REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 1114/07

In the matter between:

ANDREW BANKS First Applicant

DAVID BROWN Second Applicant

and

COCA-COLA SOUTH AFRICA
A DIVISION OF COCA-COLA AFRICA (PTY) LTD Respondent

JUDGMENT

A. VAN NIEKERK AJ

Introduction

1. This is an application in terms of section 189A(13) of the Labour Relations Act, brought as a matter of urgency on 28 May 2007. The application was postponed to 14 June 2007 for argument. By consent between the parties the Applicants' employment, due to terminate on 31 May 2007, was effectively extended to 30 June 2007. On 29 June 2007, I made the following Order:

   1 The application in terms of section 189A(13) is referred to the trial roll in terms of Rule 7(7)(b) for the hearing of oral evidence in relation to the disputes of fact appearing on the papers.

2 The application in terms of section 189A(13) and the referral to oral evidence in terms of Rule 7(7)(b) is postponed sine die.

3 The Registrar is directed to enrol the application in terms of section 189A(13) for hearing simultaneously with any action that the Applicants may institute in relation to the substantive fairness of their termination of employment. Should the Applicants not institute action in this Court in relation to the substantive fairness of their dismissal, they may enroll the application in terms of section 189A(13) on the trial roll as contemplated by paragraph 1 above.

4 The costs of this application are reserved.

These are the reasons for the Order.

2. The Applicants are senior executives, employed by the Respondent. The Respondent has given them notice of termination of employment to take effect on 30 June 2007, by reason of its operational requirements. The papers in this matter, including the heads of argument, exceed 1200 pages. These brief reasons have necessarily been prepared to accommodate the obvious need for an expeditious resolution of this matter and I accordingly reserve the right to supplement them should this become necessary.

3. The relief sought by the Applicants is wide-ranging, but in essence, they seek an order interdicting the Respondent from dismissing them, and directing the Respondent to commence afresh the consultation process required by section 189 of the

LRA.

4. The Applicants rely primarily for the relief they seek on section 189A. They also rely on the Labour Court's powers to grant interdicts in terms of section 158(1)(a), read with sections 5 and 16 of the LRA, together with sections 41(1) and 79 of the Basic Conditions of Employment Act. In addition, they rely on their constitutional right to fair labour practices. The references to section 16 of the LRA relates to a dispute between the parties about the disclosure of information. The reference to section 5 of the LRA and sections 41 and 79 of the BCEA relate to a dispute about the quantum of the severance package offered by the Respondent. The Respondent has offered employees generally a 'voluntary severance package' equivalent to 2 months' remuneration per year of service. The offer is subject to a 'full and final' settlement clause - those employees who accept the offer are required to waive any rights they would otherwise have against the Respondent. Those employees who do not accept the voluntary package on offer and who are subsequently retrenched are to receive a severance package calculated according to the statutory minimum payment. The Applicants argue that this is an infringement of section 5 of the LRA. They also avers that the severance package on offer is less favourable than those granted previously by the Respondent in similar circumstances (they submit that an amount equivalent to 3 months' remuneration per year of service was paid) and claim relief in this regard.

Urgency

5. Prior to considering the claims made by the Applicants and the nature and extent of the Court's powers under section 189A(13), I deal with the question of urgency. The Respondent contends that

the urgent relief sought by the Applicants is not appropriate in the circumstances on this case, that the claim for compensation if the dismissal is found to be procedurally unfair is a “money claim” and as such, can never be brought by way of urgency. In respect of the remainder of the claims, which the Respondent concedes could notionally be brought by way of urgency, it submits that in respect of each claim, any urgency that exists is entirely self-created.

6. Any application brought in terms of section 189A(13) must be brought “*not later than 30 days after the employer has given notice to terminate the employee’s services or, if notice is not given, the date on which the employees are dismissed*.” I address below the interpretation of this provision, but for present purposes note only that is regrettable that since the enactment of section 189A in 2002, no Rules have been made by the Rules Board to regulate the process by which proceedings in terms of that section should be brought before this Court. It would seem, though, that the application contemplated by section 189A(13) is an application *sui generis* and that in most instances, certainly where the remedies contemplated by paragraphs (a) to (c) are contemplated, the time periods contemplated by the Rules of Court in relation to applications would inevitably not apply. There is little point in affording an applicant the remedy of an interdict or an order directing an employer to reinstate an employee until it complies with the fair procedure, unless the application is accorded a degree of urgency and dealt with on that basis. Where a claim under section 189A(13) is limited to compensation, considerations of urgency will not in the normal course be present, and there is no reason why in that instance the provisions of Rule 7 should not apply. Given the nature of the relief claims by the Applicants, I intend to deal with this matter as an urgent

application, and condone any departures from the time-periods fixed by the Rules in relation to filing of affidavits and setting down of application for hearing.

