

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not reportable

Case no: JA43/2017

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

First Appellant

MEMBERS LISTED IN ANNEXURE A

**Second to
Further Appellant**

And

ARCELORMITTAL SOUTH AFRICA LTD

Respondent

Heard: 20 March 2018

Delivered: 07 June 2018

Summary: Urgent application granted which prevented employees from striking – rule *nisi* confirmed on the return date – whether union precluded from striking in order to force an employer to meaningfully consult with it – employer restructuring its business to curb losses – employer consulting with union on the restructuring process outside the prescript of section 189 of the LRA – no notice in terms of section 198(3) issued as employer not contemplating retrenchment –

Held: if the section 189 process has not been initiated, the employees would also not have a right to strike in terms of section 189A(7) or (8).

Further that when an employer invites a union to consultation, it is at liberty to implement its decision at the end of the process. When however, the employer engages in sham or unfair consultations or implements its decision without giving the union a proper opportunity to influence the process, the union may embark on a strike, subject to compliance with the provisions of the LRA, in order to convince the employer to reopen the consultations. The dispute concerned a matter of mutual interest and there is nothing in the Act that precludes the union from embarking on a strike in order to force the employer to meaningfully consult with it before it implements its decisions. Labour Court ought to have discharged the rule *nisi* - appeal upheld

Cross-appeal – employer contending that no proper service was effected – court confirming Labour Court finding that service in terms of the bargaining council rules is effected by fax and that no service affidavit is required – court finding that there was sufficient proof that documents were faxed – cross-appeal dismissed.

Coram: CJ Musi JA, Jappie AJA and Savage AJA

JUDGMENT

MUSI JA

- [1] The respondent (company) approached the Labour Court, on an urgent basis, seeking an interim interdict to prevent an impending strike by its employees who were members of the first appellant (union). A rule *nisi* was issued. The union anticipated the return date. The matter was argued and the rule *nisi* was confirmed; effectively preventing the union's members from embarking on a strike. The union sought and was granted leave to appeal to this Court by the Labour Court. The company lodged a cross-appeal against the Labour Court's finding that the dispute was properly referred for conciliation by the union.
- [2] As a result of lower steel prices, rising input costs, electricity disruptions and cheaper imported steel prices, the company's Vanderbijlpark Works and Corporate Services faced serious financial challenges. In order to curb the downward trend in profitability, the company decided to investigate various strategies that would assist it in optimising its operations. It decided to embark on an industrial footprint review of its Vanderbijlpark Works and Corporate Services. The review included engagements with its stakeholders including organised labour.
- [3] It invited the union to form part of the consultative process in an attempt to adopt a collaborative approach to address its challenges. It explained the proposed process that it intended embarking on and favoured the stakeholders with relevant information in order to conduct a successful review. The reasons and scope of the review process was set out in a letter dated 31 August 2015, addressed to its stakeholders. It also set out measures that it had already

undertaken in order to achieve its purpose. In the letter, it stated that it intends concluding the consultation process by October 2015 where after any viable alternatives would be carefully considered by the management team and the board of the company before any final decisions would be made in respect of the Vanderbijlpark Works and Corporate Services.

- [4] The company held numerous meetings with the union and Solidarity, a trade union representing some of the company's employees. The minutes of the meeting held on 25 January 2016 states the following:

‘... It would be realistic to assume that in some instances, conditions of employment may change, but unilateral changes would not be implemented. Instead it was emphasised that parties may have ideas to mitigate (sic). A commitment had been made to ensure no **job losses**’.

- [5] At the meeting held on 24 and 25 February 2016, the company reiterated that changes to conditions of employment would not be implemented unilaterally. The company further stated:

‘management emphasised that parties may be in a position to offer possible means of mitigation. **A commitment had been made to ensure no job losses and this process was not a section 189 process**’. (My emphasis)

- [6] During the meeting held on 31 March 2016, the company again confirmed that it would honour its commitment that there would be no retrenchments. The issue of the deployment of some employees, placement of employees, the advertising of some positions and the creation of a skills pool were discussed. The parties agreed that the proposals in relation to the aforementioned aspects would not be placed before their respective principals without joint consultations with management and labour.

- [7] At the meeting held on 25 April 2016, the union was informed that this meeting would determine what would be implemented when. During this meeting, the parties agreed on many issues. They also agreed that area committees would be

established on a per plant basis to oversee all aspects at different plants. The names of the committee members were supposed to be submitted by Friday, 29 April 2016.

