IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER C647/2014

DATE 14 AUGUST 2014

REPORTABLE

In the matter between

WARREN DONALD DE KLERK Applicant

and

PROJECT FREIGHT GROUP CC Respondent

JUDGMENT

STEENKAMP, J:

This is a somewhat unusual application for an order restraining the employer, Project Freight CC, from implementing its decision to dismiss the applicant, Mr Warren de Klerk, for operational requirements pending the resolution of a dispute that he has referred to the CCMA for the disclosure of information in terms of section 16 read with section 189(4)(a) of the Labour Relations Act (Act 66 of 1995).

The background facts are largely common cause. The parties have embarked on a consultation process in terms of section

189 of the LRA. In the course of that consultation process the employee, who was legally represented, made a written request for information. The employer, represented by an employers' organisation ("ESOSA") refused to provide the information.

On 21 July 2014 the applicant's attorneys wrote to ESOSA and stated the following:

> "As the employer has cited financial factors for the proposed retrenchment, our client requests in terms of section 189(4) of the (Labour Relations) Act the following information:
>
> 1. audited financial statements of the employer;
> 2. the findings of the independent consultants that preceded the business rescue practitioners;
> 3. the findings of the business rescue practitioners."

Neither the employer nor the employers' association responded.

On 29 July the applicant's attorneys again wrote to them and again asked for the information. They also alerted the

employer to the fact that they had applied for a case number at this court in order to bring an urgent application, if necessary.

The employer eventually responded on the 31st July, saying:

> "With regard to the request for the company to hand over financial statements, the company is not prepared to do so, as these are not pertinent to the case at hand."

The employee then sought legal advice and was advised by his present counsel, Ms *Harvey*, that in fact this Court would not be the proper forum to bring an urgent application to ask for the information, but that he should refer a dispute to the CCMA in terms of section 16, read with section 189(4), of the Act.

He did so on the 6th August 2014 and at the same time again wrote to the employer and to the employers' association, asking for an undertaking that, pending the resolution of the referral to the CCMA, the employer should not take any further steps.

No such undertaking was forthcoming. Instead, on Friday the 8th August at 15:21 the employers' organisation sent the employee's attorney an email refusing to give the undertaking.

The applicant then launched this application on Tuesday, the 12th August. It was heard this morning, Thursday 14 August.

The first question that arises against that background is the question of urgency. It is so that the applicant knew on the 31st July already that the employer was not willing to provide the requested information.

However, having followed the prescribed route under section 16 and section 189(4) of the Act, the applicant then attempted, once again, to avoid litigation by asking the employer to stay the retrenchment exercise, pending the resolution of the dispute at the CCMA.

The employer, assisted by its employers' organisation, refused; that only became apparent on the afternoon of Friday the 8th August. The applicant then acted with the necessary expedition and launched this application one working day after that refusal.

In this regard the background is very similar to that outlined by Mlambo AJ, as he then was, in *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 *ILJ* 516 (LC), where he noted at 526a-c:

> "I agree with the submissions made by Mr *Hardie* that the matter became urgent once Comark refused to provide the undertaking not to enforce its decisions to retrench the individual applicants on 31 March 1997 before the resolution of the s 16(6) dispute that had been referred to the CCMA. What further rendered the matter more urgent was Comark's refusal to disclose the information requested. I find it also relevant to consider the fact whether there was an alternative remedy available to NUMSA and the individual applicants if Comark had gone ahead and retrenched its members. Mr *Hardie* is correct that as the old Act made provision for *status quo* relief proceedings, the new Act does not and this renders the situation regarding any other available alternative remedies non-existent, other than approaching this court to interdict the whole process."

Similarly, I am satisfied that this application is indeed urgent.

That brings me to the nature of the relief sought. What must be stressed at the outset is that this is not one of those matters that so often unfortunately clog the urgent roll of this court where an employee seeks to interdict a disciplinary

hearing. Those applications are often dismissed and for good reason.

The Labour Appeal Court has stated clearly in *Booysen v Minister of Safety and Security* (2011) 32 *ILJ* 112 (LC) at paragraph [54] that applications of that nature will only be granted in the most exceptional circumstances.

The prescribed dispute resolution procedure in the Act is that an employee faced with a disciplinary hearing should make use of the dispute procedures prescribed by the Act. That is to continue with the hearing and, should he or she be dismissed, to refer an unfair dismissal dispute to the CCMA or to the relevant bargaining council. That is the prescribed route.

However, as I have noted, the case before me is an unusual one. The applicant seeks to suspend the consultation process in terms of section 189 of the Labour Relations Act, only pending the resolution of the dispute that he has properly referred to the CCMA. He has in other words followed the procedure prescribed by the Act.

I will return to the question whether the process envisaged by section 16 is available to an individual employee or whether it is only available to trade unions.

By the time the matter was heard this morning the respondent, Project Freight, had delivered answering papers and the applicant had replied. The applicant therefore no longer asked for a rule *nisi* but for a final order, albeit pending the resolution of the dispute at the CCMA.

I therefore intend to test the question whether the applicant is entitled to the relief sought against the requirements for a final interdict, set out in *Setlogelo v Setlogelo* 1914 (AD) 221 at 227, although the relief sought is interim in nature in the sense that it is pending the resolution of the dispute at the CCMA.

The first question then is whether the applicant has established a clear right. Firstly, of course, the applicant does have a clear right not to be unfairly dismissed, but that is true for any employee that faces possible dismissal, for example, in a disciplinary hearing.

