REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case No: P 400/14

In the matter between:

MZIMKULU AMOS KETSE **Applicant**

and

TELKOM SA SOC LTD **First Respondent**

SOLIDARITY **Second Respondent**

SOUTH AFRICAN COMUNICATION UNION **Third Respondent**

COMMUNICATION WORKERS UNION **Fourth Respondent**

Heard: **24 November 2014**

Delivered: **5 December 2014**

Summary: **An employer is not required to consult individual employees when contemplating dismissing employees for operational requirements when there is a person or body the employer is require to consult in terms of a collective agreement.**

JUDGMENT

LALLIE J

Introduction

[1] The applicant brought this application on an urgent basis for an order in the following terms:

'2. Declaring the notice of termination of the applicant's contract of employment, given by the first respondent to the applicant on 1 October 2014 to be invalid and of no force and effect.

3. Reinstating the applicant into the employ of the first respondent with fully retrospective effect to date of termination of employment.

4. Requiring the first respondent to comply with the requirement of a fair procedure and the provisions of section 189 and 189A of the Labour Relations Act 66 of 1995, as amended, prior to it being entitled to terminate the applicant's services.

5. Interdicting and restraining the first respondent from appointing any other employees into positions within the functional areas of Human Resources, Employee Relations or Call Centre Management until it has complied with the provisions of paragraph 3 above.

6. In the event of an order in terms of section 189A (13)(i) to (iii) not being appropriate, awarding the applicant such compensation as may be just and equitable under the circumstances'.

[2] The application is opposed by the first respondent which raised the following preliminary points:

'7.1 The applicant was not a consulting party as contemplated in s189A (13) of the LRA and lacks the *locus standi* to bring this application. The trade unions with members who were affected by the retrenchments, CWU, SACU, Solidarity and ICTU were the consulting parties for purposes of s189 (1) and 189A(13) of the LRA with the necessary *locus standi* to bring a s189(13)A application.

7.2 The dispute relating to any alleged non-compliance with a fair procedure is *res judicata* as an application to declare it as such was brought by Solidarity and an agreement relating to the future conduct of the consultations, including the appointment of a facilitator, was reached and made an order of the Labour Court on 22 July 2014.

7.3 A facilitator, Mr Charels Nupen, was appointed by agreement of the consulting parties in terms of s 189A (4) of the LRA and facilitated the consultations from 21 July 2014 until 9 October 2014. Accordingly, the provisions of s189A (8) of the LRA do not apply. It is s189A(7) of the LRA which applies and more than 120 days (60 days in excess of the

prescribed minimum) had lapsed since the issuing of the s189(3) notice, which had been issued on 12 May 2014 to the applicant and 17 May 2014 to the trade unions. The termination of applicant's employment contract was thus lawful'.

[3] I will consider the preliminary points in turn. The first respondent submitted that the applicant has no *locus standi* to bring an application in terms of section 189A(13) of the LRA as he is not a consulting party as contemplated in section 189A (13) of the LRA and for purpose of section 189(1) of the LRA. A consulting party is defined as follows in section 189(1) of the LRA:

> '(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-
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> (a) Any person whom the employer is required to consult in terms of a collective agreement;
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> (b) If there is no collective agreement that requires consultation-
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> (i) A workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace forum in respect of which there is a workplace forum; and
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> (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.'

[4] The applicant sought to rely on *Aviation Union of South Africa and Another v SA Airways (Pty) Ltd and Others*[1] in arguing that it was not the intention of the legislature to require an employer to consult only one of the consulting parties referred to in section 189 (1) of the LRA as such interpretation is narrow, simplistic and leads to absurdity. He criticized the decision in *Sikhosana and*

[1] [2012] 3 BLLR 211 (CC)

Others v Sasol Synthetic Fuels[2] where it was held that although section 189 (1) of the LRA sets out four levels of consultation, the hierarchy of obligations is intentional. An employer need only consult the employees likely to be affected by the proposed dismissal if there is no registered union whose members are likely to be affected by the dismissal. The applicant sought to rely on the following dictum of *SACCAWU and Another v Amalgamated Retailers (Pty) Ltd*[3].

