IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JR 805/06

In the matter between:

ZERO APPLIANCES (PTY) LTD	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	First Respondent
J S E NKOSI NO	Second Respondent
SELLO MAKGOBA & 62 OTHERS	Third to further respondent

JUDGMENT

RAMPAI AJ

[1] These proceedings are concerned with two matters. The purpose of the application is, therefore, twofold. In the first instance the employer seeks to have the second respondent's ruling reviewed and set aside. In the second instance the employer seeks to have the second respondent's certificate also reviewed and set aside. I shall revert to the ruling and the certificate in due course.

[2] I shall refer to the applicant as the employer and to the third respondent and sixty one others as the employees. The historical background seems to be necessary.

[3] The employer's deponent, George Monoyoundis, stated in the founding affidavit that in the year 2004, the employer experienced such severe financial difficulties that it negotiated with another company called Domitec and explored the possibility of Domitec buying the business of the employer as a going concern. The negotiations were fruitless.

[4] The abortive sale negotiations forced the employer to initiate a retrenchment process based on operational requirements. Among others, the employer operates a business which chiefly manufactures absorption refrigeration units in their entirety. These units are operated through gas and electricity. The employer supplies the goods to both the local and international markets. The individual respondents, in other words Makgoba and others, were employed by the applicant, Zero Appliances (Pty) Ltd. The employer started with the employee's retrenchment process on 12 May 2005. The employer issued notices of possible retrenchment and caused them to be delivered to all the employees concerned as well as the Metal & Engineering Industries Bargaining Council within whose registered industrial scope the employer falls.

[5] The first consultative meeting was held on 23 May 2005. The employees were duly represented. The employer was requested to provide documentary proof that there was no viable alternative save to retrench. The second consultative meeting was held on 08 June 2005. The unions requested for the appointment of a facilitator by the CCMA. It was agreed that the union WESUSA would take the matter up with MEIBC.

[6] On 4 July 2005 the first respondent came on board. The first facilitation meeting took place at the first respondent's offices on 13 July 2005. The employees were duly represented. At this meeting the facilitator directed the employer to furnish the employees with financial statements and other information relative to its financial affairs. The second facilitation meeting was held on 22 July 2005. Two trade unions namely SACWU and WESUSA were involved throughout the process. The non-unionised employees were represented by one employee, a delegate of their choice, throughout the process. During the facilitative phase of the retrenchment process neither the two unions nor the delegate questioned or disputed the employer's reasons for retrenchment. At the second facilitative meeting all the stakeholders agreed that early retirements or voluntary retirements or both options would serve as alternatives to outright mass retrenchment. The negotiated alternatives were accepted and endorsed by both the unionised and non-unionised employees.

[7] The parties reached a facilitation agreement and signed it soon afterwards. A list of employees who opted for early retirement or voluntary retirement was compiled and agreed upon. In terms of the facilitation agreement the employer issued notices of termination on 29 July 2005. The notices were then served on the employees concerned.

[8] A week later, on 5 August 2005, to be precise, the affected employees received the final payslips, cheques, lump-sum breakdowns, certificates of service, the unemployed insurance forms ui19 as well as the contact details forms for the purpose of possible future re-employment. The third respondent and sixty two others were among those employees whose employment contracts were terminated in accordance with the terms and conditions of the facilitation agreement.

[9] Approximately three months later, on 3 November 2005 the employer received a letter from Tshabalala Labour Consultants. The consultants advised the employer they acted on behalf of the sixty three individual respondents. Through the consultants the employees alleged that they were unfairly retrenched by the employer. The reason they gave for the alleged unfairness was that the employer did not comply with section 189 of the Labour Relations Act No. 66 of 1995 (LRA).

[10] In its founding affidavit the employer stated that it thereby understood that the employees were complaining about the procedural fairness of their dismissals- vide par 8.19 founding

affidavit p14 of the record. In their answering affidavit the employees admitted the employer's averment that the crux of the dispute was the procedural unfairness of the retrenchment process which preceded the termination of their individual contracts of employment -vide par 5 of the answering affidavit p150 of the record. In a further letter addressed to the employer on behalf of the employees, Tshabalala Labour Consultants confirmed that the only issue the employees were complaining about was that the employer did not follow a fair procedure in retrenching them.

[11] On 29 November 2005, some one hundred and twenty three days after their contracts of employment were terminated, the aggrieved employees referred a dispute of unfair dismissal to the first respondent, the Commission for Conciliation, Mediation and Arbitration. In their referral they alleged that their multiple dismissals were procedurally unfair.