The further issue at stake here is that the employee also has a right in terms of section 189(3) of the LRA to be provided with relevant information. In this regard the sentiments expressed by Mlambo AJ, as he then was, in *Comark Holdings* at 524b-g are especially relevant.

He says in his discussion of an application very similar to this one:

> "...[B]ecause the employer is always privy to all necessary and relevant information it should not only disclose information which it deems relevant. It should disclose all information requested by the consulted party subject to the limitations already enunciated. To enable employee representatives to fulfil their duty to seek alternatives through meaningful and effective consultation it is necessary to give them an opportunity to consider not only the information which, in the employer's view, supports the view that no alternatives to retrenchment exist, but also other information which the employer has not considered to be relevant but which might be."

Those sentiments are especially pertinent to this matter where the employer has expressed the view that the financial information requested is not relevant, however, given the reasons it has given for the retrenchment, it might well be. I am satisfied that the employee does have a clear right to the relief he seeks pending the determination of the s 16 dispute by the CCMA.

Furthermore, there is an injury actually committed. The employer has already given the employee notice of his dismissal that will be effective at the end of this month, that is the 31st August 2014. It has also refused to either supply the information requested or to give an undertaking not to implement its decision to dismiss, pending the resolution of the section 16 disclosure.

In this regard the facts of the matter before me can be distinguished from those in *Dlamini and Others v Sakato and Others* [1998] 4 BLLR 378 (LC). In that case Mlambo J, as he then was, refused to confirm a rule *nisi* ordering the employer to comply with the provisions of section 189 of the LRA. That was in the context where the employer had given the requisite undertaking and had in fact tendered that no employment contract would be terminated until it had complied with the consultation requirements of the Act. In the case before me the employer refused to grant such undertaking, even after numerous requests by the employee and his attorneys.

I then turn to the question of a suitable alternative remedy. It is so that the employee has another remedy, the same as any other employee, to challenge his dismissal were he to be dismissed.

But that is not what the employee is challenging in this case. He is simply asking for the consultation process -- and therefore his dismissal -- to be suspended, pending the referral to the CCMA. In that regard he has followed the remedy prescribed by the Act. That is the referral to the CCMA for disclosure of information.

That brings me then to the argument advanced by Mr *De Kock*, for the employer, that the employee is not entitled to and the CCMA does not have jurisdiction to entertain that referral. He argues that that is so on the basis of the wording of s 16 of the Act.

Section 16(1) refers to a representative trade union. Section 16(2) reads:

> "Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4)."

Mr *De Kock* argues that only a trade union is entitled to the disclosure of information and that is the only party that can refer a dispute to the CCMA in terms of section 16(6). That is

indeed the wording of section 16 which deals with the disclosure of information in the context of collective bargaining. However, that is not the context in which this application is being heard. This application is heard in the context of an operational requirements dismissal and a consultation process in terms of section 189. One has to have regard then to the wording of section 189(4) which reads:

> "The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3)."

The context is a consultation process in terms of section 189. That process is being conducted between the employer and, in this case, an individual employee. When one has regard to section 189(1) it compels the employer to consult with:

> "If there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."[1]

That is the context in which this consultation is taking place. The employer is consulting with the employee, Mr De Klerk. Mr De Klerk has asked for information. The employer and its

[1] Section 189(1)(d)

employers' organisation have refused to give him the information. In that context he has referred the dispute to the CCMA in terms of section 16.

One therefore has to read section 16 with the changes required by that context, and those changes then require that the words "trade union" should be replaced with the word "employee" in the context of the operational requirements consultation.

I am therefore satisfied that the employee has followed the prescribed route in referring the dispute to the CCMA. Should the relief he seeks pending the resolution of that dispute not be granted, the whole consultation process will be rendered meaningless. It cannot be said that the parties are engaged in a meaningful joint problem-solving exercise when the employer simply refuses to provide information that may be relevant.

I stress that the Court is not in a position to decide at this stage whether the information is relevant. That is for the proper forum, i.e. the CCMA, to decide. However, should the Court not grant the interim relief sought at this stage, the harm to the employee will be irreparable.

There is one further issue and that is a point of criticism to be levelled at the employee. There is no indication that the employee or his legal representatives have sought to expedite the hearing at the CCMA. Given the context -- that the employer has indicated that the employee will be dismissed effectively on the 31st August 2014 -- that process should obviously be expedited.

Ms *Harvey* suggested that this Court could order the CCMA to do so, but I am not satisfied that the Court has the power to issue such an order in circumstances where the CCMA is not cited as a respondent. However, I do intend to direct the parties to approach the CCMA jointly in order to expedite that process.

With regard to costs, both parties asked for costs to follow the result. I see no reason in law and fairness to order otherwise.

In conclusion, I grant the following order:

(1) Leave is granted for this application to be heard as a matter of urgency in terms of rule 8.

(2) The respondent is interdicted and restrained from implementing its decision, communicated on 31 July 2014, to

retrench the applicant effective 31 August 2014, pending:

(a) the outcome of the dispute referred to the CCMA under case number WECT 11705-14; and

(b) meaningful consultation in accordance of the provisions of section 189 of the LRA.

(3) The respondent must pay the costs of this application.

(4) The parties must jointly request the CCMA to expedite the hearing of the dispute under case number WECT 11705/14.

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STEENKAMP, J

APPEARANCES

APPLICANT:	Suzanna Harvey
Instructed by:	Aarninkhof attorneys.
RESPONDENT:	Coen de Kock
Instructed by:	Carelse Khan attorneys.