

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**(HELD IN BRAAMFONTEIN)**

**CASE NO: JS 818/06**

**In the matter between:-**

**NATIONAL UNION OF METALWORKERS  
OF SOUTH AFRICA**

**1<sup>ST</sup> APPLICANT**

**JACK NGWANIKI & 43 OTHERS**

**2<sup>ND</sup> TO 45<sup>TH</sup> APPLICANTS**

**v**

**SHAKESPEAR SHOPFITTERS (PTY) LTD**

**RESPONDENT**

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**JUDGEMENT**

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**AC BASSON, J**

1] The First Applicant in this matter, the National Union of Metalworkers

of South Africa, brought an application on behalf of the further Applicants in terms of section 189A(13) of the Labour Relations Act 66 of 1995 (“the LRA”) for the following orders:

1. Declaring that the dismissal of the 2<sup>nd</sup> to 45<sup>th</sup> Applicants by the Respondent was procedurally unfair;
2. Directing the Respondent to reinstate the 2<sup>nd</sup> to 45<sup>th</sup> Applicants into its employ on the same terms and conditions as previously applied to them until it has complied with a fair procedure;
3. Directing and compelling the Respondent to comply with a fair procedure before contemplating retrenchment;
4. Interdicting the Respondent from dismissing the 2<sup>nd</sup> to 45<sup>th</sup> Applicants prior to complying with a fair procedure;
5. Directing the Respondent to pay to the 2<sup>nd</sup> and 45<sup>th</sup> Applicants, just and equitable compensation for their unfair retrenchment;
6. Directing the Respondent to pay the costs of this application in the event of opposition;
7. Further and/or alternative relief.

**Brief overview of the relevant facts**

2] On 17 July 2006, the individual Applicants embarked upon a lawful

strike. Numerous attempts were made to settle the dispute. On 31 August 2006, the union advised the Respondent that the union has decided to end the strike and that the Individual Applicants would resume their duties on 4 September 2006. When they reported for work on 4 September 2006, the Respondent locked them out. In a letter dated 5 September 2006, the Respondent advised the union that the Applicants must first comply with the demands regarding working hours and that the Respondent will continue to implement the lock-out until the individual Applicants accede to the demands in respect of the working hours. On 9 October the union again demanded that the individual Applicants be allowed to resume their duties. On 25 October 2006 the Applicants' attorneys sent a letter to the Respondent advising them that the individual Applicants will unconditionally tender their service to resume work on 26 October 2006 on terms and conditions as per the Respondent's demands. On 31 October 2006 the Applicants' representative was advised that they (the individual Applicants) will only be allowed to tender their services if the tender is not subject to any conditions. On 6 November 2006, the individual Applicants reported for duty. At 11H00 someone from the Respondent handed brown envelopes to the individual Applicants in which it advised the individual Applicants that due to the strike the Respondent

had suffered irreparable financial damage and that it will not be possible to keep in employ any of the individual Applicants who went on strike. The Applicants submit that this act of retrenchment and the resultant dismissal of the individual Applicants is procedurally unfair. It was submitted that their dismissal was unfair in light of the fact that the Respondent had never consulted with the union and/or the individual Applicants on the issue of retrenchment. The relevant part of this letter reads as follows:

“We therefore regret to inform you that due to the strike irreparable financial damage were done to the company and it will not be possible to keep any of the employees that went on strike. We confirm that their posts became redundant and that no one will be employed to replace them.”

**The answering affidavit**

3] In its answering affidavit the Respondent states that it had experienced serious financial constraints since the previous financial year and that the company (the Respondent) had made a loss. In support hereof the Respondent attaches the financial statements of the previous year. From March 2006 the Respondent had to implement new measures to try and save the company as well as to

save jobs. As a result of the strike, Shoprite, the main client of the company, has also cancelled several projects due to the fact that the Respondent was not able to comply with the deadlines set by tenders. A list of all projects that were cancelled is attached to the papers. The Respondent admits that it retrenched the individual applicants and in fact states as follows:

*“The company had to make an urgent decision to safe (sic) the jobs and that what was left. It was decided due to necessity that the steel section will be phased out. Only the small items will be manufactured if necessary. We are extremely sorry to retrench the employees because some of them have been working for the company for more than 7 years.”*

The Respondent further states in the answering affidavit as follows:

“We submit that decisions regarding retrenchment was taken while employees were on strike and that all dismissals of individual Applicants were fair.”

4] The Respondent did not file any heads of arguments but was

represented by an attorney who merely informed the Court from the bar that the Respondent no longer existed and was in the process of being liquidated.

### **Evaluation**

5] The following is patently clear from the papers, especially if regard is had to the Respondent's answering affidavit: Firstly, the individual Applicants were retrenched because the strike contributed to the demise of the company after a number of contracts were cancelled. Secondly, no pre-retrenchment procedures whatsoever were followed prior to retrenching the individual Applicants. In fact, the Respondent freely admits that the decision to retrench was taken whilst the individual Applicants were on strike. The Applicants were therefore confronted with a *fait accompli* upon their return. On the facts before this Court, I find that the dismissal of the individual Applicants was procedurally fair.

