THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Of interest to other Judges

CASE NO: J587/2021

In the matter between:

THE NATIONAL EDUCATION HEALTH AND

ALLIED WORKERS UNION Applicant

and

THE MINISTER FOR TRADE, INDUSTRY AND 1st Respondent

COMPETITION

SOUTH AFRICAN BUREAU OF STANDARDS 2nd Respondent

Date of hearing: 3 June 2021 (Virtually)

Date of judgment: 4 June 2021. Judgment delivered by email.

JUDGMENT

VAN NIEKERK J

[1] This is an application in terms of section 189A(13) in which the applicant seeks an order declaring a consultation process 'to be unfair and a sham', declaring a resolution taken by the second respondent on 10 March 2021 to be in contravention of the second respondent's duty to consult in terms of section 189 and 189A of the Labour Relations Act (LRA), interdicting the second respondent from retrenching individual employees and members of the applicant, compelling the second respondent to comply with a fair procedure and ordering the respondents to pay the costs of the application.

[2] The application is opposed by the second respondent. The first respondent abides by the decision of the court.

[3] The material facts are not in dispute. The second respondent is a public entity established in terms of the Standards Act, 2008. The applicant was placed under administration in July 2018. It generates its income by way of grants from government and its activities in testing, training and verification services. Over the last few years, the applicant has lost thousands of customers and revenue to the tune of millions of Rands.

[4] On 10 March 2021, the second respondent issued a notice in terms of section 189 (3) of the LRA. In that notice, the second respondent records that it is contemplating reducing its headcount based on operational requirements and that it intended to commence a consultation process. A notice was addressed specifically to the applicant's regional secretary. The notice, which extends over some five pages, gives the rationale for the contemplated retrenchments, the alternatives considered and implemented, the proposed consultation process, the number of employees likely to be affected, the selection criteria likely to be

employed, the timing of the retrenchment, severance pay, assistance to retrenched employees and possible redeployment. In regard to the consultation process itself, the second respondent propose to commence the process on 16 March 2021 on the basis that the CCMA would be requested to appoint a facilitator in terms of section 189A of the LRA.

[5] The second respondent has raised two points in *limine*. The first is to the effect that the application is not urgent; the second that the application was prematurely filed. In regard to urgency, the second respondent submits that the applicant was aware as early as the date of the section 189 (3) letter issued on 10 March 2021, of the proposed retrenchment, yet it waited from then until 28 May 2021, some 2 ½ months later, to file the present application giving the second respondent one court day to file an answering affidavit. In response, the applicant submits that it only became aware during the latter half of May that the consultation process would not yield information that the applicant had sought and unable to obtain.

[6] Although applications in terms of section 189A (13) are enrolled for hearing on the urgent roll, I do not understand the section 189A to impose a discrete requirement of urgency. The section contains its own provisions in regard to the time within which an application must be filed. Section 189A (17) (a) provides that an application in terms of subsection 189A (13) must be brought not later than 30 days after the employer has given notice to terminate the employee services or, if notice is not given, the date on which the employee is dismissed. Put another way, an application in terms of section 189A (13) may be filed at any time between the commencement of a consultation process (usually signalled by the issuing of a section 189 invitation to consult) and the expiry of 30 days after notice of termination of employment, or the date of dismissal when no notice is given, whichever applies.

[7] In the present instance, while the applicant can be criticised for filing the present application some nine weeks after the event of which it complains (the in-principle decision by the second respondent to retrench) and affording the respondents only

a court day to file answering papers, this is not a basis on which to strike the application from the roll. The application was filed during an extant consultation process, and the applicant is thus entitled to be heard.

[8] The second point in *limine*, as I have indicated, is to the effect that the application was prematurely filed. There is some overlap between this point and the second respondent's point relating to urgency, but as I understand the submission, the second respondent contends that a section 189A (13) application may be filed only after the employer party has either terminated employment or given notice of its intention to do so. Put another way, the second respondent contends that there is a jurisdictional trigger to the filing of a section 189A (13) application in the form of a termination of employment or notice of intention to terminate.

