IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Durban)

Reportable

Case No: D135/17

In the matter between-

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA (NUMSA) on behalf of Members Applicant

and

TOYOTA SOUTH AFRICA MOTORS (PTY) LTD Respondent

Heard: 24 February 2017

Delivered: 03 March 2017

Summary: section 189A (13) application for an order declaring that the Respondent is obliged to comply with the provisions of section 189 and 189A before it may lawfully effect the termination of its employees – consultation was at the time outside of section 189/189A - section 189A (13) is a remedy to a "consulting party" when an employer does not comply with fair procedure in a consultative process within the ambit of sections 189 and 189A - section 189A (13) remedy designed to correct a derailment of consultations in a consensus seeking process prescribed by Sections 189 and 189A.

JUDGMENT

Cele J

Introduction

[1] In terms of section 189A (13) of the Labour Relations Act,[1] the Applicant, on urgent basis seeks to be granted an order declaring that the Respondent is obliged to comply with the provisions of section 189 and 189A before it may lawfully effect the termination of 596 employees currently in its employ; that the employment of those 596 employees is deemed to be of indefinite duration, and that any notices of termination already issued to any of the 596 employees are invalid in law and any terminations already effected are unlawful or unfair terminations. The Applicant also seeks an order that the Respondent be ordered not to terminate the services of any employees based on its current operational requirements without first complying with the provisions of section 189 and 189A of the LRA, and to reinstate, with immediate effect, any of the 596 employees whom it has already dismissed.

[2] The Respondent denies that this matter is urgent. Further, the Respondent has opposed this application and raised two preliminary points on which basis it submits that the application ought to be dismissed, alternatively struck from the roll, with costs.

Factual Background

[3] A number of facts in this matter stand as common cause either because they have not specifically been disputed or when disputed, because the Respondent has demonstrated that its version amounts to a denial of the Applicant's version which raises a real, genuine and bona fide dispute of facts[2].

[1] Act Number 66 of 1995, hereafter referred to as the LRA.
[2] See *Plascon-Evants Paints v van Riebeeck Paints* 1984 (3) 623 (AD).

[4] The Respondent is a company duly incorporated in accordance with laws of the Republic of South Africa. It carries on business in the production of Toyota motor vehicles in a competitive international motor industry. Its labour force comes from its permanent and fixed term contract (FTC) employees. The majority of the workforce earns below the earnings threshold and the minority earns above that threshold. The Applicant is the representative union for fixed term and permanent employees. From around 2005 the Applicant has been representing the labour force of the Respondent in labour issues on the National and Regional levels.

[5] In its competitive field the Respondent's greatest competitors are other Toyota manufacturers around the world. In this regard, the Respondent tenders against other Toyota Motor Corporation (TMC) Japan subsidiaries for the manufacturing work in respect of any existing or new models. TMC Japan regulates the volumes to various of its subsidiaries based on who it considers to be the most competitive manufacturer. By way of example, the Respondent tendered against, *inter alia*, the Respondent Turkey, a TMC affiliate and in 2017 lost production to it of 9 000 Toyota Corollas due to Respondent (TSAM) not being competitive. Once the tender is won by a competitor, the manufacturing of that vehicle will almost never be relocated by TMC Japan to another Toyota subsidiary. The reason for this is that there are then investments made in the physical infrastructure necessary to support the production such as bridges, roads and logistic facilities necessary for the manufacture of that vehicle in Toyota Turkey.

[6] The Respondent's volumes for motor vehicle production in South Africa are planned annually and revised every six months. However, certainty of volume lies only in three month cycles. This is due *inter alia* to global customer demand, planning timelines and parts procurement lead time. The Respondent's geographic location and the fact that 50% of parts are sourced from global markets means that the Respondent can only have confirmed volumes over rolling three month cycles.

[7] The Respondent has utilised FTC employees since 2005 to manage the fluctuation in production volumes inherent in the nature of its business and for the reasons broadly stated above. The average fluctuation has been 25% in the intervening period. Whilst over the past years the Respondent has employed FTC employees to support operational requirements it has also had to release some if FTC employees due to declines in volumes in 2008, 2010, 2013 and 2014 respectively. Arrangements to release or accommodate FTC employees (as the case may be) on these occasions were concluded between the Applicant and the Respondent and included the following measures:

1. limited early retirement packages offered to permanent employees over the age of 60 to alleviate the impact on FTC employees;

2. offers of permanent employment to some long serving FTC's;

3. retention of affected FTC employees in a Work Security Fund ("**WSF**") training pool for attrition replacement and future model requirements;

4. re-employment of ex-FTC employees as a priority when the opportunity presented itself.

