Penetrating the Opacities of Form: Unmasking the Real Employer Remains Labour Law's Perennial Problem

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Abstract

The question "who is an employer?" is generally neglected in labour law. On the contrary, considerable attention has been on examining labour law's million-dollar question: "who is the employee?" The fragmentation of work and vertical disintegration of production reveal the extent to which the concept of employer plays a central role in defining the contours of labour protection. How has South Africa come to grips with the decentring of labour law resulting from the complexities of the employing entity? What has been the judicial approach to penetrating the opacities of form designed to complicate the employment relationship with the effect of non-suiting the employees' unfair dismissal claims, thus impeding effective resolution of labour disputes? This contribution discusses the problem of identifying who is the employer through a trilogy of decisions: NUMSA v Steinmuller Africa (Pty) Ltd 2012 7 BLLR 733 (LC), Intervalve v NUMSA 2014 35 ILJ 3048 (LAC) and NUMSA v Intervalve (Pty) Ltd 2015 36 ILJ 363 (CC). The cases bring to the fore the nature of the dilemma which confronts a union in identifying the employer of each individual employee for purposes of referral of unfair dismissal disputes to conciliation proceedings, and if they fail, to arbitration and adjudication. That dilemma manifests itself where companies with shared Human Resources (HR) services deal with employees and their union as a single, composite employer in the course of the ensuing dispute and issue of a single dismissal notice to employees, resulting in the union being unable to pinpoint exactly which employee worked for which employer. The article argues that the overly restrictive and formalistic approach to compliance with section 191 of the Labour Relations Act (LRA) espoused by the majority judgment in the

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Constitutional Court cannot be countenanced. Moreover, it has the effect of depriving employees of their unfair dismissal claims against employing entities. It posits that a purposive approach to statutory compliance is to be preferred as it accords well with the goals of labour regulation in terms of promoting effective dispute resolution, protecting fundamental rights and promoting countervailing power.

1 INTRODUCTION

Despite wide acknowledgement of its significance, the question "who is an employer" remains scantily examined,[1] except within the confines of triangular employment relationships.[2] By contrast, a substantial body of literature on contemporary labour law has lavished considerable attention on examining[3] and re-examining[4] — labour law's million-dollar question: who is an

1 Rubenstein "Employees, Employers, and Quasi-employers: An Analysis of Employees and Employers who Operate in the Borderland between an Employer-and-employee Relationship" 2012 *University of Pennsylvania Journal of Business Law* 605 610, noting "a paucity of academic scholarship focusing on employer status." Bucking the trend: Deakin "The Changing Nature of the Employer in Labour Law" 2001 *ILJ (UK)* 72 and "Enterprise-risk: The Juridical Nature of the Firm Revisited" 2003 *ILJ (UK)* 57; Davies and Freedland "The Complexities of the Employing Enterprise" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 310; Prassl "The Notion of the Employer" 2013 *LQR* 380.

2 Scholarship has focused particularly on temporary employment agencies. See generally, Theron "Prisoners of a Paradigm: Labour Broking, the 'New Services' and Non-standard Employment" in Le Roux and Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 50 and "The Shift to Services and Triangular Employment: Implications for Labour Market Reform" 2008 *ILJ* 1; Benjamin "Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document" 2010 *ILJ* 845; Cohen "The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships" 2014 *ILJ* 2607; Fourie "Non-standard Workers: The South African Context, International Law and Regulation by the European Union" 2008 *PER/PELJ* 23; Van Eck "Employment Agencies: International Norms and Developments in South Africa" 2012 *IJCLLIR* 29 and "Revisiting Agency Work in Namibia and South Africa: Any Lessons from the Decent Work Agenda and the Flexicurity Approach?" 2014 49 *IJCLLIR* 49; Botes "The History of Labour Hire in Namibia: A Lesson for South Africa" 2013 *PER/PELJ* 506; Bosch "The Proposed 2012 Amendments Relating to Non-standard Employment: What will the New Regime be?" 2013 *ILJ* 1631.

3 For a snapshot of South African literature see: Mureinik "The Contract of Service: An Easy Test for Hard Cases" 1980 *SALJ* 246; Christianson "Defining who is an Employee: A Review of the Law Dealing with the Differences between Employees and Independent Contractors" 2001 *CLL* 21; Manamela "Employee and Independent Contractor: The Distinction Stands" 2002 *SA Merc LJ* 107; Benjamin "An Accident of History: Who is (and who should be) an Employee under South African Labour Law" 2004 *ILJ* 787; Mills "The Situation of the Elusive Independent Contractor and other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?" 2004 *ILJ* 1203; Van Niekerk "Employees, Independent Contractors and Intermediaries: The Definition of Employee Revisited" 2005 *CLL* 11 and "Personal Service Companies and the Definition of 'Employee'" 2005 *ILJ* 1909; Bosch "Can Unauthorised Workers be Regarded as Employees for the Purpose of the Labour Relations Act?" 2006 *ILJ* 1342 and "*Abantu Badidekile*: When must an Applicant Prove that He is an Employee?" 2010 *ILJ* 809; Bosch and Christie "Are Sex Workers Employees?" 2007 *ILJ* 804; Theron "Who's In and Who's Out: Labour Law and those Excluded from its Protection" 2007 *LDD* 25; Le Roux "The Worker: Towards Labour Laws New Vocabulary" 2007 *SALJ* 469; "The Meaning of 'Worker' and the Road towards Diversification: Reflecting on *Discovery, SITA* and *Kylie*" 2009 *ILJ* 49; Kasuso *The Definition of an "Employee" under the Labour Legislation: An Elusive Concept* (LLM Thesis, UNISA, 2015).

4 See generally, Riley "Regulating the Engagement of Non-employed Labour: A View from the Antipodes" in Brodie *et al* (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (2016) 61 and "Regulatory Responses to the Blurring Boundary between Employment and Self-employment: A View from the Antipodes" in Kiss (eds) *Recent Developments in Labour Law* (2013) 131. Canada: Davidov *et al* "The Subjects of Labour Law: 'Employees' and Other Workers" in Finkin and Mundlak (eds) *Comparative Labour Law* (2015) chp 4; "The Reports of my Death are Greatly Exaggerated: 'Employee' as a Viable (though over-used) Legal Concept" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 133; Fudge *et al The Legal Concept of Employment: Marginalizing Workers,* Report for the Law Commission of Canada (2002). Europe: Wehner *et al Social Protection of Economically Dependent Self-employed Workers*, Report No. 54 on a study conducted for the European Parliament (2013); Engblom "Equal Treatment of Employees and Self-employed Workers" 2001 *IJCLIR* 211; Engels "Subordinate Employees or Self-employed Workers?: An Analysis of the Employment Situation of Managers of Management Companies as an Illustration" 1999 *Comp Lab L & Pol'y J* 47; Van Peijpe "Independent Contractors and Protected Workers in Dutch Law" 1999 *Comp Lab L & Pol'y J* 127; Weiss "Employment versus Self-employment: The Search for a Demarcation Line in Germany" 1999 *ILJ* 741. US: Stone "Rethinking Labour Law: Employment Protection for Boundaryless Workers" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* 155; Linder "Dependent and Independent Contractors in Recent U.S. Labour Law: An Ambiguous Dichotomy Rooted in Simulated Purposelessness" 1999 *Comp Lab L& Pol'y J* 187; "Towards Universal Worker Coverage under the National Labour Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-like Persons" 1989 *University of Detroit LR* 555 and "The Involuntary Conversion of Employees into Self-employed: The Internal Revenue Service and Section 530" 1988 *Clearinghouse LR* 14; Hyde "Employment Law after the Death of Employment" 1998 *University of Pennsylvania J Lab & Emp L* 99; Burdick "Principles of Agency Permit the NLRB to Consider Additional Factors

employee? The preoccupation with unmasking the true employee is merited, as it brings into sharp focus the analytical and normative concerns of labour law. Ironically, the conceptual focus on the employee has tended to obstruct our view of the difficulties surrounding the concept of an "employer".[5]

The concept of an employer is a critical subject for the world of work, especially for the role of effective legal regulation of that domain. The crux of the problem is how the law identifies an "employer" as a counterparty with an "employee". Certain features of modern business organisation such as vertical disintegration of production, and their link to the rise of precarious employment underscore the extent to which the concept of employer plays a central role in defining the contours of labour protection. In the broadest sense, the structure of enterprises defines not only what form the employment takes, but also the form in which a common enterprise bears the responsibility for employing labour and the attendant employment-related obligations. In short, the organisational form that an enterprise takes has a profound impact upon equity in employment conditions.

How has South African labour law come to grips with the beguilingly simple question: who is an employer? What has been the judicial approach to penetrating the opacities of form designed to complicate the employment relationship with the effect of non-suiting the employees' unfair dismissal claims, thus impeding effective resolution of labour disputes? This article explores these intricate questions in the context of unravelling the complexities of the employing entity.

