157; 2000 (4) SA 645 (LAC) (*Driveline*), in which Zondo AJP (Mogoeng AJA concurring) held at para 73 that "the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication", and distinguished *Selala* and *Mokoena* above n 14.

[18] Labour Appeal Court judgment above n 3 at para 21.

[19] Section 39(2) of the Bill of Rights provides:

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

[20] Section 23(1) of the Bill of Rights provides that "[e]veryone has the right to fair labour practices", while section 23(2)(c) provides that every worker has the right to strike.

prevent the employees losing their claim against their employers because of a merely technical omission.

[16] But, according to NUMSA, even if it is wrong in its interpretation of section 191, and all employer parties must be cited in the conciliation referral, this Court may find that citing Steinmüller alone constituted substantial compliance with the requirements of section 191 because "the courts nevertheless have a discretion at common law and in terms of the LRA to permit adjudication of a dispute where one or more parties did not participate in conciliation".

[17] In opposing the application for leave to appeal, Intervalve and BHR support the Labour Appeal Court's reasoning. They point out that NUMSA did not seek a joinder of convenience under rule 22(1), where the Court may grant joinder "if the right to relief depends on the determination of substantially the same question of law or fact", but a joinder of necessity under rule 22(2)(a), where "the party to be joined has a substantial interest in the subject matter of the proceedings".

[18] They note that NUMSA did not bring a constitutional challenge to the 30-day referral requirement; hence the interpretive injunction in section 39(2) cannot help them. They also emphasise the importance of the speedy resolution of unfair dismissal disputes. Allowing joinder after a case is already pending in the Labour Court would defeat the purpose of the statute's notice requirements and time restrictions.

[19] The companies place particular emphasis on section 191(3). This provision requires that "[t]he employee must satisfy the council or the Commission that a copy of the referral has been served on the employer". This is peremptory, they contend. Actual service on every employer is a prerequisite for Labour Court jurisdiction.

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[21] Section 34 of the Bill of Rights provides:

> "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."

[20] Ten days before the hearing, this Court invited the parties to submit argument on whether the entitlement to notice under section 191(3) may be waived, and, if so, whether Intervalve and BHR waived their entitlement to separate notice or were otherwise estopped from relying on its absence.[22]

[21] In response, NUMSA cast itself upon the possibilities these enquiries opened. It contended that the companies made an election to deal with the workers and NUMSA as a single, composite, group employer – and hence elected to be dealt with reciprocally in that way. Because the companies conducted themselves so throughout the strike, and issued a single dismissal notice to the employees, Intervalve and BHR waived the right to insist on separate service of the referral. Any other approach would be asymmetrical and unfair.

[22] In addition, NUMSA argued, the companies made a series of representations that they were acting collectively for the purposes of the strike and the ensuing dismissal dispute. To their detriment, the employees and NUMSA relied on these representations. Intervalve and BHR are therefore estopped from denying that they received adequate notice.

[23] With equal vigour, Intervalve and BHR resisted. They accepted that service of the referral under section 191(3) may be waived, and that a party may be estopped from relying on the necessity for notice. But in fact there was no waiver, whether

[22] The directions of 25 August 2014 invited short written argument on whether—

> "(a) the employer's entitlement to individual notice under section 191(3) of the Labour Relations Act 66 of 1995 can be waived;
>
> (b) if so, the dismissal notice constituted a waiver of that entitlement by the first and second respondents;
>
> (c) the employer can be estopped from relying on its entitlement to individual notice under section 191(3);
>
> (d) if so, the dismissal notice is sufficient to estop the first and second respondents from contending they were entitled to individual notice under section 191(3); and
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> (e) in the light of the pleadings, evidence and argument in the courts below, it is appropriate for this Court to consider these questions".

express or tacit. They argued that the joint dismissal notice did no more than show that the employer companies acted together, and that they were willing to receive representations collectively. It did not state or imply that, if legal steps followed, notification to only one company would suffice. And if the dismissal notice did not constitute a waiver, it also could not constitute a representation to estop the companies from invoking the absence of separate service under section 191(3).

Issues

[24] The issues are:

(a) Should leave to appeal be granted?

(b) Is the referral of a dismissal dispute a precondition to the Labour Court's jurisdiction?

(c) Did NUMSA comply with section 191?

(d) If not, are Intervalve and BHR precluded from relying on NUMSA's non-compliance?

Leave to appeal

[25] The interpretation of the LRA, which gives statutory embodiment to the right to fair labour practices, raises a constitutional issue.[23] The issues at stake – the preconditions to the Labour Court's jurisdiction, and the questions of form and substance and of equitable doctrine in their determination – are important and arguable. The interests of justice require that leave to appeal be granted.

Referral for conciliation as a precondition to Labour Court jurisdiction

[26] The LRA provides that an employee may refer a dispute about the fairness of a dismissal to a bargaining council having jurisdiction.[24] The referral must be made

[23] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU v UCT*) at para 14.

[24] Section 191(1), set out above n 9. If no council has jurisdiction, the provision empowers the employee to refer the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA or Commission). Since a council had jurisdiction in this matter, the exposition here omits the provisions envisaging referral to the CCMA.

within 30 days,[25] though the council may on good cause permit late referral.[26] The employee must satisfy the council that a copy of the referral has been served on the employer.[27] The statute requires the council to attempt to resolve the dispute through conciliation.[28] If the council certifies that the dispute remains unresolved, or if 30 days have expired since the referral and the dispute remains unresolved, the statute provides that,[29] where the employee alleges that the reason for the dismissal is participation in an unprotected strike,[30] as is the case here, the employee may refer the dispute to the Labour Court for adjudication. This referral must be within 90 days,[31] though the Labour Court may condone late referral on good cause shown.[32]

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[25] Section 191(1)(b).

[26] Section 191(2).

[27] Section 191(3). Section 213 ("Definitions") provides that "serve" means "to send by registered post, telegram, telex, telefax or to deliver by hand".

[28] Section 191(4).

[29] Section 191(5) reads:

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if—
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
>
> (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
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> (iii) the employee does not know the reason for dismissal; or
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> (iv) the dispute concerns an unfair labour practice; or
>
> (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."

[30] Section 191(5)(b)(iii).

[31] Section 191(11)(a).

[32] Section 191(11)(b).

[27] The Labour Appeal Court considered these provisions in *Driveline*.[33] There, a dispute was referred for adjudication to the Labour Court after unsuccessful conciliation. The question was whether the employees' statement of claim in the Labour Court could be amended to broaden the dispute's characterisation. At issue was whether the dispute referred for conciliation, namely an unfair retrenchment, could be amended to encompass an automatically unfair dismissal.[34]

[28] The Labour Appeal Court held unanimously that it could, but its members differed sharply in approach. The minority (Conradie JA) considered that the dispute could be broadened at the litigation stage because the Labour Court had jurisdiction over that dispute regardless of how it was categorised or conciliated at the conciliation stage. Non-compliance with conciliation formalities, including referral for conciliation, was not a jurisdictional bar to the Labour Court's hearing the unfair dismissal claim.[35]

[29] The minority relied for this conclusion – which lends support to NUMSA's stance in this litigation – on section 157(4). This provides that the Labour Court "may refuse to determine any dispute" if the Court is not satisfied "that an attempt has been made to resolve the dispute through conciliation".[36] It inferred from this that the Labour Court had jurisdiction even where no referral had been made at all.[37] The statute imposed no preconditions on that Court's jurisdiction; it may or may not, in its discretion, determine even a dispute that has not been referred for conciliation.

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[33] Above n 17.

[34] Section 187 sets out circumstances in which dismissals are automatically unfair.

[35] *Driveline* above n 17 at para 8.

[36] Section 157(4) reads:

> "(a) 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.
>
> (b) A certificate issued by a commissioner or council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation."

[37] *Driveline* above n 17 at para 8.

[30] The majority (Zondo AJP, with Mogoeng AJA concurring) firmly rejected this approach. It agreed that, for the purposes of Labour Court jurisdiction, it did not matter how the dismissed employee characterised the reason for the dismissal at conciliation.[38] But it reached this conclusion quite differently from the minority. The Labour Court had jurisdiction because the unfair dismissal dispute, regardless of characterisation, had in fact been referred for conciliation. The proposed amendment did not introduce a new dispute, but merely another alleged reason, or another label, to the same dispute.[39]

[31] 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.[40] It said that it was—

> "as clear as daylight that the wording of section 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".[41]

[32] The reasoning of the *Driveline* majority is, in my view, convincing. 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.[42] 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 South African labour-law history for nearly a century.[43] We should not tamper with it now.

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[38] Id at para 64.

[39] Id at paras 35-42 and 57.

[40] Id at paras 69-70.

[41] Id at para 73.

[42] See id at para 74.

[43] See [116] to [129].

[33] And the *Driveline* minority's approach to section 157(4) seems wrong to me. Section 157(4)(a) confers upon the Labour Court the power to refuse to determine a dispute if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. Section 157(4)(b) then provides that a certificate issued by a commissioner that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation. This means that, in a case where a certificate of non-resolution has been issued at the end of the conciliation process, the Labour Court may not, on the strength of section 157(4)(a), decline to determine the dispute. This is because section 157(4)(b) says that the certificate is sufficient proof that an attempt was made.

[34] Where no certificate has been issued because there was, for example, no conciliation meeting, but a period of 30 days from the date when the council received the referral has elapsed, the statute conspicuously does not provide that the expiry of the 30-day period is sufficient proof that an attempt was made to conciliate the dispute. It is, in my view, in that situation that the Labour Court may, in terms of section 157(4)(a), refuse to determine the dispute. This provision cannot assist in a case where the dispute was not even referred to conciliation. Section 157(4)(a) underlines the importance the LRA places upon the need for attempts to be made to try and resolve a dispute through conciliation before resorting to other methods of resolution.

[35] What is clear is that subsection (4)(a), despite its appearance in the provision entitled "Jurisdiction of the Labour Court",[44] operates to empower the Court to refuse to determine a dispute, over which it does have jurisdiction, so as to enable the parties to attempt conciliation. Contrary to the conclusion of the *Driveline* minority, it does

[44] See *Driveline* above n 17 at para 8, where Conradie JA noted the odd location of section 157(4).

not operate to extend the Court's jurisdiction to disputes that have not been conciliated at all.[45]

[36] The *Driveline* minority worried that making conciliation a jurisdictional precondition would foster formalism and encourage technicalities. This would "lead to a resurgence of the kind of point" that turned the Industrial Court,[46] which existed before the LRA was adopted in 1995, into "a forensic minefield". We should not, the minority warned, "travel that road again".[47]

[37] Subject to the point that jurisdiction is not a formality, this concern is warranted. But it must be tempered with the impact of the actual decision in *Driveline*. The majority judgment eased markedly the formalities relating to dispute characterisation at the conciliation stage.[48] That counters any resurgence of formalism.

[38] There is a further important point, one that is central to the question of formalism in this case. The statute makes it easy to refer disputes for conciliation. The facts here illustrate the point. Though the initial referral cited Steinmüller alone, the referral could have mentioned any entity NUMSA suspected may have been an employer. Indeed, the second, abortive referral two months later did precisely this.[49] Why NUMSA failed to adopt this expedient from the start we do not know. The point is that it could have done so easily. That is not contested.

[45] In the time-honoured terminology of pleadings, the power the provision confers is dilatory and not in abatement. See Harms *Civil Procedure in the Superior Court* Service Issue 42 (2013) at B22.7, explaining the difference between a plea in abatement (or plea in bar), which destroys a cause of action, and a dilatory plea, which merely postpones determination of the cause of action.

[46] This was the specialist court created by the Industrial Conciliation Amendment Act 94 of 1979.

[47] *Driveline* above n 17 at para 8.

[48] Id at para 58.

[49] See [9].

[39] What is more, though the employee must satisfy the council that a copy of the referral has been "served" on the employer,[50] the statute provides for readily practicable methods of service. It can be effected by hand, post or fax.[51] In contrast to initiation of process in the Magistrates' and Superior Courts,[52] proof of service requires no formality. So the statute itself, and the Labour Courts' jurisprudence, have abated the risk of crippling formalism.

[40] Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes.[53] NUMSA therefore had to refer the dispute between the employees and Intervalve and BHR for conciliation. The question is whether it did so.

Was the dispute with Intervalve and BHR referred for conciliation?

[41] The record does not tell us how NUMSA served the referral of the dispute with Steinmüller on that company.[54] What is certain – and Intervalve and BHR accept this – is that, whether served by hand, post or fax, the referral would have arrived at, and been dealt with by, the three companies' shared HR services.

[42] Those same HR services passed on the matter to the companies' attorney, Mr Bakker. He, together with Mr Janse van Rensburg, Steinmüller's HR manager,

[50] Section 191(3).

[51] Section 213, set out above n 27.

[52] For initiation of civil process in the Magistrates' or Superior Courts, a formal return of service evidenced by the sheriff is required. See rule 9 of the Magistrates' Court Rules and rule 4 of the Uniform Rules of Court.

[53] The Labour Appeal Court was therefore right (at paras 15-22) to distinguish the factual circumstances in *Mokoena* and *Selala* above n 14 and to disapprove of the erroneous view, expressed in both those judgments, that the Labour Court has a discretion to condone non-compliance with the conciliation requirement. The Labour Appeal Court noted that the party joined in *Mokoena* was a transferee who had taken over the going concern of another business. Judgment against the old business was therefore effective against the transferee, who would be jointly and severally liable for any claim. The transferee therefore had an interest in the outcome of the dispute. The joined party in *Selala* also had an interest in the outcome of the case, as he was a co-employee currently employed in a position the applicant claimed should have been his. By contrast, *SACCAWU* above n 14 at para 10 rightly held that an applicant in the Labour Court "cannot rely on a joinder in terms of rule 22 to avoid its obligations to comply with section 191 of the LRA".

[54] See section 191(3).

appeared on behalf of Steinmüller at the conciliation meeting of 19 May 2010.[55] The same attorney has subsequently appeared for all three companies to resist the joinder application.