[8] The industry in which the Respondent operates is globally, highly competitive and its ability to maintain a sustainable business is dependent on its ability to compete with other Toyota manufacturers worldwide. In 2015 the Respondent set about trying to understand the Australian motor industry and then set out its plans to ensure that it had a sustainable industry in South Africa. In 2016 a delegation which included members of the Applicant went to Thailand to study and learn productivity improvement and how TSAM needs to be more competitive. The

Respondent undertook to continue its competitive initiatives, aim for zero interruptions during the wage negotiations and successfully launched a new Innovative Multi-purpose Vehicle (IMV), of which the Hilux referred to is one, into all markets. However, the global, African and domestic economies declined, which resulted in the associated decline in demand for vehicles, largely negating these efforts.

[9] The African market has especially seen a significant decline and as matters stand the Respondent has not been able to supply any new IMVs into key countries like Nigeria and Algeria, where TSAM was reliant on those markets. For the last quarter of 2016, the Respondent continued to produce vehicles on both the Corolla and IMV lines, with the objective to attract more volume, eliminate inefficiency and prevent takt time, (Takt time literally means the rate at which the product is completed). In the present context takt time is the average time between the start of production of one unit and the start of production of the next unit, provided that commencement of production is set to match the rate of customer demand. As demand decreases, required production decreases and so do the number of parts required to be manufactured per time interval, resulting in idle time. A takt change from 1.95 minutes to 2.05 minutes means that the production has decreased resulting in a longer time interval per vehicle. This in turn means less demand for labour.

[10] Contrary to most businesses, the Respondent is alerted three months in advance of the required manufacturing volumes and accordingly the necessary takt changes to its manufacturing process, whether this results in an increased takt changes or a decrease in takt. Because the Respondent is afforded that insight into future production, which is guaranteed, but only guaranteed for that period, the Respondent makes use of FTC employees. Without this flexibility, the Respondent believes that it would be engaging and retrenching staff throughout the year, causing an operational logjam and financial millstone around its neck as

the takt changes are issued every three months. While facilitation could take two months, this could trendering compliance with s189A wholly incompatible with the need to have a measure of fluid staffing to meet the fluctuating production volumes.

[11] Well aware of this reality, the OEMs have entrenched, in the collective agreement, the recognition of the need for fixed term contract employees and in exchange for that flexibility, the Applicant negotiated increased separation benefits above those prescribed by the LRA amendments. In addition there have been other measures to train and re-engage FTC employees after release. The Respondent has also ensured that any conversion to permanent staff, given the Applicant's concern for its core membership of permanent employees, is done in consultation with the Applicant.

[12] Currently, the Corolla is built with a very inefficient build-one-skip-one process and the IMV has significant idle time. Currently the Applicant's planned idle time is 5.5 hours per day (incorporating the day and night shift) and the outlook for 2017 and 2018 is also severe. It is anticipated that the idle time situation will continue to worsen. With the decline in demand for the Corolla, the Respondent's parent company, TMC Japan, announced that the next major model change of the new generation Corolla will no longer be manufactured at the Respondent from 2020 onwards. The Respondent's performance (quality, safety, stability and cost) over the next year is going to be vital in presenting the Respondent's case to secure manufacture of a replacement passenger vehicle.

[13] For IMV, the forecast indicates that the economy will not recover in the near future in the Respondent's key African markets like Nigeria and Algeria, hence the Respondent announced its planned takt change effective January 2017, with the concomitant necessity to reduce employee numbers, and in particular FTC employees who are specifically engaged on the understanding that their FTC's

are necessitated by the cyclical nature of the production requirements communicated to the Respondent. The Respondent has very short timeframes within which to implement the necessary Takt changes. The Respondent duly announced its planned changes to take place in phases beginning at the end of December 2016 and January 2017 respectively, with the resultant release of the FTC employees, whereupon the Applicant intervened on behalf of FTC employees.

[14] Late in 2016 the Respondent invited the Applicant to a discussions on a purely without prejudice basis the fate of the FTC employees as the Respondent considered releasing them due to a decline in demand for its product. When it became apparent that discussions had to extend beyond January 2017, the FTC employees' contracts were extended until 17 February 2017 and thereafter on certain other end dates.