2 FRAGMENTATION, VERTICAL DISINTEGRATION AND CAPITAL BOUNDARY PROBLEM

The issue of defining who is an employer encompasses crucial economic issues, such as financial reliability of the firm, economic independence of businesses, boundaries of the firm,[6] entrepreneurial strategies and, national and international investments.[7] Also arising are related issues concerning the concept of separate entity,[8] "disregarding the corporate veil",[9] as well as the group concept in company law.[10] For students of labour law, the question of employer identity is interconnected with the exercise of workplace discipline[11] or the so-called

of Entrepreneurial Independence and the Relative Dependence of Employees when Determining Independent Contractor Status under Section 2(3)" 1991 *Hofstra Lab & Emp LJ* 75. Japan: Yamakawa "New Wine in Old Bottles?: Employees/independent Contractor Distinction under Japanese Labour Law" 1999 *Comp Lab L & Pol'y* 99.

5 Prassl *The Concept of the Employer* (2015) 4, argues that "as long as attention remains focused on the employee category and related secondary conceptions alone, it will be very difficult to address the relevant questions at all."

6 See Coase "The Nature of the Firm" 1937 *Economica* 386 390–391 and "The Nature of the Firm: Origin" 1988 *JL Econ & Org* 3 3–4. Coase sought to explain why firms existed or why some productive activities were carried out in markets and others through centralised coordination. He rejected the popular answer that firms were aberrations created by foul play, like the predatory practices of robber barons. It then became more efficient to organise economic activity within the firm. For insight into many dimensions to law, or law and economics scholarship, see Calabresi "Some Thoughts on Risk Distribution and the Law of Torts" 1967 *Yale LJ* 70; Williamson "The Economics or Organisations: The Transaction Cost Approach" 1981 *American J of Sociology* 548; Easterbrook "Foreword: The Court and the Economic System" 1984 *Harvard LR* 98; Friedman "Two Faces of Law" 1984 *Wisconsin LR* 13; Landes and Posner "The Influence of Economics of Law: A Quantitative Study" 1993 *J of L and Economics* 385; Posner *Economic: Analysis of Law* 6 ed (1977); Veljanovski *The Economics of Law* 2 ed (2006). For antecedents of economic approach to law, see Holmes "The Path of the Law" 897 *Harvard LR* 457. For provocative insight into Holmes' seminal article, see Special Issue "The Path of the Law after One Hundred Years" 1997 *Harvard LR* 989; Posner "The Path Away from the Law" 1997 *Harvard LR* 1039; Ackerman "2006 Oliver Wendell Holmes Lectures: The Living Constitution" 2007 *Harvard LR* 1737.

7 Corazza and Razzolini *Who is an Employer* (2014) Centre for the Study of European Labour Law Working Papers 1, 2.

8 The *locus classicus* is *Salmon v Salmon & Co Ltd* 1897 AC 2 (HL).

9 See e.g. *Ex parte Gore NNO* 2013 3 SA 382 (WCC); *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A). See also Larkin "Regarding Judicial Disregarding of the Companies Separate Identity" 1989 *SA Merc LJ* 277; Cassim "Piercing the Veil under Section 20(9) of the Companies 71 of 2008: A New Direction" 2014 *SA Merc LJ* 307; Subramanien "Unconscionable Abuse – Section 20(9) of the Companies Act 71 of 2008" 2014 *Obiter* 161.

10 *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC). See generally, Botha "Recognition of the Group Concept in Company Law" 1982 *De Jure* 107; "Holding and Subsidiary Companies: Fiduciary Duties of Directors" 1983 *De Jure* 234 and "Holding and Subsidiary Companies: Fiduciary Duties of Directors (Conclusion)" 1984 *De Jure* 167.

11 See e.g. *Dyasi v Onderstepoort Biological Products Ltd* 2011 7 BLLR 671 (LC).

managerial prerogative.[12]

The process of "vertical integration", wherein firms generate goods and services internally, has drastically declined over the last several decades.[13] It is clear that the shifting frontiers of work and fragmentation of the enterprise as an organisation have spawned complex and varied service arrangements that do not fit with the conception of employment as a bilateral and personal contract.[14] It has been stated clearly that vertical disintegration of firms and the breakdown of internal labour markets have shown how individuals who had hitherto been treated as employees could easily be transformed into independent contractors who are outside the scope of labour protection.[15] Fragmentation takes three forms — vertical disintegration, horizontal disintegration,[16] and temporal disintegration.[17] Disintegration is often classified as vertical where multiple entities are functionally integrated but are each subject to independent control and management, a factor which is particularly relevant to triangular employment relationship. Labour cost related to vertical disintegration is integrally related to labour-cost saving. A consistent economic rationale for externalisation is evasion of employer responsibility. Thus, the subcontractor can violate the law more cheaply than firms higher in the production chain, and can utilise the resulting savings to tempt those firms into subcontracting relationships. By tapping into their unique ability to skirt employment mandates, intermediaries can maximise savings for the firms that engage them.[18] This simply means so long as firms remain free in law and practice to determine their own boundaries, their superior bargaining power allows them to dictate the form of employment relationship, including the allocation of employment related obligations.[19]

The essence of "capital boundary problem"[20] is the freedom of capital organisations to

12 For in-depth treatment: Strydom *The Employer Prerogative from A Labour Law Perspective* (LLD Thesis, UNISA, 1997).

13 Hovenkamp "The Law of Vertical Integration and the Business Firm: 1880-1960" 2010 *Iowa LR* 863, 865 — vertical integration occurs whenever a business does something for itself that it might otherwise have obtained on the market.

14 Prominent examples include: *Denel (Pty) Ltd v Gerber* 2005 9 BLLR 849 (LAC) ("*Denel*") *Vermooten v Department of Public Enterprises* 2017 38 *ILJ* 607 (LAC) ("*Vermooten*"); *Phaka v Bracks NO* 2015 36 *ILJ* 1541 (LAC); *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinet CC* 2001 3 BLLR 329 (LC); *Dyokhwe v Coen de Kock NO* 2012 33 *ILJ* (LC) ("*Dyokhwe*"). In effect, the cases are illustrative of the shaded boundary between disguised employment, genuine entrepreneurial self-employment and dependent self-employment. See generally, Van Niekerk 2005 *CLL* 11 and 2005 *ILJ* 1904; Calitz "Contracting Out of the Labour Relations Act: *Vermooten v Department of Public Enterprises & Others*" 2017 *SA Merc LJ* 543; Cohen "Debunking the Legal Fiction – *Dyokhwe v De Kock NO & Others*" 2012 *ILJ* 2318 and "Placing Substance over Form – Identifying the True Parties to an Employment Relationship" 2008 *ILJ* 87.

15 Collins "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" 1990 *OJLS* 353 and "Regulating the Employment Relation for Competitiveness" 2001 *ILJ* (UK) 17; Marshall "An Exploration of Control in the Context of Vertical Disintegration" in Arup *et al Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 542; Stone "Legal Protection for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers" 2006 *Berkeley J Emp Lab L* 251 253–254.

16 Horizontal disintegration refers to the scenario where traditional management functions are split between two or more firms, as with temporary employment agencies. See Zatz "Working Beyond the Reach or Grasp of Employment Law" in Bernhardt *et al* (eds) *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labour Market* (2008) 31.

17 Temporal disintegration refers to disintegration of ownership and control of a firm or its assets as they either dissolve or are transferred over time — a situation which applies to successor companies in situations of insolvency. See Zatz "Working Beyond the Reach" 31. See also Fudge and Zavitz "Vertical Disintegration and Related Employers: Attributing Employment-related Obligations in Ontario" 2006 *Canadian Lab Emp LJ* 107 111; Fudge "Fragmenting Work and Fragmenting Organisations: The Contract of Employment and the Scope of Labour Regulation" 2006 *Osgoode Hall LJ* 609 639.

18 An emerging phenomenon is the opportunistic use of worker co-operatives in the garment industry ostensibly to evade labour legislation. See *NCCMI (KZN) v Glamour Fashions Workers Primary Co-operative Ltd* 2018 39 *ILJ* 1737 (LAC); *NCCMI (KZN) v Glamour Fashions Workers Primary Co-operative Ltd* 2017 38 *ILJ* 17849 (LC). The notion that worker co-operatives can advance worker interests and serve as countervailing power is, of course, a fiction. Despite worker co-operatives representing a proverbial assault on collective bargaining, some commentators regard them as a viable alternative form of worker organisation in the domestic sector. See Du Toit and Tiemeni "Do Cooperatives Offer a Basis for Worker Organisation in the Domestic Sector? An Exploratory Study" 2015 *ILJ* 1677 and Du Toit and Ronnie "Regulating the Informal Economy: Unpacking the Oxymoron – From Worker Protection to Worker Empowerment" 2014 *ILJ* 1802.

19 Kates "The Supply Chain Gang: Enforcing the Employment Rights of Subcontracted Labour in Ontario" 2006 *Canadian Lab Empl LJ* 449 457.

