

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J746/2011

Reportable

In the matter between:

SASBO – THE FINANCE UNION

Applicant

And

ABSA BANK LIMITED

Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of section 189A(13) of the Labour Relations Act 66 of 1995 (the LRA), in which the applicant seeks urgent relief ordering the respondent to engage in a proper consultation process, and that it restores the *status quo* in the consultation process to 3 May 2011. Alternatively, it seeks an order that the respondent withdraws all communications at Absa Collections Cape Town, Absa Retail Bank Collections, Absa Vehicle and Asset Finance (AVAF) and Home Loans, including letters handed to the applicant's members.

Background facts

[2] The respondent embarked on a process to reorganise its AVAF, Home Loans and Collections departments in early 2011, with the objective of centralising these functions to reach increased profit targets by 2012.

[3] The process is governed by the ABSA Reassignment and Retrenchment

Policy, a collective agreement entered into between the parties in 2008. The agreement regulates the method and process of consultation, provides the selection criteria to be applied and alternatives to be considered, as well as defining certain principles applicable to restructuring. It provides for a first consultation between the parties to encompass the following:

- (a) The commercial rationale (“business case”) pertaining to the restructuring;
- (b) The current (“as is”) and the proposed (“to be”) structures;
- (c) The potential people impact

[4] The agreement makes provision for follow up consultation sessions until information referred to in paragraph 5.3 is adequately covered. Paragraph 5.3 incorporates the requirements for a meaningful joint consensus-seeking process as envisaged in section 189(2) of the LRA and lists the relevant information to be provided to affected employees and/or their representatives. This includes *inter alia* the reasons for the restructuring, alternatives to mitigate the impact, number of affected employees, selection criteria to be applied, proposed timeframes, assistance and future employment. The agreement provides that in the second consultation phase a reassignment and section 189(3) letter is issued to individual employees, who are excused from work for a period of 90 days and are paid for this period to search for alternative positions at the respondent.

[5] The parties embarked on a consultation process from 7 March 2011 until 4 May 2011 when the respondent closed the Cape Town collections offices and issued staff with reassignment or relocation letters.

The consultation process

The 7 March meeting

[6] Despite this being common cause the founding affidavit omits any reference to the meeting held between on 7 March when the “HR Guiding Principles” applicable to the restructuring were presented and discussed by the parties. It is further common cause that on the same day the power point presentation was sent to the applicant together with the meeting agenda. The power point presentation contained the business plan for the proposed restructure and sets out details relevant to the commercial rationale for the restructuring as well as detailed practical

implications for each department including the current and proposed structure; the number of employees likely to be affected; the proposed impact on the affected employees; selection criteria; alternatives to retrenchment to be dealt with in the reassignment phase; proposed compensation for employees who accept a relocation; early retirement; voluntary retrenchment and severance benefits. In it the respondent unambiguously disclosed its intention to close certain departments in Cape Town, Kwazulu Natal and Johannesburg, and to relocate or reassign employees. It also stated clearly that the Cape Town Collections department would be closed down and relocated to Johannesburg, and the Kwazulu-Natal AVAF department would be closed.

The 8 March meeting

[7] According to the applicant the consultation process commenced on 8 March 2011 when the respondent announced, during a normal weekly meeting of the parties, that it contemplated major restructuring. The business plan for restructuring was presented (as circulated the previous day) by Thomas Mashaba, the Head of HR Retail and copies provided to the applicant's representatives (the deponent to the founding affidavit, Comfort Duma, Joe Kokela and Francina Peteke).

[8] The 8 March meeting involved specific consultations on the proposed change to each department. Although there is a dispute of fact about what occurred at this meeting, the minute of the meeting (signed by Duma, the deponent to the applicant's papers) is instructive. The minutes record the following in respect of the collections department: "[t]he business plan to relocate functions from Cape Town to Johannesburg, the Cape Town office will be closed. There will be 174 employees affected; 23 will stay in current role but relocate to JHB; 112 will be placed on re-assignment & redeployed and 39 will remain in Cape Town (Trade Centre). The relocation advantage will be that employees will be developed, re-skilled, better employee engagements and continuity of business. Affected employees will be given first preference for vacancies that will be available. No change to all remaining jobs/levels or remuneration change. There will be geographical and reporting line change". In respect of Home Loans the following is recorded:

"Home Loans production center consists of four (4) processing centers currently

servicing six (6) regions. KZN center will be closed. Randburg employees (148) will be relocated to Pretoria. In total 201 employees will be affected. All the KZN product employees will be placed on reassignment. Gauteng and Gauteng North will be consolidated into one processing center. There will be no change in job change, level, remuneration or headcount. The travelling distance from Randburg to Pretoria will be reimbursed. There will be some reporting line changes – Customer care centre. The Union responded that they will not engage the Bank but will forward the presentation to the entire NCF. The Union proposed that there should be a special NCF but cannot confirm date and time. The Union advised that there should be no communication with staff until a proper engagement”.