> '…The identification of a consulting party by applying the criteria established in section 189(1)(a), (b) and (c) might confer exclusive rights on the partner with first claim in relation to the other potential partners listed in those paragraphs, but it does not relieve the employer of an obligation to consult in terms of subsection (d) with affected employees or their representatives nominated for the purpose if those employees are not presented in some manner or form by a collective bargaining agent, workplace forum or registered trade union respectively. However, in this instance, the respondent decided to initiate and conduct a separate consultation with non-union members, and to meet with these employees on an individual basis to discuss with matters relating to the proposed restructuring and their security of employment. Having elected to do so, it was incumbent on the respondent to interact with each employee with a view to reaching consensus on his or her proposed retrenchment, and the fairness of the respondent's actions must accordingly be determined on the basis of its stated intentions.'

[5] It was further argued on behalf of the applicant that section 189 (1) (a) of the LRA must be purposively construed. It applies when there is a collective agreement which requires the employer to consult a particular person or body when it contemplates the dismissal of the employee or employees in question. Absent such collective agreement, section 189 (1) (a) does not apply, See *United Breweries (SA) Ltd v Khanyeza and Others*[4]. The applicant argued that contrary to the decision in *Aviation Union of South Africa and Another (supra)* where it was held that an interpretation which takes away employees' rights should not be preferred, the first respondent, by raising this point *in limine*, adopts an attitude and a construction which takes away the applicant's right to

[2] [2000] 1 BLLR 101 (LC)
[3] [2002] 1 BLLR 95 (LC) at paras 26.and 27.
[4] [2006] 4 BLLR 321 (LAC)

be consulted. In *Moyo v Knight Watch Security*[5] it was held that in the absence of evidence of the existence of a collective agreement regulating consultation in respect of a retrenchment, the respondent was under an obligation to consult with the applicant. The applicant argued that a literal construction of section 189 (1) means that non-unionized employees will not be consulted. They will be denied recourse to procedural fairness in terms of section 189A (13). It will further penalize employees who do not belong to a trade union.

[6] The first respondent denied that the applicant was a consulting party. It was argued on behalf of the first respondent that a number of cases which the applicant sought to rely on recognize the hierarchy governing the consultation process in section 189 (1) of the LRA. In *SA Municipal Workers Union and Another v SA Local Government Association and Others*[6] the court expressed the view that it saw no need to depart from the principles established by this court under section 189 that recognize a hierarchy of persons or bodies, the first relevant to the particular factual circumstance excluding all others that rank below it. Reference was made to *Sikhosana* and *Maluleke*. In *Maluleke (supra)* the court relied on *Mahlinza* in recognising the hierarchy. In *Moyo (supra)* the court did not disagree with the hierarchy system. In *Aude SA (Pty) Ltd v NUMSA*[7] the Labour Appeal Court recognised the hierarchy in the consultation process.

[7] Based on the hierarchy governing consultation is section 189 (1), the first respondent argued that the applicant was not a consulting party. The first respondent further submitted that the applicant was not involved in consultation from May 2014 when the consultation process commenced. He was not consulted about the issues consulting parties are required to consult about. He did not participate in all ten meetings facilitator in terms of section 189A (4). He was merely informed that consultation was about to start. He was part of consultation which was run by the consulting parties. Had the applicant been a consulting party, he would have moved the present application on 1 October 2014 when he received the letter of the termination

[5] [2009] JOL 23721 (LC)
[6] (2010) 31 *ILJ* 2178 (LC)
[7] [2011] JOL 27732 (LAC) at para 32.

of his services. The first respondent further argued that the LRA does not frown upon the violation of individual employee's rights. It cited the provision allowing creation of close shop which compels employees to join a particular trade union on taking up employment at a particular workplace. The provision violates the individual employee's right of being a member of a trade union of his or her choice. Another example was a collective agreement which is extended to non-parties. The first respondent argued that in the same vein, section 189(1) of the LRA deliberately created the hierarchy which intentionally denies individual employees likely to be affected by retrenchment of the right to be consulted when there is a body to be consulted in terms of section 189(1)(a) of the LRA.

