REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 864/15

In the matter between:

NUMSA OBO MEMBERS **Applicant**

and

AVENG TRIDENT STEEL

(A DIVISION OF AVENG AFRICA (PTY) LTD **Respondent**

Heard: **14 May 2015**

Delivered: **21 May 2015**

Summary: LRA s 189A(13) – application to compel employer to reinstate workers and to compel it to comply with fair procedure.

JUDGMENT

STEENKAMP J

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Introduction

[1] This is an application in terms of s 189A(13) of the Labour Relations Act[1]. The applicant union, NUMSA, represents a number of its members who have been dismissed for operational requirements by the respondent, Aveng Trident Steel. NUMSA asks for:

1.1 a declaratory order that the respondent did not comply with a fair procedure before dismissing the workers;

1.2 an order interdicting the respondent from dismissing any more of the union's members before complying with a fair procedure;

1.3 an order compelling the respondent to reinstate the applicant's members until it has complied with a fair procedure.

[2] The union has brought the application within 30 days of the dismissal, as prescribed by s 189A(13).

Background facts

[3] The relief sought by the union relates to the dismissal of 733 of its members for operational requirements on 24 April 2015. The union says that they were dismissed pursuant to a notice in terms of s 189(3) that the employer issued on 1 April 2015. It is common cause that it is a large scale retrenchment as contemplated by s189A. The union says that there has been no facilitation and that its members must be reinstated pending a facilitated consultation process. The employer says that the dismissal is a culmination of a process that started with a s 189(3) notice that it issued on 15 May 2014, a year ago.

[4] The notice of 15 May 2014, addressed to the union, is headed: "**PROPOSED ORGANISATIONAL CHANGES IN AVENG TRIDENT STEEL**". It informs the union that the company intends to restructure with a potential for job losses. The main reason for the proposed restructuring is not financial, but structural. The company proposed reviewing its organisational structures and redefining some job descriptions. Its initial

[1] Act 66 of 1995 (the LRA).

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analysis indicated that around 400 jobs may be affected. The consultation process would be facilitated by the CCMA.

[5] A facilitated consultation process followed. The union proposed a five grade structure as an alternative to retrenchment. The employer was prepared to consider this proposal, provided that it would fulfil its operational requirements, but required a more detailed proposal from the union. The five grade structure would necessitate the re-designing of job descriptions and the employer was concerned that it should not increase costs beyond those provided for in the Main Agreement of the Metal and Engineering Industries Bargaining Council (MEIBC).

[6] In October 2014 the employment of 253 employees was terminated, of whom 249 opted for voluntary severance packages and four were dismissed. (The union says that this was the end of the consultation process; the employer differs).

[7] In February 2015 the employer and the union reached an agreement to phase out transport. The collective agreement makes it clear that the background to the agreement is that "the parties embarked on a restructuring process within the framework of LRA section 189A at Aveng Trident Steel".

[8] On 17 April 2015 the employer sent a letter to the union with the heading: "CONCLUSION OF RESTRUCTURING CONSULTATION". The following paragraphs bear repeating:

> "On 15 May 2014 in terms of section 189(3) of the Labour Relations Act ("LRA") we gave you notice of our intention to engage you regarding possible operational dismissals arising from a need to restructure. …
>
> We engaged you in facilitated consultation under the auspices of the CCMA in terms of section 189A of the LRA during the period 2 June 2014 to 18 October 2014 regarding the contemplated restructuring. Regrettably no consensus was reached by the time the facilitator's engagement ended. Notwithstanding the facilitator withdrawing from the process we continued our engagement with you in an attempt to reach consensus through consultation.
>
> On 11 September 2014, during our ongoing consultations with yourselves [*sic*], you proposed as an alternative to the redesigned job descriptions a five grade

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structure. During October 2014 we reached an in principle agreement on the implementation of a five grade structure. As a retrenchment avoidance measure some 224 employees were granted voluntary severance packages.

As a result of the release of our employees on voluntary severance packages, in line with the contemplated redefining of jobs and incorporating the redefined jobs in the five grade structure, your members agreed to work in accordance with the redefined job descriptions until the five grade structure was finalised, which it was contemplated would be by 1 March 2015, at an additional interim rate of 60c per hour.

The finalisation of the five grade job structure did not receive much attention until February 2015 as we engaged you in extensive consultations regarding the phasing out of a transport allowance between October 2014 to February 2015.

…

On 27 February we recorded that despite us having a different view on the approach you adopted in respect of the interim agreement, we remained committed to engaging you in consultation to bring the long outstanding matter to resolution, hopefully by reaching consensus.

To this end we engaged you on 3 and 5 March 2015 in consultations in respect of the implementation of a five grade structure.

…

We have carefully considered your proposal and regret to advise that we are not in a position to accommodate you further, given the adverse economic conditions coupled with the continued inefficiencies experienced.

…

In the circumstances, we now therefore give you notice that we shall implement the new structure as per the redefined job descriptions previously communicated with effect from 28 April 2015.