7. Section 189A(13) affords a remedy to a potential litigant only in respect of allegations of procedural unfairness. To the extent that the Applicants have raised in these proceedings the alleged failure by the Respondent to apply fair selection criteria, to consider properly alternatives to retrenchment, to justify operationally the Applicants' dismissal on rational grounds, and the fairness of the severance package that they have been offered, these are all matters of substantive fairness that are not amenable to adjudication as issues of procedural fairness. For this reason, I do not intend to consider any of the submissions made by the Applicants regarding these matters. The sole issue before the Court is whether the Respondent has established, as it is required to do in terms of section 192 of the Act, whether the procedure that preceded the issuing of letters of termination of employment to the Applicants was fair.

Disputes about procedural fairness

8. Section 189A(13) reads as follows:

> "*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;*

(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) to (c) is not appropriate.

Subject to subsection (13), this Court is entitled to make any appropriate order referred to in section 158(1)(a) (see section 189A(14)). Any award of compensation made in terms of paragraph (d) must comply with the limits set by section 194 of the Act (see section 189A(15)).

9. 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 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).

10. This construction of section 189A has previously been applied by this Court in *NUMSA & others v SA Five Engineering & others* [2005] 1 BLLR 53 (LC), where Murphy AJ (as he then was) referred to the objectives that section 189A sought to accomplish when it was introduced by the Labour Relations Amendment Act, 12 of 2002. As the Court noted in that case:

> *"Suffice it now to say that the intention of section 189(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employers have opted 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." (at 57 I – J)*

11. 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).

12. In the *Watts* decision, the Court referred specifically to the artificiality of the distinction between substantive and procedural fairness in the case of senior employees, and suggested that the

drafters of section 189A had mass retrenchments in mind when introducing this section into the LRA in 2002. The Court said the following:

"*[9] When individuals are retrenched, particularly senior employees, the distinction between the procedural and substantive aspects of a retrenchment is less clear, than would be the case in a collective dismissal of employees who are represented by a trade union. This is so because more often than not, senior employees have more specific knowledge of the advent of the restructuring and the reasons for it. Any retrenchment discussions in respect thereof are often conducted on a more personal level. The nature of, and solution to redundancy, in the case of an individual employee is often more complex than a mass retrenchment. Individuals are unable to exercise the strike option provided for in section 189A. The latter section is also applicable to employers who employ over a certain number of employees. These factors in themselves render the nature of the procedure too difficult to monitor, because it is often tied up with substantive issues.*

[10] Quite plainly, the drafters of section 189A had mass retrenchments in mind when introducing it into the Act. Even though the consequences of a mass retrenchment might be more serious and often more severe, the retrenchment process which precedes it, is in most cases more simple than the retrenchment of individuals, because of the trade union involvement. Consultations have a more structured character. The

> *personal interaction with the retrenchees is greatly diminished by union representation. The participants at the consultation table are more in number and do not have a direct personal interest in the outcome. The main reason behind a collective retrenchment is usually to cut the wage bill. That is an issue which is more likely to remain separate from the consultative process, when measuring fairness. The reasons for the redundancy of an individual are mostly more complex and the outcome of the consultation process depends very much on the nature of the discussions.*" [at 58 C – H)

13. While the wording of section 189A may bear the hallmarks of a collective engagement, the section itself draws no distinction between the individual and the collective (except, of course, for the numerical triggers established by section 189A(1) which ought to ensure that in most instances, a significant number of employees is likely to be affected by the employer's actions) nor does the section distinguish between senior managerial employees and those employees who would more typically be represented by trade unions in the statutory consultation or facilitation process.

