IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No:

LAC Case No: JA24/2012

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA OBO OF ITS MEMBERS	Applicant
and	
INTERVALVE (PTY) LTD	First Respondent
BHR PIPING SYSTEMS (PTY) LTD	Second Respondent
STEINMULLER AFRICA (PTY) LTD	Third Respondent
STRATEGIC HUMAN RESOURCES	Fourth Respondent
TQA TRADING ENTERPRISES (PTY) LTD	Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

NORMA CRAVEN

Hereby make oath and state:

1. I am an adult female legal advisor and am employed as the Legal Officer of the applicant, the National Union of Metalworkers of South Africa (NUMSA) with its offices at 153 Bree Street, Newtown.

2. The contents of this affidavit are true and correct and, unless the context indicates otherwise, are within my personal knowledge. Where I make legal submissions, I do so on the advice of NUMSA's legal representatives and in the belief that the advice is correct.

3. This is an application for leave to appeal in terms of Rule 19 of the Rules of this Court against the whole of the judgment and order of the Labour Appeal Court dated 26 March 2014. The application is made in terms of section 167(3) of the Constitution, read with section 168(3).

4. This affidavit is structured as follows:

    4.1. Section I identifies the parties;

    4.2. Section II provides an overview of the nature of the application, highlighting the constitutional issues that arise in the matter;

    4.3. Section III provides a brief account of the material facts of the matter;

    4.4. Section IV sets out the grounds of appeal, in the event that leave to appeal is granted;

    4.5. Section V sets out the basis for the applicant's application to condone the late filing of this application.

I PARTIES

The applicant and the individual employees

5. The **applicant** is **NUMSA**, a trade union registered in terms of the Labour Relations Act 66 of 1995 (the LRA) with its head office at 153 Bree Street, Newtown, Johannesburg.

5.1. NUMSA brings this application on behalf of the 204 individual applicants listed in annexure "A" to the notice of motion in the Labour Court application ("the individual employees"). The matter originated as an unfair dismissal claim brought by NUMSA on behalf the individual employees arising out of their dismissal for participating in a strike.

5.2. The unfair dismissal claim was originally referred only as against the third respondent, Steinmuller Africa (Pty) Ltd. After the initial referral, it became apparent that some of the individual employees may be employed by entities other than Steinmuller Africa (Pty) Ltd. Accordingly, the respondent applied in terms of Rule 22 for the joinder of the other alleged employer entities. The Labour Court granted an order joining the first, second, fourth and fifth respondents as further respondents in the unfair dismissal claim.

5.3. The Labour Appeal Court (LAC) set aside the joinder order. The present application for leave to appeal is directed at the judgment and order of the LAC decision.

The respondents

6. The **first respondent** is **Intervalve (Pty) Ltd ("Intervalve")**, a private company registered as such in terms of the Company Laws of the Republic of South Africa with its place of business at Pretoria Workshop, corner of Roger Dyason and Frikkie Meyer Roads, Pretoria West, Gauteng. Intervalve was one of the parties that the Labour Court ordered be joined as a respondent in the unfair dismissal claim.

7. The **second respondent** is **BHR Piping Systems (Pty) Ltd ("BHR")**, a private company registered as such in terms of the Company Laws of the Republic of South Africa with the same place of business as Intervalve at Pretoria Workshop, corner of Roger Dyason and Frikkie Meyer Roads, Pretoria West, Gauteng. BHR, too, was one of the parties that the Labour Court ordered be joined as a respondent in the unfair dismissal claim. Intervalve and BHR were the appellants before the LAC.

8. The **third respondent** is **Steinmuller Africa (Pty) Ltd ("Steinmuller")**, a private company registered as such in terms of the company laws of the Republic of South Africa with the same place of business as Intervalve and BHR at Pretoria Workshop, corner of Roger Dyason and Frikkie Meyer Roads, Pretoria West, Gauteng. Steinmuller was the party originally cited as the respondent in the unfair dismissal claim. Steinmuller, Intervalve and BHR have shared legal representation.

9. The **fourth respondent** is **Strategic Human Resources ("Strategic Human Resources")**, a corporate entity, whose exact corporate status is presently unknown to the applicant, with its head office at PO Box 102 Sanlamhof,

7532. Strategic Human Resources was one of the parties that the Labour Court ordered be joined as a respondent in the unfair dismissal claim. Strategic Human Resources did not oppose its joinder in the Labour Court and did not participate in the LAC proceedings.

10. The **fifth respondent** is **TQA Trading Enterprises (Pty) Ltd ("TQA")**, a private company registered as such in terms of the Company Laws of the Republic of South Africa with its offices and place of business at 22 Daphne Street, Naturena, Johannesburg. TQA was one of the parties that the Labour Court ordered be joined as a respondent in the unfair dismissal claim. TQA did not oppose its joinder in the Labour Court and did not participate in the LAC proceedings.

II OVERVIEW OF APPLICATION

11. This matter concerns the interpretation and application of section 191 and related provisions of the Labour Relations Act 66 of 1995 and Rule 22 of the Rules of the Labour Court in the light of the spirit, purport and objects of the Bill of Rights, in particular the right to fair labour practices in section 23 and the right of access to courts in section 34 of the Constitution. The application accordingly raises a constitutional matter.

12. The question at the centre of the matter is whether the Labour Court has the power, after a dispute has been referred for conciliation, to join as respondents in an unfair dismissal claim additional employer parties.

12.1. The Labour Court held that it did have that power and exercised it in favour of NUMSA and the individual employees.