20 Collins "Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration" 1990 *MLR* 731.

define their own boundaries at the expense of workers. A succinct description of the capital boundary problem is provided by the Ontario Superior Court in *Lian v J. Crew Group Inc*:

> In the absence of intervention by the legislation or regulation, businesses have the freedom of action to determine the type and extent of the particular business activity carried on, as seen to be their own self-interest. Division of labour and specialization in a competitive market are inherent to all businesses in a competitive market. Specialization in a competitive market serves to maximize consumer choice at the most favourable price. A given business, say a garment retailer, can properly limit its business activity to retailing, knowing and intending that its product for sale will be manufactured by others. The fact that there is known chain of supply and pyramid of businesses within the overall garment industry, such that it can be said there is vertically integrated industry, is in itself of no adverse legal consequence.[21]

According to Collins, firms retain the productive capacity of their workforce while delegating the protective role of the employer to an intermediary that is frequently smaller, economically unstable, and less committed to employment rights.[22] It can be argued persuasively that this undermines the trade-off between economic dependence and social protection, an overriding factor in employment relationship. It is not surprising that the result of the reallocation of responsibility through fragmentation is a structural tendency for the under enforcement of employment standards, since it is the worker who assumes any risk of default.

The question of ascribing responsibility for employment-related costs, duties and risks in multilateral employment relationship where more than one employing entity is involved has created conditions for potential injustice. Polarisation of employment relations has two distinct forms. At the apex are knowledge workers, who are associated with the rise of "new economy" and networked organisation. Although these workers function as entrepreneurs in the enterprise, when linked with their property in knowledge, they have approximate equality of bargaining power in standard employment relationship.[23] Generally, the need for protection of these employees are not typically considered.[24] At the other end of the spectrum are "precarious" or vulnerable workers who are associated with the informal economy and temporary employment agencies.[25] The exact relationship between flexible forms of labour and enhanced employment vulnerability is clear.[26]

21 *Lian v J. Crew Group Inc* 2001 54 OR 3d 329 para 71.

22 This is a common thread in TES litigation: *Assign Services (Pty) Ltd v NUMSA* 2018 39 *ILJ* 1911 (CC); *Enforce Security Group v Fikile* 2017 38 *ILJ* 1041 (LAC); *NUMSA v High Goal Investments t/a Chuma Security Services* 2016 ZALCCT 34; *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 *ILJ* 2120 (LC). For extended discussion: Geldenhuys "The Effect of Changing Public Policy on the Automatic Termination of Fixed-term Employment Contracts in South Africa" 2017 *PER/PELJ* 1; Nkhumise "Dismissal of an Employee at the Instance of a Client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd* in the Context of the Labour Relations Amendment Act 6 of 2014" 2016 *LLD* 106; Forere "From Exclusion to Labour Security: To what Extent does Section 198 of the Labour Relations Act of 2014 Strike a Balance between Employers and Employees?" 2016 *SA Merc LJ* 375; Aletter and Van Eck "Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the Controversies over Temporary Employment Agencies in South Africa and Namibia" 2016 *SA Merc LJ* 285; Bosch "Contract as a Barrier to 'Dismissal': The Plight of the Labour Broker's Employee" 2008 *ILJ* 813; Maloka "Dismissal at the Behest of a Third Party: *Kroeger v Visual Marketing*" 2004 *Turf LR* 108.

23 See e.g. *Molefe v Eskom Holdings SOC* 2017 ZALCJHB 281; *Gbenga-Oluwatoye v Reckitt Benkiser SA (Pty) Ltd* 2016 37 *ILJ* 2733 (CC); *Denel; Vermooten; Golding v HCI Managerial Services (Pty) Ltd* 2015 36 *ILJ* 1098 (LC) ("*Golding*").

24 Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663 664, notes that "statutory unfair labour practice has become a charter of rights for middle and senior management while the most vulnerable workers are left without protection." See generally Cohen "Precautionary Suspensions in the Public Sector: *Member of the Executive Council for Education, North West Provincial Government v Gradwell* 2012 33 *ILJ* 2012 (LAC)" 2013 *ILJ* 1706; Norton "When is Suspension an Unfair Labour Practice? A Review of Court Decisions" 2013 34 *ILJ* 1694; Note "Precautionary Suspension in the Public Sector" 2013 *ILJ* 1705; Mischke "Delaying the Disciplinary Hearing: Strategies and Shenanigans" 2011 *CLL* 41; Moletsane "Challenges Faced by a Public Sector Employer that Wants to Dismiss an Employee who Unreasonably Delays a Disciplinary Enquiry" 2012 *ILJ* 1568. See also the following reports: *Report on Management of Precautionary Suspension in the Public Service* – Public Service Commission June 2011; The Office of the Public Protector – "Pre-empted Appointment" *Report on an Investigation into Allegations of Maladministration, Abuse of Power and Irregular Expenditure in The Appointment of a Legal Firm as Service Provider for the Department of Finance in the North West Province* – Report No 12 of 2013/2014.

25 See e.g. *CWU obo Madela/MTN (Pty) Ltd* 2017 4 BALR 371 (CCMA); *FAWU obo Mokgethwa/SAB Ltd* 2017 5 BALR 491 (CCMA); *Matjila /Eco Group Civils (Pty) Ltd* 2017 9 BALR 982 (CCMA).

26 TUC Commission on Vulnerable Employment – *Hard Work Hidden Lives: The Short Report of the Commission on Vulnerable Employment* (2008) defines vulnerable employment as "precarious work that places people

3 THE SOUTH AFRICAN APPROACH TO THE COMPLEXITIES OF THE EMPLOYING ENTITIES

The delicate issue of determining the real employer is most amplified where a large group of employees employed by different but associated companies with shared HR services and overlapping directors and shareholders are dismissed and the corporate group conveys their dismissal. The task of correctly identifying and citing the employer party for each individual employee is similar to unravelling an omelette. *Golding* provides a convenient entry point into the decentring of labour law arising from the complexities of the employing entities.

4 *GOLDING* LITIGATION

Although the central issue in *Golding v HCI Managerial Services (Pty) Ltd* concerned an abortive attempt to halt the disciplinary hearing and declare suspension unlawful, it also touched upon the problem of identifying the real employer in complex multilateral work settings such as corporate groups.

The facts giving rise to the litigation are as follows. The applicant held senior positions within the Hosken Consolidated Investments (Pty) Ltd (HCI) group of companies. The applicant was the executive chairman of HCI and also the chief executive officer (CEO) of Sabido Investments (Pty) Ltd and etv. At HCI Managerial Services (Pty) Ltd, the entity that paid his salary the applicant was the director. Following allegations of misconduct relating to undeclared and unauthorised purchase of shares, the applicant was suspended and later notified to attend a disciplinary enquiry. On the eve of the scheduled hearing, the applicant brought an urgent application to interdict and restrain the first respondent from proceeding with the disciplinary enquiry pending the determination of an unfair labour practice dispute. He also sought to set aside his suspension.

Among the arguments raised by Golding in contesting the lawfulness of the institution of disciplinary proceedings was that HCI was not the employer.[27] To be precise, the applicant submitted that he was employed by Sabido and etv, not HCI. Both Sabido and etv were subsidiaries of the holding company HCI. The Companies Act 71 of 2008 defines a "group of companies" as a holding company and all its subsidiaries. A "holding company", in relation to a subsidiary, means a juristic person that controls that subsidiary. Since the parties did not place sufficient evidence showing how HCI controlled Sabido and etv as its subsidiaries as envisaged in sections 2(2)(a) and (3) of the Companies Act, applying the rule in *Plascon-Evans*,[28] the court was satisfied that the two entities were subsidiaries of the holding company.

In deciding the issue of who is the employer, the court noted that Golding as a CEO was clearly an employee of Sabido and etv. However, that did not necessarily imply that he was not an employee of HCI.[29] In this regard, the court sought guidance from eminent authority. The Labour Appeal Court and the Supreme Court of Appeal in *Board of Executors v McCafferty*[30] considered authoritatively the problem of identifying the true employer. *McCafferty* established that a highly placed employee in a corporate group situation who performed services on behalf of a number of entities usually has more than one employer. Similarly, the court found that Golding had more than one employer.

After examining section 213 of the LRA dealing with the definition of an employee, the court posed the question: from whom does Golding receive his substantial remuneration? Evidence revealed that the employee's salary was paid by HCI Managerial Services. However, he did not earn any remuneration from Sabido or etv. A salient feature pointing to Golding also being an employee of HCI was his acceptance of an offer to partake in the HCI employee

at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship". See further McCann and Fudge "Unacceptable Forms of Work: A Multidimensional Model" 2017 *ILR* 147; Gutierrez-Barbarrusa "The Growth of Precarious Employment in Europe: Concepts, Indicators and the Effects of Global Economic Crisis" 2016 *ILR* 477; Standing *The Precariat* (2011) 7–13; Caballer and Peiro "The Consequences of Job Insecurity for Employees: The Moderator Role of Job Dependence" 2010 *ILR* 59.

27 Generally Cassim "Contesting the Removal of a Director by the Board of Directors under the Companies Act" 2016 *SALJ* 133; Stoop "The Company Director as Employee" 2011 *ILJ* 2367; Olivier "The Dismissal of Executive Employees" 1988 *ILJ* 519; Larkin "Distinction and Differences: A Company Lawyer Looks at Executive Dismissal" 1986 *ILJ* 248.

28 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634H-I.

29 *Golding* para 31.

