THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: **2024 / 113589**

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) obo MEMBERS **Applicant**

and

BMW (SOUTH AFRICA) (PTY) LTD **Respondent**

Heard: **10 October 2024**
Delivered: **18 October 2023**

These reasons were handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 18 October 2023

Summary: **Urgency – applicant satisfying considerations of urgency – matter heard as urgent application**
Jurisdiction – Labour Court does have jurisdiction to intervene in incomplete disciplinary hearings – such intervention however only to take place in exceptional circumstances – principles considered – applicant failing to establish exceptional circumstances justifying intervention

Procedural fairness – applicant requesting Court to finally determine whether conduct of respondent procedurally fair – procedure related to disciplinary proceedings for misconduct – CCMA / bargaining council required to make such a final determination – not competent to request Labour Court to make such determination on final basis

Disciplinary proceedings – requirement of fair process – principles considered – even on *prima facie* basis nothing wrong with process adopted by respondent – however whether application of such process would be procedurally unfair not to be determined in Labour Court on motion – determination must be made in CCMA / bargaining council at arbitration after considering evidence relating to each individual matter

Unfair dismissal – applicant claiming possible procedurally unfair dismissal – applicant seeking remedy by virtue of right under LRA – applicant thus compelled to follow dispute resolution processes under LRA – applicant should not approach Labour Court as Court of first instance – applicant not establishing right to relief sought

Alternative remedy – applicant has proper / prescribed alternative remedy available in the form of unfair dismissal proceedings in normal course as prescribed by the LRA

Interdict – final relief – applicant failing to establish clear right to final relief sought – applicant having proper alternative remedy – personal circumstances of employees not relevant consideration – applicant failing to satisfy requirements for interdict – application dismissed

Costs – principles considered – conduct of applicant in this instance justifying an order of costs – costs order made

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REASONS

SNYMAN, AJ

Introduction

[1] Truth be told, this is an application that never should have been brought, especially not by a long standing and experienced trade union such as the applicant. What the applicant is in essence asking this Court to do is to micro-manage internal disciplinary proceedings in an individual employer (the respondent), whilst such proceedings are still ongoing. The applicant does this despite the plethora of authorities indicating that as a matter of principle, such kind of intervention is not appropriate and should be discouraged.[1] Yet again, I am compelled to say that where there are specific dispute resolution processes prescribed by the Labour Relations Act (LRA),[2] as is the case *in casu*, those processes should be followed without involving this Court on a direct approach.

[2] In the notice of motion first brought, the applicant asked for final relief in a variety of forms. First, the applicant sought declaratory relief to the effect that the attenuated disciplinary process being conducted by the respondent involving its members is unfair. Second, the applicant seeks to interdict the respondent from proceeding with this attenuated disciplinary process. And third, the applicant seeks an order that the respondent be compelled to '*follow a fair disciplinary process*', whatever that may mean. On the day of the hearing, the applicant sought to amend its notice of motion. Now the applicant asks for different declaratory relief, to the effect that in the absence of the applicant having been afforded a reasonable opportunity to make representations in respect of its members who stand accused of misconduct and who resort within what the respondent categorised as Groups 3, 4, 5 and 6, the respondent's attenuated disciplinary process against these members is unfair. The applicant still seeks to interdict the respondent from proceeding with the attenuated disciplinary process. Where it comes to the order sought, this has been amended to seeking an order that the applicant be afforded 14 days to make written representations relevant to its members falling within Groups 3, 4, 5 and 6, that the applicant likewise be afforded 14 days to make written representations in respect of any further members the respondent may subject to its current disciplinary process, and that the respondent be ordered to immediately inform of any of its members so subjected to disciplinary action to this entitlement.

[1] These authorities are set out later in this judgment.
[2] Act 66 of 1995 (as amended).

[3] Because the applicant is seeking final relief with regard to these three prayers in the final version of the notice of motion, it must satisfy three essential requirements, which must all be shown to exist, being: *(a)* a clear right; *(b)* an injury actually committed or reasonably apprehended (prejudice); and *(c)* the absence of any other satisfactory remedy.[3]

[4] This matter came before me for argument 10 October 2024 and was opposed by the respondent, on a number of grounds. First, the matter was not urgent. Second, there was no basis to intervene in the proceedings at this stage. Third, the applicant was compelled to follow the prescribed dispute resolution proceedings under the LRA as the alternative remedy. Fourth, the Labour Court did not have jurisdiction to grant the kind of relief the applicant sought. And finally, according to the respondent, the application was an abuse of process.

[5] After hearing argument by both parties, and on 10 October 2024, I granted the following order:

'(1) The application is heard as one of urgency.

(2) The application is dismissed.

(3) The applicant is ordered to pay the respondent's costs on the opposed party and party Scale C.

(4) Written reasons for this order will be handed down on 18 October 2024.'

[6] This judgment now constitutes the written reasons referred to in paragraph 4 of my order, *supra*. I will commence by first setting out the relevant background facts.

The relevant background

[7] Fortunately, in this case, most of the pertinent facts were either undisputed or common cause, and the case can readily be decided on these facts. However, in all instances where exists a factual dispute, and considering the detailed factual

[3] See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Mere v Tswaing Local Municipality and Another* (2015) 36 ILJ 3094 (LC) at para 4.

exposition provided by the respondent that in my view clearly satisfies the requirements in *Plascon Evans Paints v Van Riebeeck Paints*[4], the version by the respondent must be accepted. The above being said, I must point out that the factual background in this case is quite extensive, and I simply do not intend to repeat all these facts in this judgment. I will summarize only those facts which I deem necessary for deciding the case *in casu*. For ease of reference, I will refer to the applicant as '*NUMSA*' and the respondent as '*BMW*' throughout this judgment.

[8] BMW is a well-known and international automobile manufacturer. The current matter concerns employees employed at its Rosslyn plant. NUMSA is a recognised trade union in BMW, having close on 2 000 members.

[9] This matter arose from more than 500 employees being charged (or in the process of being charged) by BMW for fraudulent medical aid claims made against BMW's Employee Medical Aid Society (BEMAS). In this regard, the disciplinary processes relating to these charges started about a month ago and is currently still ongoing.

[10] BEMAS is a registered medical aid scheme administered by Discovery Health (Discovery). Discovery is *inter alia* an administrator of medical schemes, accredited by the Council of Medical Schemes in terms of section 58 of the Medical Schemes Act[5]. The members of BEMAS consist only of the employees of BMW.