[15] The first group of releases was scheduled for December 2016. On 06 December 2016 senior officials of the Applicant met with the Respondent's management where agreement was reached to keep all releases or terminations in abeyance until the new year in order to provide the parties with an opportunity to further engage given the Applicant. The Applicant took a firm position that the FTC employees were in fact permanent employees and accordingly that the Respondent was obliged to issue a Section 189 Notice and to engage with the Applicant in meaningful joint-consensus seeking consultations. At a meeting held on 17 January 2017 the Respondent made a presentation to the Applicant in which it *inter alia* disclosed the following:

1. Whilst the projected volume of production for 2016 was set at 140 000 units per annum, the actual demand and volume produced was only 92 000 units;

2. Projected volume for 2017 was only 86 000 units;

3. As a consequence the Respondent was compelled to adjust its production output and processes accordingly with a concomitant impact on 1147 positions in its staff establishment (i.e. 481 permanent positions and 656 so-called FTCs);

4. The Respondent proposed that the parties engage outside of a formal Section 189 process;

5. For these purposes it proposed accommodating all affected permanent positions and in respect of the 656 FTC employees it proposed that:

5.1 The 60 employees with service between four and six years be converted to permanent positions;

5.2 The remaining 596 will terminate on a phased basis as from 31 January 2017 to 31 March 2017 and on the basis of applying First-In-First-Out (FIFO).

[16] The Applicant went on record that it insisted upon the issuing of a formal Section 189 Notice with concomitant facilitation and meaningful joint-consensus seeking consultations and accordingly management was proceeding at its own peril and the Applicant furthermore recorded that its participation in the proceedings was without prejudice to its right to insist on the proper issuing of a Section 189 Notice. The Applicant recorded that should the process of engagement fail to resolve the issues between the parties it would insist on the issuing of a Section 189 Notice as a consequence of which the Respondent would not be able to

terminate any services without first following a 60 day consultation process. The Respondent persisted with its approach and refusal to issue a Section 189 Notice on the basis that the employees concerned were on fixed term contract. The engagement of the parties was focussed on discussions surrounding a possible voluntary severance package in order to reduce employee numbers on a voluntary basis.

[17] The Respondent employed 596 employees on consecutive fixed-term contracts for the extended periods. Most of these employees were recruited for the 640 project which started in September 2015 as a built up for start-of production in January 2016. The company put capital investment to go to 140 000 per year, but now the company was sitting on 87 000 units. The 640 project is the Hilux model with a life-span of in excess of 10 years, inclusive of face lifts. These FTC contracts were concluded for periods of three months and periodically renewed for periods of up to 6 years, with up to 24 renewals. Almost without exception there were no interruption in employment and employment remained continuous. Employment contracts were often signed long after expiry of the previous contract and in circumstances where the relevant employee was simply permitted to continue rendering services without any contract having been signed. In other instances contracts were only signed way into the next contract period. Despite the repetitive renewals and continuous employment of the affected employees over extended periods of time, these contracts contain a standard clause in respect of probation of 4 weeks. This position must however be juxtaposed with a crucial difference between the lifespan of the Hilux and consistency of demand for the Hilux range of vehicles which, according to the Respondent is the real issue and the cause for the need to conclude FTC's.

Brief engagement history between Applicant and Respondent.

[18] There is a settlement agreement signed by both parties on 11 June 2010 in settlement of a dispute raised by the Applicant during or about April 2010, in circumstances where the Respondent saw a reduction in volume and as a consequence sought to release FTC employees. In settlement of that dispute, approximately 20 FTC employees were either offered permanent positions, subject to a skills level match or retained in a temporary position until a permanent position matching their skills level and multi-skilling stream was available for placement. The balance of the FTC employees were released and not placed.

[19] On or about 1 April 2014 again, faced with the reduction in volumes, the Applicant and Respondent concluded a collective agreement, in terms of which 423 affected FTC employees were dealt with. The material express terms of the April 2014 collective agreement was that the 249 affected individuals who would be released, notwithstanding the mitigation measures agreed to, would be placed into the training pool and offered fixed term contracts of employment by no later than 31 December 2014. In respect of those individuals still in the training pool at the time the offer of employment was made. In terms of clause 2.3 thereof, it was expressly agreed that the affected individuals in the training pool were no longer considered the respondent's employees, but were awaiting possible future re-employment. Of importance to this matter is that 174 FTC employees were converted into permanent contracts with effect 1 April 2014 in terms of clause 6.

[20] In terms of clause 7 of the agreement, the parties agreed that "*going forward*", in other words in all future separation scenarios where FTC employees were released, the principle of LIFO by model, line and process based on the date of first engagement with the respondent (not last FTC contract) would be the criteria to be used in the release of fixed term contract employees affected by takt down.

In terms of clause 8, the applicant pledged its full support in respect of all the terms contained therein. Of the affected employees in this application, 296 of those were re-engaged pursuant to the terms of the 2014 collective agreement. According to the understanding of the Respondent, the Applicant has already agreed on what the selection criteria for the release of affected FTC employees would be in the event of a release in future due to affected takt down. Clause 12 of the agreement provides that any dispute arising in terms of the agreement would be resolved by way of the dispute resolution mechanisms as set out in clause 10 of the MasiBambane pact which dispute resolution provides that there be an expedited arbitration. The Applicant contends that self-evidently, the signing of these contracts was a sham and constituted a rather sinister attempt to circumvent the law. It says that what the Respondent attempted to do was to somehow confer the status of fixed-term contract employment on employees who were self-evidently employed on a permanent basis, both on a level of fact and as a matter of law.