The jobs as they existed prior to engaging you in consultation (in which jobs your members were engaged) are now redundant. Accordingly your members face retrenchment, as these positions will no longer exist in the new structure.

…

We would like to advise that we reserve the right to issue notices of retrenchment by 23 April 2015."

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[9] The workers were dismissed on 24 April 2015.

[10] In the interim, on 1 April 2015, the employer issued a separate notice in terms of s 189(3) of the LRA. That notice is also related to the intended restructuring of “some of the areas within its business” and it was contemplated that approximately 100 jobs may be affected. This consultation process would also be facilitated by the CCMA. Indeed, a facilitation meeting in terms of s 189A was scheduled for 28 April 2015.

[11] The employer explained that this notice (1 April 2015) was issued because it is contemplating reconfiguring certain operating machines in the cutting and tube divisions. This notice, it says, has no bearing on the dismissals of 24 April 2015.

<u>The union’s contentions</u>

[12] The union says that its members were dismissed pursuant to the notice of 1 April 2015. There has been no facilitated consultation process in respect of that notice; hence the dismissal does not comply with section 189A, its members must be reinstated and the process must start afresh.

[13] The union further contends that the process that started in May 2014 was finalised in October of that year. The further consultations that followed, it says, were simply to implement the five grade job structure that the parties had already agreed upon. It relies on the minute of a meeting on 31 March 2015 dealing with ongoing consultations in respect of the five grade job structure. The meeting records, inter alia:

> “Management indicated that they want to demonstrate their commitment to the resolution of the five grade structure by inviting Numsa to a consultation session for them to make a proposal whether in writing or orally by 7 April 2015.”

[14] That meeting was followed by a letter on 1 April 2015 – the same date on which the new s 189(3) notice was issued – headed “**CONCLUSION OF RESTRUCTURING CONSULTATION**”. In that letter, the employee relations manager, Mongezi M Makgalamele, says:

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"As a demonstration of commitment to prevent retrenchment we propose further consultation with yourselves [*sic*] on 11 April 2015 at 0900. This is in anticipation of consolidation of a mandate from your members by yourselves, otherwise on the 16 April 2015 as per your proposal."

[15] In a further letter to the union dated 14 April 2015 the company records:

"We have reflected on your concerns in the spirit of section 189 to engage in a meaningful joint consensus seeking process in an attempt to reach consensus, we have resolved to withdraw the offers of alternative employment currently on the table to your members, to enable us to have a final consultation on measures to avoid retrenchment by way of joint consensus seeking."

[16] That was followed by a meeting on 16 April 2015. The union relies on this minute to say that the parties were only continuing consultations on the implementation of the five grade structure. Its view is recorded as follows in the minute:

"Numsa indicated that they were confused by the correspondences being sent to them by management as they (the union) believe that the notice of s 189 sent to them last year relating to the process of consultation has been finalised given that they were people who were released from the duties through the VSP.

Numsa further mentioned that immediately after the finalisation of s 189 parties agreed to have a consultation on the five grade structure on a separate forum with regard to how the five grade structure would be implemented. However Numsa mentioned that what confuses them is that management sent them a letter on the 30 March 2015 the heading of which was "conclusion of the restructuring consultation" which was read Into the Record by the Union from Which Numsa believes the issue has been resolved."

<u>The employer's response</u>

[17] The employer's response is recorded in the same minute of 16 April 2015. It says:

"Management mentioned that the process of s 189 filed on 15 May 2014 dictated a consultation on the five grade structure which culminated in management making a proposal for Numsa's consideration. In the last meeting held on 31 March 2015, Numsa committed to make a proposal on a five grade structure to management in the next meeting to be held on 16 April 2015.

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However, given the delay in the conclusion of the 2014 process and the business being under pressure, management then decided to issue notice of S189 on 1 April 2015 which is distinct from the current process of the five grade structure. Management indicated that they believe the above explanation clarifies the union's confusion."

[18] The company says that it is clear from the correspondence and minutes referred to that there was only an in principle agreement relating to a five grade structure in October 2014. The union did not comply with the provisos spelt out by management with the result that the parties deadlocked in April 2015, leading to the dismissals on 24 April 2015. That the consultation process was ongoing is also clear from the fact that they only reached agreement on the transport issue in February 2015. The new notice of 1 April 2015 dealt with a discrete division and a separate process. It is so that more employees were dismissed than the employer initially anticipated; that is because they could not reach agreement on ways to avoid retrenchment.

<u>Evaluation</u>

[19] If a trade union alleges procedural unfairness in a large scale retrenchment governed by section 189A, it is obliged to approach the Labour Court by way of application in terms of section 189A(13) within 30 days after the employer has given notice to terminate. That is what the union has done. But it appears from the affidavits[2] that there are significant disputes of fact. This court has to consider whether those disputes can be resolved on the papers; if not, if the matter should be referred to oral evidence; and if can be decided on the papers, the Court must decide whether the union has made out a case for the relief sought.

Referral to oral evidence?

[20] Mr *Myburgh*, for the company, submitted that the disputes of fact were material and that the matter should be referred to oral evidence on an urgent basis in order to test the differing versions in cross-examination. He

[2] A full set of funding, answering and replying affidavits has been filed.