30 1997 18 *ILJ* 949 (SCA).

share scheme available only to "selected full-time employees of HCI Ltd and its subsidiaries".[31] Furthermore, the court noted that the applicant was the executive chairman of HCI. In effect, this implies that he was also an employee of HCI.[32] Steenkamp J adopted the view articulated in *Fisheries Development Corporation of SA Ltd v Jorgensen*,[33] where the point was made that there is "a difference between the so-called full-time or executive director, who participates in the day-to-day running of the company's affairs or of a portion thereof, and the non-executive director who has not undertaken any special obligation". This leads to a conclusion that the decision to discipline the applicant was not unlawful.

5 *NUMSA V INTERVALVE* TRILOGY

The nature of the dilemma which confronts a union in identifying the real employer for each individual employee for referral of unfair dismissal disputes for conciliation, manifests itself where companies deal with employees and their union as a single, composite employer in the course of the ensuing dispute and issued a single dismissal notice to employees. Naturally, matters are straightforward but for the fact that the union is unable to pinpoint exactly which employee works for which employer and the group employer is not disposed to providing a list indicating employing entities for respective employees. It begs the question whether the group employer in such a situation waived the right to insist on separate service of the referral or otherwise estopped from relying on its absence? Can the union be faulted for acting reciprocally by serving only the group employer pursuant to section 191(3) of the LRA because it is unable to pin down the real employer for each individual dispute? Does referral to conciliation of only the group employer embrace associated employing entities? Granted that non-compliance with conciliation formalities is a jurisdictional bar to the Labour Court hearing an unfair dismissal claim, does the fact that dismissed employees stand to lose their unfair dismissal claims against different employing entities perhaps justify a departure from statutory prescripts? These focal questions were pointedly faced by the Labour Court,[34] Labour Appeal Court[35] and the Constitutional Court[36] in a trilogy of judgments, each with a different outcome.

The difficult and interesting problems of jurisdictional nature giving rise to *NUMSA v Intervalve* trilogy go beyond the simple technical question "is the referral of a dismissal dispute a precondition to the Labour Court's jurisdiction?" Upon closer inspection, however, the issue brings to the forefront what Cameron J with his customary clarity characterised as "what the law can do to penetrate the opacities of form"[37]

5 1 Background to *NUMSA v Intervalve* Trilogy

NUMSA v Intervalve trilogy is a salient example of complexities of the employing enterprise. The multilateral work setting concerned three employing entities, namely Steinmuller, Intervalve and BHR. The three companies were collectively referred to as the "Steinmuller group of companies." Essentially, the three companies constituted a single economic entity, with overlapping shareholders and directors. They "shared services" including HR services and payroll administration. Another distinctive feature of the Steinmuller group of companies was manifest disregard of the provisions of section 197 of the LRA. The short point to be made was that "during their employment certain employees were transferred from one of the three entities to another, at different times, without termination of one employment contract and the conclusion of a new contract, nor cession and assignment of obligations."[38]

31 *Golding* para 33.
32 *Golding* para 34.
33 *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W) 156H. See also *Mpofu v SABC* 2008 ZAGPHC 413 para 23.
34 *NUMSA v Steinmuller.*
35 *Intervalve v NUMSA.*
36 *NUMSA v Intervalve.*
37 Per Cameron J in *NUMSA v Intervalve* para 1.
38 *NUMSA v Steinmuller* para 15.7. From a point of view of law and economics perspective, the multi-employer model testifies to the need to fit legal techniques into the changing use of relational contracts among firms. Whilst the single employer model reflects a notion of employment relationship relying on ownership of the firms, the plural employer model makes it possible to conceive it as a network of relational contracts. Baker *et al* "Relational Contracts and the Theory of the Firm" 2001 *Quarterly J of Economics* 39.

From this perspective, the group of companies can be regarded in itself as an "internal labour market" capable of supplying flexible labour, on the one hand, and disregarding the employees' expectations about stability in income and employment, on the other.[39] In Weil's terminology, a "fissured workplace".[40]

The dismissal of the employees was consequent upon a strike action at the shared premises. The strike was handled from the employer side by shared HR services, which communicated with the employees using a document on a letterhead bearing the names of all three entities, namely, Steinmuller, BHR and Intervalve. The employing entities acted with a single voice and face throughout the events that culminated in the dismissal of the individual employees, in particular, the shared HR services issued identical letters of dismissal.

NUMSA, in referring unfair dismissal dispute for conciliation before the bargaining council cited only Steinmuller as the employer party. At the conciliation meeting, Steinmuller pointed out to NUMSA that many of the dismissed employees in the referral were not its employees. In the second referral to the bargaining council, which was well beyond the LRA's 30-days cut-off, NUMSA cited the employer party to the dispute as Steinmuller, alternatively Intervalve, alternatively BHR and alternatively KOG.[41] NUMSA's condonation application for lateness[42] was refused by the bargaining council. NUMSA did not take the bargaining council decision on review but rather filed a statement of claim in the Labour Court in respect of the first referral involving Steinmuller alone. The relief sought was solely against Steinmuller.[43]

After a lapse of seven months, NUMSA launched an application in the Labour Court to join Intervalve and BHR as respondents to the unfair dismissal claim against Steinmuller. It is this dispute that found its way to the court of last resort.

5 2 The Labour Court Judgment: *NUMSA v Steinmuller*

At the court of first instance, NUMSA's application for joinder of Intervalve and BHR as respondent-employer parties was successful. The court found that Intervalve and BHR had substantial interest in the subject matter of the proceedings. Put simply, they were employing entities of employees in proceedings in which the dismissal is challenged, "quite obviously constitutes a sufficient legal interest in the proceedings" to join them.[44] Taking a cue from *Driveline* minority judgment,[45] Steenkamp J concluded that the fact that conciliation had already occurred with Steinmuller only, was not a jurisdictional bar to joinder of other entities. In support of this proposition, the judge noted that there is ample authority to the effect that Labour Court had power to join additional employer parties to an unfair dismissal dispute even after conciliation.[46] Joinder was more or less permissible since the legal representatives

39 This reinforces the precarious employment as opposed to flexicurity. For works advocating the new concept of the employer in a flexicurity perspective: Corazza and Razzolini *Who is an Employer* 9.

40 Weil *The Fissured Workplace* (2014) 158. In *Report to the Wage and Hour Division of the U.S. Department of Labor* 21. Weil, posits a "fissuring" of the employment relationship: "The relationship between worker and employer has become more and more complex as employers have contracted out, outsourced, subcontracted, and devolved many functions that once were done in house. Like rocks weakened and split apart by the passage of time, employment relationships have become deeply 'fissured' in many sectors that employ large numbers of vulnerable workers. Multiple motivations underlie this change. The use of subcontracting, long used in construction, has become widespread in sectors ranging from building services to the hotel and motel industry … In[some] cases, it arises from a desire to shift labour costs and liabilities to smaller business entities or to third-party labour intermediaries, such as temporary employment agencies or labour brokers … Regardless of motivation, fissuring in employment relations dramatically complicates the regulation of workplace conditions … [T]he task of bringing regulatory pressure on the 'employer' has become elusive." "Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division" (2010) <http://www.dol.gov/whd/resources/strategicEnforcement.pdf> (accessed 19-07-2018).

41 *NUMSA v Intervalve* para 9.

42 Section 191(2) provides that if the employee shows good cause at any time, the bargaining council may permit the employee to refer the dispute after the relevant time limit in subsection(1) has expired.

43 *NUMSA v Intervalve* para 10.

44 *NUMSA v Steinmuller* para 21.

45 *NUMSA v Driveline Technologies (Pty) Ltd* 2000 4 SA 645 (LAC) para 8. The *Driveline* minority judgment by Conradie JA considered that the dispute could be broadened at the litigation stage because the Labour Court has jurisdiction over the dispute regardless of how it was categorised or conciliated at the conciliation stage. Non-compliance with conciliation formalities, including referral for conciliation, was not a jurisdictional bar to the Labour Court hearing the unfair dismissal claim.

46 *NUMSA v Steinmuller* paras 28–30 and 33, citing *Mokoena v Motor Component Industry (Pty) Ltd* 2005 26 *ILJ* 277 (LC) and *Selala v Rand Water* 2000 21 *ILJ* 2102 (LC) and distinguishing *SACCAWU v Entertainment Logistics Service* 2011 32 *ILJ* 410 (LC).

for Intervalve and BHR were the very representatives who appeared for Steinmuller at the conciliation proceedings. It follows that they had already taken part in a conciliation process. To deny joinder would be overly formalistic. It could also herald a slide into crippling formalism.[47] This means that the rule permitting joinder would serve no purpose if NUMSA had to refer separate conciliation disputes against each individual employer only to apply for consolidation later.[48]

5 3 The Labour Appeal Court Judgment: *Intervalve v NUMSA*

In the Labour Appeal Court, Intervalve and BHR prevailed in overturning the grant of joinder. The Labour Appeal Court held that the Labour Court has no jurisdiction to entertain an unfair dismissal claim against Intervalve or BHR because the LRA requires that the matter be conciliated against them.[49] In this regard, the Labour Appeal Court relied on its earlier decision in *Driveline*.[50] The *Driveline* majority had held that "the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such dispute can either be arbitrated or referred to the LC for adjudication".[51] *De Beer*[52] also echoed the principle that it is only after the bargaining council or the CCMA Commissioner must have certified that the dispute remained unresolved, or a period of 30 days had elapsed since the referral and the dispute remained unresolved, that: (a) the council or the CCMA must arbitrate the dispute in terms of section 191(5)*(a)*; or (b) the employee may refer the dispute to the Labour Court for adjudication — section 191(5)*(b)*. Section 191(5) thus makes it clear that the referral of a dismissal dispute to conciliation is not just the first stage in the process but also a precondition before such a dispute can be arbitrated, or referred to the Labour Court for adjudication. In the absence of a referral to conciliation, or if it was referred, but there is no certificate issued as contemplated in section 191(5) and the 30-days period has not expired, the Labour Court has no jurisdiction to adjudicate the dismissal dispute.[53]

If NUMSA was uncertain about which employees worked for which entities, the preferable route was to refer the unfair dismissal claim simultaneously against all possible employers. Since "there was no requirement to set out exactly which member worked for which employer at that stage, or it could be explained that the members worked for one alternatively for the other."[54] Further the Labour Appeal Court ruled that the discretion to join parties to proceedings cannot override the expressed jurisdictional requirements of the LRA. The application for joinder was misplaced because Intervalve and BHR did not have a direct and substantial interest in the dispute between NUMSA and Steinmuller. Although BHR and Intervalve were materially connected to the underlying dispute, the judgment sought by NUMSA against Steinmuller could not affect them.