[43] And this makes sense. Intervalve and BHR do not claim that they ever acted separately. Nor do they claim that the identity of each particular employer at any point affected either the employees' conduct, or the employers' treatment of them. But this does not mean there was only one single dispute. I agree with Zondo J, for the reasons he gives, that there were separate disputes with each of the individual employers. Those disputes were of the same nature, since the facts and circumstances in each were virtually identical. And these disputes could of course be encompassed in a single joint referral to conciliation. But each dispute could also have been referred separately – a point that is illuminated by envisaging that any one of the employees could have sought separate legal or union assistance, and procured a separate referral to conciliation of his or her individual dispute with the employer. By corollary, the dispute involving each employer was a separate dispute from those involving the other employers.

[44] It is true those dealing with the dismissals on behalf of all three companies plainly had notice of the referral against Steinmüller. But can we conclude from these facts that the Steinmüller conciliation referral encompassed also Intervalve and BHR? That depends on whether the prescripts of section 191 were fulfilled. In *Maharaj*,[56] the Appellate Division stated that, in measuring fulfilment of a statute's requirements, the enquiry is not whether there has been "exact" or "substantial" compliance. The question is: was there compliance?

[55] See [7].

[56] *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A), applied in *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) (*ACDP*) at para 24 and *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 30.

> "This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."[57]

[45] This test focuses on the statute's objective or purpose. It countenances deviation from statutory prescriptions provided the purpose has been met. Since *Maharaj*, courts have generally adopted a three-step approach to evaluate this; some courts add a fourth step:[58]

1. What is the purpose of the statute as a whole, as well as the specific provision at issue?
2. What steps did the party take to comply with the provision? Here, only the acts of the party seeking to comply are relevant. The conduct of the other party is not.
3. Did the steps taken achieve the purpose of the statute and of the specific provision, even if the precise requirements were not met?
4. Was there any practical prejudice because of non-compliance?[59]

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[57] *Maharaj* id at 646C-E.

[58] See *ACDP* above n 56 at para 25 and *Maharaj* id.

[59] See *ACDP* id at paras 31-3, where this Court found substantial compliance with the Local Government: Municipal Electoral Act 27 of 2000, which required a party who wished to contest an election as a ward candidate to submit a deposit equal to a prescribed amount to the local office of the Electoral Commission. The ACDP submitted a deposit, accompanied by a list of local elections that it intended to challenge. Though the ACDP had filed a party list for Cape Town, the list submitted with the deposit omitted Cape Town by mistake. Subsequently, the ACDP decided not to contest all the elections included on the list, resulting in an excess of payment. When the Electoral Commission informed the ACDP that it did not have payment for Cape Town, it asked that the excess payment be applied to Cape Town. The Electoral Commission refused because the request occurred after the prescribed deadline. This Court found that the ACDP had substantially complied with the Act because it had taken sufficient action to accomplish the purpose of the Act by notifying the Electoral Commission that it intended to contest the Cape Town election and paying a sufficient deposit. Furthermore, there was no prejudice to any other party.

See also *Du Plessis and Others v Southern Zululand Rural Licensing Board and Another* 1964 (4) SA 168 (D), in which there was non-compliance with a requirement that a site plan be attached to an application for a trading licence. The Court found this to be fatal, and not condonable by the licensing board, which therefore did not have jurisdiction to grant the licence. But the objectors had not shown prejudice, so the application to set aside

[46] So whether the referral embraced Intervalve and BHR depends on the provision's purpose. The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships.

[47] In determining the objectives of section 191, none of its provisions can be ignored. They must all be taken into account. That includes the requirement in section 191(3) that the employee must satisfy the council that a copy of the referral has been served "on the employer". The general purpose of section 191 provides the background against which the specific purpose of section 191(3) must be understood. The subsection ensures that the employer party to a dismissal or unfair labour practice dispute is informed of the referral. The obvious objective is to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may follow.

[48] But is the purpose broadly to inform the human agents involved in a dispute that a referral to conciliation has taken place? Or is there a narrower purpose? Here the wording of section 191(3) offers a significant pointer. Service must be not on an

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the licence was refused. In *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) a local councillor who had been declared disqualified to contest local elections lodged and served a challenge to his disqualification within the 14-day period the statute stipulated. But his application was not heard within this period, as the statute required, because of the time periods allowed by the rules of court and the exigencies of court sittings. The Court held that his service and filing of his application within the 14-day period was sufficient to fulfil the purpose of the statute. Moreover, even if the applicant had managed to have a hearing scheduled within the 14-day period, the respondents still would have taken more time to prepare their case. There was no practical effect and therefore no prejudice against the respondents. And in *Kopel v Marshall and Another* 1981 (2) SA 521 (W) the nomination papers for an electoral vacancy had been wrongly dropped into a "suggestions" box, in the designated office where the elections box was placed or kept. The papers were held to have been validly lodged, because election officials immediately realised the mistake, and the effect of placing the papers in the wrong box was nil.

But see *Weenen Transitional Local Council v Van Dyk* [2002] ZASCA 6; 2002 (4) SA 653 (SCA), where the Supreme Court of Appeal required strict compliance with statutory notice requirements for a local authority to impose rates, and the question of actual notice was not considered.

associated, connected or implicated employer. It must be on "the employer". Steinmüller was not the employer: it was *one* of the employers – the employer of some of the employees, but not of all of them.

[49] The Supreme Court of Appeal has twice held that notifying the wrong party, even because of a mistake, is no notification at all and cannot constitute substantial compliance. In *Malokoane* the injured claimant, through an error on her or her attorney's part about the exact date of her accident, submitted a claim form to the wrong agent of the Multilateral Motor Vehicle Accidents Fund (MMF).[60] She contended that the timeous submission of the form to an agent of the MMF, even the wrong agent, constituted substantial compliance with the statute's notice requirement, because the MMF was the true defendant and both agents acted for it.[61] Both the High Court and the Supreme Court of Appeal rejected this argument. The Supreme Court of Appeal found that, even though the purpose of the statute was to "provide the widest possible protection to injured persons", and that the claimant had made a genuine mistake, she nevertheless did not comply.[62]

[50] The Court held that service of the form on an agent with no authority to deal with the claim was without effect.[63] It was irrelevant that the claimant notified an agent of the MMF within the prescribed time period – because it was the wrong agent. And whether the MMF or some of its agents had actual knowledge of the claim was not germane; the agent that the claimant had in fact informed had no legal authority to receive or handle her claim. Therefore there was no compliance.[64]

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[60] *Malokoane v Multilateral Motor Vehicle Accidents Fund* [1998] ZASCA 72; 1999 (1) SA 544 (SCA).

[61] Id at 549E.

[62] Id at 549G-550A.

[63] Id at 550A-D.

[64] The High Court judgment, which the Supreme Court of Appeal upheld, distinguished between cases where notice is in fact given, but is defective in some way, and those in which notice is entirely lacking. The fact that notice was missing entirely meant that there could be no substantial compliance, regardless of whether the MMF or its agents had actual knowledge. See *Malokoane v Multilateral Motor Vehicle Accidents Fund* [1999] JOL 1964 (T) at 7.

[51] The Supreme Court of Appeal applied similar reasoning in *Blaauwberg Meat*.[65] There an amendment of a summons was refused where the summons itself was issued by the wrong party, even though it was a company closely associated with the correct party. This was even though the declaration attached to the summons mentioned the correct party as plaintiff. The Court held that the summons issued by the incorrect creditor, even if later corrected, was not sufficient to interrupt prescription. This was even though the process was issued in the name of the actual creditor's parent company, and the companies shared the same address. The Court held:

> "The fact remains that the summons served on the [debtor] failed entirely to communicate to it the intention of [the actual creditor] to claim payment. The summons did not, therefore, achieve the objects of section 15(1) and was not effective to interrupt prescription".[66]

The Court found that the complete lack of service on the debtor could not possibly have put it on notice that it was subject to the proceedings. Therefore there was no compliance with the statutory requirement.[67]

[52] These decisions seem to me to be right. And they bear on this case. The focal question narrows to the purpose of the service requirement in section 191(3). The objective cannot be just to let the employer know that a dispute, related to the dispute that affects it, is being conciliated. It must be to put each employer party individually on notice that it may be liable to legal consequences if the dispute involving it is not effectively conciliated. Those consequences may be severe. They may include enterprise-threatening implications: trial proceedings, reinstatement orders, back pay and costs orders. So the notice must be directly targeted.

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[65] *Blaauwberg Meat Wholesalers CC v Anglo-Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) (*Blaauwberg Meat*), which approved and applied *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* [2000] ZASCA 11; 2000 (2) SA 789 (SCA).

[66] *Blaauwberg Meat* id at para 14.

[67] Id at paras 16-8. The Court noted that, because of the wording of section 15(1) of the Prescription Act 68 of 1969, a misdescription of the debtor from whom payment is claimed may not have the same effect as a misdescription of the creditor claiming payment.

[53] This emerges from the provision, which explicitly names the beneficiary of the service requirement: "the employer". This makes clear that a referral citing one employer does not embrace another, uncited, employer. The fact that the uncited employer has informal notice of the referral cannot make a difference. The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it.

[54] The separate legal personality of the three employers – Steinmüller, Intervalve and BHR – cannot be willed away because there was some overlap in their corporate operations. They had overlapping boards of directors and interconnected shareholdings, and a joint holding company. But this does not help NUMSA. NUMSA's argument depends on the proposition that knowledge held by an officer or employee of one corporation may be imputed to other corporations with which she is associated. That approach has long been alien to our law.[68] Our law has also rightly rejected the suggestion that serving on several corporate boards makes knowledge pertaining to one company admissible against the other.[69]

[55] This may be different if the corporate forms are fake. But there is no suggestion here that the separate identity of the three companies is a sham. On the contrary, we know that one of them, BHR, is only 50%-owned by the common holding company, and that it has its principal place of business not in Pretoria, but in

[68] See Williams "Companies" in *LAWSA* 2 ed (2005) vol 4(1) at paras 64 and 69.

[69] In *Lipschitz and Another NNO v Landmark Consolidated (Pty) Ltd* 1979 (2) SA 482 (W) at 487C-488B, endorsed in *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining plc and Others* 1998 (4) SA 767 (W) at 781-2, the Court rejected the proposition that knowledge held by a director of one company became automatically admissible against another company on whose board the director also served. The Court further held:

> "[E]ven if [the director] was the sole shareholder and governing director of the defendant it does not follow that he is to be identified with the defendant. He falls to be regarded as no more than an agent of the defendant and cannot be regarded as being the defendant itself which in law is a distinct and separate legal entity. [The director]'s statements and actions are not *ipso facto* and *per se* to be regarded as being those of the defendant. Even in the case of a one man company the company and its shareholder and/or director are distinct and separate entities."

Mpumalanga. Clearly, as a legal being, it is markedly distinct from its sister companies. So the fact that, for the limited purposes of the shared industrial process at the Pretoria site, the three constituted a single economic unit, does not justify treating them as a single legal entity for purposes of citation in a legal process.[70]

[56] In fact, the logic of events counts against NUMSA's argument. A referral arrived at the companies' shared HR services, addressed to Steinmüller alone. That fact identified Steinmüller as the sole target in the intended litigation. Far from putting the other two on notice, it gave those responsible for their affairs reason to believe that they would not be implicated. They were off the hook.

[57] While it is tempting to excoriate the companies' stance in this litigation as "cynically opportunistic", as the Labour Court did,[71] the assessment is partial. It leaves out of account that Steinmüller's representatives pointed out to NUMSA that it was not the employer of all the employees listed in the referral – and they did so at the first formal opportunity that presented itself. This was at the conciliation meeting of 19 May 2010, less than five weeks after the dismissals. It is wrong to blame all the sad, perplexing twists in this case on the employers' cynicism.

[58] So the purpose of the statutory provision – to tell those on the line that the impending legal process might make them liable to adverse consequences – was not fulfilled. That the three companies' shared HR services, and the companies' attorney, knew about the referral against Steinmüller did not mean that they knew, or should have concluded, that the dispute against Intervalve and BHR had also been referred for conciliation. On the contrary, the referral against Steinmüller alone told them the opposite. Intervalve and BHR were left out. The ensuing legal process did not encompass them.

[70] Williams above n 68 at para 91.

[71] Labour Court judgment above n 2 at para 41.

[59] The Labour Appeal Court was therefore correct. The referral did not embrace Intervalve and BHR. The question now is this: is there anything to stop the two companies from relying on their exclusion from the conciliation process?

Waiver and estoppel

[60] This Court invited the parties to address argument on waiver and estoppel. Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely.[72] It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.[73]

[61] So waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right.[74] It may be inferred from the outward manifestations of the right-holder's intention:

> "The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to speak exists."[75]

[62] Did Intervalve and BHR waive their entitlement to separate notice of the conciliation process? The three companies shared HR services. They dealt jointly with the dismissed employees. And they issued a joint dismissal letter. The question is whether this shows that each of them abandoned its right to individual notice of impending legal liability. The answer must be No. To find otherwise would require

[72] According to *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G-H—

> "a provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms."

[73] Innes CJ in *Laws v Rutherfurd* 1924 AD 261 at 263. See also the minority judgment of Kroon AJ in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 80.

[74] *Laws v Rutherfurd* id.

[75] Nienaber JA in *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at para 18.

us to infer from the companies' joint conduct an intention to abandon their right to separate notice when the legal screws tightened. That requires a leap that is impossible to make.

[63] Counsel for the companies contended that their joint conduct during the strike did no more than show that the employers acted together and that they were willing to receive the employees' representations collectively. Their conduct did not state or imply that, if the strike ended badly, and the employees resorted to legal action, notification to any single one of the companies would suffice. That question simply never arose in the workplace battle that preceded the issue of legal process.

[64] Those submissions cannot be gainsaid. More than 90 years ago, Innes CJ said that it is "always difficult" to establish waiver.[76] He was, as always, percipient. His observation applies here. There is no proof that anyone acting on behalf of any of the companies intended to waive the right to separate notice under section 191(3). Waiver has not been established.