[12] I have two difficulties with the employees referral. First, they referred the dispute to the wrong tribunal, the CCMA instead of the MEIBC. The employer falls under the scope of the latter and not the former. Second, the referral was channelled through the wrong route. Disputes about procedural unfairness of dismissals on the ground of operational exigencies are the exclusive business of the labour court and not the CCMA or any bargaining council.

[13] Prior to the scheduled conciliation meeting, the employer's representative, the General & allied Industries Employers'

Organisation, notified the first respondent about the existence of the MEIBC and that MEIBC was the only recognised structure with jurisdiction over the employer as far as dispute about labour relations were concerned. Notwithstanding such notice the first respondent carried on with the conciliation meeting as scheduled.

[14] The conciliation hearing was held at the CCMA offices on 22 February 2006. The first respondent appointed the second respondent Commissioner JSE Nkosi to chair the conciliation proceedings. The employees were represented but the employer was not. The conciliation proceedings were held under case number GA 31757-04. Having heard the representative of the employees the second respondent did two things:

Firstly he granted the application of the employees for condonation of their late referral of the dispute. Secondly he certified that the dispute remained unresolved, and issued a section 135 certificate to that effect and directed the employees to refer the dispute to the labour court.

[15] These are the two rulings by the said commissioner which are currently under attack. The employer wants to have both the condonation ruling and the conciliation certificate reviewed and reversed.

[16] Pursuant to the aforesaid rulings by the second respondent, the employees filed a statement of case in this court under case number JS 147-06. The employer opposed the claim of the employees and

filed a statement of response. In their statement of case the employees reiterated their earlier extra curial complaint that their multiple dismissals were procedurally unfair. Therefore the procedural unfairness was and is still is the only issue between the employees and the employer, in those pending proceedings.

[17] The purpose of this application before me, as I have already mentioned, is to have the second respondent's ruling by virtue of which condonation was granted to the employees reviewed and set aside and also to have the second respondent's certificate in terms of which direction was given to the employees to refer their belated dispute to this court be reviewed and set aside. This then is the undisputed factual matrix of the case before me.

[18] I now turn to consider the grounds of the review as advanced by the employer. Mr Gerber counsel for the employer argued that the employer operated a business which fell within the registered scope of MEIBC. That being the case, he argued further, that MEIBC had jurisdiction over the dispute as the employer fell under its umbrella. Therefore, he submitted that the first respondent, the CCMA did not have jurisdiction over the dispute the employees referred to it. The submission is a sound legal proposition. The matter of dispute resolution mechanism is covered by the main collective agreement. The employees and the employer are bound by the dispute resolution procedure as set out therein. The mere fact that the first respondent was involved during the facilitation phase of the retrenchment process prior to the termination of the

employees contract of employment did not entail the transfer of the jurisdiction over the dispute from the MEIBC to the CCMA.

[19] It follows from the above that since the CCMA did not have jurisdiction over the dispute between the employees and the employer, it was not competent to entertain the referral; to appoint the second respondent to conciliate the dispute; to hear the application of the employees for condonation pertaining to the late referral and to issue the certificate. In doing all these things the first respondent and the second respondent exceeded their powers. The second respondent's ruling which condoned the late referral was fundamentally defective. He exercised the power which he did not have in law. Such lack of competent power invalidates his ruling. It follows, as a matter of logic, that since the decision to condone was per se invalid any further act flowing from such invalid decision is similarly invalid. Therefore the second respondent had no competent power to conciliate the dispute and to issue a certificate of outcome as he did. The first respondent could not confer on the second respondent the jurisdiction itself did not have.

[20] The dispute resolution procedure followed by the employees was incorrect. The first respondent did not realise that the employees were on the wrong track. Likewise the second respondent did not detect that the employees were lost.

[21] It must be appreciated that the employees referred the dispute to the CCMA in terms of the ordinary dispute resolution procedure as

provided by section 191 of the Labour Relations Act No. 66 of 1995 for an alleged unfair dismissal. Where, as in this case, the alleged unfair dismissals are based on the employer's critical operational requirements, the employee would, after unsuccessful conciliation, ordinarily refer the dispute to this court for adjudication.

[22] In the instant case, however, the mass dismissals of the employees are governed by extra-ordinary provisions of section 189A. The alleged unfair dismissals concerned a huge number of employees of which sixty two are now involved in this dispute. The gist of their dispute is that their multiple dismissals were procedurally unfair. The labour court cannot adjudicate an ordinary dispute about unfair dismissals on the ground of procedural unfairness if such a dispute comes through the ordinary dispute resolution referral procedure for alleged unfair dismissals relating to a small number of employees affected by retrenchment on operational requirements- vide section 189A(18). It reads as follows:

"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)".

