IN LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: DA 10/09

In the matter between:

AUNDE SOUTH AFRICA (PTY) LIMITED Appellant

and

NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA Respondent

Date of hearing : 17 November 2010

Date of judgment : 20 June 2011

JUDGMENT

TLALETSI JA

Introduction

[1] The appellant in this matter dismissed its employees who are members of the respondent on 25 January 2009 and re-employed them on 26 January 2009 on different terms and conditions of employment. The respondent brought an application on behalf of its dismissed members in the Labour Court in terms of

section 189A (13) of the Labour Relations Act 66 of 1995 ('the Act") seeking certain relief.

[2] In consequence the Labour Court, per Molahlehi J, issued an order on the following terms on 20 May 2009:

> "2.1The retrenchment of the applicant's members was procedurally unfair.
> 2.2 The respondent is ordered to reinstate the applicant's members on the same terms and conditions, without loss of benefits and salary as applicable to them prior to their dismissals on 25 January 2009, until such time that the respondent complies with a fair procedure.
> 2.3 All or any amounts paid to the applicant's members as severance and or notice pay after the dismissal in January 2009 must be repaid to the respondent, together with interest thereon a tempore morae before any payments in terms of this order are made.
> 2.4 The respondent is to pay the costs of the applicant."

[3] This appeal is against the judgment and order of the Labour Court referred to above. For a better understanding of the issues a detailed chronology of the events that led to the dispute is apposite.

Factual background

[4] The following facts are extrapolated from the pleadings and other documents filed as part of the record and are mainly common cause or not in dispute. The appellant and the respondent are members of the Metal Industries Bargaining

Council ("MIBCO"). The respondent had at least until 2008, enjoyed a majority of membership of the hourly and weekly paid employees within the appellant. The respondent had concluded recognition and an agency shop agreement with the appellant on behalf of its members as well as non-members employed by the appellant.

[5] During September/October 2008, the appellant engaged in a consultative process for retrenchment in terms of section 189 of the Act with the respondent. The process was conducted under the facilitation of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). During this period the appellant's representatives indicated to the respondent's representatives that, quite apart from the retrenchment exercise in which it was then engaged, it intended to terminate the services of all its weekly paid employees and to re-employ them afresh on minimum level rates of pay and conditions of service prescribed by the MIBCO Main Agreement. It is important to note at this stage that the rates of pay of the employees were in excess of the minimum prescribed in the MIBCO Main Agreement. The respondent's representative expressed a view that that would be a drastic and extraordinary measure and that they were opposed to it. The parties agreed to hold off on the issue until the then current retrenchment exercise had been finalised.

[6] It is common cause that at the time of these negotiations a trade union named United Association of South Africa ('UASA") became involved for the first time in

retrenchment negotiations at the appellant. UASA was participating in these negotiations only to represent the interests of the monthly salaried employees of the appellant.

[7] On 5 November 2008 the appellant forwarded a letter to the respondent in which it referred to the "recent consultations" they held and proposed a further meeting to be held the following week in order to discuss the restructuring of the terms and conditions of employment of the hourly paid employees. The appellant indicated their availability only from Tuesday 11 November 2008 onwards and requested the respondent to advise on their suitable date and time.

[8] On 6 November 2008 the respondent replied to the said letter from the appellant and indicated that they would be available on 14 November 2008 at 11h00. This meeting did not take place. According to the appellant 14 November 2008 fell on a Friday which was a *"*half day*"* at the appellant and further that a "Pension/Provident Fund Trustees" meeting had already been scheduled for that date. The respondent proposed another meeting to be held on 26 November 2008 at 11h00 in a letter dated 20 November 2008. The appellant replied to the said letter by confirming its availability to attend on the proposed date and time.

[9] In the meantime on 19 November 2008 the appellant forwarded a letter to the respondent headed *"*Proposal to re-structure terms and conditions of employment".

The letter provided *inter alia* background information for the proposal, financial overview and forecast for 2008 and 2009 years. In addition the letter stated that:

> "3.1Remuneration and benefits
> We propose reducing the hourly paid employees rates of pay to that of the weekly MIBCO minimums. In addition we propose reducing the employees' service to zero, which would have an impact on their service related benefits, namely: annual bonus and long service awards. The current rates of pay and the proposed new weekly minimums, for the various positions are attached as Annexure D.
>
> The proposed method of achieving this, would be to retrench all employees and re-employ all of them immediately, on new contracts. The company proposes paying severance pay in accordance with the MIBCO Main Agreement as well as notice pay."

