IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 140/17

In the matter between:

THE SOUTH AFRICAN COMMERCIAL CATERING	
AND ALLIED WORKERS UNION	**First appellant**
SACCAWU MEMBERS	**Second and Further Appellants**

and

JDG TRADING (PROPRIETARY) LIMITED	**Respondent**

Heard: **26 September 2018**

Delivered: **17 October 2018**

Summary: Application and interpretation of section 189A(13) – union contending that employer had already made its mind to retrench the employees through a resolution – union contending that in light of the final decision, subsequent consultation was a sham and dismissal was a *fait accompli* – court called upon to consider whether on the evidence a final decision had been taken prior to the issuing of the section 189(3) notice. Held that the resolution stands to be interpreted regardless of its context and JDG's subsequent conduct thus contradicts the established legal position that conduct subsequent to a section 189 notice may well be determinative of the extent of the employer's compliance with its statutory duties. Further that

employer's conduct contradicts union's version that dismissal was *a fait accompli*. Labour Court's judgment upheld and appeal dismissed.

Coram: Phatshoane ADJP, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] The appellants appeal against the *ex tempore* judgment and order of the Labour Court (Steenkamp J) of 18 May 2017 dismissing their urgent application in terms of section 189A(13) of the Labour Relations Act 66 of 1995 ("the LRA").

[2] The respondent ("JDG") is a retail company that owns a number of retail chain stores. The first appellant, the South African Commercial Catering and Allied Workers Union ("SACCAWU"), has concluded collective agreements with JDG including a "relationship agreement" governing bargaining and organisational rights and a "job security agreement" dealing with closures, relocations, restructuring and operational requirement decisions.

[3] On 17 February 2017, JDG issued a notice to SACCAWU headed *"Notification regarding consultation in respect of proposed operational requirements"* in terms of section 189(3) of the LRA, read with clauses 3.1 and 4.2 of the job security agreement. The opening paragraphs of the notice read:

> 'This is a Notification in terms of Section 189(3) of the Labour Relations Act 66 of 1995 as amended, in respect of proposed operational requirements. The Group and Management formally notify SACCAWU…that it contemplates to effect certain operational requirements that may impact the job security of SACCAWU members. The Company wishes to formally inform the Union of its intention to invoke clause 3.1 and 4.2 of the….job security agreement.
>
> The Group contemplates the following work place closures and

restructuring…;

[4] Clause 3.1 of the job security agreement provides that when the company contemplates dismissing one or more employees on operational requirement grounds, it will notify SACCAWU at national level in terms of section 189(3) of the LRA. Clause 4.2 of the job security agreement reads:

> '[T]he parties shall at the quarterly meetings, dates to be agreed, address and discuss the performance of loss making and marginal places of work, with the focus being to assist with the rectification thereof and/or positively influence the situation, as well as to consult on issues covered under the provisions of clauses 3 and 4 of this agreement and/or any aspect relating to operational requirements which may affect the job security of employees within the bargaining unit.'

[5] The section 189(3) notice set out in tabulated form the contemplated closures and employees affected in the bargaining units across the various workplaces. It continued with a proposal to offer enhanced voluntary severance packages ("ESVP's") to various administrative personnel across the group as an "attempt to minimise or possibly prevent any forced retrenchments and business disruption". Alternatives for consideration by the parties are identified in the job security agreement and referred to in the letter as including: re-deployment in the group, retirement, voluntary early retirement or retrenchment and natural attrition. The letter also dealt with selection criteria, timelines, severance pay and assistance to be offered to employees selected for retrenchment. On the face of the section 189(3) notice, the total number of employees likely to be affected was 1951. However, JDG subsequently clarified on 7 March 2017 that the total number of employees likely to be affected was in fact 1095. The section 189(3) notice concluded by saying:

> 'We are looking forward to a meaningful and constructive consultation process regarding these matters.'