[65] Estoppel by representation, though raised by the Court, also cannot aid NUMSA. Estoppel is a legal doctrine that precludes a person from denying the truth of a representation made to another if that other, believing in its truth, acted detrimentally in reliance on it.[77]

[66] There are two reasons why estoppel cannot help NUMSA. First, there is a colourable argument that the companies were acting as one entity when they dismissed the employees. After all, they did not differentiate between employees or employers in the dismissal notices. But NUMSA's argument relies on a crucial further representation – that the various companies were one legal entity not just for the purposes of managing the strike, but for the purposes of subsequently being sued.

[76] *Laws v Rutherfurd* above n 73 at 263.

[77] See Rabie "Estoppel" in *LAWSA* 2 ed (2005) vol 9 at para 652, an earlier edition of which was cited and approved by Corbett JA in *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (2) SA 274 (A) at 291D-E.

That representation cannot be inferred from the companies' joint conduct during the strike and in dismissing the employees.

[67] Second, any reliance NUMSA may have placed on the alleged representation contained in the dismissal letters came to an abrupt halt when Steinmüller explained at the conciliation meeting on 19 May 2010 that it was not the sole employer of the listed employees. This makes it doubtful that the detriment NUMSA or the employees suffered can be attributed to any representation by the employers. Indeed, the Bargaining Council denied condonation after NUMSA's own further two-month delay before filing the second referral. Estoppel, like waiver, founders.

[68] And that is even without taking into account the companies' strenuous objection that NUMSA pleaded neither waiver nor estoppel. That objection applied trenchantly to a further possibility the Court canvassed with the parties during oral argument. This was to refer the joinder application back to the Labour Court for it to hear evidence on whether the companies were estopped from relying on the lack of separate notice under section 191(3). This was broached because NUMSA's founding and replying affidavits in the joinder application pertinently complained that "Steinmüller and its sister companies had created confusion among the workforce as to who the true employer is", and that the corporate structure and the close working relationship between the three companies had "led to justifiable confusion on the part of the individual applicants as to their true employer".

[69] But referral back for evidence on this issue would not be fair. The question of estoppel has never been an issue during these proceedings. NUMSA did not raise it. If it had, the companies would no doubt have been at pains to answer it. For the Court to reshape the issue the parties brought for adjudication in this way would, in the circumstances, be an unfair imposition. And it may unconscionably protract the proceedings.

[70] The sole point at issue between the parties, since NUMSA lodged the joinder application in March 2011, has been whether it is entitled to join Intervalve and BHR to the proceedings against Steinmüller. The answer to that question has to be No.

[71] The dissenting judgment suggests that the approach favoured here is overly restrictive and formalistic and will impede the effective resolution of labour disputes.[78] This seems undue. A clear requirement that a union must include every employer in conciliation proceedings is likely to lead to less, not more, litigation. The dissent rightly notes that in a complex working relationship it may be difficult to determine the true employer of each employee.[79] But the LRA offers condonation if this complexity results in missed deadlines. Indeed, condonation for the late referral involving Intervalve and BHR was available here, and it is not clear why NUMSA did not seek to review the Bargaining Council's decision in August 2010 to deny it condonation. NUMSA may indeed still seek to review that decision on the basis that, until the decision of this Court, it believed that it was entitled to have the companies joined.

[72] Nor is condonation the only recourse for the employees who, through no fault of their own, will be unable to join the action against Steinmüller. NUMSA failed to act promptly at various points during the litigation. That may make it possible for the employees of Intervalve and BHR to seek recompense from it on the basis of negligent mismanagement of their claim.[80]

[78] Judgment of Nkabinde J at [176] to [180].

[79] Id.

[80] See *Food and Allied Workers Union v Ngcobo NO and Another* [2013] ZACC 36; 2014 (1) SA 32 (CC); 2013 (12) BCLR 1343 (CC), countenancing a delictual claim by dismissed employees against their union for its negligent failure to prosecute their unfair dismissal claim.

Costs

[73] As is usual in bona fide disputes where the parties have a continuing collective bargaining relationship,[81] there will be no order as to costs.

Order

[74] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

ZONDO J (Mogoeng CJ, Moseneke DCJ, Cameron J, Khampepe J and Leeuw AJ concurring):

Introduction

[75] I have had the opportunity of reading the judgment prepared by my Colleague, Cameron J (main judgment). I agree that, for the reasons he gives, the matter raises constitutional issues and that it is in the interests of justice that leave to appeal be granted. I also agree with the conclusion he reaches, the order he proposes and the reasons he gives for the conclusion that the appeal should fail. However, I write separately to give a certain perspective to some of the issues that arise in this matter and to add to the reasons of the main judgment on why the appeal should fail. I have also had the opportunity of reading the dissent by my Colleague, Nkabinde J.

Brief background

[76] It is common cause that a large group of employees who were members of the National Union of Metalworkers of South Africa (NUMSA or union) and employed

[81] See *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51, citing *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* [1991] ZASCA 168; 1992 (1) SA 700 (A) at 739 and *De Beers Consolidated Mines Ltd v National Union of Mineworkers and Another* [1998] 12 BLLR 1201 (LAC) at 1208B-C.

by different but associated companies participated in an unprotected strike on 14 April 2010 at premises known as Pretoria Works, in Pretoria. These premises were shared by a number of companies. The companies included Steinmüller, Intervalve, BHR, KOG and others. Steinmüller, Intervalve, BHR and KOG are associated with one another, share certain services such as human resources and have certain common directors but they remain separate legal entities.

[77] Some of the employees in the group of strikers were employed by Steinmüller, others by Intervalve and others by BHR. The group of strikers was dismissed on 14 April 2010 for participating in the unprotected strike. The dismissal was conveyed by way of one letter which bore the logos of Steinmüller, Intervalve and KOG. It is, of course, beyond dispute that any employee of any one of the above-mentioned companies, who was dismissed on 14 April 2010, could only have been dismissed by his or her employer or someone acting on behalf of his or her employer. This is because in law nobody can dismiss a person unless that person is his or her employee, or, if that person is not his or her employee, unless he or she is authorised by that person's employer to dismiss him or her on its behalf. Accordingly, the position is that on 14 April 2010 each one of the three companies dismissed those of its employees who were in the striking group. Each one of those companies would have made its own decision to dismiss those of its employees who were taking part in the unprotected strike.

The first referral

[78] On 20 April 2010 NUMSA referred a certain dismissal dispute to the Metal and Engineering Industries Bargaining Council (bargaining council) in terms of section 191(1) of the Labour Relations Act[82] (LRA) for conciliation. Only Steinmüller was cited as the employer party to that dispute. NUMSA attached a list of 187 employees to the referral that it alleged had been dismissed by Steinmüller from

[82] 66 of 1995. Section 191(1) read with (4) provides that, if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute to a Bargaining Council if the parties fall within the registered scope of a Bargaining Council or to the CCMA, when the parties do not fall within the registered scope of a Bargaining Council, for conciliation.

its employ on 14 April 2010. For convenience I shall refer to this referral as "the first referral". A conciliation meeting was convened by the bargaining council but the dispute was not resolved. The dispute was then referred to the Labour Court for adjudication in terms section 191(5)[83] of the LRA.

The second referral

[79] In the meantime NUMSA made another referral of a dismissal dispute to the bargaining council for conciliation. It attached to the referral a list of employees which it alleged had been dismissed on 14 April 2010 by "Steinmüller Africa (Pty) Ltd, alternatively Intervalve, alternatively KOG Fabricators (Pty) Ltd, alternatively BHR Piping Systems (Pty) Ltd". In effect, although it cited Steinmüller as the employer party in this referral, it also cited Intervalve, BHR and KOG in the alternative. For convenience I shall refer to this referral as "the second referral".

Joinder application in the Labour Court

[80] The second referral was made out of time. In due course the bargaining council refused condonation. About a year later the union made an application to the Labour Court for an order joining Intervalve and BHR as respondents in the section 191(5) trial proceedings. These related to the dismissal dispute that had been referred to the bargaining council in the first referral on 20 April 2010. The Labour Court joined the two companies in those proceedings.

In the Labour Appeal Court

[81] On appeal the Labour Appeal Court overturned the decision of the Labour Court. The reasoning of the Labour Appeal Court that led it to the conclusion it reached was that, since the union did not cite Intervalve and BHR in its first referral and cited only Steinmüller, only the dismissal dispute between the union and Steinmüller was referred to conciliation by way of the first referral. It also held that the dismissal disputes involving Intervalve and BHR were separate disputes that

[83] This provision is quoted in para 111 below.

required to be referred to conciliation as well. The Labour Appeal Court held that that referral could have been done jointly with the referral of the dismissal dispute involving Steinmüller or the dismissal disputes involving Intervalve and BHR could have been referred to conciliation separately.

[82] The Labour Appeal Court held that, as the dismissal disputes involving Intervalve and BHR had not been referred to conciliation, the Labour Court did not have jurisdiction to adjudicate them in terms of section 191(5) of the LRA. The Labour Appeal Court said this in the light of the fact that the union's application to have the two companies joined in the section 191(5) trial proceedings relating to the dismissal dispute involving Steinmüller was intended to enable the Labour Court to adjudicate the unfair dismissals disputes involving Intervalve and BHR. If the union got the Court to adjudicate those dismissal disputes and the Court found the dismissals unfair, the union could ask the Labour Court to order Intervalve and BHR to reinstate their respective employees. The Labour Appeal Court held that the trial proceedings related to the dismissal dispute between Steinmüller and its former employees. It held that Intervalve and BHR had no direct and substantial interest in those proceedings and, accordingly, the Labour Court should not have ordered their joinder.

In this Court

[83] Before us the union contends that the Labour Appeal Court erred in concluding that Intervalve and BHR had no direct and substantial interest in the section 191(5) trial proceedings and it should not have set aside the order of the Labour Court. The union bases this contention on three grounds. The first ground is that out of the dismissal of the group of employees who took part in the unprotected strike only one dismissal dispute arose and that dismissal dispute was referred to conciliation by way of the referral of 20 April 2010 and was later referred to the Labour Court for adjudication. As to the fact that it did not cite Intervalve and BHR in its 20 April 2010 referral and cited Steinmüller only, the union submits that it did not need to cite Intervalve and BHR and they could be joined in the section 191(5) trial

proceedings. It submits that, as this is one dismissal dispute, Intervalve and BHR have a direct and substantial interest in the proceedings.

[84] The union's second argument, as I understand it, is that if, out of the dismissal of the striking group, not one but more dismissal disputes arose including dismissal disputes involving Steinmüller, Intervalve and BHR as separate dismissal disputes, then the referral of 20 April 2010 constituted substantial compliance with the requirement of section 191(1) read with section 191(5)(b)[84] of the LRA. That is the requirement that a dismissal dispute must be referred to conciliation before it can be referred to the Labour Court for adjudication. The third ground was that the Labour Court had a discretion to order the joinder of Intervalve and BHR in the section 191(5) trial proceedings even if the dismissal disputes relating to Intervalve and BHR had not been referred to conciliation. I consider each one of these submissions below.

Did the dismissals of the employees give rise to one dismissal dispute?

[85] I am unable to agree with NUMSA's submission that only one dismissal dispute arose out of the dismissals of the striking employees on 14 April 2010. I note that the dissent by my Colleague, Nkabinde J, is based on the proposition that only one dismissal dispute arose out of the dismissals of the employees on 14 April 2010. I endeavour to show below that this is not so. I think that the starting point is to seek an understanding of when it can be said that a dispute exists or has arisen in any particular situation.

[86] The LRA's definition of the word "dispute" is simply that the word includes "an alleged dispute". That is not helpful for our purposes. In *Huletts*,[85] Broome J gave the following definition of the word "dispute":

[84] See para 111 below.

[85] *Huletts South African Refineries Ltd v South African Railways and Harbours* 1945 NPD 413 (*Huletts*).

> "'Dispute' is defined in *The Shorter Oxford Dictionary* as 'a controversy', or, in a weakened sense, 'a difference of opinion'. The service of a notice under section 15 does not necessarily cause a controversy. Nor does any difference of opinion arise at that stage, for the parties have as yet expressed no opinion as to the amount of compensation. The notice calls upon the owner for an expression of opinion as to the amount of compensation. *No difference of opinion, and a fortiori no controversy, as to the amount of compensation can arise until some opinion is expressed*."[86] (Emphasis added.)

Roper J had this to say in *Williams v Benoni Town Council*[87] about when it could be said that a dispute existed:

> "A dispute exists when one party maintains one point of view and the other party the contrary or a different one. When that position has arisen, the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any less a dispute."[88]

[87] In *Durban City Council*[89] Selke J, with whom De Wet J concurred, had to consider what the minimum requirements are that must be met before a dispute could be said to exist. This question arose in the context of an application for the establishment of a conciliation board under section 35 of the Industrial Conciliation Act:[90]

> "I think it is unnecessary – and it certainly would be unwise – to attempt a comprehensive definition of the word 'dispute' as used in section 35(1) of the Industrial Conciliation Act. But whatever other notions the word may comprehend, it seems to me that it must, *as a minimum* so to speak, *postulate the notion of the expression by parties*, opposing each other in controversy, of conflicting views, claims or contentions."[91] (Emphasis added.)

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[86] Id at 419.

[87] 1949 (1) SA 501 (W).

[88] Id at 507.

[89] *Durban City Council v Minister of Labour and Another* 1953 (3) SA 708 (N).

[90] 36 of 1937.

[91] *Durban City Council* above n 89 at 712A-B.