[8] The material facts of this matter are that early in 2014, the first respondent took a decision to embark on a restructuring exercise. It announced that managerial staff would be the first to be affected by the exercise. As the applicant was a Senior Manager Call Centres, he fell within the category of managerial staff. About 2500 employees were affected by the restructuring exercise. The applicant submitted that on 12 May 2014, the first respondent's Group Chief Executive Officer ('the CEO') announced the restructuring process and indicated that consultation would commence on 13 May 2014. The applicant received a letter which purportedly constituted a notice in terms of section 189 and 189 (A) of the LRA shortly after 12 May 2014. The consultation process commenced on 13 May 2014 with the CEO making presentations to employees on the new structure and giving content to the framework he had given earlier. Affected employees in Gauteng participated by congregating at St Georges Hotel, where the CEO and his team led the consultation. Employees in other areas including the applicant participated via their desk tops with the applicant, as he put it, holding virgil over the process from his office via his laptop. Proposals and counter proposals were exchanged between employees and the CEO and his team via the internal communications system with a set period at the expiry of which a further consultation was held. The applicant attended the second consultation in Durban where the COO took the employees through the restructuring plans. Employees whose positions were going to be done away with were told to

apply for alternative positions between 26 and 30 June 2014. Employees were informed that they would receive the final structure on or about 25 June 2014. The applicant applied for three positions namely: Senior Employee Labour Relations Manager – Eastern Cape, Western Cape and Northern Cape Senior Manger Call Centre and an alternative position for Senior Manager Call Centre. He was unsuccessful. On 1 October 2014 he received a letter terminating his services in terms of section 189 (A) (7)(a) of the LRA with effect from 1 October 2014. It was the applicant's submission that his services were prematurely terminated.

[9] The first respondent submitted that it consulted only, *CWU, SACU, Solidarity* and *ICTU,* trade unions with whom it was required to consult in terms of recognition agreements. It denied having consulted with the applicant and submitted that it only provided the applicant with relevant information. The applicant did not attend any of the ten meetings facilitated by Mr Nupen ("Nupen") a facilitator selected by the consulting parties. These submissions were not refuted by the applicant. In *SACCAWU (supra)* it was held that the respondent decided to initiate and conduct a separate consultation with non-union members and to meet with them on an individual basis to discuss matters relating to the proposed restructuring and their security of employment. The respondent was ordered to consult the individual employees properly and fairly. The court however, clarified its decision as follows:

> 'I wish to emphasis that I reach this conclusion on the facts of this case and in the light of the respondent's stated intentions. It is not a general proposition concerning the right of individual employees in a consultation process. Given the primacy accorded to collective engagement with a trade union, a workplace forum or the representatives of employees accorded by section 189 (1) and to which I have referred above, it is entirely feasible that an employer may discharge its obligations in terms of that section without engaging in separate consultation with affected individual employees. *Baloyi's* case is an example of such an instance.'

[10] An analysis of the authority, the applicant and the first respondent sought to rely on reveals that in a number of cases, our courts have interpreted section 189(1) strictly by acknowledging the hierarchy governing the consultation

process. In *Moyo* (*supra)* the court found the respondent's refusal to consult individual employees to constitute procedural unfairness because there was no collective agreement which required consultation with a particular person or body. It therefore, gave section 189 (1) of the LRA a literal interpretation. Where the respondent elected to consult individual employees, it was held that the respondent had to see its lection through by holding proper consultation. See *Oosthuizen v Telkom*. I have considered the applicant's argument that the LAC held in *Baloyi (supra)* that an employer was required to consult with individual employees who were not represented by a consulting trade union. That case is distinguishable from the present as it involved an employee who was represented by a trade union during consultation. I am further of the view that the court made that comment *obiter*, it can therefore not be relied upon. The LAC clarified the correct position as follows in *Aude (supra).*

> '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…'.