14. An additional difficulty raised by the construction of section 189A is the requirement that factual disputes regarding procedural fairness must ordinarily be resolved on the papers. To apply the normal rules as they are expressed in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) may prejudice an applicant, since it may not be possible for the Court to grant final orders when material disputes of fact are disclosed on the papers, especially when these are raised by an unscrupulous

employer anxious to avoid the Court's intervention in a consultation process. To refer material disputes of fact to oral evidence in each such instance defeats the purpose of expeditious intervention by this Court in a consultation process that is underway, and compromises the remedies provided by section 189A(13)(a) to (c). However, in the absence of an amendment to the Rules of this Court to establish appropriate procedures specific to section 189A(13), material disputes of fact arising during the course of a section 189A(13) application fall to be dealt with in the customary way.

The remedies contemplated by section 189A (13)

15. It is well established that the aim of the consultation process established by section 189 is to avoid dismissal, or at least to effect a reduction in the number of dismissals and to mitigate the effect of dismissal on affected employees. The nature of the process is equally well established- the parties are required to engage in a problem solving or joint consensus-seeking exercise (see section 189(2)).

16. The four remedies established by subsection (13) afford the Court a wide discretion. The first two remedies (a compliance order, and an interdict against dismissal) clearly contemplate intervention by the Court before a dismissal takes effect, the latter (reinstatement until there is compliance with a fair procedure, monetary compensation) contemplate intervention after an employee has been dismissed. This provision is to be read with the time limits established by subsection (17). These contemplate intervention by the Court at a time that is appropriate given the circumstances of the case, and having regard to the particular remedy that is sought.

17. The requirement in subsection (17) that an application be brought *"not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed",* read with subsection (13), places what might be termed an "outside limit" of 30 days post-dismissal or notice of dismissal within which the application must be brought. However, the wording of the subsection and the structure of section 189A generally envisages that the Court may be asked to intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, for example, when an employer purports to dismiss employees without commencing any consultation with them or their representatives.

18. In short, the conclusion to be drawn from the wording of section 189A is that this Court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the Court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged, and the like. If it appears to the Court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by section 189A(13)(a), (b) and (c), then compensation as provided by paragraph (d) is the more apposite remedy.

19. In *Insurance and Banking Staff Association & another v Old Mutual Services & Technology Administration & another* (2006) 27 *ILJ* 1026 (LC), Pillay J came to a similar conclusion. In that case, the Court noted that although the timing of a section 189A(13) application is not connected to the date when the procedural unfairness occurred, it is a relevant consideration as to whether the application should succeed. More specifically, the Court held that if there is an undue delay between the occurrence of the procedural flaw and the launching of the application, the remedies established by subsections (13)(a) to (c) would be inappropriate (at 1031 G – H). Similarly, these remedies are not appropriate once the retrenchment process is completed (at 1031 H – I).

20. On the basis of the approach adopted in the *Old Mutual* matter, and for reasons that are recorded below, I am not inclined to exercise my discretion in favour of the Applicants in so far as they seek the remedies established by section 189A(13)(a) to (c). The Respondent avers that from early May 2007, it has been implementing the new structures that gave rise to these proceedings, and that it would be extremely disruptive to reverse matters at this stage simply to accommodate the Applicants. The Applicants do not deny this – they simply lay the blame for this consequence at the door of the Respondent. I hasten to add that this conclusion should not be construed as an endorsement of the procedure adopted by the Respondent prior to dismissing the Applicants – I simply note that had this application been brought at the end of February or in early March 2007, the considerations relevant to the exercise of the discretion conferred by section 189A(13) may well have been different.

The facts

21. The Respondent is part of a multi-national corporation, and a division of a business unit referred to as Coca-Cola Africa. The First Applicant, Andrew Banks, renders his services to what is referred to as “the Group”, although he is employed by the Respondent, as is the Second Applicant, David Brown.

22. What follows is a précis of the facts averred by the Applicants, without any intention to do any injustice to the comprehensive review of events from November 2006 to March 2007 recorded in their affidavits. They allege that during the latter part of October and early November 2006, they were confronted with rumours that the holding company based in Atlanta USA had decided to implement a restructuring of the business that would affect business units in the USA and elsewhere. These rumours were raised during divisional leadership team (DLT) meetings in November 2006 at which assurances were given by the then CEO, Mr David Lyons, to the effect that the restructuring was relevant to the rest of the world but that South African operations would not be affected by a few “minor tweaks”. The same issues were raised at a “town hall meeting” (a general meeting of employees held every quarter) and a similar assurance was given by Mr Lyons.

