IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS1162/14 & J2361-14

In the matter between:

SACCAWU	**First Applicant**
P DZIVHANI AND 12 OTHERS	**Second to Further Applicants**
and	
SOUTHERN SUN HOTEL INTERESTS (PTY) LTD	**Respondent**

Heard: **29 April 2016**

Delivered: **3 July 2016**

Summary: Section 189A of LRA - Consolidation of an application made in terms of section 189A (13) and a referral in terms of section 191(5)(b)(ii) of the LRA, as contemplated in section 189A (10).

JUDGMENT

WHITCHER J

[1] This case concerns an opposed interlocutory application under Labour Court Rule 23 for an order consolidating an application brought in terms of section 189A (13) of the LRA about the procedural fairness of the dismissal of the Second to Further Applicants from the Respondent and a referral about the substantive fairness of the dismissal referred in terms of section 191(5)(b)(ii) of the LRA, as contemplated in section 189 (10) of the LRA or an order directing that the dispute concerning the procedural fairness of the dismissals be dealt with by way of oral evidence at the trial of the dispute concerning the substantive fairness of the dismissals.

[2] Labour Court Rule 23 provides that consolidation of matters may take place if it is expedient and just to do so. In *Piner v SA Breweries Ltd*[1], it was held that consolidation must be equitable to all the parties and in this regard the Court must not only consider whether the balance of convenience favours the consolidation, but also be satisfied that the consolidation will not prejudice a party. The prejudice must be substantial. In determining whether the prejudice is substantial, one of the issues that must be considered is whether the relief sought in each of the separate actions that are sought to be consolidated, depends on the determination of substantially the same questions of law and fact or not.[2] Both parties agreed that this rule has to be considered in the context of section 189A of the LRA.

[3] Section 189A (13) of the LRA provides:

> "If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order–
>
> (a) compelling the employer to comply with the fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with the fair procedure;

[1] (2002) 23 *ILJ* 1446 (LC).

[2] Waglay J (as he then was) found that the questions of law and fact which were applicable in the one action, which was a claim of unfair discrimination in terms of the Equity Act, were not the same as the claim in the other action, which was a claim based on the LRA for unfair discrimination and the alternatives to the discrimination.

(c) directing the employer to reinstate an employee until it has complied with the fair procedure;

(d) make an award of compensation, if an order in terms of paragraphs (a)–(c) is not appropriate."

[4] Section 189A (18) provides:

> "The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)."[3]

[5] The purpose of section 189A (13) has been addressed in a number of judgments. In *RAWUSA v Schuurman Metal Pressing (Pty) Ltd*,[4] Murphy, AJ (as he then was) stated:

> "… the aim of section 189A (13) … is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process. The section is aimed at securing the process in the interests of a fair outcome."

[6] In *NUMSA & others v SA Five Engineering & others*,[5] Murphy, AJ noted that section 189A bestows on employees in these operational requirement dismissals a choice between industrial action and adjudication as the means to resolve the dispute. If adjudication is chosen then:

> "Referrals to the Labour Court are overtly restricted by subsection 189A (7)(b)(ii) and 189A(8)(b)(ii)(bb) to disputes "concerning whether there is a fair reason for the dismissal", in other words disputes concerning substantive fairness. Moreover, both provisions state expressly that the referral is to be made in terms of section 191(11)… Disputes about procedure in cases falling within the ambit of section 189A cannot be referred to the Labour Court by

[3] My underlining.

[4] [2005] 1 BLLR 78 (LC) at para 32.

[5] [2005] 1 BLLR 53 (LC).

statement of claim, but must be dealt with by means of motion proceedings as contemplated in section 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from determination of fairness where the employees have option for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action."[6]

"It must be noted, however, that this novel scheme is not of universal application. The section will only apply if the total number of employees employed by the employer exceeds 50, and the employer proposes dismissing a certain number of employees in accordance with the sliding scale contained in section 189A(1). It could arguably follow that dismissals for operational requirements not falling within the ambit of section 189A should continue to be processed as they were before the introduction of the amendments, meaning that both disputes about procedural and substantive fairness may continue to be referred to the Labour Court in terms of section 191(5)(b)(ii) read with section 191(11). However, a compelling argument can equally be made that the general language used in section 189A(18) operates to restrict all procedural disputes to application proceedings and thus excludes the referral of disputes about the procedural fairness to the Labour Court for trial by means of a statement of claim…"[7]

[7] In *Banks & another v Coca-Cola SA (A Division of Coca-Cola Africa (Pty) Ltd*[8] Van Niekerk, AJ (as he then was) stated the following:

"In regard to the nature of the relief sought, it would appear that section 189A contemplates separate procedures for allegations of substantive and procedural unfairness respectively. When a dismissal is alleged to be substantively unfair, an employee may choose to further his or her interests by resorting to strike action, alternatively, by referring a dispute to the CCMA and in the absence of successful conciliation, to this Court for adjudication in

[6] At para [7].
[7] At para [8].

