



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, IN JOHANNESBURG

JUDGMENT

Of interest to other Judges

Case no: J 660/14

In the matter between:

SACCAWU OBO MEMBERS

Applicant

and

CENTRE FOR AUTISM, RESEARCH

AND EDUCATION

Respondent

Heard: 25 March 2014

Delivered: 26 March 2014

Summary: (Urgent application-suspension of terminations pending further consultation under s 189 – urgent relief not an appropriate remedy on the facts – s189A does not necessarily mean interim relief can never be obtained in respect of procedurally unfair retrenchments not falling within that section)

EX TEMPORE JUDGMENT

LAGRANGE, J

- [1] This is an application for interim relief pending a final order. It is unusual in that it seeks to declare the retrenchment of the applicants invalid for want of the respondent's alleged compliance with s 189 of the LRA, pending the respondent complying with the provisions of that section.
- [2] The respondent chose not to file an answering affidavit contesting the factual allegations in the founding affidavit, except in the broadest terms. It claimed however that an order of this kind is only obtainable if the retrenchments in question fall under s 189A of the Act and it is clear on the facts alleged by the applicants that they do not. The respondent also claims the applicants have an alternative remedy in the form of an unfair dismissal claim in terms of which they can be reinstated or paid compensation if they are ultimately successful.
- [3] In essence, the applicants question the *bona fides* of the employer's operational rationale for the retrenchments and contend that the consultation process embarked on by the respondent with them was a sham as the employer had already taken a final decision to retrench them. Moreover they claim the employer bulldozed the sham consultation process to fit its pre-determined schedule so that it could proceed to retrench them with effect from the end of March 2014. The applicants were given notice of their retrenchment on 3 March 2014.
- [4] On the contents of the founding affidavit, it would appear that the applicants have made allegations on which a finding of a procedurally unfair retrenchment could be made and possibly a substantively unfair one as well, though the latter is less clear to me.
- [5] The question the court must decide is if this is an appropriate case for urgent intervention. I do not believe it was the legislature's intention that a failure to comply with s 189 of the LRA renders a retrenchment unlawful, but only that it renders it unfair. That does not mean, in exceptional circumstances, that the court might not intervene on an urgent basis to ensure that a proper consultation process takes place where it has been manifestly wanting and, or alternatively if it might serve some purpose in achieving the objects of s 189 for

the parties to be compelled to engage or re-engage in consultations under s 189, even where s 189A is not applicable.

- [6] I am aware that there is a view that the only remedy for unfair retrenchments where s189A does not apply is to refer an unfair retrenchment dispute through the conciliatory and adjudicatory processes of the LRA. However, I am willing to accept that for present purposes the applicants might have a right to bring urgent proceedings of this nature despite s 189A being inapplicable.
- [7] In this instance, there was a consultation process of sorts, *albeit* that it appears on a *prima facie* view to be seriously flawed. It also appears from the respondent's conduct of the consultations thus far, that it is unlikely that further consultation will be constructive and serve the objects of s 189.
- [8] In the circumstances, I do not believe that it would be of any value to compel the respondent to engage in further consultations. This is also not a case where there has been a complete failure to consult at all. I accept that the employees might be prejudiced in the interim pending the outcome of an unfair dismissal hearing in due course, whereas the prejudice of suspending their dismissals pending further consultation to the respondent is not as great, but the purpose of extending their employment in order to enhance the consultation process is unlikely to be achieved given the history of the consultations thus far.
- [9] Accordingly, I believe that the applicants' alternative remedy of challenging the procedural and substantive fairness of their dismissals in due course is not an inappropriate or unsatisfactory one.

Order

- [10] In light of the above, the application is dismissed, but no order is made as to costs in the light of the respondent's conduct of the retrenchments as it appears from the papers.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate W.P. Venter

Instructed by: Potgieter Penzhorn & Taute

For the First Respondent: No Appearance