[9] Section 189A (13) 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 –
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> (a) compelling the employer to comply with a fair procedure;
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> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
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> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
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> (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

Section 189A (17) reads:

> (17) (a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee services all, if notice is not given, the date on which the employees were dismissed.

(b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).

[9] There are two reasons why the second respondent's point in *limine* cannot be sustained. The first is that the time limit prescribed by subsection (17) employs the wording '… must be brought not later than 30 days after the employer …' (own emphasis). In other words, the subsection imposes an outer limit of 30 days within which the application must be brought; the window for the filing is defined by the commencement of consultation process and the expiry of 30 days' post dismissal. There is nothing in the wording of the subsection to sustain an interpretation to the effect that an employee wishing to avail him or herself of the remedy established by subsection (13) is required to delay until he or she is either dismissed or given notice of termination of employment. The second reason why the second respondent's objection cannot be sustained is one related to the purpose of section 189A (13). The preamble to the section 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 is a real-time supervisory role by this court over the consultation process, with powers to intervene if and when necessary, and to craft a remedy designed to address any procedural shortcoming that is found to exist. In *Steenkamp & others v Edcon Ltd* (2019) 40 *ILJ* 1731 (CC), the Constitutional Court said the following, at paragraph 54 of judgment (footnotes excluded):

> In exercising its powers in terms of s 189A (13) of the LRA, the Labour Court thus acts 'as the guardian of the process' and exercises a 'degree of judicial' management or oversight over the process. The aim is to proactively foster the consultation process by allowing parties to seek the intervention of the Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the process before it ends. The Labour Court in *Anglo-American* expounds:
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> > 'Section 189A (13) was introduced in 2002 and was intended, broadly speaking, to provide for the adjudication of disputes about procedural fairness in retrenchments at an earlier stage in the ordinary dispute

> resolution process, and by providing for that the termination, inevitably is a matter of urgency, an application rather than by way of referral. The section empowers employees and their representatives to approach the court to require an employer to apply fair procedure, assuming of course, that the jurisdictional requirements set out in s 189A are met. The section affords the court a broad range of powers, most of which appear to suggest that where a complaint about procedures made by consulting party, the court has a broad discretion to make orders and issue directives, thereby extending to the court an element of what might be termed a degree of judicial management into a contested consultation process.

[10] Judicial management or oversight over the whole consultation process would be compromised if the court's role was limited to an *ex post facto* examination and evaluation of the consultation process. The role of the court is not that of armchair critic – circumstances may warrant active intervention during the course of a consultation process. The fact that the court is entitled in terms of section 189A (13) (a) to compel the employer to comply with a fair procedure suggests that intervention in terms of that section is competent at any stage during the window period referred to above.

[11] For these reasons, the second respondent's point in *limine* is dismissed.

[12] Turning then to the merits of the dispute, the case presented on the applicant's behalf during argument related primarily to what was alleged to be a dispute regarding the disclosure of information; more particularly, a refusal or failure by the second respondent to disclose information demanded by the applicant. That is not the case made in the founding affidavit. The founding affidavit makes scant reference to any refusal by the second respondent to disclose information requested by the applicant. When pressed on the issue, counsel was unable to point out any direct reference to any refusal by the second respondent to disclose any specific information sought. On the contrary, the document to which reference was made, an email dated 23 April 2021 addressed by the second respondent's

human resource executive to the applicant and other consulting parties contains 'the information you requested that the section 189 consultation session held on 21 April 2021'. There is no suggestion in the papers that this email was not received or that the information disclosed, which extend to nine separate documents, including financial reports, appropriation statements, allocated budgets, notes to financial statements, asset registers and the like, were not received all were somehow inadequate for the purpose for which the information was sought.