Selke J's definition of the word "dispute" was followed in *Estate Bodasing*[92] and in *Eskom*.[93]

[88] In *Estate Bodasing* Caney J said:

> "The word 'dispute' must, I think, be taken to have been used by the rulemaking body 'to denote at least the positive state of the parties having disagreed, a state of affairs which would not necessarily arise' on the making of an application under Rule 31; see *Huletts South African Refineries Ltd v South African Railways and Harbours* 1945 NPD 413 or, as Selke J said in *Durban City Council v Minister of Labour* 1953 (3) SA 708 at 712 (N), of the word 'dispute' it 'must, as a minimum, so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions', in the present instance in relation to facts."[94]

In *Eskom* Scott J, with whom Williams J concurred, said:

> "I am satisfied that an unequivocal rejection by an employer of a demand made on behalf of an employee that he be taken back into employment after being dismissed and communicated to the employee would give rise to a dispute within the meaning of section 35(3)(d)(i) of the Act. It follows that in my opinion, as an objective fact, a dispute arose between the parties upon receipt by Blankenberg's representative of Eskom's letter of 18 October 1988."[95]

[89] These cases confirm that, in the case of a dismissal dispute, something more than the fact that a dismissal has occurred is required before it can be said that a dispute exists or has arisen about the fairness of a dismissal. Given the above understanding of when a dispute can be said to exist or when it can be said to have arisen, I do not know whether as at 20 April 2010 a dispute existed or had arisen

[92] *Estate Bodasing v Additional Magistrate, Durban and Another* 1957 (3) SA 176 (D).

[93] *Eskom v Regional Director, Department of Manpower and Others* 1990 (4) SA 362 (C) (*Eskom*).

[94] Above n 92 at 180H.

[95] Above n 93 at 369G-H.

between Intervalve and its former employees or between BHR and its former employees about the fairness of their respective dismissals. However, for purposes of this judgment, I am prepared to assume that those disputes also existed at that time.

[90] No dispute about the fairness or otherwise of a dismissal arises in a situation where an employer dismisses an employee and that employee does not dispute the fairness of that dismissal but accepts the dismissal and walks away. However, if that employee disputes the fairness of that dismissal and the employer maintains its position that the dismissal is fair, a dispute does arise. This is a clear case of one dismissal dispute or a single dismissal dispute.

[91] If two employees, Mr Dlamini and Mr Smith, who belong to the same union are dismissed by their employer, ABC (Pty) Ltd (ABC), after a joint disciplinary hearing where they faced the same allegations of misconduct and one of them accepts the dismissal and walks away and the other disputes the fairness of the dismissal and conveys that to the employer, only one dismissal dispute arises. If, however, they both dispute the fairness of their respective dismissals, in law two dismissal disputes arise. The one dismissal dispute is between Mr Dlamini and ABC. The other is between Mr Smith and ABC. This is despite the fact that there is much in common between the two dismissal disputes such as that both employees belong to the same union, were employed by the same employer, faced the same allegations of misconduct like participating in an unprotected strike and shared the same disciplinary enquiry before they were dismissed.

[92] Mr Dlamini and Mr Smith may refer their respective dismissal disputes to conciliation jointly by way of a single referral or they may refer their respective dismissal disputes to conciliation separately in two referrals. If Mr Dlamini refers his dismissal dispute to conciliation and Mr Smith does not refer his, Mr Dlamini's dismissal can later be referred to the Labour Court for adjudication in terms of section 191(5) of the LRA if the dispute remains unresolved after the conciliation process. If Mr Smith wishes his dismissal dispute to also be adjudicated by the

Labour Court when he realises that Mr Dlamini's one is about to be adjudicated and Mr Dlamini might get his job back, he would face the hurdle that his dispute was not referred to conciliation. Mr Smith cannot be saved by the argument that his dispute and that of Mr Dlamini's are one and the same dispute and, therefore, the Labour Court should join him in the trial proceedings relating to Mr Dlamini's dismissal dispute.

[93] The same would apply if Mr Smith referred his dispute outside the prescribed 30-day period and condonation was refused and he did not take the decision on review. In law the two disputes are separate disputes. Mr Dlamini could refer his dispute with ABC to conciliation separately and independently of Mr Smith's dispute with ABC. He could take it to his own attorney and instruct him to handle it for him. He could allow his union to handle it or he could handle it himself. He could settle it out of court with his employer without his union and irrespective of what Mr Smith does with his. The same applies to Mr Smith and his dismissal dispute with ABC. After Mr Dlamini has settled his dispute with his employer, Mr Smith would be able, if he has referred his dispute timeously to conciliation and later to adjudication, to pursue litigation on his dispute with ABC up to the highest court in the land. He would not in any way be affected by the fact that Mr Dlamini had settled his own dispute with the same employer out of court.

[94] What I have said above about Mr Dlamini and Mr Smith's dismissal disputes reveals that, despite the fact that Mr Dlamini and Mr Smith belong to the same union, were employed by the same employer, attended the same disciplinary inquiry facing the same allegations of misconduct and were dismissed at the same time for the same reason, if each one of them disputed the fairness of his dismissal, their dismissals would give rise to two separate dismissal disputes. If this principle applies to two employees of the same employer, it must apply with even more force to a case, such as the present, where the employees were employed by different employers.

[95] In the present case there are at least four companies that dismissed their employees who participated in the strike. The group of workers who were employed by Steinmüller can have their own dismissal disputes with their employer, those who were employed by Intervalve could have their own dismissal disputes with Intervalve and those who were employed by BHR could have their own dismissal disputes with BHR. That would be the same as in *Black Allied Workers Union and Others v Palm Beach Hotel*,[96] *Black Allied Workers Union and Others v Asoka Hotel*,[97] *Black Allied Workers Union and Others v Edward Hotel*[98] and *Black Allied Workers Union and Others v Prestige Hotels CC t/a Blue Waters Hotel*[99] all of which, as I point out below, were treated as separate dismissal disputes despite sharing a lot of common features.

[96] In the present case, assuming that all the employees who were dismissed on 14 April 2010 disputed the fairness of their dismissals, multiple dismissal disputes would have arisen because some of the dismissed employees had been employed by Steinmüller, others by Intervalve, others by BHR and so on. In law it cannot, therefore, be said that the dismissals of the group of workers on 14 April 2010 gave rise to one dismissal dispute. To say the least, it can be said that those dismissals may have given rise to dismissal disputes between Steinmüller and its former employees, Intervalve and its former employees and BHR and its former employees. These dismissal disputes were separate disputes that had many common features.

[97] Even during the 1980s under the Labour Relations Act of 1956[100] (1956 Act) – before the advent of democracy – the dismissal of groups of workers belonging to the same union by different employers for participation in a joint strike were regarded as giving rise to multiple dismissal disputes. In the cases of *Black Allied Workers Union*

[96] *Black Allied Workers Union and Others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC).

[97] *Black Allied Workers Union and Others v Asoka Hotel* (1989) 10 ILJ 167 (IC).

[98] *Black Allied Workers Union and Others v Edward Hotel* (1989) 10 ILJ 357 (IC).

[99] *Black Allied Workers Union and Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC).

[100] 28 of 1956.

and Others v Palm Beach Hotel,[101] *Black Allied Workers Union and Others v Asoka Hotel*,[102] *Black Allied Workers Union and Others v Edward Hotel*[103] and *Black Allied Workers Union and Others v Prestige Hotels CC t/a Blue Waters Hotel*[104] workers employed by a number of hotels and restaurants in and around Durban and who were members of the Black Allied Workers Union (BAWU) made the same demands to their respective employers, participated in the same strike, and were dismissed on the same day or more or less on the same day for the same reasons.

[98] Arising out of those dismissals separate dismissal disputes (then called unfair labour practice disputes under the 1956 Act) arose including those between BAWU and the Palm Beach Hotel; BAWU and the Asoka Hotel; BAWU and the Edward Hotel; and BAWU and Prestige Hotels. As the dismissal disputes in the hotel cases were separate dismissal disputes, all of them could be referred to conciliation either jointly or separately. As it turned out, they were all referred to conciliation and to court as separate and independent dismissal disputes and were accepted as such by both the industrial council and the Industrial Court.

[99] In the above hotel cases BAWU could not, after referring the dismissal dispute relating to Palm Beach Hotel to conciliation, decide not to refer the other dismissal disputes to conciliation on the basis that they were one and the same dispute as the dismissal dispute in *Palm Beach Hotel* that had been referred to conciliation. BAWU had to refer all of them to conciliation which it did. The next question to decide is: which ones of the different or separate dismissal disputes that arose from the dismissal of strikers on 14 April 2010 did the union refer to conciliation in the first referral?

[101] Above n 96.

[102] Above n 97.

[103] Above n 98.

[104] Above n 99.

What dispute was referred to conciliation?

[100] Once it is accepted that the dismissal of the employees who took part in the strike on 14 April 2010 could have given rise to multiple dismissal disputes, the next inquiry is to determine whether the referral of 20 April 2010 was limited to the dismissal dispute between the union and Steinmüller or whether it included the dismissal disputes between the union and Intervalve as well as the dismissal dispute between the union and BHR. How does one determine this? The only way to determine this lies in examining and construing the contents of the referral documents.

[101] NUMSA admits that the unfair dismissal "claim" that it referred to the bargaining council on 20 April 2010 was against Steinmüller only as the employer party. Ms Norma Craven, a Legal Officer employed by NUMSA, says in her founding affidavit in this Court: "[t]he unfair dismissal claim was originally referred only against the third respondent, Steinmüller Africa (Pty) Ltd". She then says: "After the initial referral, it became apparent that some of the individual employees may be employed by entities other than Steinmüller Africa (Pty) Ltd. Accordingly, the [union] applied in terms of Rule 22 [of the Rules of the Labour Court] for the joinder of the other alleged employer entities." Later on she repeats: "The claim was initially brought against Steinmüller alone."

[102] The union did not include in the record the referral form that it used to make the referral of 20 April 2010. However, we do have in the record the referral form that the union used for the second referral which is identical to the referral form that the union would have used on 20 April 2010. Paragraph 1 of the referral form requires particulars of the party referring the dispute. In paragraph 1 the union would have put itself only or itself and the dismissed employees as the referring party. Paragraph 2 requires the details of the other party to the dispute. The heading to paragraph 2 reads: "DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)". Here the union stated that the other party to the dispute was Steinmüller.

[103] Paragraph 2 of the referral form also requires the referring party to state whether the other party with whom it is in dispute is an employer, union, employee or employers' organisation. In paragraph 2 the union would have stated that Steinmüller was the employer. Paragraph 3 bears the heading: "NATURE OF THE DISPUTE". It then has the question: "What is the dispute about?" and then a space is provided. Under paragraph 3 the party referring the dispute is required to "summarise the facts of the dispute you are referring." Under paragraph 3 the union would have indicated that the workers listed in the referral had been dismissed by Steinmüller on 14 April 2010 for participating in an unprotected strike. It would also have probably alleged that the dismissal was procedurally and substantively unfair.

[104] Paragraph 4 of the referral form required the date of dismissal and the place where the dismissal was effected. Here the union would have given 14 April 2010 as the date of dismissal and Pretoria as the place where the dismissal was effected. Paragraph 6 required the specification of the result or outcome that the referring party would like to have out of the conciliation process. In that paragraph the union would have indicated reinstatement or payment of compensation as the result it sought out of the conciliation process.

[105] The above means that the first referral was used to refer to conciliation only the dismissal dispute between the union and Steinmüller in respect of the dismissal of the employees appearing on the list attached to that referral. The fact that we now know that some of the employees whose names appeared on that list were not employed by Steinmüller but by Intervalve and BHR is neither here nor there. This is because in that referral all the employees were alleged to have been employed by Steinmüller. Intervalve and BHR were not mentioned at all in the referral.

[106] The conclusion is inescapable that the first referral did not include the dismissal dispute between Intervalve and its former employees and the dismissal dispute between BHR and its former employees. Therefore, those dismissal disputes were not referred to the bargaining council for conciliation in the first referral. I am unable to

agree with the proposition that the first referral was for any dispute other than the dispute between the union and Steinmüller about the fairness of the dismissal of the employees whose names appeared on the list attached to the referral. In this regard it must be remembered that, in so far as that list included names of persons who had not been employed by Steinmüller and, therefore, could not have been dismissed by Steinmüller, the definition of the word "dispute" in section 213 of the LRA includes an alleged dispute.

Did the Labour Court have jurisdiction?

[107] The next question is whether the dismissal disputes involving Intervalve and BHR could be adjudicated by the Labour Court notwithstanding the fact that they had not been referred to conciliation. The union contended that the Labour Court had a discretion to allow the joinder of Intervalve and BHR even if the dismissal disputes relating to those companies had not been referred to the bargaining council for conciliation.

[108] The main judgment holds that the Labour Court has no jurisdiction to adjudicate the Intervalve dismissal dispute and the BHR dismissal dispute as these disputes were never referred to conciliation. This is right. The Labour Court does not even have a discretion to adjudicate a dismissal dispute that has not been referred to conciliation. The union is using the joinder provision of the Rules of the Labour Court for a purpose for which they were not made. It is using them to get the Labour Court to adjudicate dismissal disputes that were not referred to conciliation because the council refused condonation in respect of the second referral which covered those dismissal disputes. The effect of that decision was that the council refused the union permission to refer the dismissal disputes relating to Intervalve and BHR outside the prescribed 30-day period.

[109] That the dismissal disputes between Intervalve and its former employees and between BHR and its former employees cannot be referred to adjudication without having first been referred to a conciliation process is in accordance with a well-known

and well-settled principle of labour law that labour disputes should be referred to a conciliation process before they can be the subject of arbitration or adjudication or industrial action.

[110] Section 191(1) to (4) of the LRA reads:

> "(1) *If* there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to—
>
> (a) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (b) the Commission, if no council has jurisdiction.
>
> (2) If the employee shows good cause at any time, the council or Commission may permit the employee to refer the dispute after the 30-day time limit has expired.
>
> (3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.
>
> (4) The council or the Commission must attempt to resolve the dispute through conciliation." (Emphasis added.)

[111] The provision of the LRA that enables a dispute about the fairness of a dismissal for striking to be adjudicated by the Labour Court is section 191(5). In so far as it is relevant, it reads:

> "*If* a council or a commissioner has certified that the dispute remains unresolved, or *if* 30 days have expired since the council or the Commission received the referral and the *dispute* remains unresolved—
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if—
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
>
> (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable; or

(iii) the employee does not know the reason for dismissal; or

(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 employees 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." (Emphasis added.)