[11] As part of its administrative obligations, Discovery must ensure that proper control systems are in place and applied, where it comes to medical claims submitted to BEMAS by employees. Pursuant to this duty, and in and around 2022, the Forensics Division of Discovery identified various fraudulent activities where it came to claims submitted by or on behalf of employees to BEMAS. These fraudulent

[4] 1984 (3) SA 623 (A) at 634E-635C. See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38.
[5] Act 131 of 1998.

claims involved specific medical practitioners,[6] in conjunction with the employees of BMW that were the members of BEMAS.

[12] How the scheme of fraudulent claims came to light is due to the suspicions of Discovery being raised as a result of the frequency of claims submitted and the extent of commonality in the type of claims submitted, emanating from the group of medical practitioners referred to above. Discovery as a result commissioned a forensic investigation.

[13] The forensic investigation by Discovery revealed that the scheme was perpetrated by the medical practitioners concerned submitting claims on behalf of employees that they purportedly treated and / or provided services to. However, these claims were false as either no such services were provided, or the services provided were not medically necessary. Thus, the claims would reflect an alleged treatment date and a claim amount which was fraudulent, and which was then settled by Discovery on behalf of BEMAS.

[14] Pursuant to these claims, and in certain instances, Discovery would pay the medical practitioner directly. In other cases, employees themselves would be paid a reimbursement where employees submitted in the claims that the employees had paid for the service out of the employees' own pocket. The proceeds so obtained, by way of these fraudulent claims, would then be shared between the employee concerned, and the medical practitioner. It was clear that the operation and success of the scheme thus hinged on collusion between the medical practitioner and the employee member, to defraud BEMAS.

[15] All these fraudulent transactions took place in the period between 2021 and 2022. But the real extent of it was not known to both BMW and Discovery until later in 2024. However, and as a general approach, and in November 2023, the employees as BEMAS members were offered amnesty in respect of this fraudulent activity, provided they each individually come forward and provide information about and the particulars of the fraudulent activities they were involved in. If employees

[6] Eight individual medical practitioners are identified as being involved. There are also pending criminal proceedings in this regard.

took up this amnesty, they would not be suspended from membership of BEMAS, and disciplinary action would not be taken against them. The amnesty period ran from 10 November 2023 to 16 November 2023. The idea behind the amnesty was that, if an employee voluntarily came forward and disclosed his / her involvement in the fraudulent scheme, that employee would be exempted from disciplinary action but would have to pay back whatever monies were paid on behalf of such employee as a result of the perpetrated fraud. None of the employees who were members of NUMSA took advantage of this amnesty, and effectively spurned the opportunity.

[16] On 31 July 2024, BMW commenced disciplinary proceedings against the employees it at that time was aware of having been involved in the BEMAS fraudulent claims, being 20 individual employees. Where it came to this group of 20 employees, they were subjected to in person disciplinary hearings with oral evidence. These hearings were held in the period 15 to 21 August 2024. Pursuant to these hearings, these employees were summarily dismissed on 13 September 2024.

[17] BMW has explained that when commencing these disciplinary proceedings against the 20 employees referred to, it was unaware of the full extent of the employees involved in the fraudulent claims. It believed that these initial employees disciplined was more or less the extent of the group of employees involved.

[18] However, and recognising a pattern of claims as discussed above, the formal investigation conducted by Discovery of its own accord was started in 2022, was completed by Discovery in the course of August 2024, and the outcome and process of this investigation was conveyed to BMW only on 18 September 2024. This outcome conveyed to BMW showed that that substantially more employees were involved, being the total of more than 500 as referred to above.

[19] Fortuitously, and on 16 May 2024, BMW had amended its disciplinary code to allow for a more flexible and attenuated disciplinary process. It was undisputed that BMW had the right to amend its disciplinary code to allow for such a kind of process. NUMSA was aware of this amendment, prior to the commencement of the disciplinary proceedings in the current matter. In fact, the process of amending the disciplinary code started as far back as September 2023, and NUMSA was fully

consulted pertaining to such amendment, with the amended version of the code first being shared with NUMSA on 23 January 2024 for comment. A formal consultation was held with NUMSA on 23 April 2024 concerning the amendment of the code, and it amended only after this. There appears to be no nexus between the issue of the amendment of the code and the disciplining of the employees *in casu*. I did note from the answering affidavit of BMW that NUMSA is challenging the amendment of this code, which is being opposed by BMW, but this need not concern this judgment.

[20] In terms of the amended BMW disciplinary code, and having received information as to the large extent of the employees involved in the fraudulent BEMAS claims, BMW decided to charge the further employees in groups, and then subject them to a disciplinary process that would not involve an in person disciplinary hearing with oral evidence. The disciplinary process that BMW decided to adopt consisted of individual employees being presented with documents containing a detailed exposition of the charge against each particular individual. This charge document was supported by an accompanying bundle of documents relating to each individual employee's alleged involvement in the fraudulent claims. The employees were then afforded the opportunity to make representations concerning the charge and documents, by a stipulated deadline. Each individual matter would then come before independent external chairpersons to consider and decide. Each chairperson would be entitled to determine each matter on any basis the chairperson may deem fit / fair, which would include that the chairperson may request further information or even convene a hearing. Pursuant to the aforementioned attenuated disciplinary process, and to date, six groups of employees have been charged.

[21] The document containing the charge(s) referred to above was headed '*Request for Written Representations*'. This document set out the specific particulars of the alleged fraudulent activities perpetrated by each individual employee and the period within which it was perpetrated. The document also specified in some detail what each individual employee would be required to address in making the representations the employee(s) was called on to make, and gave the deadline for making these representations. The document also recorded that the representations would be considered by an independent external chairperson who would conduct the process in a fair manner.

[22] The first group to the disciplined under the attenuated process was a group consisting of 24 employees, and the disciplinary process was chaired by Advocate K Pule. On 20 September, they were each furnished with specific bundles, containing the particular charges against them as well as the documentary evidence implicating them in the fraudulent claims. They were given the opportunity to deliver written submissions with ultimate deadlines (as extended at the request of NUMSA) of 2 and 4 October 2024. Five employees delivered submissions. On 8 October 2024, all of the employees in this group were found guilty of the misconduct, and were summarily dismissed, pursuant to written recommendations provided by chairperson Pule.

[23] The second group consisted of 54 employees. They were charged and provided with the evidence bundles in respect of each of their cases on 24 September 2024. In this instance, the appointed chairperson was Advocate M Moolla. They were given until 2 October 2024 to provide representations. As yet, chairperson Moolla has not dealt with the cases. How he is to deal with these cases, which may include even calling an in person hearing if he believed it appropriate, is entirely in his discretion.

[24] Two further groups of employees were charged and presented with their individual bundles, on 30 September 2024. In one group of 36 employees, the appointed chairperson is to be Advocate C Jones, and they were given until 7 October to provide their representations. As to the other group of 43 employees, the appointed chairperson is to be Advocate A Nxumalo, and they were also given until 7 October to provide their representations. Both chairpersons are still to be engaged in these matters, so how the processes are to be conducted by them would be entirely up them and cannot be predetermined.