12.2. The Labour Appeal Court disagreed and set aside the joinder order made by the Labour Court. The effect of the LAC decision is to bar the individual employees from pursuing their claim for unfair dismissal against BHR, Intervalve, Strategic Human Resources and TQA.

13. For reasons that I explain more fully below, this is a legal question of great importance in the labour arena that is likely to arise in future and affect other parties.

14. The Labour Court granted an application by NUMSA to join Intervalve, BHR, Strategic Human Resources and TQA as respondents to a claim for unfair dismissal initially referred against Steinmuller alone. A copy of the Labour Court judgment is attached, marked "**NC1**".

15. The LAC subsequently upheld an appeal against an order of the Labour Court handed down by Steenkamp J. A copy of the LAC judgment is attached, marked "**NC2**". This is an application for leave to appeal against the whole of the judgment and order of the LAC handed down on 26 March 2014.

16. The decision of the LAC rests on two main findings:

16.1. First, that the Labour Court does not have the power to join a respondent to an unfair dismissal dispute after conciliation has taken place. This finding rests on an interpretation of section 191 of the LRA, read with rule 22 of the Labour Court Rules;

16.2. Secondly, the LAC held that the additional employer parties sought to be joined do not have the requisite direct and substantial interest in the unfair dismissal dispute.

17. The two primary grounds of appeal on which NUMSA shall rely, if granted leave, relate to these two primary issues. It is respectfully submitted that the LAC erred in holding:

17.1. first, that the Labour Court does not have the power to join additional employer parties after conciliation on a proper interpretation of section 191 of the LRA, read with Rule 22 of the Labour Court Rules; and,

17.2. secondly, that such employer parties – here, BHR, Intervalve, Strategic Human Resources and TQA – do not have a direct and substantial interest in the unfair dismissal dispute.

18. It is submitted that the two issues set out above raise constitutional matters or issues connected with constitutional issues. Alternatively, the issues raise arguable points of law of general public importance which ought to be considered by that Court. As I explain below, the LAC overturned a line of Labour Court decisions that had held that the Labour Court does have the power to join additional respondents after conciliation. The issue is likely to arise again in future and to affect many other litigants, especially employees who have been subjected to unfair dismissals by large corporate entities.

19. In addition, it is submitted that the LAC erred in respect of the following issues that are connected with the two primary issues set out above:

19.1. The LAC erred in finding that NUMSA had delayed unreasonably in bringing the joinder application;

19.2. The LAC erred in setting aside the joinder of Strategic Human Resources and TQA when the joinder of those respondents was not before the LAC on appeal.

III FACTUAL BACKGROUND

20. This matter originated as an unfair dismissal claim on behalf of a group of individual employees, arising from a mass dismissal following strike action. The claim was initially brought against Steinmuller alone. The dispute was referred to conciliation in terms of section 191 of the LRA. Steinmuller attended conciliation. At conciliation, Steinmuller's representatives (the shared HR services) claimed that some of the individual employees were not employed by Steinmuller at the time of the dismissals. They did not at that stage provide a list identifying which employees they claimed were employed by which entity.

21. After conciliation failed to resolve the unfair dismissal dispute, it was referred to the Labour Court.

22. Steinmuller subsequently lodged a notice to remove various causes of complaint in the statement of claim and launched a subsequent interlocutory application. One aspect of Steinmuller's complaint was that the respondent had not pertinently alleged that the individual employees were employed by

Steinmuller. Those interlocutory proceedings have now been overtaken by the present proceedings concerning joinder.

23. In respect of the joinder of BHR and Intervalve, the following facts are not in dispute on the papers and were confirmed by the Labour Court at paragraphs 14-15 of its judgment (which factual findings were not overturned by the LAC):

23.1. BHR, Intervalve and Steinmuller form part of the same group of companies and have certain directors and shareholders in common.

23.2. BHR and Intervalve employed some of the individual employees at the time of their dismissal.

23.3. BHR, Intervalve and Steinmuller are all concerned with the manufacturing of different components later assembled to form a power generating plant. They do so in terms of a contract (to which they are presumably all parties). BHR, Intervalve and Steinmuller therefore operate from the same premises.

23.4. BHR, Intervalve and Steinmuller have a number of "shared services", which include:

23.4.1. Payroll administration;

23.4.2. Purchasing of materials;

23.4.3. Quality control;

23.4.4. Heat treatment; and, significantly,

23.4.5. Human resources (HR) services.

23.5. The dismissal of the individual employees was on the basis of a strike action at the shared premises of Steinmuller, Intervalve and BHR. The strike was handled, from the employer side, by the shared HR Services of the three companies.

23.6. The shared HR Services of the three companies communicated with all employees using a document on a letterhead bearing the names of Steinmuller, BHR and Intervalve and signed by a single member of management, Mr J Abert, under the designation “General Manager”.

23.7. During their employment certain employees among the individual employees were “transferred” from one of the three companies (Steinmuller, Intervalve or BHR) to another at different times. These transfers did not involve the termination of one employment contract and the conclusion of a fresh contract, nor the cession and assignment of contractual obligations.

23.8. There are several examples of individual employees who were subjected to such transfers on the papers.

23.9. The shared HR Services of Steinmuller, Intervalve and BHR maintain a single system of records in respect of their employees working at their shared premises.

23.10. There are superintendents who perform management functions across all the bays of the premises shared by Steinmuller, Intervalve and BHR, without distinction as to employees of the different entities.