[8] [2007] 10 BLLR 929 (LC).

terms of section 189A(19). The construction of subsection (19) contemplates that any dispute about whether a dismissal was effected on the grounds of operational requirements, whether any dismissal effected on those grounds was operationally justifiable, whether there was a proper consideration of alternatives to dismissal and whether selection criteria were fair and objective, is a dispute about the substantive fairness of the dismissal and therefore not amenable to adjudication in proceedings such as the present. Disputes about procedural unfairness on the other hand are to be dealt with separately and by way of application to this Court under section 189A(13)."[9]

[8] Van Niekerk did however acknowledge the difficulties brought on by the separation of the processes:

> "The bifurcation in procedure established by section 189A is more easily established in legislation than it is applied in practice. There are a number of reasons why disputes about dismissals for reasons based on employer's operational requirements do not always lend themselves to the convenient compartmentalisation contemplated by the LRA, chief amongst them being the extent to which, in the real world of work, substantive and procedural issues are intertwined. This difficulty has previously been acknowledged by this Court – see *NUMSA & others v SA Five Engineering & others* [2005] 1 BLLR 53 (LC) and *Watts v Fidelity Corporate Services (Pty) Ltd* [2007] 6 BLLR 579 (LC), and by the Labour Appeal Court in *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC)."[10]

[9] The purpose of section 189A was summed up by van Niekerk J in *NUMSA v General Motors of SA (Pty) Ltd* matter as follows:

> "This subsection (section 189A(13)) in effect requires this court to determine disputes about the procedural fairness of larger scale retrenchments within a defined time-frame in motion proceedings, at least where there is no dispute of fact. The court has previously observed that to the extent that this bifurcation may have been motivated by the notion that procedural defects lent themselves to quick and assessable legal proceedings, in practice, a separation of substance and process is often less easily achieved… Murphy

[9] At para [9].
[10] At para [11].

AJ (as he then was) summarised the broad policy considerations underlying section 189A(13) at para 9:

> 'According to the explanatory memorandum accompanying the 2002 amendments to the LRA, since section 189A was aimed at enhancing the effectiveness of consultations in large scale retrenchments. It allows for a facilitator to be appointed to put back on track at the earliest possible moment a retrenchment process that falls off the rails procedurally. The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible… so, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals.'

The role of this court is therefore to exercise a pro-active and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals."[11]

[10] In their application, the Applicants submitted that it would be expedient and just to consolidate the two cases because the substantive fairness of the dismissals is intricately linked to the procedural fairness of the dismissals. Should the procedural fairness application be dealt with through oral evidence at the hearing of the trial on substantive fairness, the court will be in a better position to assess the averments relating to both the substantive and procedural unfairness of the dismissals.

[11] In opposition, the Respondent submitted that the procedure sought would undermine the purpose and structure of section 189A and is expressly disallowed by section 189A(18) of the LRA. It would also work to the prejudice of the Respondent, depriving it of procedural rights afforded by the LRA and of

[11] *NUMSA v General Motors of SA (Pty) Limited* (2009) 30 ILJ 1861 (LC) at paras 34 and 35; [2009] 9 BLLR 914 (LC)

their defence that the section 189(13) application lodged in this case was inappropriate and contrary to the provisions of the LRA.[12]

[12] The Respondent submitted that the Legislature clearly intended that employees in a section 189A retrenchment challenge the procedural fairness of their dismissals at the time the procedural defect arises (i.e. expeditiously) and before dismissals are effected. They are thus to be dealt with separately. If the legislature had intended for these disputes to be dealt with in the manner proposed by the Applicants, it would not have expressly, in section 189A(18), precluded disputes about procedural unfairness from being dealt with simultaneously with disputes about substantive unfairness during trial proceedings. In any event, they contend, the process followed by the Respondent in dismissing the workers is not linked to the reason for the dismissals and any other substantive issue.