[25] The final group consists of 47 employees that were charged and presented with their individual bundles on 7 October 2024. They have until 14 October to submit their representations. As yet, no chairperson has been identified for appointment, for this group. Once again, it is therefore premature to predict how these hearings will be conducted.

[26] It follows that to date, BMW has commenced disciplinary proceedings against approximately 224 employees, with many more to come. BMW has stated that in respect of all the employees charged and subjected to disciplinary proceedings, the sanctions of dismissal are not a foregone conclusion, and each chairperson has a discretion to recommend a sanction.

[27] As appears from its application, NUMSA had a number of difficulties with the attenuated disciplinary process instituted by BMW as summarized above. First, NUMSA had a problem with the formulation of the charge(s). According to it, the employees are referred in the charge documents to alleged individual acts of fraud allegedly committed in 2022, further that they were subsequently allegedly warned that their conduct was unacceptable, and that should they in future conduct themselves in similar fashion, disciplinary action would follow. NUMSA then points out that the employees are specifically charged for having allegedly persisted with such misconduct contrary to the said warnings, however there are no particulars provided of the actual misconduct employees stand accused of having persisted with.

[28] BMW contends that NUMSA misconstrued the charge(s). It contends that the dates and events when specific employees committed specific instances of fraud (between 2021 and 2022) are set out in their individual charge document(s), and it was clear from the charge(s) that this would be the misconduct they must answer. BMW explains that the reference to the conduct that persisted, as referred to in the charge document(s), is a reference to the continued concealment of the fraud already committed and not any new incidents. As far as BMW was concerned, NUMSA was actually aware of this, having engaged extensively with BMW in meetings about this and having already assisted employees in the first phases of the disciplinary process that has culminated in dismissals of employees.

[29] The next difficulty that NUMSA had is that BMW allegedly refused to disclose the identity of the independent chairpersons. According to NUMSA, this gave the impression that there must be some or other *ex parte* arrangement between BMW and the chairperson(s) concerned, bringing their impartiality into question. NUMSA

even went so far as to say that this created a reasonable apprehension of bias. BMW disagreed. It explained that the inference NUMSA sought to draw was nothing more than unfounded supposition. It further explained that it left the conducting of the process entirely in the hands of the chairpersons, and that such chairpersons may call for further information or even convene a hearing, should they deem it appropriate. The ultimate decision on the misconduct and sanction would also be solely that of the chairpersons. BMW further pointed out that at the time when NUMSA demanded the particulars of the chairpersons on 24 September 2024, most of them had not even been appointed yet, so there was nothing to disclose.

[30] Finally, NUMSA complained that it was not in possession of all the charge documents relating to its members, and that BMW had the duty to first provide it with the same. BMW answered that it was not disputed that all the members had been presented with their respective charge documents, and that it was the duty of the members themselves to provide the same to NUMSA. As far as BMW was concerned, there was no duty on it to accommodate NUMSA in this respect.

[31] In the above context, correspondence was exchanged between NUMSA and BMW in the period between 16 September 2024 and 3 October 2024. I do not intend to repeat everything that is contained in this correspondence. What is worth noting is that BMW was willing to accommodate NUMSA's request by providing it with further information it asked for, and extending the deadline for representations for the first group of charged employees. But where the parties remained at odds was surrounding the issue of the alleged shortcomings in the charge documents, and whether the attenuated disciplinary process embarked upon by BMW was *per se* fair or unfair. The upshot was that on 3 October 2024, BMW indicated that it would continue with the disciplinary process, and that if NUMSA was dissatisfied, it was free to pursue whatever legal remedies it deemed appropriate.

[32] The current urgent application then followed.

Urgency

[33] Urgent applications are governed by Rule 38 of the new Labour Court Rules. In considering the predecessor of Rule 38, being Rule 8 of the old Rules, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[7] said:

'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

There is no reason why these same considerations should not also apply to the new Rule 38.

[34] The ordinary requirements relating to urgent applications in general was summarized in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and* Another[8]. As said, I believe these requirements still apply to urgent applications under the new Rule 38. These requirements are: (a) the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[35] I am satisfied that, after due application of the above principles to the facts of this matter, NUMSA has at least made out a proper case of urgency. The first group

[7] (2010) 31 ILJ 112 (LC) at para 18.
[8] (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and all the authorities cited there.

of attenuated disciplinary proceedings were instituted on 20 September 2024, with at total close on 500 hearings still to be completed and / or to come. After the exchange of correspondence between NUMSA and BMW with regard to the disciplinary proceedings, in which NUMSA sought to get agreement from BMW to stop what it believed was an unfair process and rather negotiate the matter with it, failed to being about the required result, NUMSA virtually immediately brought the current application. I am satisfied that this constitutes the kind of immediate action on the part of NUMSA to satisfy the requirements of urgency. Even if 20 September 2024 is taken as the appropriate point from which to determine urgency, the period of some two weeks days taken to bring the application on 7 October 2024, considering all the circumstances of this case and the correspondence exchanged in between, does not establish undue procrastination and the kind of delay that could serve to non-suit NUMSA on the basis of a lack of urgency.

[36] In the answering affidavit, BMW did challenge the issue of urgency. However, and when the matter was argued before me, urgency was not really in issue. BMW rather focussed its submissions on the merits of the matter. It seemed apparent that it would be in the interest of both parties to rather have the issues raised in the application finally decided. This meant there were no considerations of prejudice that would work against deciding this matter urgently.

[37] Whilst it would be true that where it comes to the substance of NUMSA's claim, and for the reasons elaborated on later in this judgment, it would in my view be able to obtain full redress in the ordinary course by virtue of unfair dismissal proceedings under the LRA, this is an aspect that must be separately considered in these kind of cases, and the matter must be heard as one of urgency to enable this to happen. In my view, NUMSA has satisfied the requirements of urgency in order for the substance of its case to at least be determined on an urgent basis.[9]

Analysis

[9] See *Mlaba v Minister of Home Affairs and Another* (2024) 45 ILJ 139 (LC) at para 24.

[38] BMW raised a preliminary point that NUMSA has no *locus standi* in this matter, because it has failed to identify its members that are a party to the application. This point has no substance. As a registered trade union, and by virtue of section 200(1) of the LRA, NUMSA is entitled to bring these proceedings, on behalf of its members, without having to individually identify them.[10] In *National Union of Mineworkers v Hernic Exploration (Pty) Ltd*[11] the Court held: '*… I conclude in the end that on the basis of s 200(1) of the Act a trade union has a right to refer a dismissal dispute relating to its members to the CCMA for conciliation and to the Labour Court for adjudication as the referring party or as applicant without citing its dismissed members as co-applicants …*'. On this basis, the point raised by BMW in this regard is therefore rejected.

