THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 2011/19

In the matter between:

SASBO THE FINANCE UNION obo

JOHANNES PETRUS FOURIE **Applicant**

and

NEDBANK LIMITED **First Respondent**

Heard: 22 October 2019

Judgment delivered: 28 October 2019

JUDGMENT

VAN NIEKERK J

[1] On 3 October 2019, the respondent (the bank) gave the applicant notice of termination of his employment, on account of the bank's operational requirements. In this application, filed in terms of s 189A (13) of the Labour Relations Act (LRA), the applicant contends that the bank failed to comply with the statutory requirements of fair procedure.

[2] The primary procedural flaw in the process on which the applicant relies is the bank's failure to issue a notice in terms of s 189(3) the LRA before it commenced what it describes as a consultation process. He contends that this failure is fatal, since s 189 (3) states that an employer 'must' issue the notice before any consultation in terms of the LRA can commence. The bank on the other hand contends that there has been substantial compliance with the Act.

[3] I deal first with the question of urgency. The applicant has set out the basis on which he contends that the application should be heard as an urgent application. The bank disputes that the application is urgent. It is not necessary for the court to decide whether the application is urgent. Section 189A (13) applications do not require that an applicant seek condonation the matter ought to be heard outside of the normal time limits – the section contains its own time limit and requires only that the application be filed within 30 days of any notice of termination of employment. Although s189A (13) applications are enrolled on the urgent roll, this is done as a matter of convenience. The present application was filed within the 30-day time limit and there is thus no bar to it being heard.

[4] The material facts are not in dispute. The applicant was employed in November 2000, and he occupies a senior position in the bank's client coverage department. As I have indicated above, the applicant is currently serving his notice. The notice has its roots in a meeting held between the bank and the union on 30 April 2019, when the bank met with the union about the proposed

restructuring of the department. The bank wished to make the department more 'agile and competitive', and proposed 'a sectorised approach to afford it greater opportunities in the sector/supply value chain, with a view to achieving its strategic aim of becoming trusted advisors to its clients by leveraging greater knowledge of the clients' specific needs through deep relationships' (sic). The bank presented its business case to Mr. Wayne Hattingh, a union official present at the meeting. It was made clear to the union that employees in the bargaining unit would not be affected, but that there may be job losses at more senior levels, including the client coverage department. The union requested that it be present during direct engagement with employees.

[5] A meeting was convened on 9 May 2019, at which the applicant was present. Hattingh could not attend the meeting, but had one of his colleagues 'dial-in' to the meeting. At this meeting, the bank's business case was again presented. Affected employees (including the applicant) were invited to make proposals regarding the proposed change by 20 May 2019. The applicant submitted a question on 17 May 2019, and received a response on 21 May 2019. A document consolidating all of the questions raised by employees and the answers to those questions was emailed to the affected employees.

[6] On 22 May 2019, the bank again met with affected employees. The union was neither invited to nor present at the meeting. The employees were thanked for their feedback, which was discussed. The bank avers that there were no objections to the proposed new structure, which was confirmed. Employees were invited to apply for 'roles' in the new structure by completing a form indicating three preferred roles supported by a motivation and summarised personal profile.

[7] On 27 May 2019, the applicant applied for three positions in the new structure. A single interview was conducted in respect of the three positions. The applicant was also told that he would be considered for placement in what was described as 'tier 3 of the client coverage structure'. On 13 June 2019, the applicant was advised that none of his applications for positions in the new structure had been

successful. On 10 July 2019, the employee was advised that he had not been placed in the tier three structure.

[8] On 26 July 2019, the bank advised the applicant that he would be placed in what was termed an 'operational redeployment pool' on the basis that if he was not placed in a role within two months from 1 August 2019, he would be given a months' notice of termination of employment, being the month of October 2019. On 3 October 2019, the applicant was given notice of termination of his employment.