[13] In any event, to the extent that the applicant was concerned that the second respondent had failed to disclose relevant information, the provisions of section 16 of the LRA contain a self-contained dispute resolution process in terms of which disputes regarding disclosure of information must be resolved. Where, as in the present case, the consultation process is chaired by a facilitator, the Facilitation Regulations, 2002, extend specific powers to the facilitator to order the disclosure of information. Regulation 5 provides that if there is a dispute about the disclosure of information the facilitator may, after hearing representations from the parties, make an order directing an employer to produce documents that are relevant to the facilitation. Should the applicant have been dissatisfied with the terms of any ruling made by the facilitator, it was open to the applicant to seek a review of that ruling, on an urgent basis of necessary.

[14] I should mention further that the minutes of the facilitation meeting held on 21 May 2021, reflect that the request made to the facilitator was not one relating to disclosure of information so much as a demand that the second respondent formally withdraw the section 189 (3) notice. The facilitator heard submissions from both sides, including submissions relating to the application of clause 25 of the recognition agreement. The facilitator ruled that he had no power to force the second respondent to withdraw the section 189 (3) notice, as his appointment was limited to the facilitation of the consultation session. At this stage, the applicant asked to be 'recused' from the meeting, since it no longer regarded the facilitator

as impartial. The minutes of the meeting record that the applicant then 'walked out of the meeting at 11:17 a.m.'.

[15] In short, even if I were to accept that the applicant's complaint is one related to a refusal or failure to disclose information sought by the applicant, this is not the case made in the founding affidavit and in any event, the applicant had open to it a number of alternative remedies which it failed to invoke.

[16] The case made in the founding affidavit suggests that the notice issued by the second respondent in terms of section 189 (3) issued on 10 March 2021 somehow contravenes the terms of the recognition agreement between the parties, and especially clause 24 of that agreement. This is consistent with the correspondence addressed to the second respondent by the applicant's attorney of record prior to initiating these proceedings which, in essence, demanded that the consultation process should be abandoned. Clause 24 requires the second respondent to consult with the applicant on material business changes aimed at but not limited to stabilising business performance, developing long-term comprehensive resourcing plans, and advising the business on how to manage the restructuring process. To the extent that the applicant submits that in terms of the agreement, it was incumbent on the second respondent to engage and consult with the applicant prior to issuing any notice in terms of section 189 (3), I fail to appreciate how this can be so. The purpose of clause 24 is to require consultation in the event of 'material business changes'. Even if this were to be given an extended meaning so as to apply in the present circumstances, consultation is the very process invoked by the second respondent on 10 March 2021. Further, the collective agreement draws a distinction between business restructuring and retrenchment. Clause 25 provides that 'any retrenchment shall be done in compliance with the Labour Relations Act'. Little purpose would be served by a dual consultation process in circumstances such as the present, where the second respondent has clearly indicated that retrenchments are contemplated, and invoked section 189 of the LRA. There was thus no breach of the terms of the collective agreement.

[17] The question then is whether the second respondent has failed to comply with the process-related requirements of sections 189 and 189A. At the outset, it should be observed that where a facilitator is appointed to chair the facilitation process, the broad powers and duties of a facilitator conferred by both section 189A and Regulation 4 of the Facilitation Regulations, would ordinarily leave little scope for criticism of employer conduct in relation to procedure. The structure of section 189A and the powers and duties conferred on facilitators ought to have the result that facilitators manage the process and ensure that the statutory requirements of procedural fairness are observed. Put another way, one of the primary obligations of a facilitator is to exercise the powers afforded him or her to ensure that the employer complies with a fair procedure.

[18] In the present instance, three facilitation meetings have been held. Specifically, meetings were held on 8 April 2021, 21 April 2021 and 21 May 2021. During the second meeting, the applicant staged a walkout before the second respondent could make its presentation on its business case, as directed by the facilitator. The meeting continued in the presence of other consulting parties, including representatives of non-union members and Solidarity. As I have noted, at the third facilitation meeting, at the applicant's insistence, the facilitator was requested to rule on the applicant's demand that the second respondent withdraw the section 189 notice. After the ruling against the applicant, the applicant left the meeting, which continued in the absence of its representatives. The meeting discussed voluntary severance packages and early retirement and further agreed a 30-day extension to the consultation process, with effect from 15 May 2021.