[39] Turning then to the substance of the case, it is my view that no matter how NUMSA may seek to colour it in, what it is seeking in this case is quite straight forward. It wants this Court to intervene in incomplete disciplinary proceedings conducted against its members by BMW. It does so on the basis that it contends that such disciplinary proceedings are grossly unfair and would deprive its members of a proper opportunity to state their case prior to dismissal. The point is that NUMSA is asking for this intervention, because it believes its members are staring an unfair dismissal in the face. As said in the founding affidavit:

'There is a distinct possibility that in excess of 400 employees will be dismissed. In this regard BMW is on record that the first 20 who were dismissed were selected "randomly" and that they were not selected on the basis that their alleged misconduct was somehow distinguishable from the others or of a more serious nature. Accordingly, it is reasonable for NUMSA to assume that the remaining 400 plus employees are at risk of imminent dismissal, which dismissals are to occur in terms of a patently unfair process.'

[40] The complaint by NUMSA is squarely founded on the attenuated disciplinary proceedings that BMW had chosen to apply in this case, relying on a recent amendment of its disciplinary code. NUMSA does not dispute that BMW was entitled

[10] Section 200(1) of the LRA reads: '*A registered trade union … may act in any one or more of the following capacities in any dispute to which any of its members is a party - (a) in its own interests; (b) on behalf of any of its members; (c) in the interest of any of its members*'.
[11] (2003) 24 ILJ 787 (LAC) at para 40.

to amend its disciplinary code, so this issue need not be decided in this judgment. The live issue is however that the attenuated disciplinary process adopted by BMW *in casu* pursuant to such disciplinary code, is contended by NUMSA to be unfair, for a number of reasons, next set out.

[41] First, NUMSA contends that BMW refused to disclose who the chairpersons would be in this process, and therefore it believed: '*… such chairpersons are in fact conflicted and by no means independent which perception and reasonable apprehension of bias are reinforced by BMW's refusal to make the necessary disclosure …*'. Second, NUMSA has an issue with the wording of the charge documents presented to the individual employees. It contends that whilst all the employees were referred in their respective charge documents to alleged individual acts of fraud allegedly committed in 2021 / 2022, the charge documents then specifically refer the employees having allegedly persisted with such misconduct, without providing any particulars of this alleged further misconduct. As far as NUMSA was concerned, this meant that BMW failed to give proper particulars of actual misconduct committed by the employees, that they stand accused of, and that they were meant to answer for. Third, NUMSA contends that it is not in possession of all the individual charge documents of all its members, having been mandated by all its members to represent them in the disciplinary proceedings. Flowing from this, the complaint by NUMSA is that it attempted to engage with BMW about this, but BMW unreasonably refused to engage with it.

[42] The right to procedural fairness, for the want of a better description, that accrues to employees prior to being dismissed, is a right squarely founded on the LRA. This is specifically provided for in section 188(1)(b), which stipulates that a dismissal for misconduct (which is what the case *in casu* is about) must be procedurally fair, in order to qualify as a fair dismissal. What would be considered, as a general proposition, to be procedurally fair, is then provided for in Item 4(1) of Schedule 8 of the LRA.[12] In this context, the Court in *Chirwa v Transnet Ltd and Others*[13] said:

[12] Item 4(1) reads: '*Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably*

'The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. …'

[43] The right to procedural fairness in the case of disciplinary action for misconduct thus does not exist in isolation. It is part and parcel of the enquiry that a CCMA or bargaining council arbitrator embarks upon when deciding whether the dismissal of an employee is fair. Therefore, there must be a contemplated dismissal for misconduct for this right to be asserted. That is why NUMSA is effectively saying that it believes its members would be unfairly dismissed if the attenuated disciplinary process adopted by BMW is allowed to prevail. In short, NUMSA is seeking to assert a right it and / or its members would have under the LRA, on the basis that their dismissal for misconduct is contemplated.

[44] It is in this context that NUMSA faces a considerable obstacle to succeeding with its application. The LRA was intended to constitute the comprehensive legislation which was specifically designed to give effect to the protections afforded against unfair labour practices as enshrined in section 23(1) of the Constitution. Or differently put, where it comes to the right to be heard as part of the fundamental rights under the Constitution pertaining to the employment relationship, it is the LRA which was specifically enacted to give effect to this fundamental right.[14] This right to be heard prior to a decision to dismiss is commonly known as procedural fairness. What this right to be heard actually entails, in the context of an alleged unfair

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understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.'

[13] (2008) 29 ILJ 73 (CC) at para 42.

[14] In *SA Airways (SOC) Ltd (In Business Rescue) and Others v National Union of Metalworkers of SA on Behalf of Members and Others* (2020) 41 ILJ 2113 (LAC) at para 38 it was said: '*… The constitutional right to fair labour practices finds legislative expression in the LRA. Its scope covers the interests of both employers and employees …*'. See also *Public Servants Association on behalf of Ubogu v Head of the Department of Health, Gauteng and Others* (2018) 39 ILJ 337 (CC) at para 42; *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers Union* (2013) 34 *ILJ* 335 (LAC) at para 18.

dismissal, is then equally circumscribed by the LRA itself. All considered, what NUMSA's cause of complaint *in casu* would be is nothing more than an alleged infringement of the right of its members not be procedurally unfairly dismissed, as provided for in the LRA. The relief it seeks, both in its original and amended notice of motion, equally points to this. As held in *Zungu v Premier, Province of Kwazulu-Natal and Another*[15]:

'… It is not, primarily, the form of relief sought, but rather the necessary averments to demonstrate the 'cause of action' that determines the 'character' of the dispute, although the form of the relief, if it is consonant with the cause of action, will point in the same direction …'

[45] Of critical importance for consideration in this case is that this right so afforded by the LRA, is directly and specifically linked to prescribed process where it comes to its enforcement. Or in other words, the LRA specifically prescribes in what manner such right must be asserted. This prescribed method of assertion does not include the Labour Court, as Court of first instance.[16] This process in fact required NUMSA to refer its dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or applicable bargaining council (if applicable), to conciliation, and if conciliation failed, then to arbitration.[17] In *Chirwa v Transnet Ltd and Others*[18] the Court said:

'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving

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[15] (2017) 38 ILJ 1644 (LAC) at para 18.