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referred in this regard to a decision of The Labour Appeal Court handed down two weeks ago in *PUTCO (Pty) Ltd v SATAWU*.[3] Differing from the court *a quo*'s decision to decide the matter on affidavit, the LAC stated:

> "The resolution of the factual dispute in favour of the appellant would have had disastrous consequences for the first respondent. Likewise, a resolution in favour of the first respondent had put paid to one part of the appellant's case. It is clear that the consequences of accepting one version above the other were indeed significant and serious. The court a quo clearly needed more and stronger evidence to make the finding that it did.
>
> …
>
> In my view, the court a quo should have referred this issue to oral evidence. The fact that the matter was brought on an urgent basis is no bar against referring it to oral evidence."

[21] Mr *Myburgh* submitted that the same holds true in this case. Mr *Ngeko* disagreed, as do I. Most of the disputed issues can be resolved on the affidavits read with the correspondence and minutes attached thereto. When the court does so, it must obviously have regard to the principle in *Plascon-Evans*[4]*,* restated by the SCA in *NDPP v Zuma*[5]:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon - Evans* rule that where in motion proceedings disputes of fact arise on the affidavit, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[22] It is with that principle in mind that I consider the evidence before me.

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[3] JA 106/13 (5 May 2015) paras [27] – [28].

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.

[5] 2009 (2) SA 277 (SCA) para [26], cited in *Putco v SATAWU (supra)* para [26].

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The purpose of the subsection

[23] As the Labour Appeal Court recently pointed out in *Edcon v Steenkamp*[6]:

> "The object of section 189A(13) of the LRA, as appears from a purposive interpretation of section 189A read as a whole and in context, is to separate out procedural issues and to provide a means whereby the consultation and facilitation processes are not undermined by procedural flaws. It offers a useful expedient to the parties to seek the assistance of the court, acting as the guardian of the process, to ensure that the issues are adequately identified, considered and ventilated in the process of consultation or facilitation before it ends. It thus ensures that only disputes about the fairness of substantive reasons and outcomes will generally be subjected to resolution by means of collective action or in a trial involving the hearing of oral evidence."

[24] With that object in mind, the Court has to consider whether the company has complied with the provisions of s 189A; and if not, whether the employees should be reinstated in order for the parties to engage in a further consultation process.

Has the employer complied?

[25] The union's case rests on the supposition that the 733 employees were dismissed on 24 April 2015 pursuant to the s 189(3) notice that the employer issued on 1 April 2015. If that is so, it is quite obvious that the contemplated facilitation has not taken place and that there has been no proper consultation.

[26] But that version is not borne out by the evidence before me, taking into account the principles set out above.

[27] It is clear to me that the consultation process that eventually failed and that led to the dismissals of 24 April 2015 commenced with the s 189(3) notice issued in May 2014. A proper and lengthy consultation process, facilitated by the CCMA, followed. The parties reached an in principle agreement on the five grade structure proposed by the union but could not finalise that agreement. In February 2015, pursuant to the same consultation process, they did reach agreement on the phasing out of

[6] [2015] ZALAC 2 (3 March 2015) para [20].

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transport. However, by April 2015 it became clear that they could not reach final agreement on the five grade structure. That led to the redundancy and the ultimate dismissal of the employees. It followed an extensive and facilitated consultation process just short of a year.

[28] The facts of this case are distinguishable from those involving the same trade union in *NUMSA v General M*otors *of SA (Pty*) *Ltd*[7]- a case to which Mr *Ngako*, surprisingly, did not refer, but Mr *Myburgh*, to his credit, did. At first blush, the facts in that case would appear to support the union's case before me. But on the facts, the eventual retrenchments were not anticipated by the company's invitation to consult in 2008, and Van Niekerk J held that the consultation process initiated by that invitation came to an end in 2008. It followed that GM had to issue a fresh notice in terms of section 189 (3). In the case before me, the consultation process initiated in May 2014 did not come to an end in October 2014. It continued into April 2015 when the parties reached a stalemate and the company decided to dismiss. That dismissal is not, in my view, procedurally unfair.

Conclusion

[29] In conclusion, I find that the dismissals of 24 April 2015 took place after a full and extensive consultation process initiated in May 2014. This is not a case were the parties have to be put back on track in a failed consultation process. Although the consultation process did not lead to the desired outcome, i.e. to prevent dismissals, it was not unfair. The union is not entitled to the relief it seeks.

Costs

[30] The parties are engaged in an ongoing relationship and they face the next round of consultation. Although the union was unsuccessful, it raised a legitimate dispute in the appropriate fashion. In my view, taking into account the principles of both law and fairness, a costs award is inappropriate.

[7] [2009] 9 BLLR 914 (LC).

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Order

The application is dismissed.

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Anton J Steenkamp

Judge

APPEARANCES

APPLICANT:	X Ngako of Ruth Edmonds attorneys.
RESPONDENT:	A Myburgh SC Instructed by Tabacks.

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