23.11. Some employees of Steinmuller, Intervalve and BHR, including some of the individual employees, have been required to sign an addendum to their employment contracts reflecting the names of all of these entities, regardless of the identity of the employer.

23.12. Steinmuller, Intervalve and BHR acted with a single voice and face throughout the events that culminated in the dismissal of the individual applications, in particular in effecting their dismissals.

23.13. The shared HR Services prepared and issued identical letters of dismissal to all employees, regardless of employer.

23.14. No distinction was drawn between the three entities prior to the referral to the dismissal claim.

23.15. The group of employees who were re-employed following the dismissals were re-employed without distinction as to their employer.

23.16. BHR and Intervalve will suffer no prejudice if joined:

23.16.1. Because they have shared HR Services, BHR and Intervalve in reality already have full knowledge of the proceedings to date;

23.16.2. BHR and Intervalve have full and ready access to the shared records in respect of the individual employees as employees;

23.17. In light of their shared HR Services, Intervalve and BHR have effectively been represented throughout the events leading to the dismissals.

23.18. The complaint that the individual employees were not all employed by Steinmuller was raised for the first time by the shared HR Services at conciliation.

23.19. The attorneys for Steinmuller (who also act for Intervalve and BHR) furnished the respondent's attorneys with documentary records drawn from the shared HR Services and with lists, which they amended on more than one occasion, purporting to identify the correct employer of each of the individual employees.

23.20. The respondent and its legal representatives undertook a process of verification of the records and lists put up by the legal representatives of Steinmuller, Intervalve and BHR. Although BHR and Intervalve deny that the process was painstaking and time-consuming as alleged by the respondent, they do not deny that the process involved the following:

23.20.1. Contacting each of the individual employees, who are no longer physically present in one location but are scattered across the country and some of whom do not have cellular telephones;

23.20.2. Meetings and consultations with officials of the respondent trade union in attempts to verify the information provided to the respondent.

23.20.3. At the end of this process, NUMSA generated a new list, annexure "RD3" to the founding affidavit. BHR and Intervalve deny that the list in "RD3" is correct and contend that the correct position is reflected in the lists put up by their attorneys on

previous occasions. However, they do not identify the respects in which “RD3” is incorrect, nor explain which of the lists put up by them – which lists themselves differ - is correct.

23.20.4. Accordingly, on the papers, there is final consensus on which entity was formally the employer of each dismissed employee at the time of their dismissals.

24. It is respectfully submitted, for the reasons more fully set out above, that the factual findings of the Labour Court – which were not overturned by the LAC – demonstrate that the joinder of the additional respondent parties was competent and in the interests of justice.

25. I turn now to outline the grounds of appeal on which the applicant will rely if granted leave to appeal.

IV GROUNDS OF APPEAL

First ground: the power of the Labour Court to join additional employer parties in dismissal disputes

26. The LAC held that the Labour Court does not have the jurisdiction or power to join additional respondent parties to an unfair dismissal dispute after conciliation has already taken place, based on the LAC’s interpretation of section 191 of the LRA.

27. It is respectfully submitted that the LAC erred in making this finding. On a proper interpretation of section 191 and Rule 22 of the Labour Court Rules, the Labour Court does have the power to join additional respondents to a

dispute after conciliation has taken place, provided that the substantive requirements for joinder are met.

Joinder in terms of Rule 22

28. Rule 22 of the Labour Court Rules provides:

> *22 Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties*
>
> *(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law of facts.*
>
> *(2) (a)The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of proceedings.*
>
> *(b)When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs.*
>
> *(3) Any person entitled to join as a party in any proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party and the court may make an order, including any order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.*
>
> *(4) If a party to any proceedings has been incorrectly or defectively cited, the court may, on application and on notice to the party concerned, correct the error or defect and may make an order as to costs.*
>
> *(5) If any proceedings it becomes necessary to substitute a person for existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order, including an order as to costs, or give such directions as to further procedure in the proceedings as it deems fit.*

> *(6) An application to join any person as a party to the proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person's representative is already in possession of those documents.*
>
> *(7) No joinder of substitution in terms of this rule will affect any prior steps taken in the proceedings."* (emphasis added)

29. Accordingly, in terms of Rule 22(2)(a), a party may apply on notice to every other party for an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

30. I am advised that the High Court has confirmed the general principle that it has the power to order the joinder of a further defendant to an action that has already begun. In *South Africa Steel v Lurelk* 1951 (4) SA 167 (T) at 173, the High Court held:

> *'The power of the Supreme Court to order the joinder of further defendants in an action which has already begun is undoubted and, as I have said, it has been exercised in many cases. The reason for the existence of such power is that the Court is enabled to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the Court shall be before the Court, and it also enables the Court to avoid multiplication of actions and to avoid waste of costs.'*

31. In a line of cases that the LAC in the present matter has overruled, the Labour Court had held that it has the power to join additional employer parties to an unfair dismissal claim even after conciliation has taken place.

32. The three matters in which the Labour Court held that it does have the power to join additional respondent parties to a dispute even after conciliation are:

32.1. *Selala & Another v Rand Water* (2000) 21 ILJ 2102 (LC);

32.2. *Mokoena v Motor Component Industry (Pty) Ltd (Mokoena & Others v Motor Component Industry (Pty) Ltd & Others* (2005) 26 ILJ 277 (LC);

32.3. The Labour Court decision in the present matter - *NUMSA obo its members v Steinmuller Africa (Pty) Ltd and Others* [2012] 7 BLLR 733 (LC); (2012) 33 ILJ 1885 (LC).