[16] In *O'Connor v Department of Education, Eastern Cape and Others* (2024) 45 ILJ 1041 (LC) at para 44, the Court held: '*In short, the LRA has a unique scheme where it comes to resolving disputes that arise in the scope of the employment environment … The LRA creates a right to a fair dismissal and a fair labour practice, and then provides for a prescribed dispute-resolution process to give effect to such right. … At a level of policy, this court should always strive to give primacy to these prescribed dispute-resolution processes of the LRA and the notions underlying it*'.

[17] See sections 191(1) and 191(5)(a) of the LRA.

[18] (2008) 29 ILJ 73 (CC) at para 41. See also the dicta of Ngcobo J in *Chirwa supra* at para 124 where the learned Judge held: '*… It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case 'for practical considerations'. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution …*'.

employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims …*'*

Following on, and in *Gcaba v Minister for Safety and Security and Others*[19] it was held:

'… Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in Chirwa by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees …'

[46] It must follow that any application brought that seeks to approach this Court directly to challenge what is nothing more than a component of the right not to be unfairly dismissed under the LRA, is not permitted. The Court in *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[20] specifically dealt with the prescribed dispute resolution process in the case of an unfair labour practice and stated:

'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)*(a)*(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration

[19] (2010) 31 ILJ 296 (CC) at para 56.
[20] (2012) 33 ILJ 2033 (LAC) at para 46.

proceedings, except perhaps in extraordinary or compellingly urgent circumstances …'

[47] What was said in *Gradwell supra* would equally apply to unfair dismissal disputes, which are also governed by section 191 of the LRA. There are many examples in judgments of this Court, where it has been made clear that where it comes to disputes such as the one raised by NUMSA *in casu*, these must be pursued in terms of the dispute resolution process prescribed by section 191 of the LRA, and this Court was critical of litigants that effectively sought to bypass this.[21] There is in fact, in my view, a simple reason for this, alluded to in *Gradwell supra*. This reason is that it would be quite inappropriate to finally decide an issue like procedural fairness in an unfair dismissal dispute by way of motion proceedings. There are many case by case factual nuances that would or could be relevant in deciding whether a dismissal is procedurally fair. It must always be considered whether an employee, overall, was given a fair opportunity to state his or her case prior to dismissal.[22] This is best dealt with by way of *viva voce* evidence, hence arbitration is prescribed. For example, an employee could be considered to be procedurally fairly dismissed even if there was no disciplinary hearing at all, depending on circumstances.[23] The current process of arbitration is also relatively expeditious, with most disputes being finally arbitrated in under six months from when the dispute was first referred to the CCMA / bargaining council. There is simply no need for urgent Court intervention in this respect. So therefore, NUMSA was compelled to have pursued its claim that its members were unfairly dealt with in the

[21] See *Hendricks v Overstrand Municipality and Another* (2015) 36 *ILJ* 163 (LAC) at para 12; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 14; *Magoda v Director-General of Rural Development and Land Reform and Another* (2017) 38 ILJ 2795 (LC) at para 16; *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 *ILJ* 1096 (LC) at para 67; *Leshabane v Minister of Human Settlements and Others* (2024) 45 ILJ 833 (LC) at para 38; *Maphalle v National Heritage Council and Others* (2023) 44 ILJ 579 (LC) at para 35; *Minya v SA Post Office Ltd and Others* (2021) 42 ILJ 141 (LC) at paras 2 – 3; *Ngubane v Safety and Security Sectoral Bargaining Council and Others* (2022) 43 ILJ 2543 (LC) at para 23.

[22] See *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 48.

[23] See schedule 8 of the LRA, which provides in item 4(4): '*In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures*'. See also *National Transport Movement on Behalf of Molema and Others v Botselo Holdings (Pty) Ltd* (2020) 41 ILJ 701 (LC) at para 58, where the Court said: '*… The circumstances faced by both the employer and employees should dictate what procedural steps are reasonably practical and fair in the context …*'. See further *Majola and Others v D & A Timbers (Pty) Ltd* (1997) 18 ILJ 342 (LAC) at 355A-D.

disciplinary proceedings instituted against them, by way of a referral to the CCMA / bargaining council. It was not competent to approach this Court directly. As such, and by virtue of its failure to follow what is the described dispute resolution processes under the LRA, NUMSA simply has no right to the declaratory relief sought in its amended notice of motion.

[48] The situation is exacerbated by the fact that NUMSA is able to obtain full substantive relief on behalf of its members by virtue of the dispute resolution process under the LRA, as described above.[24] If the procedure followed by BMW is considered by an arbitrator to be so grossly unfair as contended for by NUMSA, such procedural unfairness may well impact on substantive fairness, rendering it substantively unfair.[25] In such an instance, competent relief that could be afforded to the NUMSA members would be fully retrospective reinstatement.[26] As held in *Leshabane v Minister of Human Settlements and Others*[27]:

'… Considering this case concerns the public service, all he needed to do was refer an unfair dismissal dispute to the applicable bargaining council and assert that there was no proper cause for the minister to terminate his contract of employment (thus dismissing him), that such termination violated his right to a hearing prior to termination, and was unfair. If successful in that case at the bargaining council, the primary relief would be fully retrospective reinstatement for the contract period, which constitutes full redress for any violation of the applicant's rights. …'

In the end, and as said in *Zungu v Premier of the Province of KwaZulu-Natal and Others*:[28]

'… the claim by the applicant relating to the Premier's decision not to appoint her, and the contention that this was unlawful, falls squarely within the definition of dismissal in s 186(1)*(b)* of the LRA. The dispute should have been referred to

[24] Compare *Broadcasting Electronic Media and Allied Workers Union and Others v SA Broadcasting Corporation and Others* (2016) 37 ILJ 1394 (LC) at para 19.
[25] As said in *Mbekela v Airvantage* (Pty) Ltd 2021 JDR 3315 (LAC) at para 19: '*… Whether a failure to follow a particular procedure would lead to substantive unfairness depends on the facts and circumstances of each case …*'. Similarly, the Court in *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC) at para 48 was of the view that: '*… There may be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure …*'.
[26] See section 193(1)(a) of the LRA.
[27] (2024) 45 ILJ 833 (LC) at para 34.
[28] (2018) 39 *ILJ* 523 (CC) at para 20.

conciliation and ultimately to arbitration under s 191 of the LRA. Therefore, the applicant cannot bypass the dispute-resolution process envisioned in the LRA. The applicant was obliged to follow the dispute-resolution process in chapter VIII of the LRA but did not do so. …'

