IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Labour Court Case No.: P301/05

Labour Appeal Court Case No: PA2/06

CONTINENTAL TYRE SA (PTY) LTD **Appellant**

and

THE NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA **Respondent**

JUDGMENT

DAVIS JA:

Introduction

[1] The respondent successfully obtained an order declaring certain dismissals contemplated for operational requirements to be invalid and further directing the appellant not to give effect to these envisaged dismissals but to include the affected individuals within the ambit of section 189 A of the Labour Relations Act 66 of 1995 ('the Act'). It

is against this order that appellant has approached this court on appeal with leave of the court *a quo.*

Factual Matrix

[2] The essence of the dispute can be set out by adopting the following chronology:

On 15 September 2004, the product manager, of appellant Hein Johnson, wrote to respondent proposing certain transfers from appellant's Steel Truck and Extruder Departments ('STED'). Thereafter appellant entered into negotiations with both respondent and the Solidarity Trade Union with a view to converting the appellant's work place to a so called 6.5 day continuous shift pattern, that all working hours would be paid in terms of the provisions of the relevant bargaining council collective agreement and all the relevant provisions contained in the Basic Conditions of Employment Act 3 of 1983.

[3] On 30 March 2005 appellant held meetings with the two trade unions, during the course of which it explained its operational needs. In terms of this explanation, it was proposed that one shift would be declared

redundant. No job losses were contemplated at this stage. It appears that these conversations were directed changes with STED.

[4] According to the answering affidavit deposed to by Ms. Kruger, the employees' services manager of appellant, an agreement was reached with both Solidarity and respondent, in terms of which, inter alia, the affected members would take up alternative positions within appellant's workforce, the agreement to commence on 1 May 2005. It appears that this agreement was not implemented and a further meeting was then scheduled for 10 May 2005. When the members of respondent refused to implement this agreement which meant that the affected employees refused to take up alternative positions, appellant then contemplated dismissals within the STED workforce, probably on 10 May 2005 when notices in terms of section 189 of the Act were issued.

[5] On that day, appellant was contacted by its German parent company and informed of a dramatic decrease in the general demand for tyres to the extent of some 400 000 (four hundred thousand) tyres. This

notification indicated that the overall decrease in demand did not only affect the appellant's plant but various plants within the world wide Continental Tyre group. On 11 May 2005 and again on 18 May 2005 appellant posted notices referring to a negotiation surrounding a 6.5 day shift pattern, the expense of labour and a general drop in the demand for tyres.

[6] On 11 May 2005 the following notices appeared:

'The Company warned NUMSA that the shift pattern rendered the cost structure of production over weekends out of line with the requirements of Continental AG. ….. however, this shift pattern has influenced the cost as a result of this'

On 18 May 2005 a further notice read:

'Since April 2004, the Company has tried to implement a revised shift system in an attempt to increase our CUD's and become more cost competitive. Although agreement was reached on the increase in CUD's, the cost of production on weekends and specifically on Sundays remained too expensive. As a result, of inter alia, our inability to reach agreement on the cost structure on weekend work, the Company is currently faced with a dramatic reduction in demand for our products (400 thousand tyres less in Export and 450 thousand tyres less in the local market).'

[7] On 17 May 2005 a meeting took place between the appellant and respondent. The meeting examined confidential information regarding the anticipated decrease in production. The presentation which was made by appellant at the meeting indicated concern about the reduction of production volumes and, "a fixing of our cost." Various steps were proposed to deal with the situation, including the cessation of weekend production, the radial tyre truck department to run at a maximum and a re-evaluation to be conducted at the end of August 2005.

[8] On 26 May 2005 a meeting took place at appellant's premises, attended by legal representatives of both appellant and respondent. At this meeting respondent advised that the operational needs of the Cross-Ply Department had to be addressed as a matter of extreme urgency. According to Ms. Kruger 'the loss of approximately one million tyres would have a severe impact on the operational requirements of respondent… It was, indeed, the consistent attitude of respondent to avoid any possible dismissals based upon operational requirements pertaining to the respondent's needs that faced

respondents as at 10 May 2005'. On that day appellant recalled its section 189 (3) notice which had been issued on 10 May 2005 and re-issued a new one to all employees in STED.

[9] On 26 May 2005 appellant issued a section 189 notice to employees in the Cross-Ply Department. The relevant notices explained the rational for the decision and referred to other alternatives which have been explored by appellant to deal with the problem in this particular department.

[10] On 30 May 2005 correspondence was generated between the parties which indicated that appellant would terminate the service of 48 employees. At the end of May 2005 appellant terminated the weekend shift and subsequently laid off certain of its employees. On 31 May 2005, respondent's attorney of record wrote to appellant's attorney of record suggesting inter alia: 'it does appear to be patently clear that your client is indeed contemplating the dismissal of a substantial number of employees which will quite conceivably affect departments other than those referred to in the two initial s189 (3)

notifications'.