33. In these three decisions, the Labour Court held that it does have the power to join additional parties in terms of Rule 22 after conciliation, notwithstanding the provisions of section 191 of the LRA.

33.1. In *Selala v Rand Water*, Pillay J held that the Labour Court "*has a discretion to join a person as a party to these proceedings even if such person was not joined at the time of conciliation*" (para 8). The matter concerned the appointment of an employee to a position within Rand Water. Ultimately, Pillay J held that SAMWU should not be joined as it did not have the necessary substantial interest, and that the second applicant for joinder need not be joined because he had agreed to abide the outcome of the proceedings. However, Pillay J held that joinder was procedurally competent provided that the requisite substantial interest was present.

33.2. In *Mokoena v Motor Component Industry (Pty) Ltd* the Labour Court confirmed this principle in the context of an unfair dismissal dispute even more closely analogous to the present matter.

33.2.1. In *Mokoena*, the applicants in an unfair dismissal claim sought to join three respondents who were not cited in the dispute referral and did not participate in conciliation (*Mokoena* (supra) at 279A).

33.2.2. The respondents opposed their joinder on that basis. Oosthuizen AJH, approving the dictum in Selala referred to above, emphatically rejected the argument:

> *"It is immediately apparent that the court's powers of joinder would, in dismissal proceedings, only be exercised after the conciliation proceedings in terms of s 134 of the Act have been exhausted. Before that occurs, the Labour Court is not seized with the matter at all. Rule 22 therefore clearly allows for applications for joinder after conciliation proceedings, and it is significant that rule 22 nowhere specifies that a party may only be joined if that party was also a participant in the conciliation proceedings.*
>
> *In my view, this court has a discretion to join parties to a matter, even if they did not participate in the preceding conciliation proceedings (Selala & another v Rand Water(2000) 21 ILJ 2102 (LC) at 2104-5). While statutory conciliation is one of the jurisdictional facts that must be present before an unfair dismissal dispute may be dealt with by the Labour Court, or by arbitration, one must not regard the dispute and the parties to the dispute in synonymous terms. Situations may be conceived where there is a dispute between the immediate disputant parties, in which other parties also have an interest. As long as the dispute has been the subject of proper conciliation, even if all the parties thereto did not participate in such conciliation proceedings, the aforesaid*

jurisdictional requirement is satisfied (Mokoena (supra) at 279C-G).*"* (emphasis added)

33.3. Oosthuizen AJ went on to note that the door to conciliation was not necessarily closed to respondents joined at this stage, as they may employ the mechanism of pre-trial conferences under Rule 8 to seek conciliation or may ask the court not to deal with the merits until there have been further attempts at conciliation in terms of s 157(4)(a) of the LRA (*Mokoena* (supra) at 279H-I).

34. The LAC held that these three prior Labour Court decisions were "*wrong*" in holding that the Labour Court has the power to join respondent parties after conciliation (LAC judgment paragraph 22).

The factual basis for joinder and absence of prejudice

35. As set out above, BHR and Intervalve, in their answering papers, did not deny the facts put up by the respondent to demonstrate that there would be no prejudice to them if they were to be joined at this stage. Instead, they seem to rely merely on the contention that Rule 22 does not allow joinder of employer parties after conciliation has taken place.

36. The facts of the present matter – in respect of BHR and Intervalve – are indeed far more strongly in favour of joinder than the facts of Mokoena, in that:

36.1. BHR and Intervalve participated in all the meetings and engagements during the strike action and dismissal process;

36.2. BHR and Intervalve have the same knowledge of the proceedings as Steinmuller;

36.3. BHR and Intervalve did, in effect, participate in conciliation through the shared HR Services;

36.4. BHR and Intervalve are now represented by the very same attorneys as Steinmuller, a further demonstration their parity of interest in the underlying proceedings and of their readiness to participate in them.

37. At no stage have BHR and Intervalve expressed any interest in re-opening conciliation. In the Labour Court NUMSA expressly confirmed that it has no objection to re-opening conciliation so should the respondents so request, and tendered to re-open conciliation. The respondents rejected the proposal to re-open conciliation. It is submitted that this demonstrates that BHR and Intervalve rely on the alleged lack of an opportunity to conciliate merely in an attempt to prevent the unfair dismissal dispute from proceeding to the merits against them.

38. It is respectfully submitted that reliance on the lack of initial service and citation of BHR and Intervalve is misconceived. In every joinder application under Rule 22, *by definition* the entities sought to be joined will never have been cited or served with the initial referral. If the Labour Court lacks the power to grant joinder applications for this reason, Rule 22 would be rendered hollow and unworkable.

39. The effect of the LAC decision is that it can never be competent to join an employer party in terms of Rule 22.

40. The respondents do not allege that there is any prejudice to them in being joined. Instead, the argument – as upheld by the LAC – is an entirely technical

one based on formal requirements to cite and serve employer entities with the referral form. The equivalent argument in High Court proceedings would be that it is not competent to join an additional defendant in circumstances where it was not cited in, and served with, the original summons.

The LAC's approach

41. The LAC based its conclusion on an interpretation of section 191 of the LRA. The LAC erred in this finding in at least three respects.

41.1. First, the plain language of section 191 of the LRA does not support an interpretation that bars joinder to a dispute after conciliation.