The 31 March meeting

[9] A Mini Negotiating and Consultative Forum (NCF) took place on 31 March when the applicant complained that it had not received the timelines for the restructuring. There is a dispute of fact about this. The respondent alleges that it was provided to the applicant by hand as well as email, but a further copy was provided at the meeting. The meeting was aborted however as the applicant had not circulated the business plan/power point presentation to its members on the NCF and they were completely in the dark about the restructuring. It was agreed that the applicant would be given more time and that the parties would meet again on 6 April 2011, although with only core NCF members since the respondent was reluctant to waste the costs of travel again. The minutes also reflect that that the applicant said “The union will never agree to retrenchments”.

The 6 April meeting

[10] Duma states in the founding affidavit that as at the 6 April meeting the applicant was not entirely convinced that there was a commercial rationale for the restructuring. However, no discussion of this issue appears from the minutes, which reflect an otherwise substantive engagement on alternatives to retrenchment. The applicant requested additional information, including demographic and vacancy information, and the parties discussed voluntary retrenchments as well as a transport allowance for relocated employees. The applicant made its position clear that it would not agree to retrenchment of its members, and made proposals to reduce the number of affected employees. It appeared that the applicant was aware that its

members faced relocation, and accordingly engaged the respondent on alternatives including setting up SMMEs and services contracts with employees.

[11] It is also instructive that the summary of minutes prepared by the applicant reflects the following: “ Management team will be responsible for communicating to employees and will rely on the communication tool provided”. What is further instructive is that in the respondent’s detailed notes of the meeting (which are not disputed) Joe Kokela, President of the applicant is recorded as having said regarding communication “...we decided that we do not want to be seen to stall the process, so communicate with the affected employees.” However the applicant submitted that this did not amount to consent to implement the retrenchment process in respect of individual employees and must be seen in the context of earlier remarks by Duma to the effect that “make sure the correct message is communicated – SASBO has not agreed when we say you may communicate. For SASBO this is not a retrenchment exercise”.

The 19 April meeting

[12] On 19 April the respondent submitted additional information to the applicant consisting of a comprehensive management toolkit (the communication tool referred to in the 6 April meeting). The toolkit was designed to assist the respondent in engaging with staff on the process and covers the entire spectrum of issues required to be dealt with under section 189(3). The applicant did not object to any of the contents of the toolkit provided to it on 19 April although Duma states in the founding affidavit that it was not useful for consultation purposes as it did not mention estimated periods such as proposed date of reassignment, notice month, date of actual closure or possible last date of service. However, contrary to this assertion, it appears that the toolkit contains extensive information concerning frequently asked questions including the nature of the consultation process with the applicant, the selection criteria, the reassignment phase, reassignment policy, voluntary severance packages as well as proposed dates for reassignment, the notice month and last date of service.

[13] The respondent had also provided a list of affected employees by email on or about 6 April. Duma admits in the founding affidavit that the list was received before

19 April.

[13] The summary of minutes prepared by the applicant reflect the following as having transpired: “[t]he Bank submitted the required information to the Union. The Bank informed the Union that they will be communicating to employees on the 4th May 2011. The Bank informed the Union that the KZN & Cape Town vacancies have been frozen. The Union responded that they will analyse the submitted information and will submit their official respond (sic) on the 3rd May 2011.” The respondent denies that this is a correct summary and in its answering affidavit states that the applicant undertook to “provide Thomas with feedback on 3 May”. The applicant rejects this as mere semantics and reaffirms that the parties “agreed to further continuous engagement and periodic updates, the first of which were to occur on 3 May 2011”. However, the handwritten contemporaneous minutes reflect that Duma only said “we will now analyse it (the toolkit) along with your business rationale” and there was no reference to reverting to the respondent by 3 May.

[14] If there was any doubt in the applicant’s mind about the continuation of the process then the statement in the handwritten minutes of the 19 April would dispense with it – it records that:

“TM: Distributes and example of the managers toolkit. By 4th May 2011 we want to communicate to staff in CT/Dbn.

CD: we are meeting with TM on 4th May 2011.

EL: SASBO welcome to join us on 4th of May 2011.