5 4 *NUMSA v Intervalve* in the Constitutional Court

The problem arising from *NUMSA v Intervalve* trilogy may be postulated in the form of propositions. Did NUMSA comply with section 191 of the LRA? Did Intervalve and BHR waive their entitlement to separate notice of the conciliation process? Can employees lose their claims against their employers because of a merely technical omission owing to complex working arrangements created by the corporate group? These questions turn upon the proper interpretation and application of section 191, in the light of the spirit, purport and object of the Bill of Rights, and in particular, the right to fair labour practices in section 23 and access to courts in section 34 of the Constitution.[55] The answer to these questions elicited a sharp

47 The *Driveline* minority worried that making conciliation a jurisdictional precondition would foster formalism and encourage technicalities. This would "lead to a resurgence of the kind of point" that turned the former Industrial Court into "a forensic minefield". See *Driveline* para 8.

48 *NUMSA v Intervalve* para 12.

49 *Intervalve v NUMSA* para 24.

50 2000 4 SA 645 (LAC).

51 *Driveline* para 73. See also *September v CMI Business Enterprises* 2018 39 *ILJ* 987 (CC) para 20.

52 *De Beer v Minister of Safety & Security* 2013 34 *ILJ* 3038 (LAC) para 23.

53 *Intervalve v NUMSA* paras 84, 112–112 and 115.

54 *Intervalve v NUMSA* para 21.

55 See e.g. *Legal Aid SA v Mgidiwana* 2015 6 SA 494 (CC) paras 13–16; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) paras 1, 30; T*wee Jonge Gezellen (Pty) Ltd v Land & Agricultural Bank of SA* 2011 3 SA 1 (CC) paras 35–36; *Lesapo v NW Agricultural Bank* 2000 1 SA 409 (CC) paras 73–76. See also Okpaluba "Constitutionality of Legislation Relating to Exercise of Judicial: The Namibian Experience in Comparative Perspective (Part 2)"

division in the Constitutional Court.

The argument for the union was that the companies had made an election to deal with the workers and their union as a single, composite, group employer. In simple terms, they elected to be dealt with reciprocally in that way.[56] Put differently, because the companies conducted themselves so throughout the strike, and issued a single dismissal notice to the striking employees, Intervalve and BHR waived the right to insist on a separate service of the referral. In this context, any other approach would be asymmetrical and unfair.

In addition, it was contended that the companies made a series of representations that they were acting collectively for the purpose of the strike and the ensuing dismissal dispute. To their detriment, the employees and their union relied on these representations. Logically, Intervalve and BHR are to be estopped from denying that they received adequate notice. On the opposite, Intervalve and BHR argued that there was no express or tacit waiver of service referral under section 191(3). They conceded that the joint dismissal notice did more than show that the employer entities acted in concert, and that they were prepared to receive representation collectively. They deny that it implied that, if legal steps followed notification to only one company would suffice. In sum, if the dismissal notice did not amount to a waiver, by parity of reasoning, it could not constitute a representation to estop the companies from relying on the absence of separate service under section 191(3).

Centrally, Intervalve and BHR contended, that section 191(3) made actual service on every employer a prerequisite for the Labour Court jurisdiction. It was pointed out that NUMSA did not seek a joinder of convenience under rule 22(1), where the Labour Court may grant joinder "if the right to relief depends on the determination of substantially the same question of law or fact"; but a joinder of necessity under rule 22(2)(*a*) where "the party to be joined has a substantial interest in the subject matter of the proceedings".[57] Building on these propositions, Intervalve and BHR contended that NUMSA did not bring a constitutional challenge to the 30-day referral requirement; hence, the interpretive injunction in section 39(2) cannot assist them.

5 4 1 The Main Judgment

Cameron J addressed the issue of the preconditions to the Labour Court's jurisdiction, and the questions of form and substance and equitable jurisdiction in the determination of the matter.

5 4 2 Referral for Conciliation as a Precondition to the Labour Court Jurisdiction

The well-known and settled principle of labour law is that labour disputes should be referred to a conciliation process before they can be subject to arbitration or adjudication.[58] As previously noted, the Labour Appeal Court relied on the *Driveline* decision in reversing the Labour Court judgment. It held that in the absence of conciliation of the dispute which was belatedly referred, NUMSA was not entitled to refer its dispute against Intervalve and BHR to the Labour

2002 *TSAR* 436 459–446 and "Justiciability and Standing to Challenge Legislation in the Commonwealth: A Tale of the Traditionalist and Judicial Activist Approaches" 2003 *CILSA* 25; Okpaluba and Mhango "Between Separation of Powers and Justiciability: Rationalising the Constitutional Court's in the Gauteng E-tolling Litigation in South Africa" 2017 *LLD* 1.

56 *NUMSA v Intervalve* para 21.

57 *NUMSA v Intervalve* para 17.

58 Section 191(5) reads: "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved –
the council or the Commission must arbitrate the dispute at the request of the employee if –
the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies.
the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances of work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
the employee does not know the reason for dismissal; or
the dispute concerns an unfair labour practice; or
the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –
automatically unfair; based on the employer's operational requirements; the employee's participation in a strike that does not comply with the provisions of Chapter IV; or because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

Court for adjudication.

The salient facts of *Driveline* bear mentioning. The case concerned an application for an amendment of the applicants' statement of claim. In their referral notice, the individual appellants claimed that their dismissal for operational requirements was unfair. The amendment, that the Labour Court rejected, sought to attack the fairness of the dismissal on the basis that the dismissal was automatically unfair. The employer contended that the conciliation of the dispute concerning automatically unfair dismissal was a jurisdictional precondition to a consideration of the matter by the Labour Court. It contended that the amendment sought to introduce a new dispute which had not been referred to conciliation and that the Labour Court had no jurisdiction to adjudicate. The *Driveline* majority (Zondo AJP, with Mogoeng AJA concurring) stated that it was "as clear as daylight that the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation before such dispute can either be arbitrated or referred to the Labour Court for adjudication".[59]

Cameron J endorsed the reasoning of the *Driveline* majority, and the separate concurring judgment as convincing. Section 191(5) specifies one of two requirements before the dispute can be referred to the Labour Court for adjudication: there must be certificate of non-resolution, or 30 days must have passed. Where neither condition is fulfilled, the LRA provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication.[60] Furthermore, section 157(4)(a) underscores the importance the LRA places upon the attempts to be made to try to resolve a dispute through conciliation before resorting to other methods of resolution.[61]

The lead judgment put to one side the question of formalism. It pointed out that the LRA makes it easy to refer disputes for conciliation. NUMSA muddied the procedural waters as the initial referral cited Steinmuller alone, the referral could have mentioned any entity NUMSA suspected may have been an employer. "Indeed, the second, abortive referral two months later did precisely this."[62] "Why NUMSA failed to adopt this expedient from the start we do not know",[63] Cameron J pondered. It was uncontested that the union could have done so easily.

In concurrence, Zondo J expressed his ultimate conclusion on the stratagem of using the process joinder in the following terms:

> The answer is that the union realised that the referral did not include any dismissal dispute between Intervalve and its former employees or between BHR and its former employees and this meant that the Labour Court would not have jurisdiction to adjudicate those dismissal disputes. It was after the bargaining council had refused condonation that the union thought of using the joinder strategy to try and bring the dismissal disputes involving Intervalve and its former employees and BHR and its former employees through the back door into the trial proceedings relating to the dismissal dispute between Steinmuller and its former employees. This was a ploy by the union to circumvent the decision of the bargaining council refusing it condonation in respect of the dismissal disputes involving Intervalve and BHR.[64]

5 4 3 Was the Dispute with Intervalve and BHR Referred for Conciliation?

Given that those dealing with the dismissal on behalf of all three entities had notice of the referral against Steinmuller, can it be concluded from these facts that the Steinmuller conciliation referral encompassed also Intervalve and BHR? That depends on whether the prescripts of section 191 were met. *Maharaj*[65] established that in measuring of a statute's requirements, the enquiry is not whether there has been "exact" or "substantial" compliance. Rather the *Maharaj*-test, countenances deviation from statutory prescriptions provided the purposes have been met.