[6] On 23 February 2017, SACCAWU sent a letter to JDG stating *inter alia* that the section 189(3) notice did not demonstrate any genuine commitment by

JDG to a consultation process. SACCAWU's scepticism was based on a suggestion in the letter which aimed at avoiding a consultation process at national level as envisaged in the job security agreement. The proposal read:

> 'In terms of the management of the affected employees, it is proposed that, in order to expedite the process and to avoid any unnecessary inconvenience experienced by the said employees, the responsible Human Resources Executives and respective Cluster/Division/Chain Full-Term Shop Steward (where applicable) to be given the mandate by both parties to manage the process, in accordance with the parties Job Security Agreement.'

[7] SACCAWU prefers as a general rule for consultations to be conducted by skilled union officials at national level. It was bothered also by the proposal to expedite the process. Nonetheless, SACCAWU committed to the process and despite its misgivings requested further detailed information.

[8] JDG responded to SACCAWU's letter and provided comprehensive information. A first consultation meeting was held on 7 March 2017. On 10 March 2017, SACCAWU sent another letter to JDG in which it sought additional information regarding *inter alia* the date on which the decision to initiate the consultation process was taken and a copy of the minutes of the meeting at which it was resolved to initiate the consultation process. JDG responded in a letter dated 14 March 2017 and cited an extract of the draft minutes of JDG's executive committee meeting of 25 January 2017 recording the resolution to initiate the operational requirements consultation process. The extract reads:

> 'The meeting resolved that as a result of the ongoing poor economic trading conditions, the lack of growth in the furniture industry and the resultant negative financial impact, the furniture brands of the Group must further reduce store staff numbers through operational requirements to reduce operational costs.'

[9] On 29 March 2017, a second consultation meeting was held between the parties at which SACCAWU raised reservations about the resolution. The minutes record the disquiet of the Deputy Secretary-General of SACCAWU as follows:

'… The concern on the decision from the Exco meeting is when looking at the extract of the minutes it reads "Furniture brand of group must further reduce store staff numbers". You don't have any powers to change this decision of Exco, therefore this consultation process becomes superficial.'

[10] The minutes later record the response of JDG as follows:

'In response to the concern on the Exco resolution, so that there is no misunderstanding herewith our response:
'Exco's resolution highlights that for the reasons stated we have more staff than required to conduct our operations. It further refers to the fact that the number of staff, in light of the aforesaid, must be reduced. It does not state that staff services must be terminated or that staff must be retrenched but specify that reduction must be considered "through Operational Requirements" referring to the required OR processes.

We have therefore been instructed to engage in terms of the required process to consult and consider possible retrenchment or alternatives / ways relating to the excess staff and requirement to reduce operational costs…'

[11] On 6 April 2017, SACCAWU sent a letter to the Chief Executive Officer of JDG, in which it stated *inter alia* that the resolution had undermined the consultation process in that a decision had been made in terms thereof to retrench employees. JDG responded on 7 April 2017 in a letter stating:

'1. Your inference that the word "must" in the Exco draft resolution indicates that management has made a final decision to retrench workers, is with respect, incorrect.

2. The manner in which the consultation process has been conducted (and the minutes will reflect that) cannot be construed as "merely going through the motions" and this was put into perspective at the consultation meeting of 29 March 2017.

3. We reiterate that Exco took the preliminary decision to reduce store staff numbers in order to reduce operational costs and considered and established that other alternatives would not achieve the cost cutting objective.

4. The consultation process was to allow the role players to engage the company to seek viable alternatives to avoid or minimize retrenchments.

5. The consultation process will, accordingly proceed on this basis.'

[12] SACCAWU maintains that its various proposals regarding alternatives to retrenchment were rejected without valid reason and that this was an indication that a decision had already been made to reduce store staff numbers, and any consultation on restructuring was pre-determined. For example, SACCAWU felt its suggestion to reduce staff store numbers through natural attrition and the transfer of employees was rejected without adequate reasons. Likewise, SACCAWU suggested that JDG introduces a government-funded training layoff scheme, which JDG rejected on the basis that it purportedly did not qualify for the funding as it was not a "business in distress".

[13] A third consultation meeting was held on 7 April 2017. Again, SACCAWU raised its concerns regarding the resolution. It was also agreed during this consultation meeting to vary the job security agreement in respect of the offering of voluntary severance packages. At the end of the third consultation meeting, a fourth consultation meeting was scheduled for 20 April 2017.