[13] The Respondent also disputed that a proper evaluation of the alleged procedural unfairness requires oral evidence and submitted that the matter can easily be dealt with on the papers, together with the evidence contained in the affidavits and the annexures attached thereto.

[14] The Respondent's argument that the consolidation or some sort of co-hearing of claims cannot be countenanced by this court because it is expressly disallowed by section 189A (18) of the LRA is borne out by a plain reading of that section.

[15] To this the Applicants argued in their heads of argument that the Labour Court is only prevented from adjudicating the procedural fairness of a dismissal in the substantive unfairness dispute (i.e. a dispute referred to the Labour Court in terms of section 191 (5)(b)(ii) of the LRA), where the applicants did not also initially lodge a dispute about the procedural fairness of their dismissal in terms of section 189A(13). The Applicants argued that they seek the consolidation of two separate judicial processes. Such a consolidation does not mean that their procedural unfairness claims are being raised in the section 191 (5)(b)(ii)

[12] They have in mind the timing of the application.

referral. Their procedural issues are raised in the section 189A (13) application at the same time as the substantive unfairness claims are raised by virtue of the section 191 (5)(b)(ii) referral.

[16] They argued that a consolidation or co-hearing does not seek to transfer the procedural unfairness inquiry (i.e. the section 189A (13) application) into the substantive unfairness inquiry (i.e. the section 191 (5)(b)(ii) referral), but seeks, for convenience sake, to have the two inquiries, which are linked to the same factual matrix, to be heard by the same judge at the same time.

[17] However, it became clear during argument that what the Applicants seek is what they initially argued for in their application (pleading), which is really to inter-link the substantive and procedural fairness of the dismissals and to have the right to cross examine on both matters for this purpose. I will, however, address the amended argument as well.

[18] With that as a backdrop, I set out as succinctly as possible what I understand section 189A (18) of the LRA to mean as a matter of plain English and in the context of the structure of the statute. This is that, in retrenchments that fall within the ambit of section 189A, inquiries into the procedural and substantive fairness of a dismissal are to be dealt with separately. Trial procedures, which are to be used to determine the substantive fairness of a section 189A dismissal, are not to be burdened with claims about the procedural fairness of the same dismissal.

[19] Read together with section 189A(13), it would appear that, in permitting employees to elect to seek the early, expedited and effective intervention of the Labour Court in procedural obligations that attach to section 189A dismissals, the legislature has seen fit to exclude employees from coupling these procedural claims with claims of substantive unfairness. The LRA provides for the adjudication of procedural claims by way of motion proceedings and claims of substantive unfairness by way of a separate trial.

[20] To my mind, consolidating unfair dismissal claims raised separately in respect of procedural and substantive unfairness, on the face of it, goes against the grain of section 189A as a whole and against the plain wording of section

189A(18) in particular. Try as I might, I cannot read section 189A(18) as permitting the distinction the Applicants wish me to make between the (impermissible) raising of procedural issues "in" a section 191 (5)(b)(ii) referral and the (permissible) raising of procedural issues if they occur "at the same time" as the section 191 (5)(b)(ii) referral. The notion that a procedural claim aired "at the same time" as a claim brought under a provision of the LRA set aside for adjudicating substantive issues is not also aired "in" that substantive trial is logically and semantically unsupportable.

[21] While it is true that drawing a line between substantive and procedural elements of dismissal may in some cases be difficult to draw, if a party has allegedly, as in this case, identified certain faults in the dismissal as being procedural in nature in moving a section 189A (13) application, these claims are to be dealt with in application proceedings. Naturally if a genuine material dispute of fact arises on the papers, oral evidence on the limited procedural issue will need to be adduced. This seems to have been the approach of Murphy in *SA Five Engineering.* If a party sincerely believes that an issue which, on its surface, seems to be procedural in nature but has significant substantive fairness ramifications, then it should raise this issue in its statement of claim in the section 191 (5)(b)(ii) referral and seek to convince the trial judge that it belongs there. It is a different thing altogether to raise a procedural claim in a section 189A (13) claim and then seek to transport it into the trial dealing with substantive matters.