The letter further proposed a change in the hours of work from 44 to 40 hours per week. With regard to the timing the letter read:

> "Given the critical situation that the Company finds itself in, we would ideally like to achieve the above by no later than shutdown this year which commences on the 6 December 2008."

[10] On 26 November 2008 the parties held a meeting as arranged. The minutes of this meeting if they were indeed kept have not been provided. However, it is common cause that there was a discussion on the proposed restructuring of terms and conditions of hourly paid employees and that no agreement was reached.

[11] Subsequent to the meeting of 26 November 2008 further dates for consultation were proposed, namely 28 November 2008 and 1 December 2008. However, these meetings could not take place due to the unavailability of the appellant's representatives. The reason advanced on behalf of the appellant for non attendance was that the proposed dates were two weeks before the appellant's annual shutdown period which is said to be an extremely busy period for the appellant. For these reasons the appellant proposed an alternative date early in January 2009.

[12] On 5 December 2008 the appellant and UASA concluded an agreement for the retrenchment and re-employment of all hourly paid employees who were members of UASA. The targeted date for the retrenchment was 3 January 2009 and re-employment to be 4 January 2009.

[13] On 9 December 2008 a letter was written on behalf of the respondent to the appellant. The letter stated that the respondent's officials had learnt that the appellant had concluded an agreement with UASA on the proposed company restructuring despite having failed to meet the respondent on 28 November 2008 and 1 December 2008. The respondent further requested an urgent response from the appellant as well as a copy of the agreement concluded between the appellant and UASA. The letter concluded by stating that should the appellant still be willing

to meet the respondent, it should provide possible dates for such a meeting as soon as possible.

[14] On 10 December 2008 the appellant replied to the letter from the respondent. A copy of the agreement was enclosed and further proposed that the meeting be held on 8 January 2009 as the appellant was "shutting down" on 12 December 2008. On 11 December 2008 the respondent wrote back to the appellant and advised *inter alia*, that the respondent's representatives would be on leave on 8 January 2009 and would only be back at work on 19/20 January 2009. They further requested a total number of the respondent's members by 12 December 2008 as contained in the appellant's records.

[15] On 12 December 2008, the appellant wrote a letter to the respondent and advised that the respondent's membership at the appellant was standing at 363 out of a total of 1042 of the hourly paid employees, thereby representing 34.8%. The letter advised further that since the respondent had ceased to enjoy majority representation, notice was given to it in accordance with the agency shop agreement to cease the operation of the agency shop arrangement at the appellant.

[16] On 21 January 2009 the appellant and UASA concluded a recognition agreement that acknowledged UASA as the sole bargaining representative at the appellant. Reference to some of the provisions of the "recognition agreement"

between the appellant and UASA that are relevant to this appeal is necessary. The parties agreed that the objectives of agreement are *inter alia*:

> "2.1…it is the intention and purpose of this agreement to record the principles and procedures which will regulate the process of collective bargaining and the sole collective relationship with the company. The principle of collective bargaining at company level is emphasized and the procedure for the implementation of this principle is given in this Agreement.
>
> Accept that this shall be a legally binding document and constitutes a collective agreement as defined in the LRA"

The agreement further records two undertakings by the appellant one of which is:

> "4.1 UASA acknowledge that the company is subject to the jurisdiction of the MIBCO Agreement which regulates actual wage increases and other terms and conditions of employment and that there cannot be any plant level negotiations on these issues. The company recognises UASA as the sole bargaining representative of the employees in the bargaining unit, for all other work related plant level issues, including any need to consult as required by the LRA".(Emphasis added).

Paragraph 16 of the agreement is headed "Retrenchment Procedure" and reads that a retrenchment procedure will be negotiated between the parties as soon as possible.

[17] On the same day which the recognition agreement was concluded the appellant sent a letter to the respondent advising that since UASA had a membership

of 60% of the hourly paid employees, they had now concluded a recognition agreement with UASA in which the appellant recognised UASA as "the sole bargaining agent for all hourly paid employees for all matters relating to plant level issues including any consultations as required by the LRA". The letter stated further that UASA acknowledged that they were bound by the MIBCO Agreement.

[18] The following day on 22 January 2009 the appellant and UASA concluded an agreement to retrench and re-employ all hourly paid employees who were not members of UASA. The date of retrenchment was 25 January 2009 and re-employment 26 January 2009. The employees were to receive notice pay of 4 week's basic salary and severance pay calculated in accordance with the terms set out in the MIBCO Main Agreement. The agreement set out the new terms and conditions of re-employment.

