REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Of interest to other Judges

CASE NO J 983/14

In the matter between:

BANKING INSURANCE FINANCE AND

ASSURANCE WORKERS UNION OBO MEMEBERS **APPLICANT**

and

SOUTH AFRICAN FOOTBALL ASSOCIATION **RESPONDENT**

Date heard: 6 May 2014

Judgment delivered: 8 May 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant seeks an order suspending notices of retrenchment issued to its members on 24 April 2014 pending the finalisation of an application filed under case number J 2986/12. The nature and significance of that application appears below in the summary of the material facts.

Factual background

[2] In the financial year ending June 2012, the respondent recorded a loss of R56 million, largely on account of a loss of revenue due to decreased sponsorship and non-sustainable operating costs. On 20 July 2012, the respondent issued a notice in terms of s 189 (3) of the LRA, inviting the applicant to participate in a consultation process to be facilitated by a person appointed by the CCMA. (It is not disputed that since the respondent was contemplating dismissing more than 10 of its approximately 109 employees, the provisions of s 189A applied.) The applicant took the view that in terms of the collective agreement between the parties, the respondent was obliged to negotiate the terms of what amounted to the implementation of a new organisational structure. The respondent took the view that it was obliged to consult in terms of s 189/ 189A of the LRA. A dispute concerning the application and interpretation of the collective agreement was referred to the CCMA for conciliation, and ultimately to arbitration.

[3] On 9 November 2012, the applicant filed an urgent application in this court seeking a stay of the consultation process pending the outcome of a ruling by the CCMA in the dispute about the interpretation and application of the collective agreement. On 13 November 2012, the court ruled that the application was not urgent and struck it from the roll, with costs. On 27 November 2012 the applicant filed an application for leave to appeal that ruling.

[4] On 14 December 2012, the CCMA ruled in favour of the respondent, effectively finding that the collective agreement, properly interpreted, meant that s189 of the LRA applied to the proposed retrenchment and that the respondent was not under any obligation to negotiate with the applicant. The commissioner's ruling is the subject of a pending application for review, filed under case number JR 306/13. The review application was filed on 12 February 2013, more than two weeks outside of the six-week period established by s 145 of the LRA. The application for review does not contain any application for condonation. In its answering affidavit, the applicant contends (wholly incorrectly) that the period of 15 December 2012 to 15 January 2013 were *dies non* and that the application was therefore filed timeously. Despite the filing of a replying affidavit on 31 May 2013, the applicant does not appear to have taken any steps to further prosecute the review application.

[5] Be that as it may, written reasons for the order striking the urgent application from the roll were furnished on 21 August 2013. On 9 September 2013, the applicant filed a notice requesting the registrar to re-enroll that application for hearing in the ordinary course. On 7 October 2013 the registrar issued a directive in terms of which the applicant was to file heads of argument within 15 days. The applicant has yet to file its heads of argument in accordance with that directive. Instead, on 11 April 2014, more than six months later, the applicant filed a replying affidavit, together with an application for the late filing of that affidavit.

[6] In the interim, the respondent continued with the restructuring process, engaging directly with its staff. That process continued in a context in which on 16 May 2013, a notice had been sent to all members of staff announcing the commencement of the second phase of the restructuring process. A new organogram had been introduced, and members of staff were encouraged to apply for vacancies reflected in the new structure. On 29 January 2014, a circular was distributed to members of staff introducing a Mr. Lerefolo, appointed temporarily amongst other things, to accelerate the final leg of the organisational restructuring. On 18 March 2014, a memorandum was distributed to staff

introducing a Mr. O'Connor who had been engaged to implement the final phase the restructuring process and in particular, to engage with staff members who had not applied for available posts, to set up interviews for those posts and to inform those members of staff who were not successful in the interview process of their status. The memorandum specifically states that the respondent intended to conclude the final phase of the restructuring process by no later than the end of March 2014. On 25 March 2014, the respondent addressed a letter to the applicant in which it recorded that it had been informed that the applicant had instructed its members not to apply for any of the advertised posts on the basis of a pending process in this court. That notwithstanding, the letter records that as mentioned to the union in a meeting on 14 March 2014, the respondent intended to conclude the consultation process speedily, and that the union was welcome to meet with the respondent on 27 March 2014 for an update on the matter. The applicant responded on 28 of March 2014 stating that in its view, the respondent was obliged to issue a fresh s 189 (3) notice, that an application was pending before this court and that its members should not be forced to participate in an unlawful and flawed process. On 23 April 2014, letters were addressed to those employees who had not been accommodated in the new structure advising them that the final day at work would be 25 April 2014 and that they would not be required to work notice periods, on the basis that they would receive one month salary in lieu thereof.