23. During January 2007, meetings were held between the CEO and senior employees at which certain of them were advised that their positions were to be “impacted” consequent on a restructuring operation. On 23 January 2007, at a DLT meeting attended by the Second Applicant and others, a Mr Bill Egbe was introduced as the new President. Mr Egbe announced that there would be a restructuring and presented a justification for what he termed a

"realignment process". At the presentation, the Second Applicant noticed that his position had been moved off the organisational structure as presented, and was portrayed as an "impacted position". Later the same day, 23 January 2007, a town hall meeting was convened at which Mr Egbe announced the restructuring and the process to be followed. He advised employees that the organisational charters (not yet revealed to employees) would be "stress-tested" at a meeting to be convened in Cairo on 29 January 2007. He stated that he would return on 5 February 2007 to advise employees of the final organisational charters. At approximately 16h00 on the same afternoon, the Second Applicant alleges that he had a meeting with Mr David Lyons who said "so you are out of a job" and proceeded to discuss with him other opportunities in Europe and elsewhere. On 25 January 2007, a meeting took place between the Second Applicant and Mr Egbe and Mr Lyons at which the Second Applicant stated that he was not prepared to consider a lower grade or status since he was not convinced about the need to retrench him. Later the same afternoon, the Second Applicant alleges that he had a further meeting with Lyons at which it appeared that the organogram had been "revised" and that his department was "back together in its entirety".

24. On 31 January 2007, a DLT meeting was convened at which the process, timings and selection criteria previously communicated at the town hall meeting held on 23 January 2007 were changed. The Applicants allege that at this meeting and at a subsequent "people managers meeting". it appeared that the Respondent was attempting to act in a manner that appeared legally compliant and that it was attempting to "go through the motions"

25. Between 31 January and 6 February 2007, the meeting of senior

managers from the Respondent's operation globally was held in Cairo. Neither of the Applicants were present at the meeting and no minutes of this meeting have been made available to them. On 6 February 2007, Egbe called a meeting of the DLT at which he advised the Second Applicant and other members of the DLT that he intended "to start the process again" as he realised that the proposed process "would not work". Egbe advised further that the restructuring process had to be completed by 23 February 2007. A timetable was outlined for review and input sought from employees in relation to their own roles in the organisation, that of their department and other functions. At a town hall meeting subsequently held with all staff, Egbe explained the process that he envisaged and invited employees to make submissions within the next week. At this point, the Applicants allege that a general request to make broad-based submissions was made entirely *in vacuo* and that the First Applicant in particular, had not been advised on any restructuring that was to take place in the Africa group in which he was envisaged to be affected. On 16 February 2007, a further DLT meeting was held at which input received from employees was discussed. The Second Applicant alleges that there was no discussion of what the organisation might look like as a whole. A second meeting of the DLT with Egbe and a person described as a 'facilitator' was conducted, at which organograms for various departments were discussed and possible cost savings debated. The meeting was advised that "section 189 letters" would be distributed on 23 February 2007, and that employees would have a week to respond and that the process would follow "the due course". The Second Applicant avers that he was surprised by this announcement since it was his understanding that proposals regarding restructuring in circumstances where dismissal was contemplated ought to be preceded by letters issued in terms of section 189(3) of the LRA.

26. On 19 February 2007, the Second Applicant addressed a letter to Egbe complaining about the process that had been adopted in respect of the South African operation. In this letter, he recalled previous conversations with both Egbe and Lyons and alleged that the Respondent had failed to comply with the provisions of the LRA. On 20 February 2007, the Second Applicant met with Egbe and reiterated his views regarding the process and again recorded his misgivings with the process as in his view, a decision had already been taken by the Respondent in the absence of proper disclosure of information and consultation as required by the LRA. At a meeting held between Egbe and the DLT later the same day, Egbe again presented a structure of the "new DLT" and confirmed that the Second Applicant's job had been eliminated. This was reconfirmed the next day when the "final structure" was displayed with colour coding used to indicate eliminated and impacted positions. Again, the Second Applicant's job fell into this category.