[112] The dispute referred to in section 191(5) is the same dispute to which reference is made in section 191(1) i.e. a dispute about the fairness of a dismissal. Section 191(5) creates two conditions one of which must be met before a dismissal dispute may be arbitrated or may be referred to the Labour Court for adjudication. The first condition is that the CCMA or bargaining council, as the case may be, must have issued a certificate of non-resolution of the dispute. The second is that a period of 30 days from the date on which the CCMA or the bargaining council received the referral must have lapsed.

[113] That these two events are preconditions is made clear by the use of "if" at the beginning of the first event mentioned in section 191(5) and the repetition of that "if" just before the second event in the provision. Either the council or commissioner must have certified that the dispute remains unresolved or 30 days must have expired since the council or the Commission received the referral and the dispute remains unresolved. It follows that, if none of these preconditions has been met in a particular case, the employee may not refer the dispute to the Labour Court for adjudication under section 191(5)(b).

[114] Section 191(5)(a) relates to those cases which do not qualify to be taken to the Labour Court after one of the two events has been met. Those are the dismissal cases

that must be arbitrated by the relevant council or by the CCMA. In regard to those cases section 191(5) provides for the employee to request that the council or the CCMA arbitrate the dispute. An employee may only competently make that request when one of the events has occurred. Where one of the preconditions has been met and the employee makes the request, the council or the CCMA *must* arbitrate the dispute.

[115] Unfortunately, the LRA does not deal with the jurisdiction of the Labour Court or the CCMA or bargaining councils in one section. One finds sections that deal with the jurisdiction of these structures in various parts of the statute in regard to various disputes.[105] It seems to me that, whatever terminology one may use to describe the effect of section 191(5)(b), it lays down two preconditions one of which must be met before a dispute concerning the dismissal of employees for striking may be referred to the Labour Court for adjudication. If neither of the preconditions has been met, the Labour Court has no jurisdiction to adjudicate the dispute. The event of the expiry of 30 days applies if the dispute has been referred to the council or CCMA for conciliation under section 191(1).

[116] 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 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. I narrate part of the history below.

[117] Section 11(1) of the Industrial Conciliation Act, 1924 (1924 Act) read:

> "Whenever an industrial council or a conciliation board [had] considered any dispute between a local authority and its employees upon work connected with the supply of light, water, . . . and has failed to settle the dispute, the council or board shall—

[105] See for example, sections 9(4), 26(14), 67(3)(b), 68(1)(a) and (b), 69(11), 77(2), 157, 158(1)(a)(iii), 158(1)(b), 158(1)(c), 158(1)(e) and 158(1)(g)-(j) of the LRA. The position is the same with regard to the jurisdiction of the CCMA.

(a) require the parties to the dispute to agree together within three days upon the appointment of an arbitrator for the determination of the dispute; and

(b) communicate to the Minister the fact of such failure and the name of any arbitrator agreed to by the parties to the dispute that no agreement has been come to, if such is the case."

[118] It is to be noted that the provision opened with the word "whenever", and then said "the council or board shall . . ." whereafter followed provisions relating to arbitration. So, even then, such a dispute was required to have been referred to a conciliation process first and a conciliation board was required to have failed to settle the dispute before it could go to arbitration. That is what section 191(5)(a) also captures. Section 191(5)(b) captures the same principle except that instead of arbitration, it refers to adjudication.

[119] Section 12(1)(a) and (b) of the 1924 Act captured the principle that a strike or lock-out could not lawfully be resorted to until the dispute had been submitted to an industrial council or until the dispute had been "considered and reported on by a conciliation board".[106]

[120] This principle was also captured in the Industrial Conciliation Act[107] (1937 Act) in respect of strikes and lock-outs. Section 65(1)(c) precluded strikes and lock-outs when neither section 65(1)(a) nor (b) applied:

[106] Section 12(1)(a) and (b) of the Industrial Conciliation Act, 1924, read:

"It shall be unlawful for any employer, employers' organization, trade union or other person to declare any strike or lock-out until—

(a) when there is an industrial council the matter giving occasion therefor shall have been submitted to, considered and reported on by such industrial council;

(b) where there is no industrial council and the matter giving occasion therefor is one upon which a conciliation board may be appointed, it shall have been submitted to, considered and reported on by a conciliation board.

and until any further period stipulated in any agreement between the parties as a period within which a strike or lock-out shall not be declared shall have elapsed."

[107] 36 of 1937.

"(i) [i]f there is an industrial council having jurisdiction, *unless the matter giving occasion for the strike or lock-out has been considered by that council and until—*

(aa) *the council has reported thereon to the Minister in writing*; or

(bb) *a period of thirty days reckoned from the date on which the matter was submitted to the council, or such longer period as the council may fix has expired,*

whichever event occurs first; or

(ii) if there is no such council, *unless application has been made under section thirty-five or sixty-four for the establishment of a conciliation board for the consideration of the said matter, and until—*

(aa) *any board that may be established has reported thereon to the Minister* in writing; or

(bb) the period of thirty days reckoned from the date on which the Minister has approved of the establishment of a board or such longer period as the board may fix has expired; or

(cc) the Minister has refused to approve of the establishment of the conciliation board; or

(dd) if the Minister has not within a period of twenty-one days reckoned from the date on which the application was lodged approved or refused to approve of the establishment of a board, the expiration of that period,

whichever event occurs first". (Emphasis added.)

[121] I draw attention to the terms of section 65(1)(c) of the 1937 Act that, if there was an industrial council that had jurisdiction in regard to a dispute, it was one of the conditions for going on a strike that would not constitute a criminal offence that the dispute should have been referred to that industrial council and that council should have considered the dispute first. If no industrial council had jurisdiction in respect of the matter, then in terms of section 65(1)(c)(ii) it was a precondition that an application should have been made for the establishment of a conciliation board for the consideration of the dispute.

[122] Also, section 65(1)(c)(i)(aa) and (bb) of the 1937 Act provided for a condition that the industrial council should have reported on the dispute after considering it or that a period of 30 days should have expired. The precondition that the industrial council had to have reported on the dispute serves the same purpose as the requirement under section 191(5) of the LRA that a certificate of non-resolution of the dispute must have been issued. The precondition of the expiry of 30 days in section 65(1)(c)(i)(bb) is the same period of 30 days that we find as a precondition in section 191(5) of the LRA. The same preconditions are also found in section 65(1)(c)(ii)(aa) and (bb) of the 1937 Act.

[123] Finally, section 46(1) of the 1937 Act read:

> "*Whenever* a dispute between a local authority and its employees engaged in the performance of work connected with the supply of light, power or water or with sanitation, passenger transportation or the extinguishing of *fires has been referred to an industrial council, or whenever the establishment of a conciliation board to consider and determine any such dispute has been approved, and the council or board has failed to settle the dispute within a period of thirty days reckoned from the date of reference or the date of approval of establishment*, as the case may be, *or* such further period or periods as the Minister may fix, or before the expiration of that period or further period or periods, has satisfied itself that further deliberation will not result in a settlement of the dispute, *the dispute shall be submitted to arbitration for decision*." (Emphasis added.)

This provision also shows that the referral of a dispute to conciliation in the circumstances envisaged in the section was a precondition before the dispute could be the subject of compulsory arbitration.

[124] The principle was continued with in the Industrial Conciliation Act[108] later renamed Labour Relations Act, (1956 Act), which was repealed by the current Act.

[108] 28 of 1956.

Section 65 of the 1956 Act made it a criminal offence to resort to a strike or lock-out without subjecting the dispute to the process of a conciliation board or to an industrial council. Section 43 of the 1956 Act conferred power on the Industrial Court to grant status quo orders (that is, reinstatement orders) but one of the jurisdictional requirements before the court could exercise that power was that the employee must have applied to the Minister of Labour for the establishment of a conciliation board in terms of section 35 of that Act. In *Marievale Consolidated Mines*[109] Goldstone J held that a section 43 order was only competent "where there is a valid reference of a dispute to an industrial council or where (as in the present case) there is no industrial council an application has been made under section 35(1) for the establishment of a conciliation board in respect of the dispute".

[125] Section 46(9)(a) of the 1956 Act gave the Industrial Court the power to adjudicate unfair labour practice disputes. Those disputes included dismissal disputes. Section 46(9)(a) made it clear that the Industrial Court could not determine an unfair labour practice dispute unless it had first been referred to conciliation. Section 46(9)(a) reads:

> "The industrial court shall not determine a dispute regarding an alleged unfair labour practice unless such dispute has been referred for conciliation to either an industrial council having jurisdiction or, where no such industrial council exists, to a conciliation board."

[126] Section 46(9)(b)(i) and (ii) of the 1956 Act, as amended, read as follows just before the LRA came into operation:

> "(b) *If* a dispute concerning an alleged unfair labour practice has been referred to—
>
> (i) an industrial council having jurisdiction in respect thereof, and that industrial council has failed to settle such dispute within the period of

[109] *Marievale Consolidated Mines v President of the Industrial Court and Others* 1986 (2) SA 485 (T) at 494; (1986) 7 ILJ 152 (T) at 161.

> 30 days, or within the further period or periods, referred to in section 27A(2), *any party to the dispute may* as soon as possible after the expiration of the said period, or the said further period or periods, but not later than 90 days from the date on which that period, or that further period or periods as the case may be, have lapsed, *refer the dispute to the industrial court for determination* and . . . ; or
>
> (ii) *a conciliation board and that board has failed to settle the dispute within the period of 30 days, or within the further period or periods, referred to in section 36(1)(a), any party to the dispute may* as soon as possible *after the expiration* of the said period, or the said further period or periods . . . as the case may be, have lapsed, *refer the dispute to the industrial court for determination* . . . ."
>
> (Emphasis added.)

[127] It will be seen that, like section 191(5) of the LRA, which governs the referral of dismissal disputes to arbitration and adjudication, section 46(9)(b)(i) and (ii) of its predecessor commenced a provision designed to serve the same purpose with the word "if". Also, apart from "if", which started the relevant sentence in section 46(9)(b) of the 1956 Act and starts the relevant sentence in section 191(5) of the LRA, one finds the phrase "may refer" in both the relevant sentence of section 46(9)(b) of the 1956 Act as well as in the relevant sentence of section 191(5) of the LRA. The reference to the 30 days' period that we have in section 191(5) of the LRA was also contained in section 46(9)(b) of the 1956 Act. Before the repeal of the 1956 Act by the LRA, it was widely accepted that the Industrial Court had no jurisdiction to determine an unfair labour practice dispute that had not first been referred to a conciliation process. Section 191(5) captures the same principle.

[128] Finally, under section 64(1) of the LRA, a strike or lock-out may be resorted to only:

> "if—
>
> (a) the issue in dispute has been referred to a council or to the Commission 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 Commission; and after . . . ."

It is clear from this provision that, before a dispute can be the subject of a strike or lock-out, the dispute must have first been referred to conciliation and either a certificate that the dispute remains unresolved must have been issued or a period of 30 days must have elapsed from the date when the council or the CCMA received the referral. The only circumstances when this requirement need not be complied with are those stipulated in section 64(3).[110] Otherwise, the requirement is compulsory before a strike or lock-out may be resorted to. The "if" which we see in section 191(5) introducing the preconditions one of which must be met before a dismissal dispute can be referred to arbitration or adjudication is also present in section 64(1) where it introduces the same preconditions in regard to resorting to strikes and lock-outs.

[129] It is true that under the 1956 Act the principle that an unfair labour practice dispute was required to be referred to conciliation before it could be determined by the Industrial Court was subject to one exception. The exception was where all the parties to a dispute agreed that there were no prospects that the dispute could be settled through the conciliation process and agreed that it should be referred straight to the

[110] One of the conditions for a strike or lock-out to be a protected strike or lock-out is that "the issue in dispute" must have been referred to a bargaining council or to the CCMA for conciliation and a certificate of non-resolution should have been issued or a period of 30 days should have lapsed since the receipt of the referral. Section 64(3) then provides:

"The requirements of subsection (1) do not apply to a strike or a lock-out if—

(a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;

(b) the strike or lock-out conforms with the procedures in a collective agreement;

(c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;

(d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or

(e) the employer fails to comply with the requirements of subsections (4) and (5)."

Industrial Court for determination.[111] The current Act has no equivalent provision. Instead, in terms of section 64(3) of the current Act a strike or lock-out may be resorted to under certain defined circumstances without the issue in dispute having been referred to a conciliation process. This is an exception rather than the norm. The 1956 Act had no equivalent provision in regard to strikes or lock-outs. The Explanatory Memorandum,[112] which accompanied the Labour Relations Bill that later became the current Act and has been used by this Court as an interpretive guide or source for the current Act, it is said:

> "[The CCMA's] commissioners will attempt in the first place to resolve disputes by conciliation, mediating where appropriate. A commissioner will be empowered to attempt other means of resolving the dispute such as fact finding . . . . *Only where these attempts fail will the commissioner determine certain disputes by arbitration. Where disputes are to be adjudicated by the Labour Court, the Commission will first seek actively to engage parties in an attempt to resolve disputes to avoid unnecessary litigation*".[113] (Emphasis added.)

[130] Even the International Labour Organisation (ILO) has recognised this principle in the Labour Relations (Public Service) Convention, 1978.[114] Clause 8 of the Convention reads:

> "The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, *conciliation* and arbitration, established in

[111] Section 46(6) of the 1956 Act read:

> "Notwithstanding anything to the contrary in this section contained whenever there is no industrial council having jurisdiction in respect of a dispute referred to in *subsection (2)*, the parties to the dispute may agree to report to the Director-General that they are satisfied that any conciliation board which may be established will not be able to settle the dispute and whether they have agreed upon the arbitrator or the arbitrators and the umpire, or to the arbitration being conducted by the Industrial Court."

[112] (1995) 16 ILJ 278. This Explanatory Memorandum has been used by this Court to interpret the LRA. See *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 48.

[113] Explanatory Memorandum at 327.

[114] ILO Convention No 151.

> such a manner as to ensure the confidence of the parties involved." (Emphasis added.)