[19] The applicant complains that these meetings have not 'yielded anything positive'. Insofar as the applicant contends that in a meeting with the deputy minister, it was suggested that the section 189 process is not appropriate and should be suspended, I fail to appreciate how this could be said to have the consequence of any procedural fairness on the part of the second respondent. The deputy minister

is not the employer of the affected parties, and it is not for the deputy minister to dictate to either the second respondent or to the facilitator how the consultation process should proceed. Insofar as the applicant contends that none of the meetings held, whether with the facilitator without, could be construed as a genuine effort to seek consensus, the evidence does not support this contention. In particular, there is no evidence to suggest that no proper opportunity has been afforded to make any contribution toward a consensus-seeking process, or that the extension of the consultation process by a further 30 days is meaningless. The consultation process remains ongoing and I must necessarily accept, these being motion proceedings, the second respondent's version that it remains open to further consultation in good faith.

[20] Section 189A (13) is aimed at securing the process of consultation in the interests of the fair outcome. It is aimed at unjustifiable intransigence, not as a tool to thwart a retrenchment process *(*see *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* [2005] 1 BLLR 78 (LC)), and is properly confined to those instances where a substantial failure or refusal to comply with the relevant statutory requirements has occurred (see *AMCU v Sibanye Gold Ltd t/a Sibanye Stillwater* [2019] 8 BLLR 802 (LC)). In my view, the applicant has failed to establish that at this point in the consultation process, the second respondent has failed to comply with a fair procedure. The application thus stands to be dismissed.

[21] Insofar as costs are concerned, the second respondent seeks an order for costs. The court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The present application was misguided. It was also contrived, to the extent that the procedural complaint raised in the founding affidavit was barely addressed during the course of argument, when what amounted to an entirely different complaint, with no basis in the founding papers, was presented. Further, the court must necessarily take into account the conduct of the union during the consultation process. The LRA requires employers and unions to engage in a meaningful joint consensus seeking

process. This is simply not possible when one of the consulting parties adopts a belligerent attitude during the course of consultation and seeks to treat the process as a power play. The result, inevitably, given the nature of the consultation and the employer's right ultimately to resort to implementation without agreement once the process has been exhausted, is the loss of jobs in circumstances where the benefit of any input or influence by the employee representative is absent. This is not what section 189 intends. The section intends to provide employees and their representatives with the means to influence employer decision-making. As Clive Thompson has observed, section 189 invites a philosophy of social partnership, and the methodology of joint problem-solving to pioneer different outcomes. The intent is that the parties deal with the implications of any prospective retrenchment in a consensus-seeking way. What this requires is a '*shared interest in probing and confirming the employer's business analysis and prognosis, coming to terms with the measures proposed to ensure continued business viability, and then addressing sympathetically and sensibly what this means for employees'* (see Thompson 'Unfair Dismissal: The Operational Requirements Dismissal', in Thompson and Benjamin *South African Labour Law* volume 1 at AAI – 502 -503). The applicant's conduct during the consultation process (and indeed, in relation to the institution of these proceedings) demonstrates none of these values and ultimately subverts the purpose of sections 189 and 189A.

[22] For these reasons, the requirements of the law and fairness are best satisfied by an order to the effect that the applicant should bear the costs of these proceedings, including the costs of senior counsel.

I make the following order:

1. The application is dismissed, with costs, such costs to include the costs of senior counsel where so engaged.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv Mapisa, instructed by Tarn Finck Attorney

For the second respondent: Adv N Cassim SC, with him Adv N Kekana, instructed by DM5 Incorporated Attorneys