Evaluation

[21] In opposing this matter the Respondent challenged the Applicant on urgency of the application and then raised two points *in limine* in the form of lack of *locus standi* and absence of jurisdiction to determine a section 198B dispute. An application in terms of Section 189A (13) is by its very nature and as a matter of law urgent. Support for this view is found in the remedies provided by the subsection itself in 189A (13) (a) to (13) (c), herein below cited, and in the provisions of section 189A (17) which 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's services or, if notice is not given, the date on which the employees are dismissed.

[22] On the factual matrix of this matter the Respondent had in fact requested the Applicant to engage with it outside of section 189/189A of the LRA. The Applicant did so without prejudice basis and that it reiterated its position that the Respondent was obliged to issue a Section 189 (3) notice. In addition the Applicant pertinently advised the Respondent that should their engagements not result in a settlement of the matter the Applicant would exercise its rights and insist on the issuing of a section 189(3) notice. Therefore the Respondent took an active part in causing the delay which it now complains of. In any event, within a matter of three days after the Respondent advised the Applicant of its intention to terminate services of the employees, the Applicant launched these proceedings. I accordingly find that it was reasonable of the applicant to explore the prospects of a settlement. I find also that this application was brought within a reasonably urgent time frame after the collapse of the parties' attempt to settle their dispute.

[23] At the commencement of the presentation of this matter Court *mero moto* raised the question whether this application in terms of section 189A (13) had any foundation at all. The issue arose because the Applicant repeatedly said that section 189 and 189A of the Act had not been invoked by the Respondent. To this extent the Applicant had the following to say about urgency in its replying affidavit:

> "In circumstances where the Respondent insisted that engagements were to take place outside of Section 189/189A of the LRA and in circumstances where the Applicant was on record that:
>
> - Its further participating was on a without prejudice basis to its right to insist on compliance with Sections 189/189A of the LRA;
>
> - That the Respondent was proceeding at its own peril given that there was no guarantee that the informal engagements would result

in a settlement of the matter as a consequence of which the Respondent would then be obliged to formally invoke Section 189/189A of the LRA."

[24] The discussions which the parties engaged each other on were certainly not those envisaged under sections 189 and 189A of the Act. The consequence is that time frames within which certain conducts of negotiating parties are to be performed were not triggered. Neither the employer nor the union could request the Commission to appoint a facilitator. The rights of the negotiating parties which flow from the invocation of sections 189 and 189A could accordingly not accrue to any of the parties taking part in a discussion playing itself out outside of Sections 189 and 189A of the Act. The provisions of section 189A (13) are clear as they read:

"If an employer does not comply with a fair procedure a consulting party may approach the Labour Court by way of an application for an order –

a) compelling the employer to comply with a fair procedure;

b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;

c) directing the employer to reinstate an employee until it has complied with a fair procedure;

d) make an award of compensation if an order in terms of paragraphs (a) to (c) is not appropriate."

[25] Section 189A (13) is therefore a remedy to a "consulting party" when an employer does not comply with fair procedure in a consultative process within the ambit of sections 189 and 189A. A "consulting party" is any person or entity whom or which the employer is obliged to consult in terms of section 189 (1) of the Act. The expression "consulting party" therefore acquires a limited interpretation as is envisaged in sections 189 and 189A. For purposes of a relief under section 189A (13), there is no authority for extending the meaning of "consulting party" beyond the purview of sections 189 and 189A so as to include a consultation of the union and an employer on any other labour related issues falling outside of sections 189 and 189A. The section 189A (13) remedy was clearly designed to correct a derailment of consultations in a consensus seeking process prescribed by Sections 189 and 189A of the Act. In its own evidence and submissions the Applicant was not such a consulting party. The Applicant has therefore failed to demonstrate how in law it is entitled to be accorded this relief. On this basis alone this application is to be dismissed. There is accordingly no need to interrogate the two points raised in limine. Nor is it proper to interrogate the merits of the matter canvassed by the parties as these may be the subject of another matter likely to play itself elsewhere.

[26] In the circumstances and taking into account the law and fairness impacting on the costs order, the following order shall issue:

1. The application is dismissed.

2. No costs order is issued.

_____

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Mr M Niehaus

FOR THE RESPONDENT: Adv C Watt –Pringle (Sc) & Adv Cooks

INSTRUCTED BY: Macgregor Erasmus Attorneys