[14] On 11 April 2017, and prior to the fourth consultation meeting that had been scheduled for 20 April 2017, JDG referred a dispute to the Commission for Conciliation Mediation and Arbitration ("the CCMA") in terms of section 189A(8)(a) of the LRA. In terms of this provision, a party may not refer a dispute to the CCMA unless a period of 30 days has lapsed from the date notice was given in terms of section 189(3) of the LRA. As the relevant period had lapsed, JDG was within its rights to make the referral. The relief sought by JDG in the LRA Form 7.11 was the "implementation of retrenchments where required."

[15] A fourth consultation meeting was held between the parties on 20 April 2017. At the conclusion of this consultation meeting, JDG advised SACCAWU that any further engagement could either be through formal written correspondence or at the CCMA.

[16] After further correspondence was exchanged between the parties, the appellants launched an urgent application (the subject matter of this appeal) seeking orders: i) declaring the consultation process to be unfair and a sham;

ii) declaring the resolution to be in contravention of JDG's duty to consult in terms of section 189 and 189A of the LRA; iii) interdicting JDG from retrenching the individual applicants; and iv) compelling JDG to comply with a fair procedure regarding the contemplated retrenchments by *inter alia* withdrawing the resolution and the section 189(3) notice and re-issuing it. The order was sought in terms of section 189A(13) which permits a consulting party, if an employer does not comply with a fair procedure, to approach the Labour Court for an order compelling compliance with a fair procedure and interdicting retrenchments prior to compliance.

[17] SACCAWU contended before the Labour Court that the resolution was couched in peremptory terms and that its grammatical and ordinary meaning was clear and unambiguous, namely that JDG "must" further reduce store staff numbers through operational requirements in order to reduce operational costs. It argued that JDG thus took a decision to retrench employees for operational requirements prior to the issuing of the section 189(3) notice and hence that the dismissal of employees for operational requirements was a *fait accompli*. JDG contended to the contrary that the resolution constituted a decision in principle which was not final, being merely contemplation on its part that a reduction of staff was needed for operational reasons and that at that point it still intended to follow a section 189 consultation process in a fair manner.

[18] The Labour Court accepted that the resolution was cast in peremptory terms but held that it could be interpreted with reference to the events that transpired after its adoption. Once the resolution had been adopted, JDG did what it was supposed to do in terms of section 189 and 189A of the LRA. It embarked on a consultation process and invited proposals from SACCAWU. In response to requests from SACCAWU, it disclosed all relevant information. It also established a data room to facilitate full access to information. Moreover, at the time of the application, the consultation was ongoing. JDG had not taken any final decision to dismiss, nor issued any dismissal notices.[1] The Labour Court found that the process had not been derailed in any way. It

[1] We were advised from the bar that of the more than 1000 employees identified as likely to be affected, ultimately less than 100 were dismissed. 729 employees accepted the EVSP's.

concluded that the words "must further reduce store staff members" in the resolution could be read in the light of the surrounding circumstances as "may have to reduce store staff members". The wording of the resolution did not mean that the decision to dismiss was a *fait accompli*. It, therefore, dismissed the application but made no order as to costs.

[19] SACCAWU submits on appeal that the Labour Court erred in finding that the resolution could be interpreted having regard to the events that transpired after its adoption. It argued that it was entitled to be consulted prior to the taking of a decision to retrench, and an *ex post facto* consultation process was improper. Fairness is bound up in the requirement of consultation prior to reaching a final decision on retrenchment.[2] In terms of section 189 of the LRA, consultation is required once the employer contemplates dismissal for operational requirement reasons. Consultation must precede a final decision on retrenchment since it is impossible to determine beforehand what might emerge from the consultation and to what extent these results might influence a final decision. Allowing for representations after the decision has been made, cannot inform the decision already taken and will be met by a justification of the original decision taken before any consultation.[3]

[20] The issue on appeal, therefore, is whether on the evidence a final decision had been taken prior to the issuing of the section 189(3) notice. The only basis upon which SACCAWU rests that claim is the wording of the resolution and the rejection of some of its proposals. JDG counters that the resolution was no more than a decision to proceed with the consultation process once retrenchments had been contemplated.