41.2. Secondly, section 39(2) of the LRA requires courts to interpret section 191 so as best to promote the spirit, purport and objects of the Bill of Rights. The LAC's interpretation does not do so, but compromises the right to fair labour practices in section 23 and the right of access to courts in section 34 of the Constitution.

41.3. Thirdly, even if section 191 can only be interpreted so as to mean that all parties must be cited before conciliation – so that joinder of a further respondent is never competent – the courts nevertheless have a discretion at common law and in terms of the LRA to permit adjudication of a dispute where one or more parties did not participate in conciliation.

42. I deal with each of these three propositions in turn.

The ordinary meaning of section 191 – referral of the dispute to conciliation

43. Section 191(1) provides that "*If there is a dispute about the fairness of a dismissal … the dismissed employee … may refer the dispute in writing to*" the CCMA or a bargaining council, as the case may be. If the council or a commissioner certifies that the dispute remains unresolved or 30 days have passed since the referral, the employee may refer the dispute to the Labour Court for adjudication in terms of s 191(5). Section 213 of the LRA defines "*dispute*" to include an alleged dispute.

44. Steinmuller, Intervalve and BHR argue that "*the dispute*" in terms of section 191(1) must include at the outset all the parties. It is submitted that this, too, is a formalistic approach to "*dispute*" that fails to have regard to the purpose of the provision or the spirit of the dispute resolution process of the LRA.

45. An example of the approach to analysing whether "*the dispute*" has been referred prior to a joinder application is *SACCAWU v Entertainment Logistics Service (a division of Gallo Africa Ltd)* ((2011) 32 ILJ 410 (LC)), in which Van Niekerk J refused an application for joinder on the basis that the "*three acts of dismissal that gave rise to the three disputes referred to the CCMA shared a limited factual commonality*" and that they should have been referred as three separate disputes initially (at paras 9-10). As appears from the Labour Court judgment in the *Entertainment Logistics* matter, the applicant trade union sought to join 70 members to a referral initially made in respect of a single employee and that the three different dismissals involved:

45.1.1. separate disciplinary enquiries;

45.1.2. dismissals at different times;

45.1.3. for participation in different forms of industrial action (overtime ban as opposed to strike action) (At paragraph 9).

45.2. Van Niekerk J concluded that the dismissals in Entertainment Logistics "*gave rise to separate and independent disputes, each of which was processed separately through the statutory dispute resolution mechanisms*" (at paragraph 9).

46. By contrast, the present dispute involved a uniform disciplinary process arising from joint strike action, culminating in an identical letter of dismissal issued to all the individual employees by a single representative of the appellants and Steinmuller, without any distinction as to the identity of the employer.

47. It cannot be suggested on the facts that separate disputes ought to have been referred as against Steinmuller, BHR and Intervalve. The LAC itself accepts that it would have been more appropriate to institute a single action rather than separate actions in this matter (LAC judgment paragraph 26). However, the LAC held that it was strictly necessary for all the respondent parties to be cited at the outset, before conciliation, after which it would never be competent for the Labour Court to join a respondent in terms of rule 22.

48. It is therefore submitted that *the dispute* in the present matter was properly referred for conciliation and then adjudication in terms of s 191. The respondents' reliance on the fact that BHR and Intervalve were not cited in the initial dispute referral is unduly formalistic.

Section 39(2) – the most constitutional interpretation of section 191

49. As explained above, the LAC's approach does not accord with the ordinary meaning of the language used in section 191. In addition, the LAC's construction is not the interpretation that best accords with the spirit, purport and objects of the Constitution, in particular the rights to fair labour practices (section 23) and access to courts (section 34).

50. Accordingly, the interpretation of section 191 contended for by NUMSA (and adopted by the Labour Court in the three decisions overruled by the LAC in this matter) is the interpretation required to be adopted in terms of section 39(2) of the Constitution.

51. It is therefore submitted that the applicant enjoys good prospects of success on appeal in relation to the LAC's finding the Labour Court lacked the power or jurisdiction to grant the joinder order sought.

52. Further legal submissions in support of this ground of appeal will be made at the hearing of this matter in the event that the application for leave to appeal is enrolled for hearing.

Discretion to permit adjudication despite no prior conciliation

53. Finally, even if section 191 can only be interpreted so as to mean that all parties must be cited before conciliation – so that joinder of a further respondent is never competent – the courts nevertheless have a discretion at common law and in terms of the LRA to permit adjudication of a dispute where one or more parties did not participate in conciliation.

54. Further legal argument in this regard will be made at the hearing of the matter, in the event that the matter is enrolled for hearing.

Second ground of appeal: direct and substantial interest

55. The LAC held that the Labour Court did not have jurisdiction to join additional respondents who had not participated in conciliation. On this basis alone, the LAC held that the appeal should succeed. However, the LAC went further to hold that, in any event, NUMSA had failed to establish that BHR and Intervalve had the requisite direct and substantial interest in the dispute (LAC judgment paragraph 25).

The requirement of a substantial interest at common law

56. I am advised that the substantive requirement for joinder and the nature of the interest required are governed by the following principles:

56.1. The test for joinder requires a legal interest in the proceedings, and not merely a financial interest (*Hartland Implements (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 (NC) at 663E-H).

56.2. A party has a right to ask that someone be joined as a party "*if such a person has a joined propriety interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the Court's order*" (*Harding v Basson and Others* 1995 (4) SA 499 (CPD) at 501J)."