[11] I have considered the applicant's argument that in *Aviation Union of SA & Another v SA Airways (Pty) Ltd & Others*[8] the court held that an interpretation which does not violate rights of employees should be followed. Each case is judged on its merits and the decision in *Aviation Union of SA & Another (supra)* is based on facts which are materially different from those of the matter at hand. I am inclined to agree with the first respondent that the LRA provides for the primacy of collective agreements. When the legislature created the hierarchy in section 189(1) of the LRA it did so deliberately. Even in instances where employers were ordered to consult with individual employees, the hierarchy system of consultation was referred to with approval and not tempered with. The courts correctly applied the doctrine of election and held the employers to their election.

[8] [2012] 3 BLLR 211 (CC)

[12] The literal approach was criticized by the applicant, inter alia, on the basis that it may have absurd results in instances where an employer may reach a collective agreement with a minority trade union thus excluding a majority trade union from consultation. The LAC dealt with that scenario in *Aude (supra).* It reaffirmed the meaning and purpose of a collective agreement and considered the validity the new collective agreement which excluded the majority union from the consultation process. It restored the majority union's right to be consulted which the appellant and a minority had unscrupulously stripped the majority union of. The court will always come to the rescue of a litigant who has a right to be consulted in terms of section 189 (1) of the LRA when that right has been unduly taken away as a result of ingenious conduct by an employer and another party. There is therefore no need to create an obligation for an employer to consult with an individual applicant in contravention of section 189 (1) of the LRA for the purpose of protecting the individual employee from unscrupulous employers and other consulting parties as individual employees have a remedy which is consistent with section 189 (1) of the LRA.

[13] The applicant submitted that his right to be consulted stems from the fact that he was a *de facto* consulting party as the first respondent had consulted with him. The first respondent submitted that the communication between the applicant and itself did not constitute consultation but it was its effort to keep the applicant informed of the retrenchment process and to maintain transparency. It maintained that it consulted with trade unions in terms of section 189(1)(a). Section 189(2) requires consulting parties to engage in a meaningful joint consensus-seeking process and attempt to reach consensus. The applicant's description of his participation in the retrenchment process is consistent with the first respondent's version. He was not afforded an opportunity to influence the retrenchment process. The applicant did not object to his exclusion from the facilitation which was conducted by Nupen. The facilitator conducted ten meetings between the first respondent and the consulting parties. Had the applicant been of the view that he was a consulting party either *de facto* or *de jure* he would have demanded to participate in the facilitation. His failure to take action against his exclusion

from the facilitation does not support his version. Consultation is an active process. The role the applicant played in the retrenchment process, even on his own version is passive. It is inconsistent with the definition of consultation.

[14] The applicant was not a consulting party as envisaged in section 189(1) of the LRA. The first respondent did not make the applicant a *de facto* consulting party as it did not consult with him in connection with his dismissal for its operational requirements. He therefore lacks *locus standi* to bring the present application as envisaged is section 189A (13) of the LRA.

[15] The second point *in limine* was that this matter is *res judicata* as an application to compel the first respondent to comply with a fair procedure (the same application as the present) was brought by *Solidarity,* one of the consulting parties and resolved by agreement relating to the future conduct of the consultation including the appointment of a facilitator. The agreement was made an order of court in July 2014. The applicant disputed the first respondent's claim on the basis that the dispute between *Solidarity* and the first respondent concerned different challenges to procedural fairness and involved different parties.

[16] Considering the issue of *res judicata,* the court in *Fidelity Guards Holding (Pty) Ltd v PTWU and Others*[9] relied on the following definition:

> 'The most oft-quoted authority for the requirements of the defence of res judicata is Voet Commentarius ad Pandectas 44.2.3:
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> > 'Under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that of one of those requisites is wanting, the exception fails" (*Bertram v Wood (1883) 10 SC 177 at 181*)'

The court however added that the strict common-law requirements for the defence of *res judicata* should not be taken literally and applied in all cases as inflexible rules. There is room for adoption of the rule and every case has to be decided on its facts.

