IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JS 792/04

In the matter between:

CATERING PLEASURE AND FOODS WORKERS UNION Applicant

and

NATIONAL BRANDS LIMITED Respondent

JUDGMENT

REVELAS AJ

[1] The applicant (or "the Union") seeks condonation for the late filing of its statement of case which it filed on 10 February 2005. The applicant had referred a dispute about the alleged unfair dismissal of 55 of its members by the respondent, for alleged operational reasons. The application concerns the provisions of section 189A of the Labour Relations Act, 66 of 1995, as amended ("the Act"). In its founding papers the union stated that it filed its statement of claim 284 days out of time. The union also maintains that it is seeking condonation for not filing its statement of claim before the sixty days contemplated in section 189A(3) of the Act had elapsed.

[2] This latter statement I assume is an attempt to deal with the two special pleas raised by the respondent in its response to the applicant's statement of claim. These pleas are essentially based on

the argument that because the union's attack on the fairness of the dismissal is procedural in nature, and a facilitation process had been followed in respect thereof, the Labour Court had no jurisdiction to determine the dispute. As far as substantive fairness is concerned, that is, the existence of a fair reason for the dismissal, it was argued that because that aspect was not conciliated, this court also lacked jurisdiction to adjudicate the matter, on that ground.

[3] The factual background that preceded the application before me is briefly the following:

[4] On 3 March 2004, the respondent had notified the employees in its Snack Division (at its Willards plant in Rosslyn) that it was contemplating retrenchment. The respondent maintains that this division was operated as an independent profit centre within the respondent. The respondent was then obliged to consult with two unions. The applicant union and a union bearing the acronym NUFBWSAW. That union is not a party to this litigation.

[5] A facilitation process was then embarked upon by the parties in terms of section 189A(3) of the Act. Five facilitation meetings were conducted by a commissioner, Ms Difeto, under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). A further meeting was held by the parties on their own (and on the advice of the commissioner). The question of disclosure was burning issue for the union. On 13 April 2004 the

union requested the respondent to furnish it with certain financial documents and information. The respondent contended in a letter to the two unions (dated 23 April 2004) that it had complied with the Act and was not obliged to give any further information.

[6] The respondent has pleaded that it did not make full disclosure, but such disclosure as it did make was indeed sufficient. The respondent's case was that the union was only entitled to disclosure of financial information insofar as its Snacks Division was concerned. In her report of outcome, (dated 28 July 2004), the commissioner noted that the parties could not agree "the reason for retrenchment". The union was still not satisfied that there were valid economic reasons for the retrenchment and it wanted more financial information. By this stage the dismissal notices (dated 3 May 2004) were already issued.

[7] In its statement of case the union premised its claim of unfairness on the respondent's alleged failure to make sufficient disclosure of its finances. The union also seeks retrospective reinstatement for its fifty five members who had been retrenched by the respondent. The respondent's case on the disclosure dispute is that it had agreed to grant the union's financial advisors access to inspect the respondent's books of account relating to its Snack Division. It pointed out that the facilitating commissioner had offered to arbitrate the disclosure dispute in an expedited arbitration, but that the union declined to avail itself of such an opportunity.

The two special pleas

[8] The respondent's first special plea raised was that the applicant had failed to refer a dispute about an unfair dismissal to the CCMA for conciliation, and instead referred a dispute directly to the Labour Court. In the absence of a conciliation process, the Labour Court lacks jurisdiction to determine the dispute.

[9] In its second plea the respondent makes the point that in terms of section 189A(18) of the Act, the Labour Court does not have jurisdiction to adjudicate a dispute about the procedural unfairness of a dismissal based on the employers operational requirements in any dispute referred to it in terms of section 191(5)B)(ii) of the Act. The respondent argued that since the dispute is about the procedural fairness of the retrenchment (i.e. non-disclosure of information and documents in the context of section 189A(3) of the Act) the dispute falls outside the jurisdiction of the Labour Court. The respondent contended further that, in any event, a dispute about the disclosure of information, should have been dealt with by bringing an urgent application under section 189A(13) of the Act within 30 days of the dismissal notice being issued.

[10] The respondent argues that the dispute referred by the applicant to the Labour Court does not constitute a section 189A(13) application.

[11] The union challenged both the procedural and the substantive

fairness of the retrenchment in trial action proceedings, without these disputes being conciliated first. The union is of the view that the facilitation process constituted a substitute for - what I shall term ordinary conciliation - and was conducted in respect of both substantive and procedural challenges. The dispute in respect of both challenges was referred to the Labour Court.

[12] The respondent seeks to dispose of both challenges by way of the two special pleas raised in its statement of defence. In short, the first plea deals with whether or not this Court can determine the substantive fairness of the dismissals, and the second special plea deals with whether or not this Court can deal with the procedural fairness of the dismissals.

[13] An analysis of section 189A of the Act shows clearly that in order to achieve the expeditious resolution of retrenchment disputes, two separate processes were envisaged. Procedural disputes are to be referred by way of motion (application) proceedings and substantive disputes by way of action. In the case of individual retrenchments the distinction may sometimes be unclear as the two may be inextricably connected. Where an employer has failed to make proper disclosure, it may have a crucial bearing on the substantive fairness of the retrenchment. The employer does after all have an onus to discharge, namely that the dismissal was for a fair reason. The union obviously had the aforesaid considerations in mind when it decided to conflate procedural and substantive disputes in action proceedings without having the dispute about

substantive fairness being conciliated first. The union is not entitled to litigate in this manner.