56.3. The court will exercise its discretion to order joinder to ensure that all persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the Court are before it to avoid a multiplicity of actions and to avoid a waste of costs (*Harding v Basson and Others* 1995 (4) SA 499 (CPD) at 501C).

The Labour Court's approach

57. In the Labour Court, BHR and Intervalve adopted the position that "*the fact that a proposed respondent was the employer of a dismissed employee is emphatically not a basis justifying its joinder in these proceedings*" (Answering Affidavit paragraph 42.12).

58. The Labour Court disagreed, holding that BHR and Intervalve clearly have an interest in the dismissal dispute in issue:

> "*[21] [T]he fact that an entity was the employer of a dismissed employee in proceedings in which that dismissal is challenged quite obviously constitutes a sufficient legal interest in the proceedings.*
>
> *[22] The fact that BHR and Intervalve employed some of the dismissed employees and that they had a hand – through the shared HR Services – in their dismissal must be a sufficient basis to justify their joinder.*
>
> *[23] The union has gone further, however, to:*
>
> > *1. explain how it came to pass that BHR and Intervalve were not initially joined, and in particular how the conduct of Steinmuller, Intervalve and BHR contributed to the lack of clarity as to the identity of each individual* applicant's true employer; and to
> >
> > *2. demonstrate that the underlying unfair dismissal claim constitutes a single dispute in which Steinmuller, Intervalve and BHR acted jointly, without distinction as to employee, to dismiss the individual applicants by way of a single "process" and for the same reason.*"

59. It is respectfully submitted that the Labour Court's findings in this regard were correct. I now address the contrary approach of the LAC.

<u>*The LAC's approach*</u>

60. The LAC held that that BHR and Intervalve do not have a direct and substantial interest in the dispute and that, even if the Labour Court did have the power to join parties after conciliation, the joinder application could not succeed for this additional reason.

61. It is respectfully submitted that the LAC's reasons in this regard are contradictory and, in any event, ask the wrong question in assessing whether the requisite direct and substantial interest is present.

62. The LAC's reasoning in respect of this issue were as follows:

62.1. The LAC held that there "*are certainly grounds for holding a single trial but they do not demonstrate that Intervalve have interest (sic) in the dispute between Steinmuller and NUMSA. A judgment against Steinmuller cannot affect Intervalve or BHR. These two companies are for all intents and purposes separate entities, a fact acknowledged by NUMSA. There is nothing to show that a judgment against Steinmuller would be of any consequence to Intervalve or BHR.*" (LAC judgment paragraph 25)

62.2. The LAC went on to hold that, "*[h]ad separate actions been instituted the matters would have been consolidated, though more appropriately a single action is what was required to be instituted.*" (LAC judgment paragraph 26)

63. First, the LAC's finding is contradictory because it holds that a single action was *required* to be instituted and that consolidation would have been granted if sought.

63.1. I am advised that a single action or consolidated action is only competent where the separate claims that make it up raise the same issues of fact and/or law.

63.2. The LAC's view that this was so in respect of the dismissal of the individual employees confirms that BHR and Intervalve had a direct and substantial interest in the dismissal dispute. The LAC's finding that no such interest was present is therefore contradictory.

64. Secondly, the LAC conducted the wrong enquiry in asking whether the requisite interest was present. As appears from paragraph 25 of the LAC judgment, the LAC approached this issue by asking whether BHR and Intervalve have an interest in a dismissal claim against Steinmuller. The LAC ought to have asked whether BHR and Intervalve have the requisite interest in the unfair dismissal dispute referred by NUMSA.

64.1. The LAC reasoning is based on a scenario in which joinder and consequential amendments to pleadings that invariably flow from joinder have been refused or ignored. This approach is formalistic and ill-conceived. If adopted, no joinder application could ever succeed in any proceedings because the pleadings prior to joinder self-evidently do not include a claim against the entity sought to be joined. Indeed, that is the whole purpose of the joinder application in the first place.

64.2. The correct approach is to examine the substance of the dispute and the facts alleged in respect of the entities to be joined in order to ascertain whether they have a substantial interest.

65. As the Labour Court correctly concluded, the fact that an entity was the employer of a dismissed employee in proceedings in which that dismissal is challenged quite obviously constitutes a sufficient legal interest in the proceedings. If this were not so, then Steinmuller itself ought not to have been joined in the proceedings initially.

66. The admitted facts that BHR and Intervalve employed some of the dismissed individual employees and that they acted jointly with Steinmuller – through the shared HR Services – to effect the dismissal are sufficient basis to justify their joinder.

67. The facts appearing from the papers demonstrate incontrovertibly that:

67.1. A significant proportion of the total number of individual employees was employed by BHR and Intervalve and at least one individual employee was employed by each of Strategic HR and TQA;

67.2. The dismissal claim underlying this application constitutes a single dispute arising from collective strike action that culminated in a mass dismissal that all took place as a single process without distinction as to the identity of the employer;

67.3. BHR and Intervalve are closely intertwined with Steinmuller in their operations and legal structure, and acted with a single face and voice throughout the strike action and dismissals.

68. In those circumstances, it is clear that BHR and Intervalve have a sufficient interest in the unfair dismissal claim.

69. It is submitted that it would not be in the interests of the proper administration of justice to require that separate proceedings ought to be instituted as against Steinmuller, Intervalve or BHR. This would involve precisely the multiplicity of actions and waste of costs that the legal test for joinder is designed to avoid. Indeed, the LAC itself held that a single action should have been instituted against all three companies.