[9] As early as 7 August 2019, the union raised with the bank its failure to issue a s 189 (3) notice and its concerns in this regard. The concern was repeated in an email sent to the bank the next day, 8 August 2019. On 14 August 2019, the bank's HR executive replied, stating that the bank considered that it had engaged in a fair process to seek consensus with affected employees. On 15 August 2019, the union replied, reserving its rights, and asking when the bank intended to serve the s 189 (3) notice. The email noted that the 60-day period commenced only on the date of receipt of the notice, and demanded retraction of the letters to affected employees (including the applicant) notifying them of their placement in the redeployment pool. On 15 August 2019, the bank replied by stating that it believed that it had satisfied the substance of the relevant legal provisions. The bank has provided no other explanation for its non-compliance with s 189 (3).

[10] The purpose of s 189A has been referred to in a number of judgments. In short, the introduction of s 189A sought to enhance the effectiveness of consultation in larger scale retrenchments, amongst other things by the introduction of the option of facilitation at an early stage, an option that may be elected by the employer in the s 189(3) notice, or by affected employees or their representatives within 15 days of the date of the s 189 (3) notice. The appointment of a facilitator suspends the employer's right to dismiss for a period of 60 days, calculated from the date on which the s 189 (3) notice is issued. If a facilitator is not appointed, the employer's right to dismiss is similarly subject to the expiry of specified time periods, calculated from the date of the s 189 (3) notice. If notice of termination is

given, employees have the option to exercise the right to strike over the substantive fairness of their dismissals, or to refer a dispute about substantive fairness to arbitration or adjudication (but not both).

[11] Section 189A (13) provides a procedure for the resolution of disputes about procedural fairness by way of motion proceedings. The section reads as follows:

> (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –
>
> (a) compelling the employer to comply with a fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
>
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
>
> (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

[12] Section 189A was introduced as part of the raft of legislative amendments effected during 2002. For present purposes, the significance of the section is the separation that it effects between substantive and procedural fairness in retrenchment disputes, and the right that it confers on an employee to approach this court to insist on a fair procedure either before or shortly after any termination of employment. The policy underlying section 189A was set out by Murphy AJ (as he then was) in *National Union of Metalworkers of South Africa & others v SA Five Engineering & others* (2004) 25 *ILJ* 2358 (LC) where he said at paragraph 7 of the judgment:

> Disputes about procedure in cases falling within the ambit of s 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in s 189A (13), the exact scope of

> which I will return to presently. Suffice it now to say that the intention of s 189A (13), read with s 189A (18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.

[13] Section 189A (14) provides that the court may make any appropriate order referred to in s 158(1) (a). That section confers a broad range of powers on the court, including the right to grant urgent interim orders, interdicts and declaratory orders.

[14] The preamble to s 189A (13) makes clear that the court's intervention is limited to instances of a refusal or failure by the consulting employer to comply with a fair procedure. What the subsection seeks to accomplish, in the face of a prohibition on the right to strike over any dispute that concerns the procedural fairness of a retrenchment and the limitation on the right to refer a dispute of that nature to this court for adjudication in terms of s 191, is to extend to this court a supervisory role over the consultation process, with powers to intervene if and when necessary, and to craft remedies designed to address any procedural shortcomings that are found to exist. The section is not an invitation to consulting parties to use this court to micro-manage a consultation process – intervention ought to be limited to a substantial failure or refusal to comply with the relevant statutory requirements.

[15] In my view, a failure to issue a s189 (3) notice falls into that category. I accept that during the course of the process that it adopted, the bank dealt with the issues listed in the section. It disclosed information relating to the reasons for the proposed dismissals, alternatives, the number of employees likely to be affected the timing of the of the proposed dismissals, and the like. Further discussions with affected employees addressed these issues.

[16] A s189 (3) notice is more than an informal notice to participate in a consultation process. First, the language in which the section is cast is significant. Section