[23] The labour relations legislation makes a specific provision for a special dispute resolution procedure in a case where a large number of employees participating in or affected by possible mass retrenchment based on operational requirements feel that the employer is not adhering to a fair procedure. Section 189A(13) provides that employees with such a grievance may directly

approach the labour court by way of a formal application and seek a court order compelling an offending employer, among others, to comply with a fair procedure. The benefits of this special dispute referral procedure are obvious. It obviates the conciliation procedure and the arbitration proceedings which characterise the ordinary dispute referral procedure as stipulated in section 191 Labour Relations Act No. 66 of 1995. It affords the aggrieved employees a direct and speedy access to the Labour Court and accelerates the eradication of an employers labour misdemeanours during the retrenchment process.

[24] Section 189A(17) compliments section 189A(13). It provides that such a special application in terms of subsection (13) must be brought not later than thirty days after the retrenching employer has given notice to terminate the employee's services. In this case the employees were warned on 12 May 2005 that the employer was contemplating mass retrenchment. On 29 July 2005 the employees contracts of employment were terminated. Their services were terminated after a negotiated, open, and facilitated retrenchment process which lasted for seventy eight days. The employees were duly represented during the entire period. Their representative fully participated in the process. They demanded this and that and they were given. During that whole and long period none of them ever complained about any procedural unfairness on the part of the employer. Instead they all received their dues on 5 August 2005 and left their workplace peacefully and without any protest.

[25] On 3 November 2005, some ninety seven days after their contracts of employment had been terminated, the employer heard for the first time, that the employees were crying foul play. By then the retrenchment process was an accomplished fact. The employees had enjoyed the rewards of the facilitation agreement. In my view such an agreement evidences, albeit prima facie, not only the active participation of the employees via the representative but also the transparency of the retrenchment process in addition to its substantive fairness and procedural fairness. The dispute raised by the employees ninety seven days later raises serious questions about their bona fides.

[26] As if their long deafening silence was not incredible and amazing enough, the employees on the advice of the labour consultants then embarked on a wrong dispute referral procedure. Not only did they follow the wrong route to the wrong forum- when they eventually approached this court on 24 March 2006 they came on a wrong ticket- the statement of case proceedings in terms of rule 6 instead of correct ticket- by way of the special application proceedings in terms of section 189A (13) read with section 189A(17).

[27] But the problem of the employees does not end there. Let us suppose for a moment that the employees had followed the correct dispute referral procedure as section 189A(13) requires. They will still find themselves in a tight corner. In that event their obstacle would be section 189A(17). The section requires that an application in terms of section 189A(13) must be made within

thirty days from the day the contract of employment was terminated. In *casu* the employees initiated the dispute in this court some two hundred and thirty eight days (on 24 March 2006) after their service agreements were terminated. They should have done so by no later than 28 August 2005 seeing that their service agreements were terminated en bloc on 29 July 2005. In such a scenario the employees would still be hopelessly out of time. To make matters worse there is no explanation of any sort for the considerable delay of two hundred and eight days. There is no formal application for the condoning of such delay.

[28] The statement filed by the employees can never be a substitute for the required special application. Strictly speaking there is no valid dispute about the procedural unfairness pertaining to mass dismissals of the employees pending in this court. The employees did not timeously follow the correct dispute referral procedure. The second respondent exceeded his powers when dealing with the matter as he did. The relevant labour legislation does not make provision for such a procedure. The procedure he followed is foreign to our labour law. It is in conflict with the special dispute referral procedure for which a specific provision is made in terms of section 189A.

[29] In the circumstances I have come to the conclusion that the second respondent misdirected himself on the question of law. The misconduct he committed in condoning the late referral of the dispute, the misconduct he committed in purporting to conciliate

the dispute and the misconduct he committed in purporting to issue a certificate in terms of section 135 cannot be allowed to stand. All these abortive acts have to be nullified. They were not legally justified.

[30] The employer's review application was filed out of time. The extent of the lateness is marginal. The application was four days late. The reasons for the delay are satisfactory and adequate. I find the employer's explanation acceptable. Briefly stated the employer's human resource manager and his team who were intimately involved in the drafting of the review application as a whole were not unavailable on the last day of the six week period, at the time the founding papers had to be signed. The founding affidavit had to be redrafted one day out of time. Moreover, the employer's excellent prospects of success as fully examined and elucidated above adequately compensate for the employer's slight delay. The matter is of outmost importance to the employer since the employees have already received their voluntary severance package and the first respondent and the second respondent have effectively given them a chance to have a second bite of the cherry whereas they were not competent to grant them the remedies they granted on a matter which fell outside their jurisdiction.