[21] In support of its submission that it was impermissible for the Labour Court to rely on the surrounding circumstances to construe the meaning of the resolution to a mere contemplation of dismissals rather than a final decision, SACCAWU relied on *Urban Hip Hotels (Pty) Limited v K Carrim Commercial Properties (Pty) Limited (Urban Hip Hotels)*[4] where the Supreme Court of

[2] *SACTWU and Others v Discreto (a Division of Trump and Springbok Holdings)* (1998) 12 BLLR 1228 (LAC).
[3] *Kotze v Rebel Discount Liquor Group (Pty) Ltd (*2000) 21 ILJ 129 (LAC) at 138J to 139B.
[4] (2016) JOL 36943 (SCA) at para 21.

Appeal ("SCA") considered the use of surrounding circumstances, and in particular the manner in which the parties carry out a contract, as aids to contractual interpretation. It said:

> 'It is now well established that the meaning of a contract must be ascertained by consideration of the words used, the contract as a whole and the context or factual matrix in which the contract was concluded, irrespective of whether there is an ambiguity in the meaning thereof…I accept that in an appropriate case the manner in which the parties to a contract carried out their agreement, may be considered as part of the contextual setting in which the terms of the contract are to be determined….The use of such evidence is, however, subject to three provisos. First, the evidence must be indicative of a common understanding of the terms and meaning of the contract. Second… the evidence may be used as an aid to interpretation and not to alter the words used by the parties.….Third, as Harms JA cautioned in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*… the evidence must be used "as conservatively as possible"'.

[22] In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another,*[5] the SCA held:

> 'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning… Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses... Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent …Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible"….. The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or

[5] (2009) (4) SA 399 (SCA) at para 39.

"factual matrix" ought to suffice.'

[23] SACCAWU submitted that the Labour Court's approach was at odds with these authorities. The evidence was not indicative of a common understanding of the meaning of the resolution. Secondly, the Labour Court used evidence of the manner in which the resolution was carried out to alter the words in the resolution in order to support a finding that JDG simply intended to consider or contemplate the reduction of store staff numbers. Thirdly, the Labour Court did not use the evidence before it conservatively but instead used it to determine the matter. SACCAWU accordingly submitted that the Labour Court ought to have found, without reference to any evidence of what transpired after the adoption of the resolution, that a decision to retrench employees was made prior to the purported consultation process, and that the JDG did not comply with a fair procedure.

[24] JDG submits that the *dicta* in *Urban Hip Hotels* find no application to the present facts because there is no basis for the extension of a principle of contractual interpretation to a unilateral statement such as the resolution. However, a proper reading of the authorities supports the proposition that the context and the manner of implementing an executive resolution would normally be relevant and are legitimate aids to interpretation. As these two decisions of the SCA confirm, it is well-established in the law of contract that the subsequent conduct of parties is relevant as part of the matrix of surrounding circumstances in light of which the contract should be interpreted;[6] and there is no reason why the principles of contractual interpretation should not be extended by analogy, *mutatis mutandis,* to other documents.

[25] SACCAWU's argument that the resolution stands to be interpreted regardless of its context and JDG's subsequent conduct thus contradicts the established legal position that conduct subsequent to a section 189 notice may well be determinative of the extent of the employer's compliance with its statutory

[6] *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA).

duties.[7] Certainly, the admonitions to act conservatively and to avoid unduly altering the language should generally be heeded; but a purposive and contextual approach, in this case, defies a conclusion that the Executive Committee intended to close the company's mind to consultations on averting or minimising retrenchments. The job security agreement, an important part of the context in the light of which the resolution stands to be interpreted, leaves no doubt about the intended practice of the parties and the process to be followed in relation to contemplated retrenchments.