TM: vacancy list – not electronic tracker – now manually done.”

[15] The applicant was therefore informed on 19 April that the respondent would be commencing the implementation of the proposed restructuring and would start communicating with employees on 4 May. It is apparent from this discussion in the context of the toolkit and timelines given to the applicant that the applicant consents to the continuation of the process and communication with staff.

[16] After this meeting Duma analysed the documentation and prepared a list of questions about the commercial rationale and business plan, which he sent to the respondent on 28 April. His understanding was that these issues would be fully discussed at the mini NCF scheduled for 3 May.

The 3 May meeting

[17] The agenda for the 3 May meeting was revised to remove “Retail Bank reorganisation presentation” as an item. The applicant emailed the meeting organiser querying whether this meant the respondent would not communicate anything to staff until the parties had engaged on the relevant issues. Duma states in his founding affidavit that he was under the impression that the item had been moved off the agenda because the respondent was preparing its response to the questions he had posed on 28 April. He then, rather tersely states that on the same day he learnt of the plans to communicate with the staff at the Cape Town office. He decided to travel to Cape Town to address staff but was advised by another official that there was no point as the respondent had informed staff of the immediate closure of the Cape Town office and asked them to hand in all bank property.

[18] The hand written minutes however reflect that Duma has been selective in his recollection of the events of 3 May. The minutes reflect that there was discussion about the communication session, that Mashaba was called on the speaker phone during the meeting and said “[Retail could go on with the calendar...Managers will start communicate tomorrow. Continuous engagement was not to stop comm.” There was then some discussion about the communication plan and Duma said this had not been received but Mashaba and VM confirmed this was done and Duma replied that the applicant would revert by the end of the day (presumably as to whether they had received the communication plan). Kokela then appeals that the communication is stopped and Mashaba is again telephoned and the following exchange ensues:

“Phoned TM again – asking him to stop communication.

TM says cannot do.

There are already rumours doing the rounds of the restructuring.

Too late to stop it now.

Do not go back on your word.

[caucus – both]

CD: Given benefit of doubt to Bank. We will attend at the comm sessions. In CT we want to also communicate to staff on 5/5/11 in the same place.

SL: not one area – venue may be a problem.

CD: we will communicate with TM. Also Dbn, JHB, Randburg – not on same day as when the Bank is communicating”.

[19] The agreement of 19 April is therefore confirmed and there could have been no doubt in the applicant’s mind about the events that would transpire the following day. Insofar as it contends that it consented merely to communication not to implementation, it is clear from the facts and submissions below that it must have been apparent that the communication was about the implementation of the closure and reassignment and relocation phase.

The events of 4 and 5 May 2011

[20] On 4 May affected employees were collectively addressed in a general meeting by managers relying on the pre-prepared script in the toolkit, which set out the restructuring process and practical implications. In subsequent individual consultations they were presented with the relevant extracts from the toolkits and given letters of reassignment or relocation. The respondent denied that employees were simply told on 4 May to hand over bank property and leave, as is alleged by the applicant, and at least one of the employees has confirmed that the process was fair.

[21] The applicant takes issue with the unfairness perpetrated on the employees by not permitting questions when the Cape Town closure was announced on 4 May, and submits that staff were not consulted and were simply handed letters of reassignment or relocation as a *fait accompli*. The refusal to permit questions in the general meeting was designed to undermine the applicant. The respondent submits that it had no intention of undermining the applicant and that it was concerned about communicating a standard message given the possibility for misunderstanding. The prepared script and process set out in the toolkit had to be adhered to and was designed to ensure that communication took place in a coherent and consistent manner to a large number of employees. There was nevertheless sufficient opportunity for individuals to raise their concerns when the individual consultations were held over the next two days. Moreover, a union official was on the premises but did not attend, and a shop steward was present but made no objection. Duma chose not to be present, and he suggests in reply that it was on account of the respondent’s conduct. The applicant could and should have availed itself of the

opportunity to attend the consultations on 4 and 5 May as it was invited to do.

Analysis

[22] Mr Pretorius submitted that the applicant's case was twofold, namely:

- a) The consultation that took place was superficial in that it was one of form rather than substance. There has therefore been no joint consensus seeking engagement as envisaged in section 189(3) of the LRA or as required in the collective agreement.
- b) The consultation process is incomplete in that it was unilaterally truncated when the respondent closed offices and issued letters to employees implementing the retrenchments on 4 May 2011.