[31] I am persuaded by Mr Gerber's submission that the employer has made out a proper case for the relief sought. The employer's review application and condonation application were opposed. However, only the third respondent appeared in person and

opposed the employer's applications. He argued that he was mandated by the sixty two other employees or individual respondents to act on their behalf. From the bar he handed numerous affidavits, which as he said, were signed by his co-respondents who authorised him to represent them before me. Trying to digest his argument was no stroll in the park for me. Suffice to say there was little, if any, substance in his arguments. I was not surprised. The legal issues were too complex for a layman to appreciate. Although he had a mysterious junior on his side who he frequently consulted when the going got tough, such frequent consultation did not really help. When the going gets tough only the tough get going. The rest get nowhere.

[32] The public gallery was almost full of members of public. I suspected that the majority of them were some of Mr Makgoba's co- respondents. I could not identify any of them because the customary list of the names of the other sixty two co-respondents was not annexed to the answering affidavit. Among these unidentified people who looked like they had direct interest in the matter was Mr Tshabalala, the employees labour consultant. He was identified through Mr Gerber's courtesy. He was anxious and unease. I am not certain whether he was also feeling the heat of the debate which was turned on his client.

[33] Mr Gerber argued that Mr SJ Makgoba was neither a union representative nor a fellow employee to his sixty two other co-respondents. The contention was that he could not as the third

respondent act as the representative of the rest. The numerous affidavits, forty nine all in all, handed in from the bar had not been served on the employer. Thirty nine of them were signed and attested on 02 December 2005. The remaining ten were signed and attested between 05 December 2006 and 14 December 2006. Their contracts of employment were terminated on 29 July 2005, approximately sixteen months before these forty nine former employees of Zero Appliances (Pty) Ltd mandated the third respondent to represent them in these proceedings. It follows therefore that since the third respondent was no longer their fellow employee at the time they gave him the mandate, the mandates so given were of no force and effect in law. They might as well have instructed any lay person- which is impermissible in a court of law. There was no longer a mutual bond of common employment to legitimise such purported mandates.

[34] The above finding is of great importance as far as the order of costs is concerned. The applicant prayed that should the respondents unsuccessfully oppose the review application and the condonation application they must be ordered to pay the costs of these applications. In the absence of the proper list signed and annexed to the answering affidavit by the third respondent's co-respondents, it cannot be said that the alleged fourth respondent to sixty second respondent were properly before the court in these proceedings. The forty nine affidavits attributed to some of the sixty two respondents were so materially defective that I am entitled to regard them as *pro non-scripto*. The third respondent was therefore

the only respondent who resisted the applicant's applications. The costs of this opposition must be borne and paid by the third respondent alone.

[35] Accordingly I make the following order:

35.1 The condonation ruling made by the second respondent on 22 February 2006 whereby he condoned the late referral of the dispute to the first respondent for conciliation has been reviewed and is now set aside.

35.2 The conciliation certificate issued by the second respondent on 22 February 2006 under case number GA 31757-05 under the auspices of the first respondent has been reviewed and is now set aside.

35.3 The ruling of the first respondent granting the application of the employees for condonation is hereby altered and substituted with the ruling that the first respondent does not have jurisdiction to entertain the dispute or the application of the employees for condonation relating to such dispute.

35.4 The issue of the conciliation certificate by the second respondent was irregular and invalid seeing that a competent bargaining council exits to entertain such a dispute, the first respondent also lacks jurisdiction to appoint the second

respondent who likewise lacks jurisdiction to issue a certificate of outcome as he did.

35.5 The third and the other sixty two respondents should apply to this court, if so advised, for an appropriate relief in terms of section 189A(13) of the Labour Relations Act No. 66 of 1995 as amended.

35.6 The entertainment of the said respondent's statement of case filed under case number JS 147/06 is hereby stayed pending the outcome of the applicant's review application.

35.7 The third respondent is directed to pay the costs of this application.

_____

Rampai AJ

APPEARANCES

On behalf of the applicant:	Adv H Gerber
	Instructed by:
	OJ Botha Attorneys
On behalf of the respondents:	Mr SJ Makgoba
	Instructed by:
	Third to further respondents
Date of hearing:	15 February 2007
Date of judgment:	28 March 2007