[11] Appellant's attorney replied: 'our client confirms that, it shall proceed, to avoid, at all costs the anticipated dismissal of any employees within the workplace and, we specifically refer to the rather expansive correspondence already exchanged between the parties. It clearly exhibiting our client's intention to retain all the employees concerned. To this end, our client restates its position, that even within their Steel Truck and Extruder Departments reasonable alternatives have been made to all possibly affected employees, subject to your client's cooperation within the joint consensus seeking framework'.

[12] Further claims of a similar nature were made by respondent's attorney which elicited a reply on 3 June 2005: 'Our client has made it abundantly clear during the course of the process they will purposely implement broader alternatives to alleviate operational requirements rather than to contemplate the dismissal of any employees.'

[13] A further meeting took place 13 June 2005 where appellant met with respondent regarding the problems of STED as well as the Cross-Ply Department. Correspondence generated by appellant on 14 June 2005 included the following comment: 'it is of paramount importance that parties endeavor to reach consensus on the implementation of viable production structures to accommodate this productions in demand'.

[14] On 7 July 2005, Ms. Kruger, on behalf of appellant, wrote to respondent as follows: 'With specific reference to our ongoing consultations regarding the Steel Truck and Cross-Ply s189 notices, the company regrets to advise that the list of alternatives that was provided to yourselves nearly 3 weeks ago has had to be dramatically altered as a large portion of the stated alternative function are no longer existing (sic). This has come about inter alia by the further reduction in our daily production volumes…. The company invites NUMSA to make submissions in terms of these alternatives'.

[15] A further meeting took place on 13 July 2005 at the work place of

appellant. At that meeting the dismissal of those employees whose names appear on Schedule One to the Notice of Motion was confirmed. Ms. Kruger avers that even thereafter 'the applicant absolutely failed and/or refused to provide any proposal and/or input pertaining to the outstanding items notwithstanding my further request made on 19 July 2005…. and I only issued individual termination letters containing the relevant financial information on 29 July 2005'.

[16] On 7 June 2005 respondent's attorney wrote as follows to appellant's attorneys:

> "Furthermore, our client anticipates that based upon the utter exhaustion of the s189-proceedings of the Steel Truck and Cross-Ply Departments, final decisions should be made in this regard and with reference to the dismissal of selected employees by no later than 8 July 2005…"

> With reference to the general and decreased productivity demands within our workplace <u>our client is currently finalizing its formal notification in terms of Section 189A</u>, of the Act and, its rights are similarly reserved in this regard. We confirm that all relevant issues pertaining to our client's operational needs

shall form part and parcel of this process…"

[17] Section 189A notices were then issued either on 19 or 20 July 2005. In these written notifications, the reasons given included a fall in the volume for passenger tyre sales both locally and internationally, no indication of improvement, a prediction of a steady decline and hence a further reduction of production volumes, the effect of aggressive price wars between local manufacturers as well as the import of less expensive foreign made tyres direct into the local market and, the down turning of the international market resulting in reduced exports.

[18] In its section 189A notice, appellant sets out the following alternatives which it had already explored:

1. A moratorium on recruitment since May 2005
2. Termination and/or non renewal of all fixed term employment contracts
3. Moratorium on overtime
4. Lay off of fourth shift / attempt to reduce alternate shift structure

5. Natural attrition i.e. resignation, transfers, earlier retirements.

[19] As a result of these developments, respondent approached the Labour Court for urgent relief.

Finding of court *a quo*

[20] In his judgment, Ngcamu AJ defined the key issue for determination as to whether s189A superceded the process under s189 of the Act, in the case where the employer issues a s189 notice immediately on contemplation of dismissal of employees but before finalization of that process contemplates the dismissal of additional employees so that the total of contemplated dismissals falls within s189A. The learned judge found: 'Section 189A notification was issued when the Section 189 process had not been finalized. I reject the respondent's submission that the process had by then been finalized. I do so on the basis, if indeed the process had been finalized there was no point in furnishing information to the appellant which was requested in June. Even if I accept that the process in regard to s189 has been finalized, the issuing of Section 189A immediately indicated that the respondent

had not been *bona fide.*'paras 55-56.

[21] It is to the scope and relationship of ss 189 and 189A that we must therefore turn.

The relevant legislation

[22] Section 189(1) provides, inter alia, when an employer contemplates dismissing one or more employees for reasons based on the employers operational requirements, the employer must consult-

a) any person whom the employer requires to consult in terms of a collective agreement

b) if there is no collective agreement that requires consultation

ii) any registered union whose members are likely to be affected by the proposed dismissals.