6] The next question to consider is what the remedy should be?

### **Section 189A**

7] The Applicants brought this application in terms of section 189A(13) of the LRA. In the Notice of Motion, the Applicants ask, and it would appear that this is primarily the relief that the Applicants seek, that they be reinstated so that the Respondent can consult with them prior to taking a decision to retrench. In terms of this section 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 fair procedure;
- d) make an award of compensation, if an order in terms of paragraphs (a) – (c) is not appropriate.

8] In terms of section 189A(17)(a) an application in terms of subsection (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. In terms of paragraph (b) the court may on good cause shown condone a failure

to comply with the time limit in paragraph (a).

- 9] The remedy that the Court may grant under section 189A(13) for non-compliance with a fair procedure includes an order compelling the employer to comply with a fair procedure, interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure and directing the employer to reinstate an employee until it has complied with a fair procedure. In order to give effect to the purpose of this section (particularly in respect of the order sought in terms of section 189A(13)(a) – (c), it is necessary that employees who seek to rely upon it, act with expedition and some measure of urgency. An unreasonable delay in bringing an application to compel an employer to adhere to a fair retrenchment procedure may render the order academic once the horse has bolted. See in this regard: *TAWUSA v Schuurman Metal Presing (Pty) Ltd* (2005) 1 BLLR 78 (LC) where the Court pointed out that:

*“The aim of section 189A(13).. is to provide a remedy to employees to approach the Labour Court to set the employer on the right tract where there is a genuine and clear cut procedural fairness which goes to the core of the process. The*

*section is aimed at securing the process / the interest of a fair outcome” (at par [32]).*

In *NUMSA & Others v SA Five Engineering & Others* (2005) 1 BLLR 53 (LC) the Court noted that section 189A was inserted into the LRA by the amendments with the aim of meeting the demands of various stakeholders for a more efficient method for handling disputes about operational requirement dismissals. At paragraph [10] of the judgment the Court remarks that the interdictory relief was central *“in the pre-emptive approach envisaged in the overall scheme of the provision”*. In *Insurance and Banking Staff Association v Old Mutual Services and Technology Administration* (2006) BLLR 566 (LC) the Court held that *“no application can be brought without condonation after the 30 day period”* (at paragraph [11]). At paragraph [9] the Court further pointed out that one of the key elements of section 189 is: *“Early expedited, effective intervention and job retention in mass dismissals.”* In *Banks & Another v Coca-Cola South Africa* unreported case no J1114/07, the Court also pointed out that there must be some measure of urgency where the order sought is one which would interdict the employer to dismiss or where the order sought is to direct the employer to reinstate the employees until the employer complies with a fair procedure (in terms of section 189A(a) – (c)). However, where

the claim is limited to compensation, considerations of urgency will not be relevant and the provisions of Rule 7 would apply:

“[6] 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.”

10] During argument I pointed out the Applicants’ representative that an order compelling the Respondent to reinstate the individual Applicants until it has complied with a fair procedure is not competent simply because the individual Applicants have already been dismissed on 6 November 2006 which is approximately one and a half years ago. The proverbial horse has long since bolted. If the union and the individual Applicants had wished to pursue this route they should have brought this application with a measure of urgency. Mr. Mbuli conceded this point but persisted with his argument that the individual Applicants are nonetheless entitled to compensation. I agree.

**Compensation**

11] I now turn to the issue of compensation. I have already pointed out that no procedure whatsoever was followed and that the individual Applicants have been confronted with a final decision. What will be a fair order in respect of compensation in these circumstances? A complete failure to follow any procedures whatsoever in terms of the LRA constitutes a flagrant disregard for the law. It should also be emphasized that the Respondent knew that the individual Applicants were represented by a union and were in fact in constant contact with the union during the strike. Yet it made no attempt to consult with the union in respect of the retrenchment. I also expressed some concern about the fact that it would appear from the papers that only those who were on strike (namely the individual Applicants) were retrenched. Mr. Mbuli did, however, not pursue this point.

12] I am of the view that the Applicants have made out a case for substantial compensation and I am of the view that an award of 10 months' compensation is equitable in the present circumstances. I am further of the view that it a cost order against the Respondent is warranted in the circumstances. Apart from the fact that it admits in its answering affidavit that it took a decision to retrench whilst the Applicants were on strike, no heads of arguments were filed on behalf

of the Respondent. On the day of the hearing, the only submission that was made on behalf of the Respondent was from the bar. In the event the Respondent is ordered to pay the costs of this application.

13] In the event the following order is made:

1. The dismissal of the 2<sup>nd</sup> to 45<sup>th</sup> Applicants by the Respondent was procedurally unfair.
2. The Respondent is ordered to pay each of the Applicants compensation that is equivalent to 10 months' remuneration.
3. The Respondent is to pay the Applicants' costs.

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**AC BASSON, J**

**FOR THE APPLICANT: Mr Mbali**

**FOR THE RESPONDENT: UNKNOWN**

**DATE OF PROCEEDINGS: 28 FEBRUARY 2008**

**DATE OF JUDGEMENT: 10 MARCH 2008**