In fact as long ago as 1978 the Freedom of Association Committee of the ILO said:

> "The Committee has recognised in a number of cases that . . . compulsory conciliation and arbitration in industrial disputes before calling a strike are provided for in the laws or regulations of a substantial number of countries, and that reasonable provisions of this type cannot be regarded as an infringement of freedom of association."[115]

Substantial compliance

[131] When it is said that there was substantial compliance with section 191 of the LRA in this matter, it is important to ask the question: substantial compliance with what requirement of the Act? Is it meant that there was substantial compliance with section 191(1) or with section 191(3)? To say that there was substantial compliance with section 191(1) would mean that there was compliance with the requirement for the referral of the dismissal disputes involving Intervalve and BHR to the bargaining council for conciliation. Substantial compliance with section 191(3) would mean that there was compliance with the requirement that the bargaining council or CCMA "must satisfy itself that a referral has been served on the employer".

[132] To the extent that it is said that there was substantial compliance with section 191(1), it has to be shown that the dismissal dispute between Intervalve and its former employees and the dismissal dispute between BHR and its former employees were referred to the bargaining council for conciliation in the first referral. In my view there is no room for the contention that in this case there was substantial compliance with section 191(1). The only referral that the union made on 20 April 2010 was a referral of the dismissal dispute between Steinmüller and its former employees represented by the union. That referral did not include the dismissal disputes between Intervalve and its former employees or the dismissal

[115] Freedom of Association Committee cases (report 187/1978, November 1978).

dispute between BHR and its former employees. The documentation that was put before the bargaining council for the purpose of the referral of 20 April 2010 did not contain any reference to Intervalve or BHR. As far as the bargaining council was concerned and, objectively speaking, the dismissal dispute that was referred to the council was between Steinmüller and its former employees.

[133] The list of the employees that the union attached to the referral included former employees of Intervalve and BHR who were dismissed on 14 April 2010. That cannot help the union because in that referral the union alleged either expressly or by necessary implication that all the employees on the list had been employed by Steinmüller and were dismissed by Steinmüller. In that referral there was not even a single reference to any dismissal dispute between Intervalve and BHR and any employees that the two companies had dismissed on 14 April 2010.

[134] Either the dismissal disputes involving Intervalve and BHR were referred to conciliation or not. There is no room for a proposition that there was almost a referral or there was an imprecise referral of the dismissal disputes involving Intervalve and BHR and, therefore, there was substantial compliance. An examination of the referral form identical to the one used on 20 April 2010 reveals that there is nothing in the content thereof that would support the proposition that the referral was used to refer the dismissal disputes involving Intervalve and BHR to conciliation. In fact the contents of the referral documents contradict that proposition.

[135] The identity of those who attended the subsequent conciliation meeting is irrelevant to whether the dismissal dispute between Intervalve and its former employees and the dismissal dispute between BHR and its former employees were referred to the bargaining council for conciliation on 20 April 2010. Since the dismissal disputes involving Intervalve and BHR were not referred to conciliation on 20 April 2010, the question of whether the purpose of section 191(1) or 191(3) could have been achieved does not arise. This is because the purpose of the section can only be achieved if a dismissal dispute had been referred to the conciliation process. If

there was no compliance with section 191(1), there could obviously not be compliance with section 191(3) because a non-existent referral could not have been served on the employer.

[136] The union knew the legal position that a dismissal dispute that had not been referred to conciliation could not be referred to adjudication by the Labour Court. That is why on 22 July 2010 it made the second referral and cited not just Steinmüller this time around but also Intervalve, BHR and KOG. The question that arises is: if the dismissal dispute between Steinmüller and the employees whose names were attached to that referral is the same dispute as the dismissal dispute between Intervalve and its former employees or as the dismissal dispute between BHR and its former employees, why did the union make the second referral in which it cited Intervalve, BHR and KOG? Why did it not wait for the stage of the trial proceedings and then apply for the joinder of Intervalve and BHR without having tried to refer those disputes to conciliation?

[137] The answer is that the union realised that the first referral did not include any dismissal dispute between Intervalve and its former employees or between BHR and its former employees and this meant that the Labour Court would not have jurisdiction to adjudicate those dismissal disputes. It was after the bargaining council had refused condonation that the union thought of using the joinder strategy to try and bring the dismissal disputes involving Intervalve and its former employees and BHR and its former employees through the back door into the trial proceedings relating to the dismissal dispute between Steinmüller and its former employees. This was a ploy by the union to circumvent the decision of the bargaining council refusing it condonation in respect of the dismissal disputes involving Intervalve and BHR.

[138] NUMSA needs Intervalve and BHR to be respondents in the trial proceedings relating to the dismissal dispute between Steinmüller and its former employees or its alleged former employees so that it can ask the Labour Court to order these two companies to reinstate their former employees or to pay them compensation for unfair

dismissal. That, of course, can only happen if those disputes are adjudicated by the Labour Court. However, they cannot be adjudicated by the Labour Court if they have not been referred to the bargaining council for conciliation. Hence, the stratagem of using the process of a joinder. A joinder under Rule 22 is not competent in these circumstances. In this regard Ms Craven said in her affidavit: "After the initial referral, it became apparent that some of the individual employees may be employed by entities other than Steinmüller Africa (Pty) Ltd. Accordingly, the [union] applied in terms of Rule 22 for the joinder of the other alleged employer entities."

[139] Finally, section 191(1)(a) requires that a dismissal dispute be referred to "a council, *if the parties to the dispute fall within the registered scope of that council*." (Emphasis added.) This means that a bargaining council needs the parties to be specified in the referral so that it can determine whether the parties fall within its registered scope. This provision is necessary for the council to establish whether or not it has jurisdiction in respect of the dispute. If both the employer and the employee or employees involved in a dismissal dispute fall within the council's scope of registration, the council will have jurisdiction. If, however, they do not both fall within the registered scope of the council, the council will not have jurisdiction to conciliate the dispute.

[140] This provision reveals part of the legal significance for the referring party to cite the correct employer party to the dispute in the referral documents and not leave out an employer who should be cited. If, as in the present case, certain entities that are said to have employed some of the employees are not cited in the referral, the bargaining council would not be able to establish whether the parties fall within its registered scope and, therefore, whether it has jurisdiction in respect of the dispute. The union's failure to cite Intervalve and BHR in the referral of 20 April 2010 made the achievement of the purpose of section 191(1) impossible.

[141] In the circumstances the appeal must fail.

NKABINDE J (Froneman J, Jafta J, Madlanga J and Van der Westhuizen J concurring):

Introduction

[142] At the heart of this matter is whether NUMSA complied with section 191 of the LRA.[116] The matter implicates the power of the Labour Court. That Court decided in favour of NUMSA and the individual claimants.[117] It joined additional employers to an unfair dismissal dispute that was originally referred to conciliation against one employer. The Labour Appeal Court disagreed with the decision of the Labour Court. It set aside the order of the Labour Court and dismissed the employees' joinder application.[118] The order of the Labour Appeal Court has the effect of non-suiting the employees' unfair dismissal claims, thus making the resolution of the labour dispute, which is the subject matter of this application, ineffective and impractical through the mechanisms created by the LRA.

[143] I have had the benefit of reading the judgments prepared by my Colleagues, Cameron J (main judgment), Zondo J (concurring judgment) and Froneman J. I concur in the judgment of Froneman J. Whilst I agree with the main and concurring judgments regarding the characterisation of the issues and that leave to appeal should be granted, we differ on the interpretation of section 191 and on whether that section was complied with. The question raised requires a proper interpretation and application of section 191, in the light of the spirit, purport and objects of the Bill of Rights, and, in particular, the right to fair labour practices in section 23 and access to courts in section 34 of the Constitution. As this judgment seeks to demonstrate, a proper construction of section 191 yields a different conclusion to that reached by the Labour Appeal Court, the main judgment and the concurring judgment.

[116] Above n 8.

[117] Above n 2.

[118] Above n 3.

Background facts and litigation history

[144] The background facts are set out in the main judgment and the concurring judgment. I will only repeat those that are relevant for the purposes of this judgment.

[145] This matter originated as an unfair dismissal claim on behalf of individual employees arising from a mass dismissal following participation in a strike at the shared premises of three engineering companies, Steinmüller, Intervalve and BHR (the three companies). On behalf of the three companies the strike was handled by their shared HR services.[119] Notably, the shared HR services of the three companies maintain a single system of records in respect of their employees working at their shared premises.[120] During their employment certain employees among the individual employees were transferred from one of the three companies to another, at different times, without termination of one employment contract and the conclusion of a new contract, nor the cession and assignment of contractual obligations.[121]

[146] Throughout the events that culminated in the dismissal of the individual employees, in particular in effecting the dismissals, the three companies acted with a single voice. The shared letter of dismissal addressed to all employees participating in the unprotected strike action at the Pretoria Workshop bears the logos of Steinmüller and Intervalve and is signed by the Managing Director, Mr von Neuberg, who is also the CEO of Bilfinger. Notably, in the code of conduct applicable to the three companies, Mr von Neuberg refers to the "Steinmüller Group of Companies" as including Bilfinger, BHR, Intervalve and KOG.[122]

[147] Upon receipt of the dismissal letter, NUMSA, on behalf of all its dismissed members, referred an unfair labour dispute to the Bargaining Council for conciliation

[119] Labour Court judgment above n 2 at para 5. Their shared services include: payroll administration; purchasing of materials; quality control; heat treatment; and, significantly, HR services.

[120] Labour Appeal Court judgment above n 3 at para 7 and Labour Court judgment id at para 15.3.

[121] Save for denying that such transfers constituted "internal redeployment", Steinmüller provided no further answers on the issues.

[122] Labour Court judgment above n 2 at para 15.7.

in terms of section 191, citing Steinmüller as the employer party. Conciliation was attended by the shared HR services of the three companies. The complaint that the individual employees were not all employed by Steinmüller was raised for the first time at conciliation by the shared HR services.[123] Steinmüller's attorney, who also acts on behalf of Intervalve and BHR, furnished NUMSA's attorneys with documentary records drawn from the shared HR services and with lists purporting to identify the correct employer of each of the individual employees.[124] The dispute remained unresolved and the Bargaining Council issued a certificate of non-resolution.

[148] In August 2010 NUMSA filed a statement of claim in the Labour Court, seeking an order declaring the dismissal of its members as both procedurally and substantively unfair and directing reinstatement and payment of compensation plus costs. Steinmüller did not file a statement of defence but filed an interlocutory application raising an *in limine* objection to the statement of claim. The basis of the objection was that the claimants had not pertinently alleged that Steinmüller was the employer of the individual claimants. On 30 August 2010 Steinmüller filed a notice for NUMSA to remove the cause of complaint.[125] It threatened to bring an application for an order setting aside the statement of claim as an irregular step and declaring that the statement of claim did not contain allegations necessary to sustain a cause of action; alternatively, that it was vague and embarrassing.[126]

[149] In October 2010 the claimants filed a notice to amend the statement of claim followed by the amendment in which it was alleged that Steinmüller was the employer

[123] Labour Appeal Court judgment above n 3 at para 2 and Labour Court judgment id at para 7. Despite its objection, Steinmüller did not furnish documentation to indicate the identity of the employer of each individual employee. This was despite the fact that it had, at all material stages, been in exclusive possession of the records.

[124] Labour Court judgment id at para 8.

[125] The first cause of complaint was the failure to allege material facts necessary to establish the jurisdiction of the Labour Court and the second cause of complaint was the failure to allege that the relevant members were employed by Steinmüller.

[126] It appears that the threatened application was in the end lodged and was still pending when the joinder application was determined by the Labour Court.

and that it dismissed the individual claimants. In November 2010 the attorney acting on behalf of Steinmüller provided NUMSA with copies of documents setting out its position in relation to the individual claimants represented by NUMSA.[127]

[150] On the basis of this information, in March 2011 the claimants successfully launched a joinder application in terms of rule 22(2)(a) of the Rules of the Labour Court[128] to join Intervalve, BHR, Strategic HR, Eduardo and TQA.[129] The basis for the joinder of Intervalve and BHR included the fact that these companies employed certain of the individual claimants and that this was sufficient to establish that they have a direct and substantial interest in the matter. An added reason for the joinder was that the operations, personnel, identities and other characteristics of the three companies are so interwoven that the three companies have a parity of interest in relation to their employees, including the individual claimants.

[151] Intervalve and BHR opposed the joinder application on the basis that, firstly, the Labour Court lacked jurisdiction to entertain an unfair dismissal claim against them because the "condition precedent", that the matter first be conciliated before being referred to adjudication, was not met. Differently put, they disputed that the Labour Court had jurisdiction to entertain an unfair dismissal claim against the two companies if they were to be joined. Secondly, they contended that NUMSA failed to satisfy the requirement that the parties it sought to join have a direct and substantial interest in the subject matter of the proceedings as required by rule 22. In seeking to support these contentions, the opposing affidavit deposed to by a director of BHR accepted that these companies form part of the same group of companies and have the same shareholders and directors in common. It explained however that the companies are separate companies and are registered as such. It contended further that the failure to refer the dispute against Intervalve and BHR for conciliation was an insuperable

[127] The documents disclosed that Steinmüller had no records of 22 persons identified in the list; 45 of the employees were employed by Intervalve; 2 of the employees were employed by BHR; 24 of the employees were employed by itself; and 6 of the employees were employed by labour brokers, including Strategic HR and TQA.

[128] Rule 22(2) is set out above n 12.

[129] Strategic HR and TQA did not oppose the joinder application.

obstacle to their joinder. Intervalve and BHR denied that they had any legal interest in the main claim because there was no claim before the Labour Court that they dismissed their employees unfairly. The Labour Court's order was set aside on appeal.[130]

[152] The Labour Appeal Court held that the dispute between the parties, being "one of dismissal on participation in a non-procedural strike[,] . . . *must*, firstly be referred to conciliation".[131] It said:

> "NUMSA as has been recorded earlier referred the unfair dismissal dispute against Steinmüller both for conciliation and to the Labour Court *prima facie* in compliance with section 191. NUMSA *did refer* a dispute for conciliation against Intervalve and BHR but this was done outside the prescribed time limit and it was rejected by the Bargaining Council on the basis that NUMSA failed to show good cause as to why the referral should be entertained. In the circumstances no dispute against Intervalve and BHR was referred for conciliation. Based on the non-referral of the dispute for conciliation and relying on the judgment of this Court in *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* ('*Driveline*'), Intervalve and BHR aver that the Labour Court has no jurisdiction to entertain a dispute between NUMSA and them. In *Driveline*, Zondo AJP . . . with Mogoeng AJA . . . concurring held that:
>
> > '. . . the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication.'"[132] (Emphasis added and footnote omitted.)