[49] This leaves NUMSA with possibly only one avenue still open to it. This would only relate to the interdictory relief sought in the notice of motion. It is settled that the Labour Court has jurisdiction to interdict unfair conduct perpetrated by an employer in the case of disciplinary action against employees. As held in *Booysen v Minister of Safety and Security and Others*[29]: '*…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. …*' But the enquiry does not stop there. The fact that the Labour Court has such jurisdiction, does not mean that the Labour Court should always exercise it, and the Court must still decide whether the case itself is a good or a bad case.[30] As set out above, and because of the prescribed dispute resolution process under the LRA, the kind of case brought by NUMSA *in casu* would ordinarily be a bad case and must thus fail. As an exception, it can only be considered to be a good case if NUMSA can show that there are truly exceptional circumstances justifying intervention. Again, as said in *Booysen supra*:[31]
'*… However such an intervention should be exercised in exceptional cases. …*'

[50] In thus follows that NUMSA must demonstrate the existence of exceptional circumstances. If there are no such exceptional circumstances, then this Court must decline to step in. As to what exceptional circumstances may be, there are of course no specific hard and fast rules. In *Booysen supra* the Court said:[32]
'… It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene

[29] (2011) 32 ILJ 112 (LAC) at para 54. See also *Gradwell* (*supra*) at para 46.
[30] As held in *Makhanya v University of Zululand* (2009) 30 ILJ 1539 (SCA) at para 54: *'… the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim …*'. See also *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* 2013 (6) SA 345 (SCA) at para 23; *Minya* (*supra*) at para 1; *Mlaba* (*supra*) at para 35.
[31] Id fn 29
[32] See fn 29 *supra*.

would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive. …'

[51] The simple point is that this Court will only entertain applications to intervene in uncompleted disciplinary proceedings in truly exceptional circumstances crying out for intervention and if material irremediable prejudice or grave injustice is shown to exist.[33] *In casu*, NUMSA dismally failed to establish this, for the reasons to follow.

[52] In seeking to establish exceptional circumstances, and despite how NUMSA seeks to categorize it, it is clear to me that NUMSA's real problem is its dissatisfaction with the attenuated disciplinary process adopted by BMW. Even though conceding that BMW is entitled to change its disciplinary code to make provision for such an attenuated process as adopted in this case, NUMSA contends that this process is so grossly unfair that intervention is required. In the founding affidavit, this contention is based on three reasons. First, NUMSA believes that BMW's refusal to disclose the identity of the chairpersons is unfair, and leaves it convinced that these chairpersons would not be impartial. Second, NUMSA is critical of the wording of the charges, complaining that insufficient particulars are provided and therefore its individual members would not have a fair opportunity to present their defences. Third, NUMSA contends that because BMW is unwilling to engage with it about the disciplinary proceedings, it would compromise its members' opportunity to state their respective cases, as they have mandated NUMSA to represent them.

[53] In my view, none of the above grounds of complaint raised by NUMSA, even as they stand, show the existence of exceptional circumstances.[34] In simple terms, there is nothing special, unique, exceptional about these complaints, nor is there any grave injustice, that would justify urgent intervention by this Court. Whether or not a chairperson is impartial is an issue that is regularly raised as part of procedural fairness challenges at arbitrations, and is best dealt with in evidence at such

[33] See *Jiba* (*supra*) at para 17; *Ngobeni* (*supra*) at paras 12 – 13; *Uthukela District Municipality* (*supra*) at para 17; *Magoda* (*supra*) at paras 17 – 18.
[34] Similar grounds were unsuccessfully raised in *Public Allied Workers Union of SA on Behalf of Netshikhudini v Commission for Conciliation, Mediation and Arbitration and Others* (2022) 43 ILJ 2812 (LC) at para 7, and *Minya* (*supra*) at para 20, as being exceptional circumstances.

arbitrations. In any event, an external independent chairperson is more than what schedule 8 of the LRA provides for. Similarly, having insufficient particulars about a charge to enable an employee to mount an effective defence is a regular basis for challenging procedural fairness in the normal course in unfair dismissal arbitration proceedings. And finally, there is no basis for NUMSA to insist that BMW must engage with it on how the disciplinary process is to be conducted, which is in reality what it demands. There is no indication that NUMSA would not be able to fully assist all its members in making representations to the various chairpersons concerned, relating to the charges against them, and no such case is even made out. Of relevance, the following is recorded in the charge documents themselves:
'Your representations will be considered by an external independent chairperson. The chairperson may also contact you to request for any further information which the chairperson may require to arrive at an informed recommendation. The chairperson will undertake the process in a fair manner.'

[54] Insofar as the attenuated disciplinary process itself is concerned, there is nothing in law that compels BMW to hold an in person and oral disciplinary hearing before deciding to dismiss an employee. The right to be heard, in this context, in essence involves three considerations.[35] The first is that the employee should know the nature of the accusation against him or her, the second is that the employee must be given an opportunity to state his or her case, and the third is that the employer acts in good faith. These three principal objectives have found their way into item 4 of schedule 8 of the LRA. Not only is there nothing in the entire item 4 of schedule 8 that makes an in person / oral disciplinary hearing compulsory, but item 4(1) actually stipulates there does not need to be a formal enquiry in order to comply with the employee's right to state a case. It is quite acceptable, where circumstances so dictate, to conduct the disciplinary process by way of representations.[36] This was

[35] See *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 587B-F.
[36] In *Mathabathe v Nelson Mandela Bay Metropolitan Municipality and Another* (2017) 38 ILJ 391 (LC), the disciplinary process was conducted by way of representations being submitted to an independent chairperson, similar to the case *in casu*. The Court had the following to say about this at para 23: '*… In my view, the applicant was afforded a right to be heard on terms that satisfy the requirements of the code of good practice. The applicant was afforded an opportunity to state her case, which she did with the assistance of counsel. The second respondent considered the applicant's submissions, and made a decision. He communicated that decision to the applicant and advised her of her right to pursue the matter further. …*'. See also para 25 of the judgment.

made clear in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*[37], as follows:

'… The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process. …'

[55] Similarly, and in *Public Allied Workers Union of SA on Behalf of Netshikhudini v Commission for Conciliation, Mediation and Arbitration and Others*[38], the Court expressed the following view:

'There are a number of other reasons why the application ought to be refused. The right to a fair procedure established by the LRA is elaborated by the code of good practice. The code envisages that an employee who is accused of misconduct is afforded an opportunity, in an informal setting, to respond to the employer's allegations. The Act does not envisage, as the applicant appears to contend, an elaborate court-like hearing at which the rules applicable in a court of law necessarily apply …'

[56] *In casu*, the evidence showed that there was in excess of 500 employees of BMW that were involved in the misconduct relating to making the fraudulent claims, and as a result needed to be disciplined. To hold a formal in person disciplinary hearing for each one of them, considering that the facts in each case would be different, is an untenable proposition, and will severely compromise the requirement

[37] (2006) 27 *ILJ* 1644 (LC) at 1651I – 1652B. See also *Strydom v Arcelormittal SA* (2024) 45 ILJ 931 (LC) at para 30; *SA Broadcasting Corporation* (*supra*) at para 17; *Kelly Group Ltd v Khanyile and Others* (2013) 34 ILJ 2035 (LC) at paras 22 – 23.
[38] (2022) 43 ILJ 2812 (LC) at para 10.

of expeditious dispute resolution.[39] In the answering affidavit, BMW points out that due to the sheer number of employees involved, as well as the existing and compelling evidence against such employees, it was neither practical nor rational to follow a criminal style in person hearing. BMW added that this was particularly so in circumstances where NUMSA, acting for the employees, has effectively admitted on the employees' behalf that they were involved in the fraud. All this considered, it is my view that this certainly would be the kind of situation where an attenuated disciplinary process based on representations would be justified.