The crucial question is: was there compliance? In order to ensure compliance with section 191, NUMSA had to refer the dispute between the employees and Intervalve and BHR for conciliation. Referral for conciliation is a prerequisite to the Labour Court's jurisdiction over

59 *Driveline* para 73.
60 *NUMSA v Intervalve* para 32.
61 *NUMSA v Intervalve* para 34.
62 *NUMSA v Intervalve* para 38.
63 *NUMSA v Intervalve* para 38.
64 *NUMSA v Intervalve* para 137. See also *NUMSA v Intervalve* para 108.
65 *Maharaj v Rampersad* 1964 4 SA 638 (A), applied in *ACDP v Electoral Commission* 2006 3 SA 305 (CC) para 24 and *All Pay Consolidated Investment Holdings (Pty) Ltd v CEO: SASSA* para 30.

dismissal disputes.[66] Whether the referral embraced Intervalve and BHR depends on the purpose of the provision. The content and ambit of section 191 is clear: to ensure that, before parties to a dismissal or unfair labour practice resort to legal action, a prompt attempt is made to bring them together to resolve issues between them. It serves to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may ensue.[67] Another purpose is to inform broadly the human agents involved in a dispute that a referral to conciliation has occurred. Section 191(3) offers a significant signpost. Service must be on "the employer". Steinmuller was not the sole employer but one of the employers — the employing entity of some of the employees, but not all of them.

Although non-compliance with statutory service requirements often results in harsh outcome, the lead judgment relied upon venerable precedents[68] which have held that notifying the wrong party, even because of a mistake, is no notification at all and cannot constitute substantial compliance. The facts in *Malokoane* are illustrative of the fatal consequences of non-compliance. There the injured claimant, through an error on her or her attorney's part about the exact date of her accident, submitted a claim form to the wrong agent of the Multilateral Motor Vehicle Accident Fund (MMF). She contended that the timely submission of the form to an agent of the MMF, even the wrong agent, constituted substantial compliance with the statute's notice requirement, because the MMF was the true defendant and both agents acted for it.[69] Both the High Court and the Supreme Court of Appeal rejected this argument. The Supreme Court Appeal found that, even though the purpose of the statute was to "provide the widest possible protection to injured persons" and the claimant had made a genuine mistake, she nevertheless did not comply.[70]

The Supreme Court Appeal held that service of the form on an agent with no authority to deal with the claim was without effect.[71] It was immaterial that the claimant notified an agent of the MMF within the prescribed period because it was the wrong agent. As to the fact that the MMF or some of its agents had actual knowledge of the claim, the court held that it was not relevant. The claimant had in fact informed no legal authority to receive or handle her claim. In the circumstances, there was no compliance.

In *Blaauwberg*, the Supreme Court Appeal found that the complete lack of service on the debtor could not possibly have put it on notice that it was subject to the proceedings.[72] In that decision an amendment of a summons was refused where the wrong party issued the summons itself, even though it was a company closely associated with the correct party. This was even though the declaration attached to the summons mentioned the correct party as plaintiff. The court held that the summons issued by the incorrect creditor, even if later corrected, was not sufficient to interrupt prescription. This was even though the process was issued in the name of the actual creditor's parent company, and the companies shared the same address.[73] Therefore, there was no compliance with the statutory requirement.

It is important to pause and scrutinise the purpose of service requirement in section 191(3). Beyond simply letting the employer know that a dispute that affects it is being conciliated, notice must be directly targeted. In other words, "it must be to put each employer party individually on notice that it may be liable to legal consequences if the dispute involving it is not effectively conciliated."[74] The adverse consequences for the employer are readily apparent. These may include: trial proceedings, reinstatement orders, back pay and costs orders.

Undoubtedly, the beneficiary of service requirement is the employer.[75] Once one appreciates

66 *NUMSA v Intervalve* paras 15–22.
67 *NUMSA v Intervalve* para 47.
68 *Malokoane v Multilateral Motor Vehicle Accidents Fund* 1999 1 SA 344 (SCA) ("*Malokoane*"); *Blaauwberg Meat Wholesalers CC v Anglo-Dutch Meats (Exports) Ltd* 2004 3 SA 160 (SCA) ("*Blaauwberg Meat*"); *Associated Paint & Chemical Industries Ltd t/a Albestra Paint & Lacquers v Smit* 2000 2 SA 789 (SCA).
69 *Malokoane* 549E.
70 *Malokoane* 549G-550A.
71 *Malokoane* 550A-D.
72 *Blaauwberg Meat* para 16–18.
73 *Blaauwberg Meat* para 14.
74 *NUMSA v Intervalve* para 52.
75 "This makes clear that a referral citing one employer does not embrace another, uncited, employer. The fact that the uncited employer has informal notice of the referral cannot make a difference. The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive a notice of liability to legal process through oblique or informal acquaintance with it." per

that the purpose of the statutory provision is "to tell those on the line that impending legal process might make them liable to adverse consequences — was not fulfilled".[76] A referral that arrived at the companies' shared HR services identified Steinmuller as the sole target in the intended litigation. That the three entities shared HR services and the entities' legal representative knew about the referral against Steinmuller did not mean that they should have concluded that the dispute against Intervalve and BHR had also been referred for conciliation. On the contrary, the exclusion of Intervalve and BHR signalled that the ensuing legal process did not encompass them. They were off the hook.

At the core of NUMSA's challenge is that throughout the events leading to the dismissal of the individual employees, in particular, in effecting dismissal, the three companies acted with a single voice. It will be remembered that the Labour Court deplored as "cynically opportunistic"[77] the companies' stance in the litigation. Behind this complaint lies the suggestion that the separate identity of the three companies is a sham. This raises the question of "piercing the corporate veil" [78] so as to prevent the shirking of employer responsibilities in an intricate working relationship where it is almost impossible to determine the true employer for each employee.[79] To this, the majority judgment noted that the fact that the companies shared premises and constituted a single economic unit, does not justify treating them as a single entity for purposes of citation in a legal process."[80] The fault for the sad, perplexing twists in litigation lies on both parties.

In upholding the right of the two companies to rely on the exclusion from the conciliation process, Cameron J indicated:

> The separate legal personality of the three companies – Steinmuller, Intervalve and BHR – cannot be willed away because there was some overlap in their corporate operations. They had overlapping boards of directors and interconnected shareholdings, and a joint holding company. But this does not help NUMSA. NUMSA's argument depends on the proposition that knowledge held by an officer or employee of one corporation may be imputed to the other corporation with which she is associated. That approach has long been alien to our law.[81] Our law has also rightly rejected the suggestion that serving on several corporate boards makes knowledge pertaining to one company against the other.[82]

5 4 4 Waiver and Estoppel

As already pointed out, the three entities shared HR services. They dealt jointly with the dismissed employees and they issued a joint dismissal letter. It is from here that NUMSA's alternative argument premised on waiver and estoppel springs. This brings to fore the question whether Intervalve and BHR waived their entitlement to separate notice of the conciliation

Cameron J in *NUMSA v Intervalve* para 53.

76 *NUMSA v Intervalve* para 58.

77 *Intervalve v NUMSA* para 41.

78 Courts will in appropriate circumstances disregard a company's separate personality if it is used by another person to achieve irregular objectives: *Airlink Pilots Association of SA v SA Airlines* 2001 6 BLLR 587 (LC); *NUMSA v Lee Electronics (Pty) Ltd* 2013 2 BLLR 155 (LAC); *Group 6 Security (Pty) Ltd v Moletsane* 2005 6 BLLR 1072 (LC); *Veres v Granard CC t/a G2 Clothing* 2004 3 BLLR 283 (LC). The observations of Lord Sumption in *Lowick Rose LLP (in Liquidation) v Swynson Ltd* 2017 WLR 1161 para 1 are telling: "The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves. Mr Michael Hunt is not the first businessman to make that mistake, and doubtless he will not be the last."

79 See e.g. *Footwear Trading CC v Mdlalose* 2005 5 BLLR 542 (LAC).

80 *NUMSA v Intervalve* para 55.

81 See Williams "Companies" in *LAWSA* 2 ed (2005) paras 64 and 69.

82 *NUMSA v Intervalve* para 54. In *Lipschitz v Landmark Consolidated (Pty) Ltd* 1972 2 SA 482 (W) 487C–488B, 767 (W) 881–782, the court rejected the proposition that knowledge held by a director of one company became automatically admissible against another company on whose board the director also served. It further held: "[E]ven if [director] was the sole shareholder and governing director of the defendant it does not follow that he is to be identified with the defendant. He falls to be regarded as no more than an agent of the defendant and cannot be regarded as being the defendant itself which in law is a distinct and separate legal entity. [The director]'s statement and actions are not *ipso facto* and *per se* to be regarded as being those of the defendant. Even in the case of a one man company and its shareholder and/or director are distinct and separate entities." For Froneman J, the reasoning of the majority is not unassailable because "finding for NUMSA here will not threaten any fundamental principles of our law, be they those relating to the recognition of separate legal personality or to orderly dispute resolution. All it does is to discourage relying on formal technicalities in order to avoid dealing with the true merits of underlying labour disputes." *NUMSA v Intervalve* para 197.

process.

Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely.[83] The onus to prove waiver rests with the party asserting it. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.[84] The test to determine the intention to waive is said to be determined objectively rather than subjectively.[85] If the right holder's conduct appears to manifest an intention to waive yet falls short of manifesting an unequivocal intention, waiver will not be readily inferred. So, waiver depends on the intention of the right holder. That can be proved either through outward manifestations or by conduct plainly inconsistent with an intention to enforce the right. This leaves no doubt that the "knowledge and appreciation of the party alleged to have waived is ... an axiomatic aspect of waiver".[86] In short, as Innes CJ observed it is "always difficult"[87] to establish waiver.

On the face of the facts, the court was satisfied that the conduct of Intervalve and BHR did not square up with waiver of the right to separate notice under section 191(3). To hold otherwise would require the courts "to infer from the companies's joint conduct an intention to waive their right to separate notice when the legal screws tightened. That requires a leap that is impossible to make."[88] Therefore, waiver has not been established.

The question of estoppel by representation, takes us to NUMSA's keenest objection — intentional obfuscation, namely that the various companies were one legal entity not just for the purposes of managing the strike, but for the purposes of subsequently being sued. This squares up with NUMSA's overall argument in the court of first instance concerning the joinder application. It pertinently complained that "Steinmuller and its sister companies had created confusion among the workforce as to who the true employer is", and that the corporate structure and the close working relationship between the three companies has "led to justifiable confusion on the part of individual applicants as to their true employer".[89]

Estoppel is a legal doctrine that precludes a person from denying the truth of a representation made to another if that other, believing in its truth, acted detrimentally in reliance on it.[90] The party invoking estoppel must prove that he acted reasonably in relying on the representation. It is often said that a person who knows the correct position cannot say that he was induced to act to his prejudice in the face of the representation.[91] If the defence of estoppel succeeds, it has the effect that the incorrect impression is maintained as if it were correct.[92] Reliance on estoppel is thwarted by the rule that estoppel cannot operate in such a way as to bring about a result not permitted by law.[93]

On the question of estoppel by representation, the majority held against NUMSA. NUMSA's submission was flawed because it relied on crucial representation "that the various companies were one legal entity not just for the purposes of managing the strike, but for the purposes of subsequently being sued. That representation cannot be inferred from the companies'

83 According to *SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 (A) 49G-H: "a provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms."

84 Innes CJ in *Laws v Rutherford* 1924 AD 261, 263. See also the minority judgment of Kroon AJ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 80.

85 See e.g. *RAF v Mothupi* 2000 4 SA 38 (SCA) para 16; *Palmer v Poulter* 1983 4 SA 11 (T) 20; *Multilateral Motor Vehicle Accident Fund v Meyerowitz* 1995 1 SA 23 (C) 27; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 2 SA 537 (C) 543. For extended discussion see: Hutchison and Du Bois "Contracts in General" in Du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 881.

86 *RAF v Mothupi* para 17.

87 *Laws v Rutherford* 263.

88 *NUMSA v Intervalve* para 62.

89 *NUMSA v Intervalve* para 68.

90 See Rabie "Estoppel" in *LAWSA* 2 ed (2005) para 652; Christie and Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 28–29. See also *West v De Villiers* 1938 CPD 103–105; *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 2 SA 274 (A) 291D-E; *Maluti Transport Corporation Ltd v MRTAWU* 1999 20 *ILJ* 2531 (LAC) para 35; *Captick-Dale v Fibre Solutions (Pty) Ltd* 2013 34 *ILJ* 129 (LC) para 17; *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) paras 49–50.

91 See e.g. *Bird v Summervile* 1961 3 SA 194 (A) 204E; *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W) 79G; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 849G.

92 See Van der Merwe *et al Contract: General Principles* 4 ed (2012) 29.

93 See e.g. *Saldanha Bay Municipality v SAMWU obo Wilschut* 2015 36 *ILJ* 1003 (LC) para 25; *HNR Properties CC v Standard Bank of SA Ltd* 2004 4 SA 471 (SCA) 480A; *Strydom v Die Land en Landboubank van Suid-Afrika* 1972 1 SA 801 (A) 815B-816B; *Mgoqi v City of Cape Town* 2000 (4) SA 355 (C) 396D; *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 142 (SCA) 148E-H. See also Rabie and Sonnekus *The Law of Estoppel in South Africa* 2 ed (2000) 171.

joint conduct during the strike and in dismissing the employees."[94] That Steinmuller indicated during conciliation that it was not sole employer of the listed employees renders NUMSA's reliance on the alleged representation contained in the dismissal letters, flawed. It further raised doubt whether the union or the employees suffered prejudice that can be ascribed to any representation by the employers.[95] It is, however, important to remember that no case of estoppel was pleaded or advanced at first instance. To recapitulate: the bone of contention between the parties, since NUMSA lodged the joinder application, has been whether it was entitled to join Intervalve and BHR to the proceedings against Steinmuller. Against this background, NUMSA's reliance on estoppel rang hollow.

For the dissenting opinions, the approach espoused in the lead judgment was overly restrictive and formalistic, thereby hindering the effective resolution of labour disputes.[96] According to Cameron J, this charge seems undue because:

> A clear requirement that a union must include every employer in conciliation proceedings is likely to lead to less, not more, litigation. The dissent rightly notes in a complex working relationship it may be difficult to determine the true employer of each employee. But the LRA offers condonation if this complexity results in missed deadlines. Indeed, condonation for the late referral involving Intervalve and BHR was available here, and it is not clear why NUMSA did not seek to review the Bargaining Council's decision in August 2010 to deny it condonation. NUMSA may indeed still seek to review that decision on the basis that, until the decision of this Court, it believed that it was entitled to have the companies joined."[97]

At first glance, the main judgment represents a death knell for the union and the employees. However, upon close reading Cameron J identified a third way for legal redress concerning the employees of Intervalve and BHR at risk of losing their unfair dismissal claims as a result of NUMSA's failure to act promptly at various points during the litigation.[98] They may seek recompense from the union based on negligent mismanagement of their claims.[99] Paradoxically, this reveals the comparatively narrow outlook and historical failure of South African labour law to develop trade union law into a niche area. By way of counterpoint,[100] the paltriness of jurisprudence in this crucial area of labour law — trade union governance remains a puzzling

94 *NUMSA v Intervalve* para 66.

95 For a plea of estoppel to be successful, the party invoking it must prove that, by acting on the representation made to him, he acted to his detriment, as is usefully illustrated by the decision in *Saldanha Bay Municipality.* In that case, the employee who had pleaded guilty to dishonesty during the course of a disciplinary hearing invoked estoppel to validate a settlement agreement entered into by him and an outgoing municipal manager ostensibly to circumvent the disciplinary process. The Labour Court found reliance on estoppel was defeated by the fact that the employee had not suffered in any apparent detriment; on the contrary he was shielded from the labour law's version of capital punishment. For full discussion Maloka "The Turquand Rule, Irregular Appointments and Bypassing the Disciplinary Process" 2017 *SA Merc LJ* 527.

96 Per Nkabinde J in *Intervalve v NUMSA* paras 176–180.

97 *NUMSA v Intervalve* para 71.

98 *NUMSA v Intervalve* para 71.

99 See *FAWU v Ngcobo NO* 2014 1 SA 32 (CC) countenancing a delictual claim by dismissed employees against their union for its negligent failure to prosecute their unfair dismissal claim. See also *SAMWU v Jada* 2003 6 SA 294 (W). See Le Roux "The Rights and Obligations of Trade Unions: Recent Decisions Clarify Some Limits to Both" 2012 *CLL* 31. Approached from an American perspective, NUMSA's negligent handling of unfair dismissal claims would generally breach the duty of fair representation. The absence of duty of fair representation highlights another aspect of trade union law in which South African labour law is infirm. In this regard, one thinks of watershed American cases: *Steel v Louisville & NRR* 323 US 192 (1944); *Vaca v Spies* 386 US 171 (1967); *Bowen v US Postal Service* 459 US 212 (1983). There is a wealth of literature examining the trade union duty of fair representation. The sources consulted for the brief sketch include: Summers "The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?" 1977 *U Pa L Rev* 251; Holzhauser "The Contractual Duty of Competent Representation" 1987 *Chicago-Kent LR* 255; Finkin "The Limits of Majority Rule in Collective Bargaining" 1980 *Minn LR* 183; Harper and Lupu "Fair Representation as Equal Protection" 1985 *Harvard LR* 1211; Bonventre "The Duty of Fair Representation under the Taylor Law: Supreme Court Development, New York State Law Adoption and a Call for Independence" 1992 *Fordham Urban LJ* 1.

