REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J641/14

In the matter between:

NUMSA obo ITS MEMBERS AS PER THE LIST OF MEMBERS ANNEXED TO THE NOTICE OF MOTION MARKED "A" — **Applicant**

and

CCI TURNKEY PROJECTS (PTY) LTD — **Respondent**

Heard: 27 March 2014

Delivered: 01 April 2014

Reasons filed: 02 April 2014

Summary: Urgent interdict to compel payment of arrear fund contributions and to suspend retrenchment consultations, pending such payment – alternative remedy exists for recovery of contributions – further retrenchment consultations not prevented by non payment of arrears.

JUDGMENT

LAGRANGE, J

[1] On 01 April, I dismissed this application with no order as to costs. My brief reasons are set out below.

[2] The applicant in this matter brought an urgent application to compel the respondent to pay arrear employer and employee contributions to retirement benefit funds administered by the Metal and Engineering Industries Bargaining Council, and to compel it to comply with the provisions of section 189 A of the Labour Relations Act 66 of 1995 ('the LRA'). Although they also sought other associated relief the central thrust of the application concerned these two issues.

[3] Although the respondent has deducted contributions for retirement funds from the applicants, it is common cause that it is in serious arrears in the payment of the contributions deducted and its own contributions to the funds in question. From the papers, it is apparent that it has been seeking to agree on terms of repayment with the bargaining Council without success and enforcement proceedings initiated by the council are in the offing. In passing, it seems strange that such action is only being contemplated now when the arrears apparently dates back to the second half of 2012.

[4] From the minutes of meetings between the union representatives and the company during the period January to October 2013, it appears that the arrears were one of the issues discussed at those meetings. Although the minutes do not provide much detail, it would appear that the union representatives ought at least to have been aware that the last confirmed reports of arrear payments was that, contributions back to June 2012 had been paid in August that year, but that by October 2013, a payment plan was still under discussion. On the papers, it appears that it may be so that the union representatives would not have known the exact extent of arrear payments outstanding, but it seems improbable they could have reasonably believed that all payments were up to date at the time the respondent issued its notice of intended retrenchments in January 2014.

[5] Accordingly, it is hard to accept that it was only on 5 March 2014 at the facilitation meeting that the union became aware that no arrears had been paid over since September 2012, and for this reason the applicants could not accept the *bona fides* of the respondent in the retrenchment consultations, until it had made good the outstanding payments.

[6] I can understand that the applicants would have understandably been upset if they had only learnt at that point that payouts from the retirement funds would be based on contributions actually received and not on contributions deducted and due. However, it does not follow in my view that consultations over the retrenchment could not continue because the ultimate amounts due from the benefit funds are contingent on the arrear payments being made. What ought to have been capable of determination was what was owed on the present balances in the funds.

[7] The uncertainty would have concerned the balance of arrears and that uncertainty would have related more to the risk of non-payment than uncertainty about the amount of additional value that the unpaid arrears would add to the fund payouts. That uncertainty did not prevent consultations taking place. What it meant was that there was no guarantee that the moneys in question would be recovered and therefore the applicants could not factor that amount in when consulting on ways of ameliorating any retrenchment. Similarly, the respondent could not hold out in the consultations that the arrears would ultimately form part of the benefits due from the funds to retrenched employees.

[8] Consequently, I am not satisfied that the uncertainty about the payment of arrear contributions, or the fact that the arrears remain outstanding, would have prevented consultations in accordance with the provisions of s 189A on the issues which s 189 of the LRA envisages parties must deal with.

[9] On the issue of compelling the employer by means of this application to pay the arrear contributions to the retirement funds, which apparently amount to about R 9m, I accept that there are certain contractual obligations flowing from the Consolidated Benefit Funds Agreement that members of the fund may enforce. However, the primary enforcement mechanism to enforce contractual obligations arising from a collective

agreement are the proceedings which can be initiated by the bargaining council under its enforcement mechanisms. If the bargaining council has been tardy in utilising those mechanisms, nothing prevents the applicants from taking steps to compel it to do so.

[10] In the circumstances, I am satisfied that the applicants have not established a *prima facie* right to stay the retrenchment consultations, and a suitable alternative remedy exists for the enforcement of the respondent's obligations relating to the payment of arrear contributions.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R Edmonds of Ruth Edmonds Attorneys

RESPONDENT: P Kirstein instructed by Serfontein, Viljoen & Swart