[130] The order of the Labour Appeal Court reads:

> "The appeal succeeds with no order as to costs.
>
> The order of the Labour Court is set aside and substituted with the following: *The application is dismissed with no order as to costs.*"

[131] Labour Appeal Court judgment above n 3 at para 12. Emphasis added.

[132] Id at para 14.

[153] The Labour Appeal Court therefore concluded that "NUMSA failed to comply with section 191(1) read with section 191(3) [of the LRA] in that, it failed to refer on time the dispute against Intervalve and BHR to conciliation".[133] It said that—

> "[i]n the absence of conciliation, it is not entitled to refer its dispute for adjudication to the Labour Court as provided in section 191(5). The Labour Court does not have jurisdiction to entertain the dispute, and as such it serves no purpose to consider whether the application for joinder has merit".[134]

Issue

[154] The issue for consideration therefore concerns compliance with section 191(1). A determination of this issue necessitates a proper interpretation of section 191 of the LRA. However, before determining the meaning of section 191(1), which must be read with section 191(3), it is necessary to address the importance of the conciliation process, the constitutional and statutory scheme and the proper approach to statutory interpretation.

Conciliation process

[155] It is true that conciliation, under the auspices of the CCMA or a bargaining council, is not intended as just another perfunctory step on the way to securing a licence for action. The mechanism is a process required by the LRA for the adjustment of competing interests and industrial peace. In conciliating a dispute, the conciliators must fulfil the primary goal of promoting labour peace by the effective resolution of labour disputes. They must act fairly and quickly, with minimum legal formalism.[135] However, the conciliators are constrained by certain constitutional and statutory requirements. When they apply the provisions of the LRA they must interpret its provisions to give effect to its primary object and in compliance with the

[133] Id at para 24.

[134] Id.

[135] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) (*Sidumo*) at para 85.

Constitution. These are the constraints that must inform the interpretation of section 191.

[156] The need to avoid "over-judicialising" issues and for speedy, efficient and cost-effective resolution of labour disputes during conciliation and arbitration captures the primary reason of their proceedings under the LRA.[136] Although bargaining councils enjoy none of the status of a court of law and have no judicial authority within the contemplation of the Constitution, the conciliation and arbitration proceedings must be conducted in a manner consistent with the goal of the LRA, the object of the Bill of Rights and in accordance with the values of the Constitution.[137]

The constitutional and statutory scheme

[157] Section 23(1) of the Constitution provides that "[e]veryone has the right to fair labour practices". Section 34 provides that "[e]veryone 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". Section 39(2) enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights, when interpreting any legislation.

[158] Section 3 of the LRA provides that any person applying the LRA must interpret its provisions: (a) to give effect to its primary objects; and (b) in compliance with the Constitution and the public international law obligations of the Republic.

[159] The purpose of the LRA is—

[136] O'Regan J in *Sidumo* id at para 125 referred to Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 244-5. Although this source relates to the administrative law context, the sentiments expressed apply with equal force to the role played by tribunals such as the CCMA in the modern administrative state, which the majority in *Sidumo* said performs an administrative function. See also Hoexter *Administrative Law in South Africa* (Juta & Co Ltd, Cape Town 2007) at 52-3 and Wade and Forsyth *Administrative Law* 8 ed (OUP, Oxford 2000) at 886, as cited in *Sidumo* id.

[137] See Brassey *Employment and Labour Law: Commentary on the Labour Relations Act* (Juta & Co Ltd, Cape Town 2006) vol 3 at A7–1-2, as cited in *Sidumo* id at para 86. See also *Sidumo* id at paras 149-52.

"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 27 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

. . .

(d) to promote—

. . .

(iv) the effective resolution of labour disputes".[138]

[160] A bargaining council has the power to prevent and resolve labour disputes and perform the dispute resolution function identified by section 51.[139] Section 51(3) provides:

"If a dispute is referred to a council in terms of this Act and any party to that dispute is not a party to that council, the council must attempt to resolve that dispute—

(a) through conciliation; and

(b) if the dispute remains unresolved after conciliation, the council must arbitrate the dispute if—

(i) this Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or

(ii) all the parties to the dispute consent to arbitration under the auspices of the counsel."

[161] Section 157 deals with the jurisdiction of the Labour Court. It reads, in relevant part:

[138] Section 1.

[139] As established under section 27 and in terms of the powers conferred by section 28.

"(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

. . .

(4) (a) 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."

[162] Section 191, the section in issue, provides, in relevant part:

"(1) (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; [or]

(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.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

. . .

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.

. . .

> (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
>
> . . .
>
> (b) the employee may refer the dispute to the Labour Court for adjudication." (Emphasis added.)

Proper interpretive approach

[163] While grammar and dictionary meanings are the primary tools for statutory interpretation, as opposed to being determinative tyrants, context bears great importance. This was underscored by Schreiner JA in *Jaga v Dönges*,[140] a decision often quoted with approval by this Court:[141]

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."[142]

[140] *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another* 1950 (4) SA 653 (A) (*Jaga v Dönges*).

[141] See, for example, *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 37; *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 21; and *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 17.

[142] *Jaga v Dönges* above n 140 at 662G-H.

[164] This Court has given approval to an interpretive approach that, "whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution".[143] As such it is important to have regard to the stated purpose of the LRA, in particular, the advancement of social justice and labour peace in the workplace by fulfilling the primary objects of that Act which, among others, are: (a) to give effect to and regulation of fundamental rights and (b) to promote the effective resolution of labour disputes.[144] What is more, section 191 should not be construed in isolation, but in the context of the other provisions in the LRA and the Constitution.[145]

[165] The starting point is the Constitution. Section 39(2) bears repeating. It enjoins every court, tribunal or forum, when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights. The interpretive process envisaged in section 39(2) is not limited to what the text of the legislative provision in question is principally capable of meaning but what it should mean when read with the Constitution.[146] This Court has also said that "[c]onstitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them" and "when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning".[147] The preferred interpretation should also not be unduly

[143] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 9. See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 46.

[144] At [159].

[145] See *South African Police Service v Police and Prisons Civil Rights Union and Another* [2011] ZACC 21; 2011 (6) SA 1 (CC); 2011 (9) BCLR 992 (CC) at para 30.

[146] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 21-6.

[147] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 15 and *SATAWU and Others v Moloto and Another NNO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44, referring, with approval, to *Hyundai* id at paras 22-3. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) (*Wary Holdings*) at paras 46-7 and *NEHAWU v UCT* above n 23 at para 39.

strained beyond the text.[148] However, it must have regard to the constitutional rights in issue, namely the rights to fair labour practices and access to courts.

[166] This Court has confirmed that the correct approach is "whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole" or put differently, whether the steps that were taken were effective when measured against the object of the Legislature.[149] The Court emphasised that a narrowly textual and legalistic approach is to be avoided.[150] In *AllPay* this Court endorsed the approach of substantial compliance with a statutory provision.[151]

Meaning of section 191

[167] Section 191(1) provides that "if there is a *dispute* about the fairness of a dismissal . . . the dismissed employee . . . may refer the *dispute* in writing" to the CCMA or a bargaining council, as the case may be, within 30 days of the dismissal, or if at a later date, within 30 days of the employer making a final decision to dismiss or uphold dismissal.[152] If the council or a commission certifies that the *dispute* remains unresolved or 30 days have passed since referral, the employee may refer the dispute to the Labour Court for adjudication in terms of section 191(5). What is important is to cut to the real dispute.[153]

[168] The language of section 191(1) is plain and is not couched in peremptory terms. The section provides for the referral of the *dispute*. The referral must be done

[148] *Hyundai* above n 146 at paras 24-5.

[149] *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) at para 26.

[150] *ACDP* above n 56 at para 25.

[151] *AllPay* above n 56 at para 30. Prior to *AllPay* the Supreme Court of Appeal endorsed this approach in *Weenen Transitional Local Council v Van Dyk* above n 59 at para 13.

[152] Emphasis added.

[153] The Labour Appeal Court illustrated this in *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others* [1998] ZALAC 23; (1) (1998) 19 ILJ 260 (LAC) at 265A-H and *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC) at 677E-678C.

within the prescribed time period. An employee may be permitted to refer the dispute after the expiry of the prescribed time if good cause is shown. However, if the dispute remains unresolved, the employee may refer the dispute to the Labour Court for adjudication. The Labour Court may refuse to determine any dispute if it is not satisfied that an attempt has been made to resolve the dispute through conciliation.[154]

[169] The LRA, in section 213, defines "dispute" as "including an alleged dispute". "[I]ssue in dispute in relation to a strike" is defined as "mean[ing] the demand, the grievance, or *the dispute that forms the subject matter of the strike*".[155] Section 191(1) provides that if there is "a dispute" the dismissed employee alleging an unfair labour practice may refer the *dispute*.

[170] It needs to be stressed that the *dispute* that was referred to conciliation in this case was "the dispute" that arose from the strike. This was handled, at all times, by the shared HR services of the three companies. It is important to emphasise also that the *dispute* referred to the Labour Court for adjudication was the same dispute that was conciliated. The remarks of the Labour Appeal Court in *Driveline*[156] regarding the nature of the dispute contemplated in section 191(1) are apposite:

> "The Act makes provision for the resolution of various disputes in the workplace by the employment of certain mechanisms in certain *fora*. One of such disputes is the dispute that arises between an employee or his union, on the one hand, and, an employer, on the other, when the employer dismisses the employee. That dispute consists of the employee side contending that the dismissal is unfair whereas the employer side contends it to be fair. The Act calls such a dispute a 'dispute about the fairness of a dismissal'. This is to be found in section 191(1) where the subsection begins by saying: 'If there is a dispute about the fairness of a dismissal . . . .'
>
> . . . . Whether a dispute will end up in arbitration or adjudication it must first have been referred to conciliation before it can be arbitrated or adjudicated.

[154] See [161].

[155] Emphasis added.

[156] *Driveline* above n 17.

. . .

The dispute remains the same dispute that was referred for conciliation in terms of section 191(1) of the Act, namely, the dispute about the fairness of the dismissal."[157]

Was section 191 complied with?

[171] Section 191(3) must be read with section 191(1). Subsection (3) requires an employee to satisfy a bargaining council or the Commission that a copy of the referral has been served on the employer.[158] The language used in this subsection appears to admit of more than one meaning. Of importance are the subject matter of the statute, its apparent scope and purpose. Section 191(1) read with section 191(3) must be construed and applied in a manner least restrictive of the primary object of the LRA, which includes the promotion of "*the effective resolution of the labour dispute*".[159]

[172] The construction contended for by NUMSA, on the one hand, is that section 191 was substantially complied with when read in the light of sections 23 and 34 of the Constitution. NUMSA therefore contended that the decision of the Labour Appeal Court should be set aside and that of the Labour Court be reinstated. The construction contended for by Intervalve and BHR, on the other hand, supporting the reasoning of the Labour Appeal Court, in essence comes to this: where a single dismissal dispute involving more than one employer is timeously referred and the employers concerned are aware of the referral and conciliation, each and every one of them must still of necessity have been served and should be a party to conciliation. It is contended that deviation from the above meaning is fatal.

[173] The Labour Appeal Court held that in the absence of conciliation of the dispute which was belatedly referred, NUMSA was not entitled to refer its dispute against Intervalve and BHR to the Labour Court for adjudication. For this reasoning the

[157] Id at paras 37-8 and 42.

[158] Section 191(3) is couched in similar terms to section 51(2)(c) of the LRA.

[159] Emphasis added.

Labour Appeal Court relied on *Driveline*.[160] The Labour Appeal Court held that the Labour Court lacked jurisdiction to entertain the dispute.[161] This was because "section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication".[162]

[174] The salient facts of *Driveline* bear mentioning. The case concerned an application for an amendment of the applicants' statement of claim. In their referral notice, the individual appellants claimed that their dismissal for operational requirements was unfair. The amendment, which was rejected by the Labour Court, sought to attack the fairness of the dismissal on the basis that the dismissals were automatically unfair. The employer contended that the conciliation of the dispute concerning automatically unfair dismissal was a jurisdictional precondition to a consideration of the matter by the Labour Court. It contended that the amendment sought to introduce a new dispute which had not been referred to conciliation and that the Labour Court had no jurisdiction to adjudicate it. In rejecting the employer's argument, the majority in *Driveline* correctly remarked:

> "The [employer party's] submission had as its basis the notion that there are two disputes between the parties now, namely, a dispute concerning a dismissal for operational requirements and a dispute concerning an allegedly automatically unfair dismissal.
>
> . . . [I]t is a fallacy to regard the proposed amendment as introducing a new dispute. To my mind, this approach is a result of a failure to appreciate the nature of the dispute between the parties, the event giving rise to the dispute, and the cause of, or the event giving rise to the dispute and the grounds of each party's case to the dispute.
>
> . . .

[160] *Driveline* above n 17 at para 46.

[161] Labour Appeal Court judgment above n 3 at para 24.

[162] *Driveline* above n 17 at para 73.