[23] Counsel submitted that as at 4 May the consultation process was just beginning and the parties were yet to reach consensus on issues pertaining to the commercial rationale and the business plan for the restructuring. The applicant was simply presented with a *fait accompli* – it was given complex and detailed prescriptive material and not given a real opportunity to influence the outcome of the process or to interrogate the business plan. A list of questions had been submitted by the applicant with the purpose of engaging in meaningful consultation, but the respondent formed the view that consultation was over and proceeded to implement the retrenchments in respect of individual employees. It is not possible on any reasonable interpretation of events that the applicant would have given the go ahead for implementation, and it therefore seeks a proper opportunity to consult on the commercial rationale and business plan.

[24] In this context, counsel submitted, it is highly improbable that the applicant would have consented to implementation because it expected the business plan to be debated on 3 May. The notes of the 3 May meeting indicate that the applicant requested a workshop, and this could be attributed to its frustration at having been excluded from interrogating the commercial rationale and being forced to deal only with human resources staff rather than a business representative. Duma also expressed his frustration with the haste with which the respondent has proceeded, which led to the applicant being presented with a *fait accompli*. He complained that

the applicant should be approached at a conceptual stage instead of with the “diagnosis and medicine”. There is however a dispute of fact as to whether these remarks relate to the process that forms the subject of this application or to the FX operating model, although this issue is not material to these proceedings.

[25] Moreover, from the facts set out above it is improbable that Duma could have formed the view that the commercial rationale and business plan would be discussed on 3 May. It is apparent that the power point presentation complies in all respects with section 189(3) of the LRA, and that the applicant would therefore have been aware, as from 7 March, that employees were to be relocated or reassigned and various offices closed. It is also improbable that he would only have considered this on 19 April for the first time despite having been in possession of the business plan, the timetable and broad principles applicable to affected employees, from as early as 7 March. Even if his version is accepted that he only formulated the list of questions after the meeting of 19 April there is no attempt to explain why he only sent it on 28 April. Moreover the applicant does not dispute that it was provided with detailed information for the purposes of consultation, but asserts that there was no substantive opportunity to engage on the commercial rationale and business plan. In the circumstances the applicant’s *bona fides* in bringing this application must be questioned. The respondent submits that the applicant failed to submit any counter-proposals nor has it demonstrated an intention in these proceedings to do so. However what is of significance, and I return to this below, is that the applicant, having now received a formal response to its questions (many of which appear to have been answered in the consultation and documentation presented to it), is not precluded from continuing to engage the respondent in discussion about its issues, concerns and even proposed alternatives.

[26] What is further of concern is that the applicant does not disclose in its founding affidavit that it had not circulated the power point presentation, a clearly critical document, to its NCF members as a result of which they were kept in the dark until 31 March about the restructuring. This is untenable in circumstances where it was the applicant that requested that the matter be dealt with at the level of the NCF. The only explanation provided is that there were sensitive and difficult salary negotiations ongoing at the time, but this explanation only emerges in the replying

affidavit and is rather spurious. It is clear from these facts that the applicant, as was correctly conceded by its counsel in argument, had to accept some responsibility for the delay in the process. However counsel also submitted that the delay was insignificant given that the restructuring relates to proposed profit margins to be achieved by 2012 and there was no need for the respondent to proceed with such undue haste.

[27] On the issue of the undue haste with which respondent has proceeded, the applicant's counsel relied upon a *dictum* of Van Niekerk J in *Van Rooyen v Blue Financial Services* [2010] 10 BLLR 1119 (LC) at [25] for the submission that although our law acknowledges and permits business reorganisation for strategic reasons other than as a life-saving measure, this comes with a caveat that the process must have reasonable timeframes. In this regard the court said the following: "[25] As I have already indicated, the circumstances in which the respondent found itself was not one in which urgent and drastic measures were necessary in order to ensure the survival of the enterprise. The business in which the applicants were engaged was profitable, and the respondent's restructuring was designed and implemented to generate profit levels that it considered acceptable. While from the perspective of substantive fairness this court has recognised an employer's right to restructure for reasons relating to profitability and increased efficiency as opposed to reasons which threaten the financial viability of the business, it seems to me that in the former case, the obligation to give serious consideration to reasonable proposals made by employees or their representatives, especially in relation to alternatives to retrenchment and the prospects of accommodation in alternative employment is more onerous. This is not a case where any delay in the consultation process would have resulted in unsustainable losses for the respondent, or which might otherwise have justified bringing the consultation process to an abrupt end." Counsel conceded correctly that the case is not directly in point. Moreover it is clear from this *dictum* that this is not a matter where the respondent is proceeding without having considered proposals made by the applicant. Indeed it is still expected of the applicant to submit these, particularly in relation to individual consultations, although my understanding is that the respondent will not dismiss consideration of reasonable counter proposals to the business plan

should these be forthcoming.