<u>Urgency</u>

[7] It is trite that this court will not entertain an application where a departure from the rules ordinarily applicable is sought when the urgency relied upon is self-created. In the present instance, urgency stands to be assessed at two levels. First, there is the historical context of the dispute between the parties. In short, what this reveals is that on its own version, the applicant, as far back as 19 September 2013, made a conscious decision to pursue the application that had been struck off, in the ordinary course. The directive issued by this court in October 2013 to file heads of argument was simply ignored. Nothing of any

consequence occurred until 11 April 2014 when a replying affidavit was filed, months out of time. Given the chronology of events recorded above, the irresistible conclusion is that having done nothing to pursue the application pending before the court since early September 2013 and after having been informed in mid- March 2014 that the respondent intended to implement the final phase of the restructuring process, the applicant woke up to the fact that it had best pursue the litigation that it had initiated. In other words, having been content to litigate at its leisure, the realisation that its strategy of obstruction was about to be compromised and that the restructuring initiated by the respondent would become a reality by the end of March 2014, galvanised the applicant into action. In my view, in these circumstances, the applicant ought not to be entitled to rely on its own ineptitude and in particular, its failure to prosecute the application with due diligence to seek what amounts to the preservation of the status quo pending the outcome of that application. Secondly, when more recent events are scrutinised, it is clear from the above chronology that the applicant's members were aware at least from 18 March 2014 that the respondent intended to complete the restructuring process by the end of that month. It is also clear that the union was advised of this fact on 14 March 2014 and again during the last week of March. Yet, the present proceedings were initiated only on 25 April 2014, without any satisfactory explanation for the delay. Given this conspectus of all of the relevant facts, in my view, any urgency in the present application is self-created and the application stands to be struck from the roll on that basis.

[8] In any event, I am not satisfied that the applicant has established a *prima facie* right that entitles it to what amounts to an interim order pending the outcome of the substantive application before the court. The relief that the applicant seeks in that application, it should be recalled, was primarily to stay the consultation process pending the outcome of the dispute about the interpretation of the recognition agreement respondent and in particular, the determination of whether the respondent was under any obligation to negotiate the terms of any restructuring with the applicant. That notice of motion seeks a stay '*pending the outcome or ruling by the CCMA in the matter relating to labour dispute* …'. It is

common cause that the CCMA made such a ruling on 14 December 2012. To the extent that the present application seeks a stay of the implementation of the restructuring process pending the outcome of the proceedings initiated initially by way of the urgent application filed in November 2012, that application sought no more than a stay pending the outcome of the ruling which was made almost a year and five months ago. Further (and I did not understand the applicant's representative to dispute this) where s 189A applies, as it does in the present instance, any dispute about fair procedure must be referred to this court by way of an application in terms of s 189A (13). The present application is not such an application, and is to that extent misguided.

[9] In relation to costs, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of law and fairness. Although this court is reluctant to make orders for costs against unions in circumstances where they are embroiled in a dispute with a collective bargaining partner, in my view, this case stands to be treated differently. The applicant has failed to prosecute the litigation that it has initiated before this court with due diligence and ultimately, it is that failure that it now seeks to rely on to justify intervention by the court at this late stage. At every level, the applicant has failed to advance the interests of its members with any reasonable degree of diligence and the present application, as I have indicated, is nothing more than yet another attempt, too little, too late, to discharge its obligations to its members. The respondent has incurred costs in opposing the applicant's misguided attempts to frustrate the implementation of the restructuring, and there is no reason to deprive the respondent of those costs.

For the above reasons, I make the following order:

1. The application struck from the roll for lack of urgency, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. Xolani Mazibuko instructed by Pule Pule Attorneys

For the Respondent: Mr. P M Mosebo, Maserumule Inc.