[57] The situation *in casu* is a situation that can perhaps best be compared to the disciplining of a large group of striking employees, in respect of which the Court in *National Union of Metalworkers of SA and Others v Transnet National Ports Authority*[40] had the following to say:

'… Mr *Todd*, for TNPA, correctly contended that there is no obligation in law to conduct a formal tribunal-style hearing, as the appellants sought to suggest. There is no reason why the employer cannot comply with the audi rule by calling for collective representations why the strikers should not be dismissed.'

[58] In the end, the fact is that the duty (onus) is on an employer to prove that the dismissal of an employee for misconduct is fair. In this context, it is up to the employer to decide how to conduct the disciplinary proceedings, and having made such a decision, it would have to prove to an arbitrator that what it decided to do was fair. It follows that BMW is entitled to adopt the attenuated disciplinary process in the manner that it did, and it would then be up to BMW to establish and prove to an arbitrator deciding the fairness of the dismissal of the employees (if employees are indeed dismissed) that the process it decided to adopt qualifies as being fair in line with the guiding principles in item 4 of schedule 8 of the LRA.

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[39] In *SA Broadcasting Corporation* (*supra*) at para 18, it was held: '*That is exactly the conundrum that the SABC faces in these proceedings. To have individual hearings for each individual employee numbering more than 100, along the lines of a criminal justice model, will impede the very workplace efficiencies that Van Niekerk J spoke about. …*'. The Court was referring to the judgment of Van Niekerk J in *Avril Elizabeth* (*supra*).

[40] (2019) 40 ILJ 516 (LAC) at para 29. See also *Modise and Others v Steve's Spar, Blackheath* (2000) 21 ILJ 519 (LAC) at para 76.

[59] What NUMSA is also asking for, is for this Court to prescribe to BMW what would be a fair process. This is evident from the amended notice of motion, where NUMSA seeks declaratory relief that it be allowed to make representations on behalf of employees, and that time limits be prescribed for doing so. It would not be appropriate for this Court to adhere to this request by NUMSA, in the light of what has been discussed above. In simple terms, it is not for this Court in micro-manage internal disciplinary proceedings in an individual employer, be it on an urgent basis, or otherwise.[41] This was made clear in *Minya v SA Post Office and Others*[42], as follows:

'From a plethora of such cases that are routinely brought on an urgent basis, it has become increasingly apparent that this court is more often than not, called upon to micro-manage these internal proceedings, and that every little complaint about internal disciplinary proceedings, whether real or perceived, has by default, become an "exceptional circumstance". It has long been stated that the powers of this court under the Labour Relations Act (LRA) do not include the micro-management of workplace discipline or every dispute arising out of the workplace. This is so in that the prerogative to maintain discipline remains that of the employer, and further since the framework of the LRA is such that it is dispute specific.'

[60] But what is in the end the final blow to the case of NUMSA, is the detailed exposition provided by BMW in its answering affidavit concerning the background to the disciplinary proceedings, and how the disciplinary proceedings are to be conducted. BMW has also addressed in detail its answers to the various allegations made by NUMSA about the interaction between NUMSA and BMW in the run up to the disciplinary proceedings. As discussed above, there is no legitimate cause or reason not to accept these explanations, by virtue of the application of *Plascon Evans*.[43] In a nutshell, BMW says that it never refused to provide the details of chairpersons, and indicated that when the request came from NUMSA, most of the chairpersons had not even been appointed, so how could their details be provided. Where it comes to the issue of the alleged lack of particulars of the charge, BMW

[41] See Shezi v SA Police Service & Others (2021) 42 ILJ 184 (LC) at para 14.
[42] (2021) 42 *ILJ* 141 (LC) at para 2. See also *Mlaba* (*supra*) at para 47.
[43] Compare *Mokoena v Merafong Local Municipality and Another* (2020) 41 ILJ 2882 (LC) at para 24, where the same approach was followed in an urgent application to intervene in an incomplete disciplinary hearing.

explained that NUMSA was well aware of what the charge was all about, and further explained what it meant. And finally, BMW indicated that it would have no difficulty with NUMSA making representations on behalf of its members. All this puts paid to the concerns raised by NUMSA.

[61] It is clear to me that it is as a result of what BMW said in the answering affidavit, NUMSA decided to amend its notice of motion. This was done to try and save a case that had no merit. It was nothing more than a watered-down version of the relief originally asked for, when it should have been clear that there was no basis to proceed with this case.

[62] NUMSA, faced with the difficulty of being unable to establish a right the relief sought, then argued that because of the particular hardship the employees would suffer in losing their employment in such an unfair manner, and considering all the dependants they have, and the large number of employees involved, this Court should nonetheless come to their assistance. This approach is unsustainable. As held in *Mlaba v Minister of Home Affairs and Another*[44]:

'… this kind of argument suggests that the mere existence of particular personal circumstances and / or hardship on the part of the applicant effectively created a right to relief where none exists in the first place. This surely cannot be. If the right does not exist in the first place, no amount of hardship can save the situation, as one of the primary requirements for obtaining final relief is absent.'

[63] It is not necessary for me to decide whether any of NUMSA's members committed the misconduct concerned, and / or whether their dismissal would be justified or fair. That is squarely the task of the arbitrator(s) in the ultimate unfair dismissal proceedings, which NUMSA have indicated they would pursue should their members be dismissed. I will therefore not pronounce on the extensive contentions made by BMW in its answering affidavit as to the fact that the individual NUMSA members committed the misconduct, and that NUMSA may admitted their involvement in the same, save only for saying that considering the allegations made against them, disciplinary action was certainly justified.

[44] (2024) 45 ILJ 139 (LC) at para 46.

[64] All considered, it is not necessary to consider any of the other requirements where it comes to the final relief being sought by NUMSA. The simple reason for this is that NUMSA has not exited the starting block of establishing its right to any of the relief it was seeking. As such, a clear right to the relief sought has not been proven. That should be the end of the matter, no matter what the consequences may be where it comes to the personal circumstances of the employees.