[23] Section 189 (3) provides:

The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

a) the reasons for the proposed *dismissals;*

b) the alternatives that the employer considered before proposing

the *dismissals*, and the reasons for rejecting each of those alternatives;

c) the number of *employees* likely to be affected and the job categories in which they are employed;

d) the proposed method for selecting which *employees* to dismiss;

e) the time when, or the period during which, the *dismissals* are likely to take effect;

f) the severance pay proposed;

g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;

h) the possibility of the future re-employment of the *employees* who are dismissed;

i) the number of *employees* employed by the employer;

j) the number of *employee*s that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.

[24] Before s189A was introduced into the Act in 2002, employees could not strike over proposed retrenchments. Hence, the precise purpose of

s189A was to provide employees with the right to strike over dismissals based upon operational requirements provided that the provisions of s189 (1) were satisfied. S189 creates a threshold prior to its operation. It only applies to employers who employ more that fifty employees. A cut off of ten proposed retrenchments is required when the workforce is below two hundred, fifty proposed retrenchments when the workforce is over five hundred and otherwise there must be a proposal to retrench at least 10% of the workforce.

[25] It is common cause that, in the present dispute, if all the proposals for retrenchment of respondent's members were taken into account, more than fifty employees were to be retrenched.

[26] Mr. Niehaus, who appeared on behalf of the respondent, submitted that the court *a quo* had been correct in its decision, because, by splitting the retrenchment decision into three segments, firstly STED, then the Cross-Ply Department and finally the balance of the workforce, appellant had sought to subvert the rights given to employees in terms of s189A. In his view, it was convenient for the

appellant that only forty eight workers stood to be retrenched in so far as the first two proposals were concerned. Mr. Niehaus contended that in this way appellant had attempted to circumvent the possibility of a strike under s189A which could otherwise have taken place. By compartmentalizing one retrenchment process into three, he contended that appellant had acted in *fraudem legis.* The essence of Mr. Niehaus's submission was that, in the last week of May 2005, a number of workers were laid off, albeit temporarily. These were the employees in his words were "the subject matter" of the s189A notice. Given that the section 189 notices indicating that a dismissal of various workers in the STED and Cross-Ply Departments had been issued on 25th May and 26th May 2005, it was clear, in his view that, when these notices were issued, the possibility of a s189A retrenchment had to have been foreseen by the appellant. Accordingly the entire process should have been dealt with in terms of s189A.

Evaluation

[27] In Atlantis Diesel Engine (Pty) Ltd v NUMSA 1995 (3) SA 22 (A) at 28 F Smallberger JA held that the duty to consult arose when 'the

employer having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure'. That judgment however did not engage with the wording as employed in s189 of the Act based as it was on the Labour Relations Act 28 of 1950.

[28] This court in General Food Industries Limited v Food and Allied Workers Union 2004 (25) ILJ 1260 (LAC) considered the relevant provisions of the Act as follows: 'An employer is entitled to take the provisional decision to consider the possible retrenchments of employees on his own, without any input from the employees or the union. But he is not allowed to make a final decision before consulting with the trade union or employees involved. In practice an employer will first sense the need to retrench at managerial level and a decision in principle will be taken. However, the employer must consult once it contemplates a dismissal of employees for operational

requirements'. Furthermore, in Enterprise Food (Pty) Ltd v Allen and others (2004)25 ILJ 1251 (LAC) at para23 this court confirmed that the word "contemplates" does not exclude an employer 'developing a preliminary approach upon which a decision may be based.' As Martin Brassey Commentary on Labour Relations Act A8-91 writes: 'An employer is entitled to consider whether a new scheme or structure might be viable before initiating the process of consultation'.

[29] In the application of the facts of the present dispute to this legal position, it must be remembered that the relief sought was in the form of a final interdict. In connection with this form of relief this court said in Fry's Metal (Pty) Ltd v The National Union of Metal Workers in South Africa & others (2003) 24 ILJ 133 (LAC) at paras 37- 40:

'In such a case the court makes its decision insofar as any dispute of fact is concerned, on the basis of the version of the respondent party unless that version is so far fetched or clearly untenable that the court is justified in rejecting it merely on the papers or the denial by the respondent of a fact alleged by the applicant is such as not to create a real or genuine or bona fide dispute of fact. In a case where the respondent party's version is so far fetched or so untenable that the court is justified in rejecting it merely on the papers or where the denial by the

respondent of a fact alleged by the applicant is not such as to create a real or bona fide dispute of fact, the court must include the fact alleged by the applicant among the facts it takes into account in deciding whether or not to grant the final relief. Of course, the other facts that the court will take into account are those that are alleged by the applicant and admitted by the respondent (or which the respondent cannot deny) as well as those facts which are alleged by the respondent'.