100 For a pick into high craftsmanship that characterises British labour law see: Rideout *The Right Membership of a Trade Union* (1963); Grunfeld *Modern Trade Union Law* (1966); Citrine *Trade Union Law* (1967); Perrins *Trade Union Law* (1985); Kidner *Trade Union Law* 2 ed (1984); Elias and Ewing "Trade Union Democracy: Members' Rights and the Law" in Hepple and O'Higgins (eds) *Studies in Labour and Social Law* (1987). See generally, Chafee "The Internal Affairs of Associations not for Profit" 1930 *Harvard LR* 993; Cox "The Role of Law in Preserving Union Democracy" 1959 *Harvard LR* 72.

feature of our labour law landscape.[101]

5 4 5 The Dissenting Judgments

Nkabinde J delivered the principal dissent. She noted that the primary question was whether NUMSA complied with section 191 of the statute. She agreed with the characterisation of the issues by the majority as squarely raising questions about "what the law can do to penetrate the opacities of form." Her disagreement with the main judgment flows from the fact that majority's overly restrictive construction of the section 191 has the effect of non-suiting the employees' unfair dismissal claims. Overall, it makes the resolution of labour disputes ineffective and impractical through the mechanism created by the LRA.

The interpretive approach adopted by the minority to section 191 leads to the same destination but yields different conclusions from those reached by the LAC, the main and concurring judgments. Unlike the main judgment, which focused solely on the scope and breadth of section 191, the thrust of the dissenting opinion is on the proper interpretation and application of the relevant provision, in the light of the spirit, purport and objects of the Bill of Rights, and, in particular the right to fair labour practices in section 23 and access to courts in section 34 of the Constitution.[102]

It is in this context, and in the light of the primary objects of the LRA that the provisions of section 191 must be understood and construed. In a sense, section 191 should not be construed in isolation, but in the context of other provisions in the LRA and the Constitution.[103] The critical point is the interpretive process envisaged in section 39(2) of the Constitution.[104] It is generally said that when legislative provisions limit or intrude upon fundamental rights, they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.[105] It is perhaps worth repeating what Ngcobo J said in *Chirwa*:

> The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must be read in the light of its objects. Thus where a provision is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA. [106]

Having regard to the constitutional rights at issue, namely the rights to fair labour practices and access to courts, a narrowly textual and legalistic approach to determining whether there has been substantial compliance with the prescripts of section 191 is to be avoided.

Had the Labour Appeal Court and the majority interpreted the LRA in a purposive manner and paid due consideration to the facts and the fundamental rights at play, they would have concluded that there was substantial compliance with the relevant provisions of the Act. One can do no better than repeat Nkabinde J's apt conclusion:

101 Lately, nascent trade union scholarship is emerging to fill the neglected chapter in the South African labour law corpus see: Cohen *et al Trade Unions and the Law in South Africa* (2009); Mlungisi T*he Liability of Trade Unions for Conduct of their Members during Industrial Action* (LLD Thesis, UNISA, 2016).

102 See e.g. *Legal Aid SA v Magidiwana* 2015 6 SA 494 (CC) paras 13–16; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) paras 1, 30; *Twee Jonge Gezellen (Pty) Ltd v Land & Agricultural Bank of SA* 2011 3 SA 1 (CC) paras 35–36; *Lesapo v NW Agricultural Bank* 2000 1 SA 409 (CC) paras 73–76. See also Okpaluba 2002 *TSAR* 436 459–460; Okpaluba and Mhango 2017 *LLD* 1; Okpaluba 2003 *CILSA* 25.

103 *SA Police Service v POPCRU* 2011 6 SA 1 (CC) para 30.

104 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 1 SA 545 (CC) para 21–26.

105 See e.g. *S v Zuma* 1995 2 SA 642 (CC) para 15; *SATAWU v Moloto NNO* 2012 6 SA 249 (CC) para 44; *Hyundai* paras 22–23; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) paras 46-47, *NEHAWU v UCT* para 39.

106 *Chirwa v Transnet* 2008 29 ILJ 73 (CC) para 110.

> The interpretation contended for by the three companies non-suits the individual claimants. The construction may have a chilling effect on the stated objects of the LRA which include the promotion of the effective resolution of labour disputes and the right of access to courts in section 34 of the Constitution. The restrictive and formalistic approach and the construction contended for by the three companies undermines this context. If the approach and construction are accepted, it would mean that there must, of necessity or inevitably, be another referral of the same dispute which had already been conciliated. This construction would, to borrow the words used by the majority in *Driveline*, 'render the dispute mechanism of the Act ineffective, unworkable and nugatory'. *It would also allow for a situation whereby employees, in a complex working relationship created by the employers, are saddled with an undue burden of having to establish who their true employer is. Such a situation, in effect, rewards an employer who complicates the working relationship. It also has the effect of creating unfairness in labour relations and limiting access to courts. This is untenable and it is manifestly unfair.*[107]

To the extent that real dispute between the parties has been conciliated, it stands to reason that section 191 was substantially complied with. That Intervalve and BHR were not served, does not detract from the fact that they participated in the conciliation process through the shared HR services and their legal representative. Accordingly, "proper reading of *Driveline* supports a construction that favours a conclusion that there was substantial compliance, particularly because 'the dispute' was conciliated."[108]

The concluding remarks of concurring minority judgment exposes the weakness if not the fallacy of "narrowing of purpose" articulated in the lead judgment.[109] Putting the matter more forcefully, Froneman J writes:

> It seems to me to tilt the scale too far towards compliance with form rather than substance. I cannot accept that a mistaken reference to a party in a referral notice must necessarily spell non-compliance. The concerns relating to the mistake can adequately be met by the fourth requirement in determining substantial compliance, namely whether there was 'any practical prejudice because of non-compliance'.
>
> Here, there was notice of referral to the other employers, albeit informally and, perhaps, in the mistaken belief that they fell under Steinmuller as the real employer. There was no obstacle to attaining the purpose of attempting conciliation, except for a deliberate decision to stay away as far as possible from conciliation by relying on, yes, a formal technicality. There was no 'practical prejudice', only intentional obfuscation.[110]

If we bear in mind that deliberate obfuscation of the employment relationship by the corporate group created a justifiable confusion on the part of individual employees as to their real employer, the minority opinion is to be preferred. The reasoning of the minority accords with the facts, constitutional and statutory scheme. At the same time, it gives proper consideration to the fundamental rights at stake. In short, the inescapable conclusion is that there was substantial compliance with section 191 of the statute.

NUMSA v Intervalve trilogy encapsulates the problems resulting from a unitary analysis of the employer, where the employing entity is defined as a single counterparty to the contract of employment or service. To a large extent, the approach of the minority dovetails with the views of scholars who have attempted to fashion a comprehensive rethink of the unitary concept of employer.[111] Put concisely, Prassl contends that in order to restore congruence to the application of employment law norms, the very definition of the employer must carefully be re-conceptualised as a more openly functional one.[112] In the light of the outcome in *NUMSA v Intervalve* it is hard to disagree.

107 *NUMSA v Intervalve* para 180 [emphasis added].
108 *NUMSA v Intervalve* para 182.
109 *NUMSA v Intervalve* paras 45–48 and 53.
110 *NUMSA v Intervalve*195–196.
111 See generally, Deakin 2001 *ILJ (UK)* 72 and 2003 *ILJ (UK)* 57; Davies and Freedland "The Complexities of the Employing Enterprise" 274; Prassl 2013 *LQR* 380.
112 Prassl *The Concept of the Employer* (2015) 24–25 and "Towards a Functional Concept of the Employer" A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: *The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation* (April 2017).

While the lead judgment can be commended for correctly diagnosing the problems of fragmenting work and enterprises as a matter of penetrating the opacities of form, in failing to account for the asymmetries between the employees and employing entities in complex multilateral settings such as a corporate group, it demonstrated its inflexibility in the face of facts. The conclusion reached by majority inevitably means that the employees' unfair dismissal claims are defeated not only by complex and evasive multilateral working arrangements but also by a mere technicality. Rather than sanctioning the employing entities for contriving the opacities of form, the majority unwittingly rewards an employer who complicates the employment relationship. In this context the central postulate of *Driveline* stranglehold perpetuates precariousness, allowing employing entities to rely on technicalities to evade their employment-related obligations and shift risk onto employees. Without doubt, this is patently unfair.

6 CONCLUSION

The article has responded to the problem of fragmentation of employment and the vertical disintegration of employing enterprises. To this end, it addressed the complexities of identifying the real employer in a multilateral employment setting stemming from the *NUMSA/ Intervalve* trilogy. It is now increasingly clear that the legal meaning of the employer is not coterminous with the sociological or economic idea of the 'enterprise' or 'organisation', nor with the workplace, that is, the physical place on which work is carried out. The tendency towards fragmentation implies that the identification of the employer may be decided partly by considerations of organisational and workplace boundaries.

The stage at which an employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. It is impossible to overstate the importance of identifying the real employer or employing entities where the employment relationship has been obfuscated by opacities of form designed to non-suit the employees' unfair dismissal claims. With respect, the overly restrictive and formalistic approach to compliance with section 191 of the LRA espoused by the majority judgment in the Constitutional Court cannot be countenanced. *NUMSA/Intervalve* brings to attention the insidious effect of depriving employees of their unfair dismissal claims against employing entities, on the one hand, and rewarding the latter for complicating the employment relationship, on the other. It can be submitted that the purposive approach to statutory compliance adopted by the minority opinion is to be preferred as it is attuned to the goals of labour regulation in terms of promoting effective dispute resolution, protecting fundamental rights and promoting countervailing power.