[19] On 25 January 2009 the hourly paid employees targeted in the agreement referred to above were retrenched and were re-employed on 26 January 2009 on new terms and conditions of employment by the appellant purporting to act in accordance with the agreement with UASA.

[20] On 27 January 2009 the respondent sent a letter to the appellant in which it *inter alia*, requested information relating to particulars of membership figures of the respective unions, members who resigned at particular dates and employees who were still "paying agency shop subscriptions". The letter further advised that once it

had received the requested information, the respondent would request a verification or audit of the UASA stop orders or "joining forms" by an independent body, preferably the Motor Bargaining Council. The letter concluded that it was only after such an exercise that the respondent would accept defeat by UASA should the findings of the audit exercise not be in its favour.

[21] On 29 January 2009 the appellant sent a letter to the respondent requesting the agenda, a date and time for the meeting requested by the respondent.

[22] On 30 January 2009 the respondent wrote a letter to the appellant in which it referred to previous proposals for the meetings which had not been successful and that it was still awaiting the information it requested in its letter dated 27 January 2009 which would help it to know its status at the appellant.

[23] On 2 February 2009 the appellant sent a letter to the respondent in which it advised *inter alia*, that the respondent remained sufficiently representative of the appellant's employees, and as such would still be entitled to trade union access to the work place and deduction of trade union subscriptions; that the appellant would no longer recognise the respondent's shop stewards nor allocate any leave for the respondent's activities for any individual holding any office with the respondent; and further that the appellant would no longer meet with the respondent's officials on a monthly basis. Regarding the verification of UASA membership, the appellant undertook to discuss the matter first with UASA and further advised that it had no

objection to the respondent verifying its own members' resignation forms provided that the exercise did not disrupt the normal business operations of the appellant. The respondent was further advised that the appellant was giving it notice in terms of section 25(8) of the Act to establish its "representativity". The notice period was extended to 12 March 2009.

[24] On 5 February 2009 the respondent referred a dispute concerning this matter with the appellant to the Bargaining Council.

Proceedings in the Labour Court

[25] In the Labour Court, the respondent contended that the dismissal of its members on 25 January 2008 was procedurally unfair as there had not been a meaningful consultation with the respondent by the appellant. It was further argued that the agreement that the appellant concluded with UASA did not relieve the appellant of its duty to consult with the respondent. Finally, it was contended that the termination of the respondent's members' services and their subsequent re-employment on different terms had been presented to the respondent as a mere *fait accompli*.

[26] On the other hand the appellant contended that at the time when the members of the respondent were dismissed, the respondent was no longer a union that its members formed the majority of the employees and as such it had no obligation to consult the respondent in relation to the retrenchment exercise. It was

at that time obliged to consult with UASA as it did and thereby complied with the procedural requirements of the Act. In the alternative and in the event the Labour Court finding that the respondent was entitled to the relief it sought, the appellant contended that the relief to be granted by the Labour Court should be expanded to include provision for the repayment of the severance packages paid out in giving effect to the retrenchments on 25 January 2009, together with interest.

[27] In its judgment the Labour Court recorded that the crisp issue for determination was whether the appellant had a duty to consult the respondent after the latter had lost its majority membership and after the appellant had signed a recognition agreement with UASA. The main reasoning of the Labour Court in granting the relief sought was that:

> "[17]…The question that arises in this respect is whether at the time this agreement was concluded the respondent had a collective agreement regulating the consultation process in case of a retrenchment. The answer in my view is clearly in the negative. The recognition agreement which the respondent sought to rely on in support of its argument that the procedure it followed was in line with the provisions of section 189(1)(a) of the LRA, is silent in as far as the regulation of the consultation process in case of a retrenchment was concerned. Thus in the absence of this provision in the recognition agreement between the respondent and UASA or any other collective bargaining agreement between them, the respondent was in my view obliged to consult with NUMSA before the dismissal of its members for operational reasons."

The Labour Court consequently found that the appellant was obliged to consult with the appellant and having failed to do so the retrenchment of the respondent's members on 25 January 2009 was procedurally unfair.

The appeal

[28] The appellant is appealing against the judgment of the court *a quo* on the grounds that it erred in finding that there was no collective agreement in place between the appellant and UASA which regulated the consultation process in the case of retrenchment occurring when the recognition agreement clearly stated that UASA would be the sole bargaining representative for employees in any issue that require consultation as requested by the Act. That the court *a quo* erred in finding that the appellant was obliged to consult with the respondent before effecting the retrenchment more particularly in light of the fact that the court *a quo* had found as a fact that the respondent had lost its majority membership at the relevant time.