[26] It is trite that section 189(1) of the LRA obliges an employer to consult on contemplation of retrenchments. Du Toit et al *Labour Law Through the Cases,*[8] after a discussion of the authorities, accurately capture the prevailing legal position about what is required as follows:

> 'It would therefore seem that the weight of authority has shifted from a broader to a narrower interpretation of the term "contemplates". Having initially accepted that contemplation of dismissal as one of various options was sufficient to trigger the employer's duty to consult, the courts now appear to take the view that, for purposes of section 189, "contemplates" refers to dismissal as the preferred or most likely option from the employer's point of view rather than a mere possibility. It follows that the employer is entitled to go through a process of weighing up various alternatives before dismissal can be said to be "contemplated". However, the employer may not embark on consultation with a closed mind but must be willing to seriously consider any further alternatives to dismissal that may emerge in the process.'

[27] The retrenchment decision and process expressed in and initiated by the resolution were on their face proper and valid. SACCAWU did not challenge the commercial or business rationale for retrenchment in its application. Facing a dire financial situation, JDG engaged with SACCAWU, as the union with the highest number of members employed by it, through an exchange of written correspondence and a series of four consultative meetings over a sustained period from 23 February 2017 to 20 April 2017. The resolution to

[7] *Arthur Kaplan Jewellery (Pty) Ltd v Van De Venter* [2006] ZALAC 7.
[8] LexisNexis, LRA Chapter 8, Commentary on s189(1). October 2017 update.

initiate a retrenchment process was taken on 26 January 2017 and a three-month process of engagement with the appellants ensued.

[28] The evidence as a whole indicates that JDG was prepared to discharge its statutory consultation duties with an open mind, to consult in good faith, and to seriously consider alternatives to dismissal during the consultation process. SACCAWU's contention that the subsequent conduct of JDG confirms that the process was a sham does not withstand scrutiny. The record reveals a dire business environment; an employer willing to respond to the union's requests for information; a sustained, three-month period of meaningful engagement; and four consultative meetings. JDG received and considered suggestions from SACCAWU to avert job losses, and provided reasons for its decisions in respect of these suggestions. JDG accepted and implemented SACCAWU's proposal to extend the EVSP's to sales staff and it appears that placements into available vacancies reduced the ultimate number of retrenchments significantly. There is no basis upon which JDG's averments in the answering affidavit that it genuinely considered and responded to SACCAWU's representations can be rejected as un-creditworthy or untenable. JDG accordingly complied with its procedural duties in terms of section 189(5) and (6) of the LRA.

[29] JDG's conduct belies any description of the process as a *fait accompli*. The most probable inference to be drawn regarding the resolution is that JDG had merely formed a *prima facie* view on the likelihood of retrenchments. An employer in such situations invariably will form a *prima facie* view on the need for retrenchments.[9] It is unrealistic, technical and formalistic to seize upon the word "must" in the initiating resolution and to divorce it from its context. That context includes the process stipulated in the job security agreement and the subsequent engagement of the parties in a section 189(3) consultation exercise. The perhaps injudicious use of language in the resolution does not lead inescapably to the conclusion that the employer had closed its mind to alternatives. An employer cannot be held to a standard of a genuine commercial rationale for retrenchment if it would be prejudiced in subsequent

[9] *Visser v Atronic International Bmgh* [2009] ZALC 76.

court proceedings precisely for making such an assessment of its commercial realities. The employer must be entitled to form a *prima facie* view on retrenchment, even a firm one, provided it demonstrates and keeps an open mind in the subsequent process of consultation, which was the case here.

[30] In the premises, it is clear from the subsequent conduct of JDG that, properly interpreted, the resolution did not amount to a final decision to dismiss employees for operational requirements. Events following the resolution reveal that JDG meaningfully engaged in a genuine retrenchment consultation process which was still underway when the urgent application was launched. The Labour Court hence did not err in dismissing the application.

[31] Neither party seeks costs.

[32] In the result, the appeal is dismissed.

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JR Murphy

Acting Judge of Appeal

Murphy AJA (with whom Phatshoane ADJP and Kathree-Setiloane AJA concur)

APPEARANCES:

FOR THE APPELLANTS:	Adv FA Boda SC
	Instructed by Dockrat Inc
FOR THE THIRD RESPONDENT:	Adv G Fourie SC
	Instructed by Cliffe Dekker Hofmeyr