[14] Section 189A(13) provides that:

> **"(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –**
>
> **(a) compelling the employer to comply with a fair procedure;**
>
> **(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;**
>
> **(c) directing the employer to reinstate an employee until it has complied with a fair procedure;**
>
> **(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."**

[15] It is clear from this section that disputes about procedural unfairness in retrenchment matters should be kept out of the trial court if possible. This section can be invoked as a mechanism to avoid retrenchments or at least to vouchsafe that a fair procedure is followed in effecting them. It is evident that the process is designed to deal only with procedural matters.

[16] Section 189A(17)(a) provides that any application brought in terms of the aforesaid section must be brought not less than 30 days after the employer has given notice to terminate the employee's services or the dismissal date (in a case where no notice has been given). Condonation can be granted on good cause shown. This provisions

further strengthens the view that procedural issues are not to processed by way of action.

[17] The separation of processes is also envisaged in sections 189A(18) and (19) of the Act which provide as follows:

> **"(18) The Labour Court <u>may not adjudicate</u> 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 195(5)(b)(ii).**
>
> **(19) In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour court must find that the employee's dismissal is <u>for a fair reason if</u> ….. ."** (My emphasis)

The aforesaid sections refer to section 191(5)(b)(ii) of the Act, which pertains to labour disputes which must be finally resolved by means of adjudication. It also pertains to substantive fairness ("for a fair reason"). It is plain that the substantive fairness of a retrenchment must be determined in a trial.

[19] The intended separation of the two processes is clear. Whether it is practical to litigate this way is not clear. However, the problems that may very well arise from the introduction of section 189A into the Act, are not for me to debate, but I must mention the

possibility. In individual retrenchment cases such a separation can create problems.

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

> **"(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged the reason for dismissal is –**
>
> **(ii) based on the employer's operational requirements."**

(Section 191(5)(b)(ii) of the Act).

[21] The certificate, obtained only if a dispute has been referred to the bargaining council or CCMA for ordinary conciliation, which process had failed (or the expiry of 30 days) is a jurisdictional fact to be proved before the matter may be referred to the Labour Court under section 189A of the Act. It is a necessary prerequisite for the exercise of jurisdiction by the Labour Court in unfair dismissal proceedings. That was the authoritative view held by the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd and Another 2000 21 ILJ 142 (LAC)* and *Fidelity Guards Holdings*

(Pty) Ltd v Epstein NO and others (2000) 21 ILJ 2382 (LAC). This view was also endorsed by Murphy AJ in *NUMSA v SA Five Engineering (2005) 1 BLLR 53 (LC)* who discussed the problem fully and who further concluded that disputes about alleged unfair procedure must be dealt with by way of strike action or motion proceedings (urgent application) as contemplated by section 189A(13) of the Act.

[22] The union did not bring an urgent application in terms of the aforementioned sub-section and also declined to have the dispute regarding the alleged non-disclosure determined in terms of section 189A(13) of the Act. The applicant did not procure a certificate to enable the Labour Court to exercise jurisdiction over the fairness of the dismissal. The Labour Court cannot condone the failure to do so.

[23] The applicants should have launched application proceedings in terms of section 189A(13) within the time periods as set out if they were still dissatisfied about the procedure and the sufficiency of the disclosure made. With regards to the latter, an interdict could have been sought to compel better disclosure. Here I must pause to mention that this issue seems to have been rather fully tackled by the facilitator and the parties at the various meetings. The union has not put any proper grounds forward to demonstrate why there was insufficient disclosure. Section 16 of the Act could also have been invoked. It was not, despite an invitation to do so.

[24] The two special pleas must be upheld for the considerations set out above.

Condonation

[25] The union's condonation application must fail. The degree of lateness (284 days) is excessive and the prejudice to be suffered by the respondent to defend the fairness of retrenchments effected so long ago, would be severe. The explanation for the delay is that the union's attorneys were lax in June, July and August 2004. On 8 September 2004, new attorneys were appointed who only obtained a case number in October 2004. The referral took place in February 2002.

[26] There is no proper reason why the referral was out of time, other than the inaction of the union's attorneys which inaction does not amount to an acceptable explanation. The prospects of success are also poor in view of the authorities which dictate that a lack of a certificate of outcome ousts the Labour Court's jurisdiction on substantive issues. The procedural aspects seemed to have been explored fully and Judge Murphy has authoritatively decided that point.

[27] In the circumstances, I make the following order:

1. The two special pleas raised by the respondent are upheld.

2. The application for condonation of the applicant's late referral of the matter is dismissed with costs.

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E Revelas
Acting Judge of the Labour Court

Date of hearing: 13 September 2006

Date of Judgment: 10 January 2007

On behalf of the Applicant:

Doe Tsatsi Attorneys

On behalf of the Respondent:

Adv. FA Boda, instructed by Deneys Reitz Attorneys