The legal framework and analysis

[29] By way of background, a recognition agreement is an agreement between an employer and a trade union in terms of which it seeks to establish and formalise the relationship between the two parties thereto. Normally a recognition agreement would contain provisions in which the employer recognises a union's bargaining entitlement for a particular bargaining unit, and which regulate how collective bargaining should take place. A procedure to be followed by a trade union that seeks to exercise organisational rights conferred by Chapter III of the Act, dealing

with collective bargaining, is set out in section 21 of the Act. In short a trade union must notify the employer in writing providing information, amongst others of its representativeness. The employer must then meet the said trade union within thirty days in an attempt to conclude a collective agreement. If a collective agreement is not concluded, either party may refer a dispute in writing to the CCMA. A commissioner would then be appointed to attempt to resolve the dispute through conciliation, failing which the dispute would be referred to arbitration. Section 21(11) of the Act provides that an employer who alleges that a trade union is no longer a representative trade union may apply to the commission to withdraw any of the organisational rights conferred by Part A of Chapter III of the Act.

[30] A collective agreement is a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered trade unions and one or more employers' organisation. In terms of section 23(1) (d) of the Act the collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if (i) the employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the work place.

[31] In general terms an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements has to conduct consultations first before embarking on the dismissals. Section 189 of the Act regulates dismissals based on operational requirements. A hierarchy that

governs the consultation process in section 189 (1) (a)-(g) requires the employer to consult:

> "(a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation:-
> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (c) If there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
>
> (d) If there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[32] Where an employer consults in terms of agreed procedures with the recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchment, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment. If such a consultation exercise culminated in a collective agreement that complies with the requirements of a valid collective agreement, all employees including those who are not members of the representative trade union

that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not.

[33] The appellant's submissions in this Court may be summarised as hereunder. That:

33.1 Clause 4.1 of the recognition agreement provides that the appellant recognised UASA as the sole bargaining representative of the employees in the bargaining unit for all work related plant level issues including any need to consult as required by the LRA.

33.2 On 22 January 2009 appellant concluded a written agreement with UASA representing hourly paid employees listed in the agreement and in terms of such agreement the appellant and UASA agreed that the named employees would be retrenched on 25 January 2009 and re-employed on 26 January 2009.

33.3 By reason of the provisions of section 23 (1) (d) of the Act the aforesaid recognition agreement was binding on the respondent's members and that the appellant was under no obligation to continue further consultations with the respondent before retrenchment.

33.4 Further and alternatively, it is the appellant's case that it did in fact consult with the respondent prior to the retrenchments (during the period 6 November 2008 to 26 November 2008) but the negotiations between them broke down due to the intransigent attitude of the respondent's representatives.

[34] On the other hand, the respondent contended that the appellant was obliged to consult with the respondent on the retrenchment of its members and failure to do so rendered the retrenchment exercise procedurally unfair.

[35] In my view, what the court *a quo* had to determine was whether the process followed by the appellant in dismissing the hourly paid employees on 25 January 2009 and re-employing them on 26 January 2009 on amongst others, MIBCO rates of pay which were less than what they earned before the dismissal, was procedurally fair. The main issue here relates to consultation or failure to continue to consult the respondent.

[36] As pointed out already the appellant's defence to the challenge that it failed to consult the respondent is that it had no obligation to consult the respondent as it had already lost its majority representation at the appellant's workplace and that it consulted UASA as it was obliged to consult it in terms of clause 4.1 of the recognition agreement.

[37] Clause 4.1 that vaguely states that UASA is recognised as "the sole bargaining representative of the employees in the bargaining unit for all other work related plant level issues, including any need to consult as required by the LRA" should not be considered in isolation and out of context of the entire agreement. Of importance is clause 16 of the agreement which specifically refers to a "Retrenchment Procedure". Clause 16 states that a retrenchment procedure "will be

negotiated between the parties as soon as possible". It is common cause that at the time of the dismissal of the respondent's members, there was no negotiated retrenchment procedure between the appellant and UASA in existence. The appellant could therefore not have acted in terms of clause 16 of the agreement.