189 (3) provides that an employer intending to consult must issue a written notice inviting the other consulting party to consult. The section is peremptory. The present dispute is not one that concerns the terms of a s 189 (3) notice, a dispute in which substantive compliance may often be sufficient to satisfy the requirements of procedural fairness having regard to the relevant facts. The present dispute is one where no notice was issued at all. Secondly, and even if I were to accept that the informal framework within which the parties to the present dispute conducted themselves achieves the broad object of meaningful consensus-seeking, the notice is a significant statutory trigger for a number of events and options. For this reason particularly, the issuing of s 189(3) notice is peremptory. The notice is the basis for the computation of time periods that regulate ultimately the timing of any dismissal. It also triggers the right to require the intervention of a facilitator, and the time periods that regulate the making of that election. If a facilitator is not appointed, consulting parties are precluded from referring any dispute to the CCMA unless 30 days have elapsed form the date of the notice. Whether or not a facilitator is appointed, the right to strike (or to refer any dispute about substantive fairness to this court) must be exercised within time periods that are ultimately triggered by the date of the s 189 (3) notice. If this court were to hold that compliance with s 189 (3) was other than peremptory (or that the threshold of compliance was a degree substantial compliance), the time periods established by s 189A for the intervention of a facilitator, the giving of notice of termination of employment, the issuing a strike notice and the date by which a dispute must be referred to this court would be difficult if not impossible to determine. That uncertainty is the antithesis of what s 189 and s 189A seek to achieve in the procedural process that they respectively establish. Finally, it should be recalled that the provisions of s 189 and s 189A have their roots in the constitutional right to fair labour practices (see s 23 of the Constitution), and in particular, the right not to be unfairly deprived of employment. It follows that a strict approach to the procedural requirements established by the LRA is warranted, and that this court should not easily overlook any one or more of those requirements. This is particularly so in respect of s 189 (3), where so

much of what follows is regulated by reference to the baseline set by the date on which the notice is issued. For all of these reasons, the requirement to issue a notice in terms of s 189 (3) is peremptory, the bank's failure to issue the notice is procedurally unfair.

[17] Turning then to the question of an appropriate remedy, Mr. Goosen, who appeared for the applicant, submitted that the appropriate remedy was that the applicant's notice of termination of employment be set aside, and the bank be directed to file a notice in terms of s 189(3). In effect, this would require the applicant's continued employment and the commencement of a consultation process. Section 189A (13) provides that the court may grant an order compelling the employer to comply with a fair procedure, interdicting or restraining the employer form dismissing an employee pending compliance with a fair procedure, ordering reinstatement pending compliance with a fair procedure and making an award of compensation. As the Constitutional Court observed in *Steenkamp & others v Edcon Ltd* (20190 40 *ILJ* 1731 (CC), an award of compensation is to be granted only when the (other) primary remedies are inappropriate. The latter are 'preferred remedies' (see *Steenkamp* (2016) 37 *ILJ* 564 (CC). The court must be guided by this hierarchy, the remedy that is sought by the applicant and what is most appropriate to get the process of consultation back onto a fair track. The applicant seeks to place the consultation process on track in manner that complies with the time periods established by s 189A. The bank, as I have noted, has provided no substantive explanation for its failure to issue a s 189 (3) notice. The bank has not established that the prejudice it might suffer should the consultation process be put back onto the statutory track is such that it militates against the granting of an order requiring strict compliance with the Act. The order sought will have the effect of establishing certainty as to the time periods to be observed, and will permit the union to consider and exercise the options available to it (to request a facilitator, to issue a strike notice or to refer any dispute about substantive fairness) within the prescribed time limits. It will also establish certainty as to when the bank is entitled to issue any notice of termination of employment.

[18] The court has a broad discretion to make orders for costs according to the requirements of the law and fairness (see s 162). The court must necessarily take into account that the applicant has, in part at least, succeeded in establishing procedural unfairness. Further, the bank was forewarned before any notice of termination of employment was issued that the union regarded s 189 (3) as peremptory, and that it insisted that notice was given. Finally, as I have observed, the bank has yet to proffer an explanation for its election to ignore the applicable statutory precepts when embarking on the restructuring exercise. For these reasons, costs ought properly to follow the result.

I make the following order:

1. The respondent's failure to issue a notice in terms of s 189 (3) constitutes procedural unfairness.
2. The applicant's notice of termination of employment, given on 3 October 2019, is set aside.
3. The respondent is directed, should it wish to proceed with a consultation process in respect of any dismissal for operational requirements in its client support division, to issue a notice in terms of s 189(3) and to comply with the applicable provisions of s 189 and s 189A.
4. The respondent is ordered to pay the costs of these proceedings.

André van Niekerk
Judge

APPEARANCES

For the applicant: Adv. C Goosen, instructed by BJ Erasmus Pieterse Attorneys

For the respondent: Adv. H Nieuwoudt, instructed by Norton Rose Inc.