[9][1998] 10 BLLR 995 (LAC) at para 7

[17] I accept the applicant's argument that the fact that the parties before court when the court order was granted and the parties before me is a fatal flaw in the first respondent's defence. Inescapably, the cause of action if the same, however, the relief sought by the parties is different. As section 189(1) requires an employer under appropriate circumstances to consult with more than one party, the different parties may experience the employer's failure to follow a fair procedure differently. The order granted in July 2014 provides, *inter alia,* for the appointment of a facilitator and implementation of the facilitator's recommendations. It does not deal with the kind of procedural unfairness which triggered this application. As an employer's failure to follow a fair retrenchment procedure manifests itself in different ways, each consulting party retains its right to approach this court in terms of section 189A (13) for as long as the manner in which it experiences an employer's failure to follow a fair procedure has not been determined by a court of law. This point in limine has no legal basis.

[18] The last point in *limine* is that as consultation was facilitated, the first respondent terminated the applicant's services lawfully in terms of section 189A (7) as more than double the prescribed 60 day period had lapsed from 12 May 2014, the day on which the applicant was issued with the section 189(3) notice and the date on which he was given notice of the termination of his service. The applicant argued that the termination of his service was unlawful because the appointment of the facilitator by way of private arrangement rather than under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) does not satisfy the requirements of section 189A of the LRA. He submitted in the alternative that the facilitation did not satisfy the requirements of section n 189A of the LRA in view of his exclusion from the process.

[19] Facilitation in the process of dismissing employees for operational requirements of the employer is governed by the following sections:

> '(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-

(a) the employer has in its notice in terms of section 189 (3) requested facilitation; or

(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).'

[20] The applicant submitted that as a *de facto* consulting party he was entitled to be consulted and therefore to participate in a lawful facilitation process. He argued that the appointment of a facilitator who was not a commissioner of the CCMA was in breach of section 189A(4) because the purpose of section 189A(4) was to afford consulting parties an opportunity to appoint a CCMA facilitator after the 15 days period prescribed in section 189A(3). It was never the intention of the legislature to remove the facilitation process from the CCMA. The CCMA was deliberately charged with the responsibility of facilitation to protect consulting parties from anything that may go structurally wrong during the facilitation. The first respondent argued that if by enacting section 189A(4) the legislature intended extending the 15 day period in section 189A (3) the legislature would have stated so expressly as it did with the other time periods it enabled the Labour Court and the CCMA to condone. Section 191(2) of the LRA provides for condonation of the late referral of disputes to the CCMA. Section 145(1A) provides for condonation of the late filing of review applications. Section 189A (4) is unambiguous and its literal construction does not lead to absurdity. There are therefore no grounds not to give it its literal interpretation. The skill to facilitate consultation is not possessed by CCMA commissioners only. Section 189(4) makes the pool from which a facilitator may be chosen bigger. It gives consulting parties the liberty to select the best facilitator who may not necessarily be a CCMA commissioner. It further extends the 15 day period within which a request for facilitation should be made. The applicant's argument that facilitation was intended to be conducted by CCMA commissioners only has no legal basis.

[21] If the applicant was a consulting party as he alleges, he would have approached this court in terms of section 189 (13) shortly after the agreement to appoint a facilitator was made an order in July 2014. He did not and time did not wait for him. He realized too late that the process had moved to the point where the first respondent could invoke provisions of section 189 A(7) and issue him with a notice of the termination of his contract of employment in accordance with section 37 (i) of the Basic Condition of Employment Act 75 of 1997. As the applicant received his notice in terms of section 189(3) on 12 May 2014, the first applicant could lawfully issue him with a notice of the termination of his contract of employment after 13 July 2014. The termination of the applicant's contract of employment was therefore lawful.

[22] In the premises the following order is granted:

22.1 The point in limine that the applicant was not a consulting party and lack *locus standi* to bring this application is upheld

22.2 The point in limine that this matter is *res judicata* is dismissed.

22.3 The point in limine that the termination of the applicant's contract of employment was lawful is upheld.

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Lallie J.

Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant: Advocate Le Roux

Instructed by Brown Braude & Vlok Attorneys

For the Respondent: Mr Maserumule of Maserumule Attorneys