70. To the extent that the list of individual employees now put up by NUMSA in annexure “RD3” is disputed in certain (unspecified) respects by BHR and Intervalve, this is not a matter that should be decided at the stage of joinder proceedings. It is properly a matter for evidence at trial. Indeed, the question whether an individual employee was employed by a respondent is a question that is often necessary for the CCMA or Labour Court to determine on oral evidence, even in matters involving a single employee.

71. However, the common cause facts establish that BHR and Intervalve employed some of the employees dismissed by the shared HR services of the three companies. Accordingly, the LAC erred in finding that BHR and Intervalve do not have a substantial interest in the dismissal dispute, as required for their joinder in terms of Rule 22.

72. Further legal submissions in support of this ground of appeal will be made at the hearing of this matter in the event that the application for leave to appeal is enrolled for hearing.

Further / ancillary grounds of appeal

73. I have set out above the two primary grounds on which the appeal will be advanced, if leave to appeal is granted. In addition to those grounds, it is submitted that the LAC erred in making the following findings of fact and/or law that may have had a bearing on the order of the LAC:

73.1. First, the LAC erred to the extent that it held that NUMSA and/or the individual employees delayed unreasonably in bringing the joinder application.

73.1.1. The LAC's reasoning in this regard is set out in paragraph 21 of its judgment. NUMSA provided a detailed account of the process of verification undertaken on the strength of the records and information provided by the shared HR services of the three companies, including the exchange of lists between NUMSA and the employer parties.

73.1.2. In the absence of any factual basis, the LAC suggests that NUMSA ought to have been able to conduct this exercise based on membership forms or wage slips and that the LAC was not convinced that it would take several months to conduct this exercise and take instructions from the 204 individual employees across the country.

73.1.3. It is submitted that the LAC erred in making this finding regarding the delay in instituting the joinder application.

73.2. Secondly, the LAC erred in making an order setting aside the joinder of Strategic Human Resources and TQA in circumstances where no appeal against the order joining them was before the LAC.

73.2.1. Strategic Human Resources and TQA did not oppose the joinder application. There was no opposition by any party to their joinder in the Labour Court.

73.2.2. Only Intervalve and BHR applied for, and were granted leave to appeal. They did not seek leave to appeal in respect of the joinder of Strategic Human Resources and TQA, but only in respect of their own joinder.

73.2.3. The LAC's order sets aside, in its entirety, the Labour Court order, including the orders joining Strategic Human Resources and TQA. The LAC did not have the jurisdiction to make such an order in the absence of leave to appeal having been sought and granted.

74. Further legal submissions in support of these grounds of appeal will be made at the hearing of this matter in the event that the application for leave to appeal is enrolled for hearing.

V IN THE INTERESTS OF JUSTICE TO GRANT LEAVE TO APPEAL

75. The matter raises constitutional matters and issues of general public importance that warrant determination by this court. It is submitted that the matter accordingly falls within the jurisdiction of this Court in terms of section 167(3) and that it is in the interests of justice to grant leave to appeal.

76. The question of the power of the Labour Court turns on the interpretation of section 191 of the LRA. The LAC's interpretation does not best promote the spirit, purport and objects of the Bill of Rights, as required by section 39(2) of the Constitution.

77. The impact of the LAC decision may be to non-suit those employees among the 204 individual employees whom the Labour Court finds were not employed by Steinmuller, but were employed by one of the other entities whose joinder is sought. Those employees would be deprived of the opportunity of having their unfair dismissal dispute decided. This would infringe their right to fair labour practices in section 23 (which includes the right not to be unfairly dismissed) and the right of access to courts in section 34, which guarantees the right to have justiciable disputes determined by a court or other tribunal or forum.

78. In this regard, Steenkamp J in the Labour Court concluded that "*[t]he objection of [BHR and Intervalve] – represented by the same attorneys as Steinmuller – to the joinder smacks of a cynically opportunistic approach in an attempt to avoid dealing with the merits of the dispute at trial*" (Labour Court judgment paragraph 41). The LAC did not overturn or criticise this observation.

79. The opposition to the joinder application by BHR and Intervalve seeks in effect to non-suit those individual employees who BHR and Intervalve now admit were their employees at the time of the mass dismissal.

80. More broadly, the matter turns on an interpretation of provisions of the LRA and the Rules of the Labour Court concerning unfair dismissal disputes. The

question whether the Labour Court has the power to join additional respondents, especially employer parties, after conciliation is likely to arise in future cases. The issue has already arisen in at least three reported cases in which such joinder was granted.

81. It is submitted that the matter raises issues of fundamental importance for the individual employees and, more broadly, all similarly situated employees working, for example those working for groups of companies in which the formal identity of the employer may be unclear at the time of dismissal.

82. It is respectfully submitted that the application enjoys strong prospects of success and that it is in the interests of justice that leave to appeal be granted.

CONDONATION

83. The LAC judgment was handed down on 26 March 2014. In terms of Rule 19, NUMSA ought to have delivered this application within 15 days of that date, on 16 April 2014 (immediately prior to the Easter weekend). For reasons that I explain below, this application will be delivered on 29 April 2014, six days out of time. NUMSA respectfully prays that the late delivery of the application be condoned, having regard to:

83.1. The prospects of success on appeal;

83.2. The explanation for the delay set out below, which I respectfully submit is reasonable and is also in no way attributable to the individual employees on whose behalf leave to appeal is sought.