- [8] On 28 April 2016, the company gave all its employees feedback with regard to the consultation process. It recorded the agreements reached and indicated that the union requested it to clarify in detail how the protection of salaries would work including movement to other departments. It also indicated that the union requested it to consider swapping employees in respect of changing of shifts. The company further indicated that sufficient progress that would pave the way for a progressive implementation of the productive ideas had been made.
- [9] Subsequent to 28 April 2016, the parties had further meetings with regard to the implementation of the review process. On 27 July 2016, the union sent an e-mail to the company wherein it made reference to a meeting held on 15 July 2016 between them about the review process. It contended that at the meeting of 15 July 2016 the company promised to revert to it on 18 July 2016, which it failed to do. The union stated, in the e-mail, that “we also take note management at Vanderbijlpark are busy implementing that footprint processes without any guiding document or any agreement by parties at footprint forum (sic)”. It also informed the company that it had lodged a grievance about the fact that the footprint or review process was being implemented without a guiding document. The company did not respond to this e-mail.
- [10] On 27 July 2016, the union wrote a letter to the CEO of the company requesting his intervention because the footprint process was being implemented without any regard to the challenges that were raised by the union during the meetings between the parties.
- [11] On 22 September 2016, the union wrote a letter to the company requesting permission to march in order to submit a memorandum of its demands to the CEO of the company. It also pointed out that it had already declared a dispute in relation to the unilateral changes to the terms and conditions of employment of its

members. On 23 September 2016, the company responded and pointed out that the dispute relating to the unilateral changes of conditions of employment had been referred to the Centre for Dispute Resolution and had not been finalised. It therefore refused permission because it was of the view that the march would be premature.

- [12] The issues raised by the union remained unresolved and its General Secretary intervened. As a result of his intervention, further meetings were held in relation to the deployment of employees during November 2016. During a meeting held on 18 November 2016, the company presented the union with a document styled a "Framework Agreement on the Vanderbijlpark Footprint Implementation Process". Neither party signed the document.
- [13] On 8 December 2016, the company informed the union that it cannot stop the redeployment process. It is common cause that the employer implemented its redeployment process.
- [14] The union referred a dispute on 1 August 2016 to the Metal & Engineering Industries Bargaining Council (MEIBC) for conciliation. It classified the nature of the dispute as a unilateral change to terms and conditions of employment. It stated that the result that it required was that the employer should consult with the union before implementing any changes/movements of employees and that the *status quo* should remain until the parties have consulted fully. It further stated that there was consultation by both parties and the company promised to respond to issues raised by the union but the company failed to revert and implemented changes by redeploying employees.
- [15] The referral was faxed to the MEIBC on 1 August 2016 at 08:27 and to the company on 1 August 2016 at 08:21. The union attached the relevant fax transmission reports. It is common cause that the dispute was conciliated on 8 February 2017. The dispute remained unresolved after conciliation and a certificate of outcome to that effect was issued by the MEIBC. The company was present during the conciliation but it disputed that the referral forms were served

on it. The dispute, in the Labour Court, was mainly based on the fact that there was no service affidavit attached to the papers of the union.

[16] The Labour Court found that the dispute was properly referred. It found that the union, by agreeing to be part of the consultation process, acknowledged that it does not engage with the employer as a bargaining partner and that its role is limited to that of influence only. It further found that the consultation process ran to a close and the company thereafter commenced with the implementation of the outcome of that process. The Labour Court concluded that it failed to appreciate the basis on which the employees were entitled to strike in support of their demand for further consultation or to express dissatisfaction with the process of implementation.

[17] The Labour Court found that where an employer engages with a trade union to discuss proposals specifically designed to avoid job losses, it is acting in compliance with the statutory obligations and within the framework established by section 189 of the Labour Relations Act 66 of 1995 (The Act). Consequently, so the Labour Court opined, a failure or refusal to act fairly in these circumstances is a matter that can be referred to the Labour Court for adjudication for the purposes of section 65(1)(c).

[18] Section 64(1)(a) of the Act reads as follows:

‘Every employee has the right to strike and every employer has recourse to lock-out if—

- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and—
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the

referral was received by the council or the Commission; and
after that—‘

[19] The Labour Court correctly found that in terms of the dispute resolution agreement concluded under the auspices of the MEIBC, documents may be served by *inter alia* faxing them to the other party. It further found that there is no requirement for a service affidavit.

[20] The company's only criticism of the Labour Court's finding was that there was no service affidavit. There was sufficient proof that the documents were faxed to both the bargaining council and the employer. The dispute resolution agreement does not make provision for the need for a service affidavit. The employer was present during the conciliation proceedings. There was indeed an attempt to resolve the dispute, which attempt was unsuccessful. The requisite certificate was issued. I can find no fault with the Labour Court's finding that there was a proper referral. The cross-appeal ought to be dismissed.

[21] Section 65(1)(c) of the Act reads as follows:

‘(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;’

[22] In terms of section 189(1), an employer must consult with a relevant consulting party if it contemplates dismissing one or more employees for reasons based on the employer's operational requirements. Section 189(3) provides as follows:

‘(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose inviting all relevant information, including, but not limited to-

(a) the reasons for the proposed dismissals;

- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
- (c) the number of employees likely to be affected and the job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to take effect;
- (f) the severance pay proposed;
- (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and
- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.'