[65] Therefore, and in sum, NUMSA has failed to make out a case for the relief it seeks. Considering it relies on contentions pertaining to rights that squarely resort within the unfair dismissal jurisdiction under the LRA, it is compelled to follow the prescribed dispute resolution processes as established by the LRA. This entails, in the first instance, a referral of the dispute to the CCMA or applicable bargaining council for conciliation, followed by arbitration if the dispute remains unresolved. There are no exceptional circumstances in existence that would warrant interference by this Court at this stage. For all the reasons as set out above, NUMSA's application must fail, and thus falls to be dismissed.

Costs

[66] BMW has asked for a punitive costs award against NUMSA. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. The Constitutional Court has provided some guidance as to how this discretion is to be exercised. In *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[45] that Court said:

'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it …'

[45] (2021) 42 ILJ 2371 (CC) at para 35.

[67] NUMSA was legally assisted throughout these proceedings, and is itself an experienced and well-resourced trade union, fully familiar with litigation in this Court concerning LRA disputes. NUMSA should thus have known, from the outset, that its application was doomed to fail. I also consider that NUMSA in fact deliberately designed the current application to try and effectively scupper the disciplinary proceedings, with the view to compelling BMW to negotiate some alternative resolution to the matters with it rather than dismissing its members.[46] This is further evident from a number of public statements made by NUMSA, quoted in BMW's answering affidavit, to the effect that despite NUMSA admitting that its members were involved in the misconduct concerned, those members should not be dismissed.[47] Telling is the statement by Irvin Jim, the general secretary of NUMSA, where he said on 29 September 2024 in a quarterly meeting with its members at the BMW factory in Rosslyn: *"The company wants to dismiss. We are saying you can't dismiss. We* say *you can put workers on final warning, you can put workers on suspensions but you can't dismiss workers. You are not angels, BMW management. It is YOU who appointed those corrupt criminal Doctors who knew our members to participate in such activities that are fraudulent'* (sic). This kind of behaviour of bringing applications to achieve ulterior purposes is not conducive to the fundamental requirement of the expeditious resolution of employment disputes, would be an abuse of the scarce resources of this Court, and should be frowned upon.

[68] And finally, the continuous failure by litigants to heed the numerous warnings by this Court where it comes to these kind of applications, which is effectively what NUMSA has done in this instance, must be visited with adverse consequences.[48] It

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[46] As said in the founding affidavit by NUMSA itself: '*… NUMSA could not merely permit a blood-bath of jobs being implemented, resulted in attempts to engage with BMW to find a negotiated settlement*'.

[47] See for example the statement by the regional secretary, Jerry Morulane, as follows: '*We will not support the dismissal of our members as* a *result of the situation we find ourselves in. It is a situation that we are convinced that it can be addressed. Now we further said to the employer, Employer, you can't discipline our members alone. You must also discipline Discovery, Discovery must go* …' (sic). Further, and in a press statement by NUMSA dated 17 September 2024, it is recorded: '… *If workers were indeed involved in the alleged criminal conduct this could have only occurred with the participation of various other stakeholders, including corrupt service providers appointed by the medical aid scheme*'.

[48] See, for example, *Uthukela District Municipality* (*supra*) at para 47; *Magoda* (*supra*) at para 20; *Botes v City of Joburg Property Company SOC Ltd and Another* (2021) 42 ILJ 530 (LC) at para 50;

constitutes an abuse process to pursue a case which is for all intents and purposes hopeless.[49] Exercising the broad discretion I have with regards to costs, I believe this is a situation where a costs order against NUMSA was earned, and justified. I fully align myself with the following *dictum* in *Mokoena v Merafong Municipality and Others*[50]:

'In casu, the applicant brought a meritless application to this court and fairness dictates that the respondents cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in before approaching this court on an urgent basis. …'

And in *Leshabane supra*,[51] it was said:

'In bringing the application, the applicant took up the valuable time and already stretched resources of this court. In doing so, the applicant compelled the respondents, which is a public institution funded out of the taxpayers virtually empty pocket, to defend the case using these already limited and stretched public funds, which is not acceptable. What in reality happened in this instance as abuse of process. This court has consistently said that this kind of unfounded litigation is deserving of costs orders. The applicant must be told, in no uncertain terms, hopefully also serving as an example to others, that exercising his right of access to the courts must be done in a responsible manner and always in compliance with the rules and processes of the court.'

[69] Considering that a costs order against NUMSA is earned and justified, the next question is on what basis? The Court in *Minya supra* granted a punitive costs

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Shikwane and Another v Bojanala Platinum District Municipality and Others (J 774/20) [2020] ZALCJHB 191 (29 August 2020) at para 64.

[49] In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) at para 35, the Court described a hopeless case as follows: '*Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based.*'. This is certainly apposite *in casu*, considering the discussion earlier in in this judgment.

[50] (2020) 41 ILJ 234 (LC) at para 36.

[51] Id at para 58.

order in comparable circumstances to the case *in casu*.[52] The reasoning in Minya is compelling, and I was sorely tempted to grant a punitive costs order. But in the end, I first consider that there is a long standing and structured ongoing relationship between the parties. I also consider that there are likely still substantial further proceedings between them to follow, and it may thus be inappropriate to award costs as a basis for punishment with all this to come. I do not think NUMSA was *mala fide*, but was misguided in the pursuit of the interest of its members. And finally, the existence of the attenuated disciplinary process brings some uniqueness to the matter. For these reasons, I am convinced not to grant a punitive costs order. But for all the other reasons already mentioned, a costs order at the highest party and party scale is certainly justified. A party and party costs order at scale C is thus appropriate, and justified.

Order

[70] It is for all the reasons set out above that I made the order that I did, as reflected in paragraph 5 of this judgment, *supra*.

S Snyman
Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Mr M Niehaus of Minnaar Niehaus Attorneys
On behalf of the Respondent:	Advocate F A Boda SC
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys

[52] The Court said at para 29: *'… This application ought never have seen its day in court in the light of its ill-conceived nature, more particularly in view of the procedural complaints raised by the applicant. The applicant's attorneys of record and counsel ought to have foreseen the futility of bringing this application. To reiterate, this court ought not to be seen as a first port of call for all workplace related complaints when these can be sufficiently dealt with internally. In the event that an employee is still aggrieved after the internal process, such issues can properly be addressed through the dispute-resolution framework of the LRA. This is something of which the applicant, being legally represented, ought to have been made aware. In the circumstances, I therefore agree that the requirements of law and fairness dictate that a punitive costs order should follow. …*'.