Prospects of success

84. It is respectfully submitted that the application and the intended appeal bear good prospects of success. The LAC decision overturned the Labour Court, which had ordered joinder, and two prior Labour Court judgments on the issue of the power to grant joinder after conciliation. The LAC decision against which leave to appeal is sought is, to NUMSA's knowledge, the only judicial decision taking the opposite approach.

85. It is submitted that another court could reasonably come to a different conclusion from the LAC.

Explanation for delay

86. The application was due to be delivered on 16 April 2014. It will ultimately be delivered on 29 April 2014, six days out of time.

87. It is submitted that the delay is accordingly not substantial. However, NUMSA assures the Court that its lateness does not reflect any disrespect for the time periods applicable in this Court. I describe the steps taken by NUMSA following the delivery of the LAC judgment and explain the delay as follows:

    87.1. On the same date, 26 March 2014, NUMSA's attorneys of record, Mr Reynaud Daniels of Cheadle Thompson & Haysom, e-mailed the judgment to me. I received the judgment and read it, but did not at that stage discuss with NUMSA's attorneys the possibility of an application for leave to appeal.

87.2. From the end of March to the first week of April 2014, Daniels made a number of telephone calls to follow up with me regarding whether NUMSA intended to seek leave to appeal. He did not manage to speak to me, but left voicemail messages on my cellular phone.

87.3. On 8 April 2014, Daniels addressed a letter to NUMSA and advised that, if intending to do so, we needed to deliver the application for leave to appeal by 16 April 2014.

87.4. I was not in the office from 9 to 11 April 2014. On 9 April I was attending the NEDLAC Development Chamber. On 10 April I was at the NEDLAC Labour Market Chamber. On 11 April I was at a meeting of the NEDLAC task team on the ESTA Amendment Bill.

87.5. I finally saw the letter dated 8 April on 14 April 2014. I considered the letter in the light of the judgment of the LAC and the advice of NUMSA's legal representatives regarding prospects of success. I could not, however, take a decision alone on whether to seek leave to appeal. The matter is an important and complex one, affecting 204 NUMSA members. In addition, the costs associated with an application for leave to appeal had to be taken into account.

87.6. It was therefore necessary for me to consult the General Secretary of NUMSA regarding to secure a decision to institute the application. I spoke to the General Secretary about the matter on either 16 or 17 April 2014. The General Secretary considered the judgment and its implications for the 204 individual employees and for NUMSA members who may face

similar circumstances in future cases. On 21 April 2014, we jointly determined that an application for leave to appeal should be made.

87.7. On behalf of NUMSA, I instructed our attorneys to proceed with the application on 22 April 2014. The application was immediately drafted and settled by counsel from 23 to 25 April 2014.

88. It is respectfully submitted that the delay in delivering this application is not substantial and that the explanation for the delay is reasonable. In addition, I emphasise that no part of the delay is attributable to the individual employees on whose behalf this application is made.

CONCLUSION

89. It is respectfully submitted that the LAC erred in upholding the appeal against the order of the Labour Court joining the additional respondents to the unfair dismissal claim referred by NUMSA on behalf of its dismissed members. The LAC erred in two main respects.

90. First, the LAC erred in respect of the power or jurisdiction of the Labour Court. The Labour Court has the power to join respondents, including employer parties, to a dismissal dispute after conciliation.

90.1. Section 191 of the LRA does not bar joinder in these circumstances. The plain language of section 191 requires "*the dispute*" to be referred to conciliation. It does not bar the joinder of additional parties to a dispute that has been properly conciliated. Where additional respondents are

joined after conciliation, the LRA and the Rules of the Labour Court in any event permit conciliation to be re-opened and provide for a pre-trial conference at which settlement of the dispute should be discussed.

90.2. In addition, the provision must be interpreted so as to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. In particular, the right to fair labour practices in section 23 of the Constitution and the right of access to courts in section 34 require that section 191 be interpreted in a manner that does not constitute an absolute bar to dismissed employees having their dispute resolved against employers who are not initially cited.

91. Secondly, the LAC erred in holding that BHR and Intervalve do not have a substantial interest in the dismissal dispute.

91.1. The LAC's finding in this regard is contradictory and frames the enquiry incorrectly. On the LAC's approach, no defendant party would ever have the requisite interest permitting it to be joined to a claim originally brought against a different defendant.

91.2. BHR and Intervalve acted with Steinmuller to dismiss a group of employees for the same reason, following the same procedure, and through the same representatives. They plainly have an interest in a challenge to the fairness of that dismissal.

92. The matter is of great importance to the 204 individual employees, some of whom risk being non-suited if joinder is refused. It is a matter of general public importance, because similarly situated employees are likely to face the same

difficulty in future. The approach of the LAC undermines the right to fair labour practices in section 23 and the right of access to courts in section 34 of the Constitution to the extent that it may bar such employees from having their unfair dismissal disputes adjudicated based only on an unduly technical and formalistic approach to the requirement of conciliation.

93. NUMSA respectfully prays for an order granting leave to appeal, upholding the appeal and reinstating the order of the Labour Court, with costs.

NORMA CRAVEN

I certify that-

(a) the deponent–

  (i) acknowledged that he knows and understands the contents of this declaration;

  (ii) informed me that he does not have any objection to taking the prescribed oath;

  (iii) informed me that he considers the prescribed oath to be binding on his conscience;

(b) the deponent then uttered the words, 'I swear that the contents of this declaration are true, so help me God'; and

(c) the deponent signed this declaration in my presence at

....

on the .... day of .... 2014.

COMMISSIONER OF OATHS