[23] It is common cause that a section 189(3) notice was not issued by the company. Mr Boda on behalf of the employer contended that even though a section 189(3) notice was not issued, it is clear that the parties were indeed engaged in a section 189 consultation process. He consequently contended that because the employer employed more than the employees set out in the threshold in section 189A, the employees would only have a right to strike after notices of termination have been issued.

[24] Mr Van Der Riet, on behalf of the union, contended that section 189 was not applicable to the facts of this case. He contended that the section 189(3) notice initiates the consultation process in terms of section 189.

- [25] It is clear that the section 189(3) notice must state the alternatives to dismissal that the employer considered. The section therefore requires the employer to consider the alternatives to dismissal on its own. After it has issued the notice it must engage the other consulting parties in a meaningful joined consensus-seeking process in an attempt to reach consensus on appropriate measures to avoid dismissal; to minimise the number of dismissals; to change the timing of dismissals; and to mitigate the adverse effects of the dismissals.
- [26] The employer in this matter did not contemplate any dismissals at any stage during the consultation process. It said so on numerous occasions. It also expressly disavowed reliance on section 189. What the employer envisaged was to consult with the unions in order to agree on the implementation of the restructuring process that would lead to the redeployment of employees without any employee losing his or her job. There was therefore no contemplation of retrenchments during the consultation process.
- [27] It, therefore, goes without saying that if the section 189 process has not been initiated, the employees would also not have a right to strike in terms of section 189A(7) or (8). I am unable to agree with the Labour Court's conclusion that "where an employer engages with a trade union to discuss proposals specifically designed to avoid job losses, it seems to me that it is acting in compliance with its statutory obligations and within the framework established by s 189". I disagree because the section 189 process is kick-started by the notice in terms of section 189(3). The consultations in this matter occurred outside of the statutory framework created by section 189. There was, as I have stated above, no contemplation of retrenchments when those consultations occurred.

- [28] The right to strike is protected in the Constitution as a fundamental right without express limitation. A constitutional right conferred without express limitation should not be cut down by reading implicit limitations into it.¹
- [29] It is common cause that the parties were engaged in a consultation process and not in collective-bargaining. The Labour Court was of the view that under these circumstances the union participated in order to influence the employer's decision-making. I agree. It was further of the view that the consultation process came to a close when the employer informed the employees about the consultation process, on 28 April 2016. I disagree.
- [31] A proper reading of the 28 April 2016 notice makes it clear that the consultation process was not yet finalised because the notice itself stated that the union required clarification with regard to the protection of salaries and movement of employees to other departments. The communication between the union and the company thereafter also incontrovertibly shows that the consultation process was not yet concluded. There was no signed agreement between the employer and the union. The employer only endeavored to enter into a collective agreement with the union during November 2016.
- [32] There was clearly a disagreement between the union and the employer with regard to the redeployment of employees. The employees understood their role during the consultation process. What they, however, wanted to achieve was for the consultation process to be taken to its logical conclusion where there would either be an agreement or the company informing them that it would implement its decision. The union did not acquire or have an existing right to challenge the fairness of the consultation process in the Labour Court or at arbitration.
- [33] The union wanted to force the employer not to terminate the consultation process mid-stream. This they wanted to do by embarking on a strike. The mere fact that

¹ *South African Transport and Allied Workers Union (SATAWU) v Moloto NO and Another* 2012 (11) BCLR 1177 (CC); 2012 (6) SA 249 (CC) at para 52

the decision to restructure is ultimately that of the employer does not in my view deprive the employees of the right to strike. There is no provision in the Act that provides that process related demands may not be pursued by way of industrial action.

[34] To sum up, when an employer invites a union to consultation, it is at liberty to implement its decision at the end of the process. When however, the employer engages in sham or unfair consultations or implements its decision without giving the union a proper opportunity to influence the process, the union may embark on a strike, subject to compliance with the provisions of the LRA, in order to convince the employer to reopen the consultations.

[35] The dispute concerned a matter of mutual interest and there is nothing in the Act that precludes the union from embarking on a strike in order to force the employer to meaningfully consult with it before it implements its decisions. The court *a quo* should have discharged the rule *nisi*.

[36] There is no reason in the law or fairness why a costs order should not be made.

[37] I, accordingly, make the following order:

1. The appeal is upheld with costs.
2. The order of the Labour Court is set aside and replaced with the following:
 - (2.1) The rule *nisi* issued on 24 February 2017 is discharged with costs.
3. The cross-appeal is dismissed with costs.

C.J. Musi JA

Jappie AJA and Savage AJA concurred with Musi JA.

APPEARANCES

FOR THE APPELLANT:

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FOR THE RESPONDENT:

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