27. On 23 February 2007, a town hall meeting was convened at which Egbe reiterated that the next week would be a "consultation week" and that final decisions would be made thereafter. The submissions made by employees were discussed and the new DLT structure was presented, as were "time lines for consultation" which envisaged a "separation process" between 9 and 20 April 2007. At this point, the quantum of the severance package was raised – payment of two months' remuneration for each year of service. The Applicants allege that there was no consultation on the structure of the package. On the same afternoon, the Second Applicant was presented with a letter advising him that he was "impacted" and where various alternatives were discussed with him. The Second Applicant alleges that he left this meeting understanding clearly that he had no position in the new structure, that a decision to make his position redundant had already been

taken, that the consultative process was concentrated on his subordinates, that selection criteria would be based on “talent”, and that employees not prepared to enter into a settlement with the company would be paid the statutory minimum severance package rather than the more generous package tabled earlier that day. The First Applicant alleges that on the same day, the first time that he became aware that his position would be affected by the restructuring process, he was given letters to be handed out to his subordinates. At this point, he asked the Human Resources Manager whether he was “impacted or not” and after an apology, was handed a letter advising him that his current position was indeed "impacted". Thereafter, the First Applicant alleges that he engaged with his direct superior in regard to applications for a “global position” but indicated that his personal circumstances precluded him from accepting a position outside of South Africa. Both Applicants, by 28 February 2007, had addressed letters to the Respondent expressing their view that the Respondent had failed to comply with the LRA, particularly in that the Respondent had failed to provide meaningful, financial and other information that their positions were necessarily redundant, and that their retrenchments had been presented to them as a *fait accompli*.

28. On 1 March 2007, the matter was elevated, at least in respect of the Second Applicant, to the level of a letter addressed to the Respondent by the Applicants’ attorneys. On 2 March 2007, the First Applicant received a letter from the Respondent’s in-house counsel, recording the view that the Respondent was confident that it had complied with the provisions of the LRA. The First Applicant notes however that he was surprised by this statement, since he had only been told on 23 February 2007 how the restructuring process would affect him, that he had not been provided with information in advance of any presentation that had

been held, nor had he received information in writing as required by section 189(3), nor had fair selection criteria been applied, nor had there been consultation on the severance package other than the Respondent's statement that the statutory minimum would be paid to employees who did not enter into a settlement agreement with the Respondent.

29. On 5 March 2007, a letter was addressed to the Applicants' attorneys by the Respondent's attorneys and from that point, further exchanges between the parties were broadly limited to an exchange of correspondence between the parties' respective attorneys.

30. On 30 March 2007, the Respondent referred a dispute to the CCMA categorising the dispute between the Respondent and the Applicants as a "lack of consensus with regard to proposed retrenchments and the proposed voluntary severance packages resulting from a proposed company restructuring". On 30 April 2007, the Applicants were advised that their employment would terminate on 31 May 2007. As I noted above, this date was subsequently extended in terms of an agreement reached in terms of these proceedings to 30 June 2007.

31. In short, the Applicants allege that the Respondent has failed to engage in any meaningful individual consultations about a structure that could save their jobs, that the consultation process was "*nothing less than a shambles, that vague and subjective selection criteria were applied, that the Respondent made a decision on restructuring and sought to consult thereafter and that it failed to make a proper severance proposal*".

32. In its answering affidavit, the Respondent denies that the restructuring exercise was embarked upon in an ill-conceived manner and on a piece-meal basis as alleged by the Applicants. It denied that it failed to consult properly and that any decision finally taken to restructure the business was taken without proper consultation. Material allegations made by the Applicants are denied. For example, Lyons specifically denies that when the issue of a possible restructuring was brought up in the DLT meeting held in 2006 that he guaranteed everyone in the DLT a job or that he said that apart from a few “minor tweaks” South Africa would not be affected.

33. At meetings that took place at which Lyons and Egbe were present, the Respondents emphasise that on each occasion, it was reiterated that no final decision had been taken and that any organisational charters presented reflected proposals by the Respondent. In particular, Lyons states that he does not recall that he said to Brown “so you are out of a job”.