> The dispute remains the same dispute that was referred for conciliation in terms of section 191(1) of the Act, namely, the dispute about the fairness of the dismissal of the . . . appellants.
>
> To hold that the amendment . . . will introduce a new dispute altogether would not only be illogical but would render the dispute mechanisms of the Act ineffective, unworkable and nugatory."[163]

[175] The construction of section 191 contended for by the three companies, and sanctioned by the Labour Appeal Court, the main and concurring judgments is stringent. It fails to take into account that the dispute, which the Labour Appeal Court said ought to have been referred timeously to conciliation, was the same dispute that was already conciliated by the Bargaining Council. The construction does not consider whether, regard being had to the relevant statutory provisions, purpose and the legislative scheme of the LRA as a whole, there has been substantial compliance. As correctly stated by the Labour Court, it goes against the grain of the LRA's stated aim – "the effective resolution of labour disputes". It also ignores the fact that, despite Intervalve and BHR not having been served with the first referral, the statutory goal of conciliation, which intends to have the parties attempting to resolve the dispute, was achieved. Notably, the Labour Appeal Court accepted that "more appropriately a single action is what was required" instead of "separate actions".[164]

[176] I agree that conciliation requires the referral of a dispute and that parties to the dispute should be granted the opportunity to represent themselves. *Driveline* confirms this position when it distils the components of a dispute.[165] The facts of this case are in conformity with this position. Intervalve and BHR rely on the lack of initial service and their citation. However, the three companies must have been aware of the dispute. I find it difficult to maintain that with the shared HR services and legal representation, Intervalve and BHR were unaware of the referred dispute. The three companies' argument regarding non-service is a technical one based on the formal

[163] Id at paras 34-5 and 42-3.

[164] Labour Appeal Court judgment above n 3 at para 26.

[165] Above n 17 at paras 36-7.

requirement to cite and serve employer companies with the referral form. This, in my view, elevates form over substance.[166]

[177] In *ACDP*, this Court cautioned against a narrowly textual and legalistic approach:

> "A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in *Weenen Transitional Local Council v Van Dyk*:
>
> > 'It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of section 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the Legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular . . . . Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether "shall" should be read as "may"; *whether strict as opposed to substantial compliance is required*; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have *a posteriori*, not *a priori* significance. The approach described above, identified as ". . . a trend in interpretation away from strict legalistic to the substantive" by Van Dijkhorst J in *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1138D-E, seems to be the correct one and does away with debates of secondary importance only.'"[167] (Citation omitted.)

[166] See in this regard *Nabolisa v S* [2013] ZACC 17; 2013 (8) BCLR 964 (CC) at para 33.

[167] *ACDP* above n 56 at para 25.

[178] In *AllPay* this Court echoed this:

> "Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in [*ACDP*] as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not the same as asking whether compliance with the provision will lead to a different result."[168] (Emphasis added and footnotes omitted.)

[179] In my view, the steps taken by NUMSA and the individual claimants were effective when measured against the object of the LRA.[169] The factors that the Labour Appeal Court should have considered include, at the risk of repetition, that—

(a) all the affected employees were dismissed for participation in the same strike action and, importantly, were collectively dismissed following collective disciplinary proceedings handled by the shared HR services of the three companies;

(b) identical letters of dismissal were prepared by the shared HR services of the three companies and those who were re-employed, were re-employed without distinction as to their employer;

(c) both the shared HR services and the legal representative of the three companies took part in conciliation of "the dispute" and were in possession of all pleadings and documents previously delivered;

(d) "the dispute" that was referred also involved Intervalve and BHR;

[168] *AllPay* above n 56.

[169] See *ACDP* above n 56 at para 25.

(e) Intervalve and BHR were represented in the joinder application by the same attorney as Steinmüller, a further demonstration of their parity of interest in the underlying proceedings and of their readiness to participate in them;

(f) Intervalve and BHR have not expressed any interest in re-opening conciliation; and

(g) the three companies not only initiated proceedings which had the effect of frustrating the effective resolution of the dismissal dispute but also opposed every step taken by NUMSA towards that resolution.[170]

A consideration of these factors links the question of compliance to the purpose of section 191.

[180] The interpretation contended for by the three companies non-suits the individual claimants. This construction may have a chilling effect on the stated objects of the LRA which include the promotion of the effective resolution of labour disputes and the right of access to courts in section 34 of the Constitution. The restrictive and formalistic approach and the construction contended for by the three companies undermines this context. If the approach and construction are accepted, it would mean that there must, of necessity or inevitably, be another referral of the same

[170] By way of examples:

(a) After the issuance of the certificate of non-resolution, Steinmüller applied to the Labour Court for review and setting aside the certificate of non-resolution and sought certain consequential relief.

(b) After the statement of claim was lodged in the Labour Court, Steinmüller—

(i) did not file a statement of defence but an interlocutory application raising an *in limine* objection to the statement of claim;

(ii) filed notice to cause removal of certain complaints; and

(iii) threatened to bring an application, which it ultimately lodged, to set aside the statement of claim as an irregular step and declare that the statement lacks averments to sustain a cause of action, alternatively, that it was vague and embarrassing.

(c) Intervalve and BHR opposed the attempt to have the dispute against them conciliated.

(d) The three companies opposed the joinder application on a ground which, if legally tenable, would bring an end to the matter without the dismissal dispute being effectively adjudicated.

dispute which had already been conciliated. This construction would, to borrow the words used by the majority in *Driveline*, "render the dispute mechanism of the Act ineffective, unworkable and nugatory".[171] It would also allow for a situation whereby employees, in a complex working relationship created by the employers, are saddled with an undue burden of having to establish who their true employer is. Such a situation, in effect, rewards an employer who complicates the working relationship. It also has the effect of creating unfairness in labour relations and limiting access to courts. This is untenable and it is manifestly unfair.

[181] If the dispute has to be referred to conciliation in respect of additional employers who were aware of the referral and, in fact, had an opportunity to participate in the conciliation through the shared HR services and their legal representative, that would beg the questions of the nature of that dispute which the majority in *Driveline* describes as follows:

> "If it cannot be a dismissal dispute, what can it be said to be then?
>
> If the dispute is not a dismissal dispute, as it cannot be, under what section of the Act would it fall to be referred to conciliation if [the] submission is that it must still be referred to conciliation were to be accepted? . . . Another question that would arise would be: . . . what event gave rise to the dispute? The date as to when the dispute arose would be required for the purpose of determining whether such dispute is being referred to conciliation within such time as may be prescribed by the Act. . . .
>
> . . . . Another difficulty in the path of the referring party would be that, if the council or the CCMA discovered, as I think it inevitably would, that the dispute being referred for conciliation relates to the dismissal in respect of which it has already dealt with a dispute, it would hold itself to be *functus officio* and refuse to conciliate the dispute because it would have already issued the certificate referred to in section 191(5). The result of all this is that the approach we are urged by the respondents to adopt . . . is one which would render the dispute resolution mechanisms of the Act completely unworkable and ineffective. I can find no reason

[171] *Driveline* above n 17 at para 43.

> why we should adopt such an approach when there is an approach which we can adopt which would still leave the mechanisms of the Act operative and effective."[172]

If the construction contended for by the three companies and endorsed by the Labour Appeal Court, the main judgment and the concurring judgment, that NUMSA failed to refer timeously the dispute which has already been conciliated, were to be accepted as correct one would ask the same questions here.

[182] The majority in *Driveline* went on to say:

> "The mere allegation of another or an additional reason for dismissal or the mere allegation of another ground of alleged unfairness does not change one dismissal dispute into as many dismissal disputes as there are alleged reasons for the dismissal or into as many disputes as there are grounds of alleged unfairness. If this was not the case, an employer could frustrate the entire processing of such a dispute by the mere device of keeping on changing the alleged reasons for dismissal."[173]

I agree. As is the case here, in *Driveline* the real dispute between the parties had been conciliated. Although Intervalve and BHR were not served with the referral, they participated in the conciliation process through the shared HR services and their legal representative. It follows that section 191 was substantially complied with. A proper reading of *Driveline* supports a construction that favours a conclusion that there was substantial compliance, particularly because "the dispute" was conciliated.

[183] Had the Labour Appeal Court interpreted the LRA in a purposive manner and paid due consideration to the facts of this case and the constitutional rights at play, it would have concluded that there was substantial compliance with the relevant provisions of that Act.

[172] Id at paras 44-6.

[173] Id at para 48.

[184] Finally, to the extent it is necessary to consider the question whether Intervalve and BHR had a direct and substantial interest, I make only a few remarks to support the conclusion that these companies do have a direct and substantial interest.

Direct and substantial interest

[185] The Labour Appeal Court held that Intervalve and BHR have no direct and substantial interest in the dispute between NUMSA and its members on the one hand and Steinmüller on the other.[174] I do not agree. The director of BHR who deposed to the opposing affidavit in the Labour Court acknowledged that the three companies form part of the same group of companies and have the same shareholders and directors. Moreover, the documents which were furnished to NUMSA by the shared attorney in November 2010 disclosed the individual claimants who were employed by each one of the three companies.[175]

[186] The test for joinder at common law is governed by the following principles:

(a) There must be a legal interest in the proceedings and not merely a financial interest.[176]

(b) A party has a right to ask that someone be joined as a party "if such a person has a joint proprietary interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the Court's order"[177] and "to avoid a multiplicity of actions and . . . a waste of costs".[178]

[174] Labour Appeal Court judgment above n 3 at para 25.

[175] See above n 127.

[176] See *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK en Andere* 2002 (3) SA 653 (NC) at 663E-H.

[177] *Harding v Basson and Another* 1995 (4) SA 499 (C) at 501C.

[178] Id at 501I.

[187] This Court in *ITAC*[179] observed that whether it is in the interests of justice for a party to intervene, and the question of direct and substantial interest, is important though not necessarily determinative.[180] It identified the following considerations in the interests of justice enquiry—

(a) "the stage at which the application for joinder is made";

(b) "whether the party has furnished adequate explanation for the delay, if any, in seeking to be joined";

(c) "the nature of the relief or opposition the intervening party puts up"; and

(d) "[w]hether the intervention would materially prejudice the case of any of the other parties to the litigation".[181]

[188] The Labour Court was thus correct in its reasoning:

> "[T]he fact that an entity was the employer of a dismissed employee in proceedings in which that dismissal is challenged quite obviously constitutes a sufficient legal interest in the proceedings.
>
> The fact that BHR and Intervalve employed some of the dismissed employees and that they had a hand – through the shared HR Services – in their dismissal must be a sufficient basis to justify their joinder.
>
> [NUMSA] has gone further, however, to:
>
> [1.] explain how it came to pass that BHR and Intervalve were not initially joined, and in particular how the conduct of [the three companies] contributed to the lack of clarity as to the identity of each individual applicant's true employer; and to
>
> [2.] demonstrate that the underlying unfair dismissal claim constitutes a single dispute in which [the three companies] acted jointly, without distinction as to

[179] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*).

[180] Id at paras 11-2.

[181] Id at para 12.

> employee, to dismiss the individual applicants by way of a single 'process' and for the same reason."[182]

[189] So BHR and Intervalve do have a direct and substantial interest in the dispute. On the facts of this case, the Labour Appeal Court ought to have held that there was substantial compliance with section 191, dismissed the application by the three companies and upheld the Labour Court's decision regarding the joinder of BHR and Intervalve.

Conclusion

[190] I would have granted leave to appeal, upheld the appeal, set aside the order of the Labour Appeal Court and reinstated the order of the Labour Court.

FRONEMAN J (Madlanga J and Nkabinde J concurring):

[191] It is because I agree with most of the main and concurring judgments' exposition of the law, but concur in the judgment and outcome proposed by my sister Nkabinde J, that I feel compelled briefly to state my reasons for doing so. I do not read her judgment as challenging much of the main contours of the law as set out in those judgments.

[192] In the main judgment Cameron J distils and appears to accept four steps to evaluate whether there has been substantial compliance with a statutory requirement:

> "1. What is the purpose of the statute as a whole, as well as the specific provision at issue?
> 2. What steps did the party take to comply with the provision? Here, only the acts of the party seeking to comply are relevant. The conduct of the other party is not.
> 3. Did the steps taken achieve the purpose of the statute and of the specific

[182] Labour Court judgment above n 2 at paras 21-3.

provision, even if the precise requirements were not met?

4. Was there any practical prejudice because of non-compliance?"[183]

[193] The main judgment then deals with the general and specific purposes of section 191:

> "The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships.
>
> . . . The general purpose of section 191 provides the background against which the specific purpose of section 191(3) must be understood. The subsection ensures that the employer party to a dismissal or unfair labour practice dispute is informed of the referral. The obvious objective is to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may follow."[184]

[194] So far so good. But then it continues:

> "But is the purpose broadly to inform the human agents involved in a dispute that a referral to conciliation has taken place? Or is there a narrower purpose? Here the wording of section 191(3) offers a significant pointer. Service must be not on an associated, connected or implicated employer.
>
> . . .
>
> This emerges from the provision, which explicitly names the beneficiary of the service requirement: "the employer". This makes clear that a referral citing one employer does not embrace another, uncited, employer. The fact that the uncited employer has informal notice of the referral cannot make a difference. The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This

[183] At [45].

[184] At [46] to [47].

> demands the directness of an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it."[185]

[195] It is at this "narrowing" of the purpose that I must part way. It seems to me to tilt the scale too far towards compliance with form rather than substance.[186] I cannot accept that a mistaken reference to a party in a referral notice[187] must necessarily spell non-compliance. The concerns relating to the mistake can adequately be met by the fourth requirement in determining substantial compliance, namely whether there was "any practical prejudice because of non-compliance".

[196] Here, there was notice of the referral to the other employers, albeit informally and, perhaps, in the mistaken belief that they all fell under Steinmüller as the real employer. There was no obstacle to attaining the purpose of attempting conciliation, except for a deliberate decision to stay away as far as possible from conciliation by relying on, yes, a formal technicality. There was no "practical prejudice", only intentional obfuscation.

[197] Finding for NUMSA here will not threaten any fundamental principles of our law, be they those relating to the recognition of separate legal personality or to orderly dispute resolution. All it does is to discourage relying on formal technicalities in order to avoid dealing with the true merits of underlying labour disputes.

[185] At [48] and [53].

[186] See Nkabinde J's judgment at [177].

[187] Or other kinds of notices and legal documents. I would thus hesitate to endorse the Supreme Court of Appeal decisions referred to in paragraphs [49] to [51] of the main judgment in support of the outcome here.

For the Applicant:	P Kennedy SC and J Brickhill instructed by Cheadle Thompson & Haysom.
For the First and Second Respondents:	A J Freund SC and M Bishop instructed by Anton Bakker Inc.