[30] Ms. Kruger, in her answering affidavit, contends in relation to the s189 processes concerning STED and Cross-Ply Department: 'in relation to the 39 dismissed employees it should be noted that at no stage whatsoever did the applicant during the course of my countless meetings and /or consultations, dispute the fairness/or validity pertained to the operational needs of the Steel Truck, Extruder and/or Cross-Ply Departments. I was present at all of the aforestated meetings, and, not once, during the course of such meetings/consultations did the applicant even attempt to make out a case that the respondent does not possess over such fair and/or economical reasons'.

[31] To this averment appellant's response in reply was: 'having regard to the fact that the applicant has consistently questioned the respondent's *bona fides* relevant to the retrenchment processes, the applicant finds it incomprehensible that the respondent can now allege that the applicant never challenged the underlying substantive reason for the retrenchment'.

[32] Unfortunately, save for this broad statement summarizing the general approach adopted by respondent during this dispute, there is no evidence provided to this court which gainsays the averment that the commercial rationale of the s189 processes had ever been attacked by respondent. Furthermore, as Mr Wade, who appeared on behalf of appellant observed, respondent had been brought in to a meeting on 17 May 2005 to deal with the confidential information provided by appellant's parent in Germany. At no stage had either party and, in particular respondent, raised the question of retrenchments in terms of s189A of the Act.

[33] Mr. Wade noted that, as late as 14th June 2005, Ms. Kruger stated the

following in a letter written to respondent: 'The disclosure of information to yourselves is now fully and completely dealt with in so far as the reissuing of the relevant information packs as well as our consultation of yesterday'. She then went on to say: 'In the light of the above the company extends a final invitation to NUMSA to meet on Monday, 20 June at 12h00 to make representations in terms of s189 (2) of the LRA regarding the selection of affected employees and alternatives in order for the company to make a final decision in this matter'.

[34] It appears that, until a very late stage, appellant sought to find alternatives other than retrenchment. It is clear from the s189A notice of 19th July 2005 that appellant had considered a number of alternatives before moving to a decision to retrench in terms of s189A, including a moratorium on recruitments since May 2005, termination or non renewal on all fixed term employment contracts, a moratorium on overtime, a layoff of the fourth shift in an attempt to introduce alternative shifts structures, and natural attrition, being resignations, transfers and early retirements.

[35] In my view, it could not be said that, as at the end of May 2005, the appellant had contemplated retrenchments as defined in this judgment and the other judgments of this court cited in relation to s189A retrenchments. Indeed s189(3) makes it clear that an employer must issue a written notice inviting the other consulting party to consult with it and must disclose in writing all relevant information including but not limited to the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives. Applied to the notice of 19th July 2005, it is clear that the employer considered various alternatives before it proposed dismissals. In short, the contemplation necessary to trigger s189 and s189A of the Act does not occur when the employer initially considers alternatives. In a case such as the present, where, for the relevant period, retrenchments were not even upon the 'contemplative agenda' it was only once the alternatives had been discounted that the employer considered a process of dismissal and then was obliged to consult.

[36] The s189 processes commenced in this case and continued almost to conclusion before the s189A process began. They were separate processes. It may well be that a process begins under s189 which had just commenced when the employer contemplates a larger process of retrenchments covered by s189A. If the employer then ignores the implications of s189A, on the particular facts, it could be held to have acted in a manner so as to avoid the scope of s189A and thereby to have subverted the hard earned rights won by employees in terms of the Act.

[37] However, based on these papers viewed in terms of the approach adopted in Fry's Metal supra it is, in my view, not possible, on a balance of probabilities, to conclude that appellant initiated, as it was obliged to do, a s189 process with regard to the STED and Cross-Ply Departments when it had already contemplated retrenchments within the meaning and scope of s189A.

[38] Respondent contended that it had requested information from

appellant as late as 17 June 2005 and hence the process initiated under s189 was not yet complete. However, the evidence indicates that there were a set of generalized requests which were not directly applicable to the s189 retrenchments. In any event, prior thereto, on 14th June appellant had taken the view that the exchange of information had been completed. Nowhere further on respondent's papers, is any specific evidence provided which indicated that the process had been impeded in any way or that it had not effectively run its course to impasse.

[39] For these reasons therefore the following order is made:

1. The appeal succeeds with costs.
2. The judgment of the Labour Court of 13 October 2005 is set aside and replaced with the following:

   The application is dismissed with costs.

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DAVIS J A

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LEEUW JA

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TLALETSI AJA

Appearances

Date of Judgment: **19 May 2008**

For the appellant **Advocate R B Wade**

For the respondent **Mr M Niehaus**