REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 32/2014

In the matter between

FOOD AND ALLIED WORKERS UNION **Applicant**

and

THE COL CHAIN (PTY) LTD **Respondent**

Heard: **17 April 2014**

Delivered: **13 May 2014**

JUDGEMENT

SHAI AJ

Introduction

[1] This is an application in terms of Section 189A (13) and (14) of the Labour Relations Act No.66 of 1995, as amended, in which the applicant seeks an order in the following terms:

(a) Permitting this matter to be enrolled for hearing on an expedited basis;

(b) Declaring that the purported notices of termination of the Applicant's members contracts of employment issued on or about 13 December 2013 are of no force and effect.

(c) Alternatively, directing the Respondents to reinstate the Applicant's members purportedly dismissed in terms of the notices issued on the 13 December 2014 until it has complied with a fair procedure.

(d) Awarding the Applicant's compensation.

(e) Directing the Respondent to pay the costs of this application.

(f) Granting further and/or alternative relief.

[2] The Respondent is opposing the application.

Factual exposition

[3] On the 9 September 2013, the Respondent gave notice in terms of Section 189(3) of the LRA that it contemplated, by reason of the Respondent's operational requirements, dismissing at least 50 employees. It is common cause between the parties that section 189(A) of the LRA finds application to the retrenchments contemplated.

[4] It is further common cause between the parties that no facilitator was appointed and accordingly subsection 189A(8) governs any notices of termination resulting from the consultation process.

[5] The first consultation meeting took place on the 7 October 2013 during which the Respondent made a presentation to the Applicant on the commercial rationale behind the contemplated retrenchment and restructuring plans that necessitated the retrenchment. During the meeting Applicant requested further information so that it could participate meaningfully in the remaining consultations.

[6] On the 9 October 2013 the Respondent emailed the presentation of the 7 October 2013, so to enable the applicant to effectively consult on the same. This consultation was followed by the consultation of the 7 and 8 November 2013. Various documents were exchanged between the parties as discussions were proceeding as properly captured in the pleadings.

[7] Following the consultation of the 7 and 8 November 2013 the Applicant requested an organogram previously furnished in a simple format to which the respondent duly complied and furnished same on 15 November 2013.

[8] The Respondent recorded on 15 November 2013 that it had now fully complied with all the Applicant's requests for information.

[9] The next consultation took place on the 20 November 2013. In that meeting the Applicant made certain proposals to the respondent in respect of various issues including severance pay, selection criteria and alternatives to retrenchment. The Respondent duly complied with this request and responded on the 21 November 2013. The Applicant followed with its written response on the 25 November 2013 to which the Respondent responded on the 26 November 2013.

[10] It appears that the Responded expected the Applicant to respond to various issues it had raised but the later did not respond in time.

[11] A next consultation date of 29 November 2013 was agreed upon between the parties, and the consultation took place on that date. In this meeting no consensus was reached. It appeared to the respondent that no consensus was going to be reached, whereas the Applicant was of the view that further consultations were needed on various issues.

[12] On the 29 November 2013 the Applicant referred a dispute in terms of Section 64(1) of the LRA to the CCMA for conciliation.

[13] On the 13 December 2013, notice of termination of employment was then issued to the Applicant's members. The said notice stated that the affected employees were given notice until 14 January 2014, however, they would not be required to work out this notice period.

The applicant's case

[14] The Applicant submits that the notices of retrenchment issued by the Respondent on the 13 December 2013 are premature and unlawful in terms of Section 189 A(8)(b) read with Section 189 A(2)(a) of the LRA.

[15] The Applicants further submits that the said notices are invalid because the notice does not comply with Section 37(1) of the BCEA.

Respondent's Case

[16] The Respondent's contention in brief is that it gave proper notice as contemplated by Section 189(3) to the Applicant and the employees on 9 September 2013. In its view, the time period contemplated by Section 189 A(8) had already expired on 8 November 2013 when it issued the said notice. Therefore, any termination of employment on 13 December 2013 is entirely competent and permitted in terms of Section 189 A (8) (b).

Legal Exposition

[17] The parties are in agreement that Section 189A (8) finds application in this matter. This is the situation where a facilitator was not appointed.

[18] Section 189A(8) provides as follows:

"(8) If a facilitator is not appointed-

(a) a party may not refer a dispute to a council or the commission unless a period of 30 days has lapsed from the date on which a notice was given in terms of Section 189(3); and

(b) Once the periods mentioned in Section 64(1)(a) have lapsed-

(i) the employer may give notice to terminate contracts of employment in accordance with Section 37(1) of the Basic Condition of Employment Act, and

(ii) a registered trade union or the employees who have received notice of termination may -

(a) give notice of a strike in terms of Section 64(1)(b) or (d); or

(b) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of Section 191(11).

[19] Critical to the answers we are in search of in this matter is reference to Section 64 of the LRA, which provides as follows:

"(1) Every employee has a right to strike and every employer has a recourse to lock out if-

(a) the issue in dispute has been referred to a council or to the commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the

referral was received by the council or the commission; and after that……."

[20] It was argued for the Applicant that the consultation process was still proceeding when the Respondent issued notices of termination prematurely. The Applicant regards the said notices as premature and null and void in that they do not comply with Section64(1)(a). At the heart of the complaint is that the Respondent has failed to trigger the periods referred to in Section 64(1)(a) by the referral to the council or commission.

[21] On behalf of Respondent it was argued that it has consultation sufficiently and fairly so, hence there was no need to refer and that once 60 days had lapsed the Respondent had all the right to issue no notices of dismissal and such notices are valid and in accordance with the law.