[22] It is also true that one class of employees, those able to prosecute an operational requirements claim under section 189 of the LRA, are entitled to a trial in which both the substantive and procedural fairness of their dismissal may be adjudicated at the same time. They will however largely be deprived of the attention of the Labour Court in supervising the procedural aspects of the consultation process before their dismissals occur. Employees whose dismissal looms in circumstances triggering section 189A of the LRA are, inversely, deprived of the ability to have their procedural and substantive claims considered by the Labour Court at the same time. However, they enjoy the compensatory facility that the Labour Court may effectively interdict procedural missteps by their employer before a dismissal occurs. In bemoaning the fact

that the structure the LRA confines the adjudication of procedural claims in section 189A disputes to motion proceedings, sight cannot be lost of the fact that this same structural arrangement in the LRA provides affected employees with the unique attention of the Labour Court in supervising their employer's conduct and thus enhancing the effectiveness of procedural consultations before dismissal.

[23] Perhaps recognising that a straightforward reading of section 189A (18) of the LRA does not support the distinction between procedural claims raised in as opposed to claims raised at the same time as substantive unfairness in a section 191 (5)(b)(ii) referral, the Applicant urges me to stretch the plain meaning of section 189A (18).

[24] For me to strain the meaning of section 189A(18) so that it permits procedural unfairness claims to be considered on referral as long as these are raised, (according to the Applicants' interpretation), at the same time as claims concerning substantive fairness, I would need to be convinced that significant and unwarranted intrusions occur upon the constitutional rights of a party when reading section 189A(18) in the standard way.

[25] I am not persuaded that damaging inroads are made into the individual Applicants' rights under section 34 of the Constitution should I interpret section 189A (18) in accordance with its plain meaning. A party with procedural complaints still has access to a fair public hearing of their complaint. Section 189A (13) read together with section 189A(18) simply provides that this must be done on motion and not a referral.

[26] It is not apparent to me either that the constitutional right to fair labour practices is meaningfully intruded upon by a provision of the LRA directing that claims of procedural unfairness be adjudicated separately from claims of substantive unfairness. The LRA provides remedies for procedural unfairness in a section 189A dispute, and the particular remedy the Applicants seek in this case,

compensation, may be attained utilising the application mechanism the LRA has set aside in cases of procedural unfairness[13].

[27] I add that this court is being asked to expand upon the plain meaning of a section of no ordinary statute but one whose provisions are first negotiated in a tri-partite structure, Nedlac, in which organised labour, business and government all have input before the law is promulgated. If I am to impose a reading on section 189A(18) that differs from its most obvious meaning, it is not only parliament who did not fully secure the Applicants' constitutional rights in the words they chose, but also the parties to Nedlac too.

[28] The Applicant is correct to point out that the LRA should also be interpreted in line with its purpose. In this regard I take heed of the values of economic development and the effective resolution of disputes. If the legislature (acting on the recommendations of Nedlac) has providing a method of adjudicating claims of procedural unfairness in mass retrenchments that is relatively quick and easy, but at the cost of separating these more easily determined claims from the determination of the harder substantive issues, tampering with this arrangement is not to be lightly done. I can quite readily see how the present separation of suits enhances the speedy resolution of labour disputes and thus also, quite possibly, aids economic development.

[29] To the extent that the court has permitted consolidations of this nature previously, I respectfully differ with those approaches. I do so having had the benefit of the incisive arguments of both counsel before me who have each provided valuable insights into this specific jurisdictional question and thus placed me in a position, I hope, to make an informed finding.

[30] I thus find that consolidation or any other co-hearing of the procedural issues raised in the Applicants' section 189A(13) together with the Applicants' section 191 (5)(b)(ii) referral is impermissible in terms of the LRA.

[31] While consolidation of connected claims is provided for in the Labour Court rules, where a statute prevents consolidation, it is unnecessary to even decide

[13] Section 189A(13)(d) ensures that an employee's procedural fairness claim could be adjudicated if paragraphs (a) to (c), which provided a form of supervisory or interdictory relief, were inappropriate.

whether the conditions under the rules for consolidation apply or not. This court would lack the jurisdiction to order consolidation even if it were to be convenient to do so and accord no meaningful prejudice to the respondent.

[32] I do not deem it appropriate to award costs considering the subject matter of this case.

Order

[33] The application is dismissed with no order as to costs.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: A Roskam from Haffegee Roskam Savage Attorneys
For the Respondent: Adv A Redding, SC instructed by Edward Nathan Sonnenberg Inc