[28] Secondly, counsel submitted, being a “spill and fill” exercise where a department is closed down and its staff reassigned or relocated elsewhere in the business, it is imperative that selection criteria should be consulted about. This principle was confirmed by Van Niekerk J in *Van Rooyen (supra)*, when he stated as follows : “[18] Prof. Rycroft observes that a decision by an employer that all jobs in a department are redundant avoids the need to decide selection criteria ‘up front’ for those who will be ultimately retrenched. The selection criterion effectively becomes the employee’s failure to be appointed to a ‘new’ job, or the failure to apply for it. Prof Rycroft suggests in this regard that the criteria for appointment to the restructured position to be fair, they have to be clear and transparent – the more vague the criteria, the more likely it is that in reality, the selection is made on the basis of a subjective view, thus crossing the line between a no-fault dismissal and one based on performance (at 680-681).” Counsel submitted that this is imperative particularly where the criteria in the collective agreement are all-encompassing and vague as is the case *in casu*. I do not understand the respondent to disagree, although having agreed broad selection criteria, in the context where offices have been closed the application of the criteria to individual employees who may not be reassigned or relocated is still pending.

[29] In this context Mr Redding submitted that the closure of the Cape Town office has not resulted in retrenchments and this application is therefore premature. The process has involved employees being identified for either redeployment or reassignment, and an employee who is to be retrenched will only receive a notice of retrenchment if no alternative position in the business is found for them in approximately 3 months from 4 or 5 May or 16 or 17 May (in relation to employees offered relocation). They may then be retrenched on or about 4 or 5 August or 16 or 17 August, with an additional 4 weeks’ notice pay. They will be paid while alternative positions in the business are being sought for them and they are obliged to participate in this process together with the applicant. Only at the culmination of this 90 day process is it correct to refer to retrenchment of an individual who cannot be placed in the bank.

[30] The applicant initially sought the setting aside of the Cape Town office closure and the reversal of the process to 3 May 2011. At the hearing it proposed a compromise which involved postponing the date referred to in the letters issued to members. The relief sought is in essence a final interdict and in this regard the applicant must therefore demonstrate a clear right. It undoubtedly has a statutory right to participate in a joint-consensus seeking process as well as a right to enforce compliance with the collective agreement, although this does not encompass extending or reversing the process on account of it having dragged its heels. It has furthermore failed to demonstrate that the balance of convenience favours the granting of relief or that it will suffer irreparable harm should relief not be granted. It is common cause that both parties contemplate a continued consultation process save that the commercial rationale is no longer on the agenda and the process cannot now be reversed. The applicant moreover has not demonstrated that it has real counter proposals to avoid the restructuring which it will put on the table should the process be reversed.

[31] The prejudice to the respondent both logistically and financially is insurmountable and outweighs the prejudice to the applicant should relief not be granted – it has closed offices, reassigned staff and there is no utility in postponing by a further month or longer a decision that is yet to be made in regard to retrenchment. Employees are not in immediate danger of losing their jobs as there is a further 90 day period before any decision to retrench can be taken. Insofar as employees who were issued with relocation letters are contractually obliged to relocate whilst others being re-assigned are not required to relocate, the applicant has a real role to play in their consultations to seek placements, or alternatives in the event these cannot be found through the job matching exercise or otherwise. The respondent has moreover undertaken to apply the principles of reassignment and relocation in a fair manner with due regard to the individual circumstances of the affected employees. The applicant has obvious remedies should this undertaking not be complied with. In my view the applicant had sufficient opportunity to engage substantively with the respondent but failed to do so, nor did it brief its members timeously or properly about the process. This is not a deficiency in the process for which the respondent can be accountable, and it is entirely up to the applicant to

determine its future course of conduct. Rather than having been unilaterally terminated the consultation process is continuing, and in the absence of manifest unfairness in the process, which is the basis for a section 189A (13) intervention, the applicant is not entitled to relief. For these reasons the application stands to be dismissed. The respondent does not seek costs given the ongoing relationship between the parties

Order

[32] Therefore, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 19 May 2011

Date of judgment: 23 May 2011

Appearance:

For the Applicant: Adv P Pretorius SC instructed by Bieldermaans Attorneys

For the Respondent: Adv A Redding SC with Adv F A Boda instructed by Cliffe Dekker Hofmeyr