[22] In the case of **De Beers Group Services (Pty) Ltd v. National Union of Mineworkers(JA) 65/2009 [2010] ZALAC 26; [2011] 4 BLLR 319 (LAC); (2011) 32 ILJ 1293(LAC) 20 December 2010** the LAC per DAVIS A cited with approval the following paragraphs from the case of **National Union of Mineworkers v. De Beers Consolidated mines (Pty)ltd 2006 27 ILJ 1909 LC:**

" I think it is clear that the law giver intended that the employer may only give notice to terminate the contracts of employment if the periods mentioned in S 64(1)(a) have lapsed" paragraph 35.

[23] Accordingly, where a facilitator is not appointed, Section 189 A(8) is the operative provision. Then:

" A well advised employer intent upon giving notice to terminate the contracts of employment as soon as is lawfully permissible is not prevented by Section 189 A(8) from giving such notices for any longer than the same sixty day period. To procure the same result the employer must ensure that the relevant dispute is referred to a bargaining council or the CCMA as soon as it is permissible in terms of Section 189 A(8)(a), i.e. as soon as thirty days have elapsed from the date on which the police was given in terms of Section 189(3). Of course, the employer is not obliged to refer the dispute at the earliest permissible moment, but if it fails to do so, the consequence may be that, if agreement is not reached in respect of the retrenchments and the dispute is referred for conciliation, it will have to hold off from issuing notices of termination for the periods mentioned in Section 64(1)(a)" paragraph 36.

[24] The court went further and said the following at paragraph 21:

" In my view, this approach as adopted by Fraud AJ, is the only one which is clearly justified in terms of express wording of Section 189 A (8). The section envisages that a period of thirty days must have lapsed from the date on which notice was given in terms of Section 189 (3) before the party may refer the dispute to the Council or the Commission. In addition to the thirty day period, there is the further period set out in Section 64(1)(a) which must lapse before the employer can give notice to terminate the

contracts of employment. Hence, if a dispute existed, the question arises as to whether it should have been referred, that is after the initial thirty day period."

[25] My understanding of the above reasoning is that the periods referred to in Section 64(1)(a) do not exist in a vacuum, but in a context. The context is that, to be acted upon and to be relied on they have to be triggered and the trigger must be a referral of a dispute by either of the parties.

[26] With reference to the existence of a dispute the court went further to say:

"[32] The section contemplates a dispute, namely that the employees, quite obviously, do not accede to the losing their employment and there is then a need for a fair process. Hence a fair consultation process is designed to ensure that some form of consensus can be reached as how to deal with a problem of reduction of a workforce based on the employer's operational requirements. In this case, no such consensus had been reached as to how to deal with the affected employees. So much is clear from a reading of the founding answering and replying affidavits. In other words, as at the time that the termination notices were issued on 13 March 2009, an agreement had not been reached about the dismissals and, accordingly, by implication, a dispute, within the meaning of Section 189, remained to be resolved. But the Section goes further. In the case of a facilitator not being appointed, a notice of termination can only be issued once a 30 day period has elapsed from the issuing of the initial notice, pursuant to Section 189(3) and a further 30 days has lapsed, as set out in Section 189 A(8)(b)(i). In this case the fact that there was a dispute, as I have interpreted it, then once a period of 30 days had lapsed from the date of the issue of the Section 189(3) notice, appellant was in a position to refer dispute to the Commission. If the further period, as set out in Section 64(1)(a) of the Act had lapsed since that referral, then it would have been competent for the appellant to give to terminate the contracts of employment of the individual respondents, that is of course what the appellant failed to do in this case."

[27] What is clear to me is that when one is in a Section 189 A (8) situation and one seeks to rely on the periods referred to in Section 64(1)(a) one has to activate them by a referral to the Council or CCMA as the case may be.

[28] In our given case it is common cause that Section 189 A(8) applies. It is further common cause that no consensus was reached and that the Respondent had not activated the periods in Section 64(1)(a) as aforesaid.

[29] It was argued for the Respondent that if the above is the construction that must be given to Section 189(A) (8) read with Section 189(3) and Section 64(1)(a) then this meaning will not apply to the circumstances of the Respondent because at the time of the issuance of the termination notice, sixty days had lapsed. I do not agree with this argument since it is clear that activation by a referral was necessary despite 60 days, since issuance of the termination notice had lapsed. This much is clear from what Freud AJ said as quoted in paragraph 23 above.

[30] It was further argued for the Respondent that even though there was no consensus, there was nothing to refer to the council or the CCMA. I do not agree

with this argument since the Respondent cannot escape the meaning given to the 'a dispute' by Davis JA above that unless there is an agreement as to how the dismissal is to be carried there remains a dispute to be resolved and where applicable to be referred. To *'agree to disagree'* does not mean that a dispute dies or has died. In our context it actually means it is alive and kicking. In my view too, if a party says, 'I have followed a fair procedure' but the other party says otherwise, then a dispute remains.

[31] The question of whether the Respondent recognises the referral by the Applicant of the dispute to the CCMA or not, does not make any difference and I agree with Mr.van Riet that if the Respondent does not recognise the referral for the purpose of compliance with Section 64(1)(a) then the Respondent is in a worse situation.

[32] Whatever the case may be the Respondent has failed to trigger the periods in Section 64(1)(a) or and has breached Section 189 A(8) read with Section 189(3) and Section 64(1)(a).

In the premise I make the following order:

(a) Permission is granted for the matter to be heard on an expedited basis.

(b) That the notices of dismissals issued on the 13 December 2013 were issued prematurely and are of no force and effect.

(c) That the members dismissed in terms of the notices issued on 13 December 2013 are reinstated until such time that the Respondent has complied with a fair procedure.

(d) The Respondent is ordered to pay the costs of this application.

_____

Shai AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate van der Riet SC

Instructed by: K Naidoo – CTH Attorneys

For the Respondent: Mr S Snyman