[38] Section 189(1) of the Act that has been referred to above places a duty on any employer to consult any person it is required to consult in terms of a collective agreement or other persons or structure where there is no collective agreement. It would therefore be unreasonable to interpret clause 4.1 of the agreement in such a way that it included consultation in terms of section 189 (1) of the Act when the procedure required to consult in terms of section189 (1) of the Act had not been negotiated with UASA in particular. Such an interpretation would amount to denying the respondent and its members a fundamental constitutional right to fair labour practice. The finding by the court *a quo* that in the absence of a provision regulating the retrenchment process between UASA and the appellant, or any other collective agreement to that effect, the appellant was obliged to consult with the respondent before the dismissal of its members is, in my view, a correct finding. It is clear from the wording of clause 4.1 that what is envisaged therein is consultation for bargaining process as provided in Chapter III of the Act. If that was not the case then clause 16 of the agreement is *pro non scripto.* I am of the view that clause 16 was included for a specific purpose, that being to have an agreed procedure for dismissals based on operational requirements in compliance with section 189(1) of the Act.

[39] There is a further reason why the appellant was obliged to consult the respondent. It is to be remembered that at all relevant times there had been a collective agreement between the appellant and the respondent that was in existence. In terms of that agreement the appellant was obliged to consult the respondent or its shop stewards on all matters affecting the interests of hourly paid employees that may arise out of the performance of their work. That agreement further stated that it would be legally binding on the parties and could only be terminated upon three months written notification by either party. It is not in dispute that when the appellant dismissed the respondent's members the said agreement was still in operation and the termination clause had not been affected. The appellant was therefore obliged to consult with the respondent in terms of that agreement and failure to do so rendered the dismissal process unfair.

[40] Furthermore, the appellant had in fact commenced discharging its obligations in terms of section 189(1) by consulting with the respondent. This is evidenced by the fact that on 5 November 2008, the appellant invited the respondent in writing to a consultation on the matter. Attempts were made to have a meeting either on 11 November 2008 or 14 November 2008 without success. On 19 November 2008, a letter contemplated in section 189(3) of the Act was issued by the appellant to the respondent. Indeed on 26 November 2008 a consultation meeting was held although no agreement was reached. The parties thereafter saw a need to hold further meetings to conclude the process. The circumstances prevailing at that time of the

year made it difficult for both parties to hold the meetings as envisaged. A dramatic turn of events took place when the appellant concluded a recognition agreement with UASA and the consultation process was abandoned on the basis that there was no longer an obligation on the part of the appellant to consult the respondent. What is clear is that the consultation process between the appellant and the respondent was at that stage incomplete. The appellant can therefore not claim that it, in any case, consulted with the respondent and that there was a deadlock and was as such entitled to effect the restructuring of its work place. Both parties by agreeing to further meetings had recognised the fact that the consultation process up to that stage had not run its course. Therefore the dismissal of the respondent's members in circumstances where the consultation process was incomplete renders such a dismissal procedurally unfair.

[41] The alternative argument that the negotiations between the appellant and the respondent's representatives broke down due to the intransigent attitude of the respondent or its representatives has no merit. Such an argument is not supported by the evidence on record. As pointed out on behalf of the respondent the mere fact that the representatives of the respondent did not agree with the appellant's drastic proposal in one meeting does not amount to an intransigent attitude. The respondent was entitled to its view and there was a duty on both parties to endeavour to reach consensus on the matter. What seems to have been the problem with the continuation of the process is the introduction of UASA and the deal struck with UASA to dismiss and re-employ employees who were not its members.

Furthermore, the respondent cannot be blamed for endeavouring to negotiate what is reasonable for its members. Failure to hold further meetings cannot be blamed on the respondent alone. In fact most of the dates proposed by the respondent were not acceptable to the appellant.

[42] It is interesting to note that the recognition agreement with UASA was concluded on 21 January 2009 and an agreement to dismiss the respondent's members was concluded a day later on 22 January 2009. Unless the consultation process with UASA had been started before 22 January 2009, a day seems to be rather too short for a meaningful consultation process especially in circumstances where it was known to the appellant and UASA that the respondent was opposed to the dismissal.

[43] In conclusion, there is no basis to interfere with the decision of the Labour Court. It would be in accordance with the requirements of law and fairness that the appeal be dismissed with costs.

[44] In the result, the following order is made

(a) The appeal is dismissed with costs.

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Tlaletsi JA

Mlambo JP and Mailula AJA concur in the judgment of Tlaletsi JA

Appearances:

For the Appellant	:	Mr A I J Chadwick
Instructed by	:	Shepstone & Wylie Attorneys
For the Respondent	:	Mr B Whitcher
Instructed by	:	Brett Purdon Attorney