34. In regard to DLT members, the Respondent avers that it cannot recall any DLT members accusing the Respondent of “playing lip service to the LRA” or that there was any refusal to address the Respondent's motives.

35. I do not intend to dwell further on the factual disputes raised in the Respondent’s answering affidavit, save to say that in response to each allegation of precipitous action at every meeting to which the Applicants refer, the Respondent denies presenting the restructuring of its operation to the Applicants as a *fait accompli*, and avers that at all relevant times it maintained an open mind on the nature and extent of the restructuring, and the alternatives that were available to the Applicants. The Respondent’s case in

essence is that these proceedings are opportunistic, and that the Applicants are seeking to do no more than secure themselves reinstatement for the purposes of negotiating a more generous severance package.

Appropriate relief

36. From the brief overview of the facts recorded above, three considerations are immediately apparent. The first is that there are material disputes of fact raised in the papers. The second is that some two and a half months passed between an effective breakdown in the consultation process and the launching of this application. The Applicants elected to utilise their section 189A(13) remedy in mid-May in circumstances where battle lines had clearly been drawn as early as the first week of March 2007, a stage when intervention by this Court in the forms contemplated by section 189A(13)(a) and (b) may well have been appropriate. Instead, the Applicants chose to litigate ancillary disputes in the CCMA during March and April 2007, and to delay the exercise of their right to contest the unfair procedure that they allege was adopted by the Respondent in this Court until some two weeks after they were presented with letters of termination of employment. The third consideration is that a relationship between the parties that was strained from the outset of discussions on the proposed restructuring of the Respondent's operations rapidly became acrimonious, to the point where by March 2007 whatever engagement there was became conducted at arms' length by correspondence between the parties' respective attorneys, an exchange that was more often than not characterised by varying degrees of disapprobation and bellicosity. In making these observations, I pass no judgement on the appropriateness of the conduct of the parties or their

respective legal representatives. I simply record the existing state of affairs, best described as a hostile stand-off, in so far as it is relevant to the remedy sought by the Applicants.

37. In these circumstances, I fail to appreciate what purpose would be served by requiring the Respondent, as the Applicants proposed, to "go back to square one" and begin the consultation process afresh. After a careful consideration of the papers, I am satisfied that the purposes of the Act in general, and section 189A in particular, would not be served were the Court at this late stage to grant an interdict against dismissal and issue directions on how the parties should conduct themselves in a resurrected consultation process.

38. In my view, the only appropriate remedy that is potentially available to the Applicants in circumstances such as the present is an award of compensation. In this regard, on 23 May 2007, the Respondent made a payment into Court in a sum equivalent to 12 months' remuneration in respect of each of the Applicants, and urged the Court to make an appropriate order as to costs should the Court find that they are entitled to less. The offer was rejected by the Applicants.

39. For the reasons stated above, I am not in a position to make a finding on the papers before the Court as to whether or not the Applicants and/or the Respondent have discharged their procedurally-related obligations in terms of section 189, and therefore, whether any compensation should be awarded to the Applicants. Given the inevitability of a future referral to this Court of a dispute concerning the substantive fairness of the Applicants' dismissal, I intend to adopt an approach similar to that applied in *Watts* and *SA Five Engineering* and to require that the substantive

and procedural aspects of this dispute are dealt with simultaneously, in a trial action. Should the Applicants not refer a dispute concerning the substantive fairness of their dismissal to this Court, this application may be re-enrolled on the trial roll for the hearing of evidence and adjudication.

40. As I noted above, I am conscious that the outcome of these proceedings, like those in *Watts* and *SA Five Engineering*, might encourage unscrupulous employers to generate factual disputes solely to avoid intervention by this Court in a consultation process that falls short of the applicable statutory requirements. I am satisfied that the present instance is not one of those cases.

41. Accordingly, on 29 June 2007, I granted the Order recorded in paragraph 1 above.

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ANDRÉ VAN NIEKERK,
Acting Judge of the Labour Court

Date of hearing: 14 June 2007

Date of judgment: 29 June 2007

Advocate for Applicants: F Boda

Attorneys for Applicants: Deneys Reitz – Mr B Patterson

Advocate for Respondent: C Watt-Pringle SC & C Orr

Attorneys for Respondent: Edward Nathan Sonnenbergs – Mr A Steenkamp